

CASENOTE

CHERAMIE SERVICES V. SHELL DEEPWATER PRODUCTIONS: PRIVATE ACTIONS UNDER THE LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT—WHERE DO WE STAND?

I. INTRODUCTION

Since the early 1900s, the federal and state governments have worked together to provide protection in a rapidly expanding and evolving marketplace.¹ In 1914, the United States government introduced the Federal Trade Commission Act (FTC Act) in response to the anticompetitive and deceptive practices that were emerging in the modern marketplace.² Since the enactment of the FTC Act, the federal government has launched additional legislation, ranging from truth-in-lending to food and drug laws, to prevent and combat unfair and deceptive trade practices and activities.³ However, this legislation proved inadequate and many states, including Louisiana, adopted state analogues to the FTC Act, known as “Little FTC’s.”⁴ Louisiana’s Little FTC, the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA), provided a new weapon for parties injured by unfair and deceptive trade practices in the state—

1. See William A. Lovett, *Louisiana Civil Code of 1808+: State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 727-30 (1972).

2. See Federal Trade Commission, H.R. 15613, 63d Cong., 38 Stat. 717 (1914); Lovett, *supra* note 1, at 728 n.8.

3. See Lovett, *supra* note 1, at 728-29; see also Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-399d (2006)); Truth in Lending Act, Pub L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1667f (2006)).

4. See Keith E. Andrews, *Louisiana Unfair Trade Practices Act: Broad Language and Generous Remedies Supplemented by a Confusing Body of Case Law*, 41 LOY. L. REV. 759, 759-60 (1996), cited in *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1056; Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1621-22 (1983) [hereinafter *Toward Greater Equality*]; see also Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 427 (1984).

private actions with private remedies.⁵

For nearly thirty years, Louisiana courts have been split on the issue of standing to bring a private cause of action under LUTPA, and the Louisiana Supreme Court avoided the issue on several occasions.⁶ Finally, after addressing the issue in *Cheramie Services v. Shell Deepwater Production, Inc.*, the court issued a fragmented opinion, in which the plurality purported to change the long-standing majority interpretation of LUTPA and protect a larger class of claimants under the Act.⁷

This Note addresses the right to bring a private cause of action under LUTPA. Part II offers a summary of the facts and holding in the *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, a Louisiana Supreme Court Decision. Part III examines the events leading up to the creation of LUTPA and the judicial treatment of the Act in Louisiana. Part IV discusses the decision and reasoning of the court in *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.* Part V considers the value and possible effects of the court's decision.

II. FACTS AND HOLDING

The litigation in *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, arose out of allegations of unfair business practices in violation of the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA).⁸ *Cheramie Services, Inc.* and its sole owner, *Attecia Cheramie* (collectively *Cheramie*), filed suit against defendants *Shell Deepwater Production, Inc.* (*Shell*) and *Filco International, Inc.* (*Filco*) on January 15, 1999, for damages allegedly arising out of a conspiracy between *Filco* and *Shell* to lure and steal away *Cheramie's* employees.⁹

5. See LA. REV. STAT. ANN. §§ 51:1401-1427 (1972 & Supp. 2011); see also Paul L. Zimmering, *Louisiana's Consumer Protection Law—Three Years of Operation*, 50 TUL. L. REV. 375, 378-79 (1976).

6. Compare *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 707 (La. App. 4 Cir. 1982) (standing under LUTPA limited to consumers and business competitors), *abrogated by Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, with *Jarrell v. Carter*, 577 So. 2d 120, 123 (La. App. 1 Cir. 1991) (standing under LUTPA not limited to consumers and business competitors).

7. *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1058.

8. See generally *id.*

9. *Id.* at 1054-55, 1060. *Filco* failed to file an answer, and as a result, *Cheramie* obtained a default judgment. *Id.* at 1055. Thereafter, *Filco* paid *Cheramie* a settlement sum for dismissal of the suit against *Filco*. *Id.* The plaintiffs sued on the following theories: misappropriation of trade secrets, tortious interference with business relations, intentional infliction of emotional distress, unfair trade practices, conspiracy, discrimination, violation of civil rights, and breach of contract. Petition for damages, *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, No. 99,693, 2007 WL

Cheremie alleged that the defendants worked in concert “to divert Cheremie Services’ employees to Filco, so that Filco could take over Cheremie Services’ contract.”¹⁰ Cheremie provides labor and equipment used to maintain offshore activities to the oil industry, primarily for Shell.¹¹ Cheremie and Shell had an agreement where Cheremie provided all clerical services for Shell’s Auger platform.¹² Cheremie provided two employees to Shell for a brief period after the agreement was made.¹³ Without notice, Shell started paying Filco for the services of those employees.¹⁴ Cheremie sent another employee to Shell, but at the interview two Shell employees informed the employee that if she wanted the position, she would have to work for Filco rather than Cheremie.¹⁵ Cheremie argued that these instances were evidence of a conspiracy between Shell and Filco “to deprive Cheremie Services of its employees and contractual rights” and “enhance [the defendants’] respective businesses and competitive positions.”¹⁶

The defendants obtained a summary judgment on all claims,¹⁷ and

6598607-08 (La. Civil D. Ct.-Orleans 1/15/99), *aff’d in part, rev’d in part*, 2007-1231 (La. App. 4 Cir. 3/4/09); 14 So. 3d 1, *rev’d*, 2009-1633 (La. 4/23/10); 35 So. 3d 1053, 1999 WL 34987407.

10. Original Brief of Cheremie Servs., Inc. and Attecia Cheremie, Appellees at 1, *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2007-1231 (La. App. 4 Cir. 3/4/2009); 14 So. 3d 1, 2010 WL 1477673 [hereinafter Brief of Cheremie].

11. *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2007-1231 (La. App. 4 Cir. 3/4/2009); 14 So. 3d 1, 2, *rev’d*, 2009-1633 (La. 4/23/10); 35 So. 3d 1053. Prior to entering into a contract with Shell in August 1997, Cheremie provided clerks for Shell’s Auger platform in 1996. *Id.* at 2.

12. *Id.* at 2. The contract was disputed because it was attached as a supplement to the blanket order agreement and was not signed. *Id.* at 6. The Fourth Circuit affirmed the trial court’s decision on the breach of contract issue and Cheremie did not challenge that issue in the Louisiana Supreme Court. *Id.*

13. *Id.* at 2. As part of the arrangement, Shell paid Cheremie for the services of the provided personnel, and then Cheremie paid the personnel. *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1054.

14. *Cheremie*, 14 So. 3d at 2. The employees that Cheremie claims were stolen away as part of a conspiracy between Shell and Filco both provided affidavits that they voluntarily quit Cheremie Services to work for Filco, a competitor of Cheremie Services. *Id.* at 2-3.

15. *Id.* at 3. The employee testified that she left Cheremie to work for Filco, because she needed the money from the position with Shell. *Id.*

16. *Id.*

17. *Id.* Shell disputed the validity of all of the claims arising from the alleged conspiracy. *Id.* On the contract claim, Shell noted that the contract did not require that Shell use Cheremie exclusively for all services needed. *See* Memorandum in Support of Shell Deepwater Prod. Inc.’s Motion for Summary Judgment at 2, 99-693 (La. Civil D. Ct.-Orleans 1999); *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2007 WL 6598607, 1999 WL 34987408. For the tort claims, the undisputed evidence showed that the employees who left Cheremie were at-will employees exercising their right to change employment. *Cheremie*, 14 So. 3d at 2. Shell argued that Cheremie’s LUTPA claim failed to meet both the procedural and substantive requirements of the statute. Memorandum in Support of Shell Deepwater Prod. Inc.’s Motion for Summary Judgment

Cheramie appealed the trial court's dismissal of the LUTPA and breach of contract claims.¹⁸ On appeal, the Louisiana Fourth Circuit Court of Appeal addressed the validity of Cheramie's LUTPA claim.¹⁹ The appellate court found that Cheramie had established a LUTPA claim, showing that the defendants conspired to injure the plaintiffs and reversed the trial court's grant of summary judgment on that issue.²⁰ However, the fourth circuit did not directly address whether the language of LUTPA limits the right to bring a private cause of action to consumers and competitors.²¹

The Louisiana Supreme Court granted certiorari to address Cheramie's LUTPA claim.²² The defendant contended that the plaintiffs lacked standing to bring an action under LUTPA because Cheramie was neither a consumer nor a business competitor.²³ In contrast, the plaintiffs asserted that the protected class under LUTPA is not limited to consumers and business competitors and the language of the statute is sufficiently broad to encompass the relationship in this case.²⁴ In a plurality opinion, the Louisiana Supreme Court decided that the plaintiffs did have standing to bring a cause of action under LUTPA even though they were neither business competitors nor consumers.²⁵

at 8-9, *Cheramie*, 2007 WL 6598607 (No. 99-693). Shell claimed that the conduct cited by Cheramie was a "normal business relationship" and was not "unethical, oppressive, unscrupulous, or substantially injurious," as required to succeed in a LUTPA action. *Id.* at 9 (quoting *JCD Marketing Co. v. Bass Hotels & Resorts, Inc.*, 2001-1096 (La. App. 4 Cir. 3/6/02); 812 So.2d 834, 841-42). Also, since Cheramie was neither a consumer nor a business competitor of Shell, it lacked standing to bring the action. *Id.* at 8.

18. *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2007-1231 (La. App. 4 Cir. 3/4/2009); 14 So. 3d 1, 2, *rev'd*, 2009-1633 (La. 4/23/10); 35 So. 3d 1053.

19. *Id.* at 3-6. The appellate court affirmed the trial courts granting of the motion for summary judgment on the breach of contract claim. *Id.* at 6.

20. *Id.* The court agreed that "anyone who conspires to injure a party's competitor in violation of La. R.S. 51:1401 et seq. is liable in solido with that party." *Id.* at 5-6 (quoting *Camp, Dresser & McKee, Inc. v. Steimle & Assocs., Inc.*, 94-547 (La. App. 5 Cir. 2/15/95); 652 So.2d 44, 48).

21. *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1055.

22. *Cheramie Servs., Inc. v. Shell Deepwater Prod.*, 2009-1633 (La. 11/20/09); 25 So. 3d 809. The issue of who had standing to bring a private cause of action under LUTPA had never been addressed by the Louisiana Supreme Court. See *Cheramie*, 35 So. 3d at 1056.

23. Memorandum in Support of Shell Deepwater Prod. Inc.'s Motion for Summary Judgment, *supra* note 17, at 9. Additionally, Shell argued that the conduct in question did not constitute an unfair or deceptive trade practice under LUTPA. *Id.*

24. Brief of Cheramie, *supra* note 10, at 9. Cheramie relied on both the plain language of the statute and the conspiracy theory that has allowed parties other than consumers or competitors to bring a cause of action under LUTPA "when the defendant acted in concert with a competitor." *Id.* at 9-10.

25. *Cheramie*, 35 So. 3d at 1058. Additionally, the court reversed the decision of the fourth circuit that reinstated the plaintiffs' LUTPA claim; the court stated that there was insufficient

III. BACKGROUND

LUTPA was inspired by and modeled after the FTC Act of 1914.²⁶ The FTC Act “prohibits unfair methods of competition in interstate commerce and empowers the FTC to fine violators.”²⁷ The “purpose of the [FTC Act] is protection of the public, not punishment of a wrongdoer.”²⁸ However, protection under the FTC Act comes in the form of injunctions and cease and desist orders, rather than actual recovery for damages suffered due to unfair and deceptive trade practices.²⁹ Additionally, the FTC Act does not provide a private cause of action for individuals.³⁰ Although the FTC Act and subsequent related legislation has reduced the instances of antitrust violations, consumers have consistently been left without adequate remedies, namely a private action for damages resulting from unfair and deceptive trade practices.³¹

LUTPA was enacted to serve as a supplement to the FTC Act and provide greater protection to consumers and competitors through remedial measures.³² The Enactment of LUTPA provided consumers and business competitors greater access to recovery for damages resulting from claims of unfair and deceptive trade practices.³³ However, with the exception of Louisiana’s First Circuit Court of Appeal, parties who were neither consumers nor competitors seeking recovery for losses suffered as a result of conduct prohibited by LUTPA were denied the right to assert a private cause of action.³⁴

A. CONSUMER PROTECTION: BEFORE THE LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT

Although the FTC Act offered a mechanism for deterring and

evidence to support the conspiracy theory and the Fourth Circuit’s decision relied on “mere speculation that there was a conspiracy between the two defendants.” *Id.* at 1063.

26. Andrews, *supra* note 4, at 759.

27. Dunbar, *supra* note 4, at 427.

28. *Gimbel Bros. v. Fed. Trade Comm’n*, 116 F.2d 578, 579 (2d Cir. 1941).

29. *See Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986, 991 (D.C. Cir. 1973) (“The commission was entrusted with a broad responsibility and discretion, prosecutorial in part, judicial in part (to enter orders of restraint), linked and subject to a determination that cease and desist proceedings and orders would further the public interest.”).

30. *Id.* at 988-89. Most Little FTC’s adopted by states created a private right of action for parties injured due to unfair and deceptive trade practices. Andrews, *supra* note 4, at 427.

31. Lovett, *supra* note 1, at 726-30.

32. Andrews, *supra* note 4, at 759.

33. *Id.* at 766-67.

34. *See, e.g., Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 707 (La. App. 4 Cir. 1982), *abrogated by Ceramic Servs., Inc., v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053.

enjoining unfair and deceptive trade practices, these practices remained common until more aggressive and effective state measures were adopted.³⁵ Prior to the enactment of state laws prohibiting unfair and deceptive trade practices, consumers were often the victims of “fraud, deceptive practices, or at least shoddy service and workmanship.”³⁶ Additionally, consumers would rarely take action against fraudulent or deceitful businessmen because the actions available under the commercial law provided “unreliable and uneconomic access to justice.”³⁷ After an analysis of the potential risks and costs of litigation, most consumers would come to the conclusion that “it was less expensive to suffer most deceptive trade practices than to remedy them through legal action.”³⁸

In 1964, the National Conference of Commissioners on Uniform State Laws approved the Uniform Deceptive Trade Practices Act (UDTPA).³⁹ Several states adopted UDTPA within years of its approval.⁴⁰ However, like the FTC Act, state statutes based on UDTPA provided inadequate remedies to consumers. Under UDTPA, attorney’s fees were available only in limited number circumstances, and injunctive relief was the only remedy available to plaintiffs.⁴¹ Therefore, even though many states adopted UDTPA, consumers were still left with insufficient and unrealistic options to defeat unfair and deceptive trade practices and methods of competition.

State statutes based on UDTPA ultimately proved inadequate and consumer dissatisfaction prompted the Council on State Governments to create the Unfair Trade Practices and Consumer Protection Act (UTPCPA).⁴² Most notably, UTPCPA provided for a private cause of action to individuals.⁴³ It also provided for attorney’s fees for successful plaintiffs, making it more realistic for consumers to bring claims for losses suffered due to prohibited conduct.⁴⁴ These enhanced remedies served as a greater deterrent of fraudulent and deceptive practices because merchants could not be certain of which consumers would exercise their right to bring

35. See Lovett, *supra* note 1, at 725-27. As unfair practices became more common, the public more easily victimized and the legal remedies of the FTC Act were insufficient. *Id.* at 727-28.

36. *Id.*

37. *Id.* at 725.

38. *Id.* Most of the traditionally available consumer actions like warranty, misrepresentation, and fraud do not normally provide attorney’s fees and costs for successful plaintiffs. *Id.*

39. *Toward Greater Equality*, *supra* note 4, at 1623.

40. *Id.* at 1623.

41. *Id.* at 1624. The problem was that the “individual consumer has little incentive to sue for injunctive relief, because he is unlikely to be deceived repeatedly by the same merchant.” *Id.*

42. Lovett, *supra* note 1, at 730.

43. *Id.*

44. *Id.*

a private cause of action if defrauded.

B. THE LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT: GREATER PROTECTION FROM DECEPTIVE AND UNFAIR TRADE PRACTICES AND METHODS OF COMPETITION

After the wave of federal legislation and proposed state models, many states started adopting their own laws, or Little FTCs, to combat unfair and deceptive trade practices.⁴⁵ In particular, state legislatures were seeking “to establish formal mechanisms to deal with consumer fraud.”⁴⁶ Three policy justifications drove the adoption of Little FTCs: (1) “to correct a perceived imbalance of power in the marketplace,” (2) to “make litigating small claims economical,” and (3) to “deter other potential unfair or deceptive practices.”⁴⁷

The Louisiana legislature enacted LUTPA in 1972.⁴⁸ Like many Little FTCs, it was enacted in response to “consumer dissatisfaction with their treatment in the marketplace.”⁴⁹ The statute’s language was patterned closely after the FTC Act, but LUTPA also provides for a private cause of action and damages.⁵⁰ It states that the private action is available to “[a]ny person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by [Louisiana Revised Statute (La. R.S.) §] 51:1405.”⁵¹ LUTPA also provides incentives to plaintiffs with valid claims of unfair and deceptive trade practices: the award of attorney’s fees and costs and the potential to

45. Zimmering, *supra* note 5, at 375 & n.2.

46. *Id.* at 375.

47. *Toward Greater Equality*, *supra* note 4, at 1625-26 (listing the policy justifications for adopting Little FTCs in many states).

48. 1972 La. Acts 1712, No. 759; *see* Zimmering, *supra* note 5, at 375.

49. Lovett, *supra* note 1, at 724-25.

50. *See id.* at 730.

51. LA. REV. STAT. ANN. § 51:1409 (2003 & Supp. 2011), *cited in* *Cheramic Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1053.

Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by [Louisiana Revised Statute §] 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. Upon a finding by the court that an action under this Section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.

Id.

receive treble damages in the most egregious cases.⁵² These potential additional expenses for a defendant provide consumers with more bargaining power to obtain settlements and to deter unfair and deceptive trade practices.⁵³

Prior to the Louisiana Supreme Court's decision in *Cheremie Services*, appellate courts throughout the state held contradictory interpretations of LUTPA, namely whether the right to bring a private cause of action under the Act was limited to consumers and competitors.⁵⁴ Even after the inconsistent positions of the various circuits became apparent, the Louisiana Supreme Court declined to interpret the statute on several occasions prior to *Cheremie Services*.⁵⁵ Many Louisiana courts have followed a very conservative interpretation, strictly limiting LUTPA's private cause of action to consumers and business competitors.⁵⁶ *Gil v. Metal Service Corp.* is one of the earliest decisions addressing the issue of standing under LUTPA. In *Gil*, the plaintiff alleged that his employer was engaged in removing foreign identifiers from steel and selling it to consumers as domestic.⁵⁷ The plaintiff refused to participate in the practice and was subsequently fired.⁵⁸ The plaintiff argued that his claims fell within the ambit of LUTPA because his injury, the loss of his job, was "'in furtherance' of deceptive trade practices by his employer."⁵⁹ The court dismissed the plaintiff's argument, stating that LUTPA had already "been construed to give protection only to consumers and business competitors."⁶⁰ In its opinion, the fourth circuit offered this as a legal conclusion, rather

52. *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1053.

53. Lovett, *supra* note 1, at 747-48.

54. See *Cheremie*, 35 So. 3d at 1056. In addition to Louisiana appellate courts, with the exception of the First Circuit Court of Appeal, Louisiana federal courts have also maintained the position that the right to assert a private cause of action under LUTPA is limited to consumers and competitors. See generally, e.g., *Landreneau v. Fleet Fin. Group*, 197 F. Supp. 2d 551 (M.D. La. 2002); *Cashman Equip. Corp. v. Acadian Shipyard, Inc.*, 2002 WL 1433876 (E.D. La. 2002).

55. See *Cheremie*, 35 So. 3d at 1056; see also *Jarrell v. Carter*, 577 So. 2d 120, 123-24 (La. App. 1 Cir. 1991) writ denied, 582 So. 2d 1311 (La. 1991); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. App. 4 Cir. 1982), writ denied, 414 So. 2d 379 (La. 1982).

56. *Delta Truck & Tractor v. J.I. Case Co.*, 975 F.2d 1192, 1205 (5th Cir. 1992); *Gil*, 412 So. 2d at 707 (citing *Nat'l Oil Serv. of La. v. Brown*, 381 So. 2d 1269 (La. App. 4 Cir. 1980); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. App. 4 Cir. 1979)), abrogated by *Cheremie*, 35 So. 3d 1053; see also *Nat'l. Gypsum Co. v. Ace Wholesale, Inc.*, 98-CA-1196 (La. App. 5 Cir. 6/1/99); 738 So. 2d 128, 130; *Vermillion Hosp., Inc. v. Patout*, 2005-82 (La. App. 3 Cir. 6/8/2005); 906 So. 2d 688, 692.

57. *Gil*, 412 So. 2d at 707.

58. *Id.*

59. *Id.*

60. *Id.* (citing *Nat'l Oil Serv. of La. v. Brown*, 381 So. 2d 1269 (La. App. 4 Cir. 1980); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. App. 4 Cir. 1979)).

than a reasoned interpretation of LUTPA's language.⁶¹

The first circuit has taken the position that “although business consumers and competitors are included in the group afforded this private right of action, they are not its exclusive members.”⁶² In *Jarrell v. Carter*, the plaintiff agreed to buy the distributorship of Anheuser-Busch, Inc. from a distributor of the brand, pending Anheuser-Busch's approval of the agreement.⁶³ Anheuser-Busch refused to approve the deal because it claimed that the business would fail due to its excessive sale price.⁶⁴ Additionally, it threatened to disclose the excessive sale price information to the financing institution for the plaintiff's intended purchase.⁶⁵ Thereafter, the distributor refused to sell to the plaintiff and subsequently informed him that Anheuser-Busch was purchasing the business for much more than its maximum worth.⁶⁶ The *Jarrell* court noted that although the plaintiff had not labeled himself a consumer or business competitor, the facts he alleged were “sufficient to classify him as a member of the group provided for by [La. R.S. §] 51:1409(A).”⁶⁷ The court also emphasized that consumers and competitors are not the exclusive members of the protected class under LUTPA.⁶⁸ The holding in *Capital House Preservation, Co. v. Perryman Consultants, Inc.* echoed the reasoning of the *Jarrell* court, stating that “[i]f a plaintiff alleges facts sufficient to classify himself as a member of the group provided a remedy by La. R.S. [§] 51:1409(A), it is of no moment if plaintiff is not a consumer or a business competitor of defendant.”⁶⁹

61. See *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. App. 4 Cir. 1982) (citing *Nat'l Oil Serv. of La. v. Brown*, 381 So. 2d 1269 (La. App. 4 Cir. 1980); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. App. 4 Cir. 1979)). In the instant case, the Louisiana Supreme Court noted that the *Gil* court's reliance on *National Oil Service of Louisiana* and *Reed* was misplaced, because both cases “involved plaintiffs seeking injunctions and neither of which addressed the issue of a limitation of the private right of action under LUTPA.” *Cheramic Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1057 n.6.

62. *Jarrell v. Carter*, 577 So. 2d 120, 123 (La. App. 1 Cir. 1991) (citing *Roustabouts, Inc. v. Hamer*, 447 So. 2d 543 (La. App. 1 Cir. 1984)).

63. *Id.* at 121.

64. *Id.*

65. *Id.*

66. *Id.* at 121-22. The prior undervaluation by Anheuser of the distributorship was allegedly due to Anheuser's own desire to purchase the business and deter other potential buyers. *Id.* at 122. Additionally, Anheuser allegedly put pressure on the distributor so that he would not sell to the plaintiff. *Id.*

67. *Id.* at 124. The plaintiff alleged that the unfair and deceptive conduct of Anheuser caused him to suffer substantial injuries as a prospective purchaser of the distributorship. *Id.*

68. *Jarrell*, 577 So. 2d at 124.

69. *Capitol House Preservation Co. v. Perryman*, 98-1514 (La. App. 1 Cir. 12/10/98); 725 So. 2d 523, 530 (citing *Jarrell*, 577 So. 2d at 124).

The inconsistent holdings in the Louisiana state courts have frustrated many Louisiana federal courts when confronted with the issue of standing under LUTPA. In *Cashman Equipment Corp. v. Acadian Shipyard, Inc.*, the United States District Court for the Eastern District of Louisiana discussed the contradictory holdings of Louisiana appellate courts when asked to determine whether a plaintiff had the right to assert a private cause of action under LUTPA.⁷⁰ Additionally, the court noted that the Louisiana Supreme Court had not resolved the issue of standing under LUTPA, thus it should “determine as best it can, what the highest court of the state would decide.”⁷¹ The federal court resolved the issue by looking to the interpretations of federal appellate courts, rather than those of the Louisiana First Circuit Court of Appeal cited by the plaintiff.⁷² The *Cashman* court noted that it was bound to follow the law in its circuit and cited the circuit’s recent decision in *Tubos de Acero de Mexico, S.A. v. American International Investment Corp.*, which found that the correct interpretation of LUTPA limited standing for private actions to consumers and business competitors.⁷³ The court in *Cashman* quoted *Tubos de Acero de Mexico, S.A.*: “LUTPA’s private right of action is limited to direct consumers or business competitors. . . . Thus, to have standing under LUTPA, [plaintiff] must demonstrate that it is either a consumer or a business competitor of [defendant].”⁷⁴

In summary, the issue of whether LUTPA limited the right to assert a private cause of action has always been unresolved despite the contradictory holdings throughout the state. However, the majority of courts relied on the narrow interpretation of the statute and regularly dismissed LUTPA claims of injured plaintiffs who were neither consumers nor competitors. The Louisiana Supreme Court’s silence on the issue of standing under LUTPA finally ended with *Cheremie Services*.

70. *Cashman Equipment Corp. v. Acadian Shipyard, Inc.*, No. Civ. A. 01-2411, 2002 WL 1433876, at *2 (E.D. La. 2002).

71. *Id.* at *2 (quoting *Labiche v. Legal Sec. Ins. Co.*, 31 F.3d 350, 351 (5th Cir. 1994)).

72. *See id.* at *1-2 (citing *Gardes Directional Drilling v. U.S. Turnkey Exploration Co.*, 98 F.3d 860, 867-868 (5th Cir. 1996); *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 975 F.2d 1192, 1205 (5th Cir. 1992)). The Fifth Circuit expressed “some hesitation regarding the application of the narrow interpretation, in light of the statute’s broad language and the Louisiana First Circuit’s interpretation, the court concluded that there had been no subsequent decisions of the Louisiana courts demonstrating that the *Delta Truck* opinion was clearly wrong.” *Id.*

73. *Id.* at *1 (citing *Tubos de Acero de Mexico, S.A. v. American Int’l Inv. Corp.*, 292 F.3d 471, 480 (5th Cir. 2002)).

74. *Id.* (quoting *Tubos de Acero de Mexico, S.A. v. American Int’l Inv. Corp.*, 292 F.3d 471, 480 (5th Cir. 2002)).

IV. THE COURT'S DECISION

Prior to *Cheremie Services*, the Louisiana Supreme Court had never addressed whether the language of LUTPA limited the right to bring a private cause of action to only consumers and business competitors.⁷⁵ The Louisiana Supreme Court noted that the plaintiffs were neither consumers nor business competitors of Shell.⁷⁶ In a plurality opinion authored by Justice Weimer, the court began its analysis by considering the language La. R.S. § 51:1409(A), which governs private actions under LUTPA.⁷⁷ After reviewing the plain language of the statute, the court determined that the words “any person,” used in the statute, do not contain any limitation on who may assert a private cause of action under LUTPA.⁷⁸ Further, the plurality stated that “[a]ny such limitation that has found its way into the jurisprudence resulted without proper analysis of the statute.”⁷⁹ In addition, the opinion noted that the legislative history proved inconclusive, but stated that where the language is “clear and unambiguous, the letter of the law is not to be disregarded under the pretext of pursuing its spirit.”⁸⁰

Prior to addressing whether LUTPA applied to the facts of this case, the court addressed concerns that this interpretation of § 51:1409(A) was too broad.⁸¹ The plurality emphasized that the statute limits its applicability to plaintiffs who can show that they were injured as a result of unfair and

75. *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1056. The court recognized the split among the circuits, as well as the contradictory holdings that the Supreme Court refused to address previously. *Id.* (citing *Jarrell v. Carter*, 577 So. 2d 120 (La. App. 1 Cir. 1991), *writ denied*, 582 So. 2d 1311 (La. 1991); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. App. 4 Cir. 1982), *writ denied*, 414 So. 2d 379 (La. 1982)).

76. *Id.* at 1056. The court also stated that the plaintiffs conceded that they were neither consumers nor competitors. *Id.*

77. *Id.* “The starting point in the statutory interpretation of any statute is the language of the statute itself.” *Grant v. Grace*, 2003-2021 (La. 4/14/04); 870 So. 2d 1011, 1014 (citing *Theriot v. Midland Risk Ins. Co.*, 95-2895 (La. 5/20/97); 694 So. 2d 184, 186; *Touchard v. Williams*, 617 So. 2d 885, 888 (La. 1993), *superseded by* LA. CIV. CODE ANN. art. 2324 (2011)), *cited in Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1056.

78. *Cheremie*, 35 So. 3d at 1056. The plurality noted that several cases have interpreted the Act to extend the private right of action to persons other than consumers and competitors. *Id.* (citing *Capitol House Preservation Co. v. Perryman*, 98-1514 (La. App. 1 Cir. 12/10/98); 725 So. 2d 523, 530).

79. *Id.* The plurality noted that *Hamilton v. Business Partners, Inc.*, 938 F. Supp. 370 (E.D. La. 1996), recognized that the seminal case interpreting the law, *Gil*, offered a flawed interpretation of the statute, limiting its use to consumers and competitors, which has since been relied on in many subsequent cases. *Cheremie*, 35 So. 3d at 1056.

80. *Id.* at 1056 n.4 (citing LA. REV. STAT. ANN. § 1:4 (2003)). However, the court did recognize that the Act was modeled after the FTC Act and was created in part due to the federal Act's inadequacies. *Id.* at 1056 n.4.

81. *Id.* at 1058.

deceptive trade practices.⁸² The defendants' conduct is addressed on a case-by-case basis for violations and "LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions."⁸³ Additionally, the court recognized that although the potential recovery under the statute can be generous for plaintiffs, defendants are entitled to attorney's fees and costs if the court finds that the action was "groundless and brought in bad faith or for the purposes of harassment."⁸⁴

After determining that the plaintiffs did have standing to bring a private cause of action under LUTPA, the court looked to the facts of the case to evaluate whether there was sufficient evidence to withstand a motion for summary judgment.⁸⁵ The plurality recited the requirements necessary to recover under LUTPA, namely that plaintiffs suffer an ascertainable loss and prove "some element of fraud, misrepresentation, deception, or other unethical conduct."⁸⁶ Although the range of prohibited practices under LUTPA is narrow, "it has been left to courts to decide, on a case-by-case basis, what conduct falls within the statute's prohibition."⁸⁷ After considering the evidence, the court decided that the plaintiffs had not made a *prima facie* showing of Shell conspiring with Filco to injure the plaintiffs.⁸⁸ In particular, the court noted a lack of factual support to show that a conspiracy between Shell and Filco caused the three employees to

82. *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1058.

83. *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993) (citing *Monroe Med. Clinic, Inc. v. Hosp. Corp. of Am.* 522 So. 2d 1362, 1365 (La. App. 2 Cir. 1988)). Additionally, "the statute does not forbid a business to do what everyone knows a business must do: make money." *Id.*

84. LA. REV. STAT. ANN. § 51:1409(A) (2003 & Supp. 2011). Successful plaintiffs are entitled to attorney's fees and costs under the Act. *Id.* Additionally, plaintiffs may recover treble damages if the court finds that the unfair or deceptive trade practices were knowingly pursued after being put on notice by the attorney general. *Id.*

85. *Cheramie*, 35 So. 3d at 1058. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact." LA. CODE CIV. PROC. ANN. art. 966(B) (2011).

86. *Cheramie*, 35 So. 3d at 1059 (quoting *Dufau v. Creole Engineering, Inc.*, 465 So. 2d 752, 758 (La. App. 5 Cir. 1985)).

87. *Id.* at 1059 (citing *Dufau v. Creole Engineering, Inc.*, 465 So. 2d 752, 758 (La. App. 5 Cir. 1985)). As part of the case-by-case analysis, courts have repeatedly stated that a plaintiff must show that the conduct "offends established public policy and . . . is immoral, unethical, oppressive, unscrupulous, or substantially injurious." *Id.* (quoting *Moore v. Goodyear Tire & Rubber Co.*, 364 So. 2d 630, 633 (La. App. 2 Cir. 1978)).

88. *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1063.

leave Ceramic Services to work for Filco.⁸⁹ As a result, the court reversed the judgment of the fourth circuit and dismissed the plaintiffs' petition.⁹⁰

While agreeing with the result of the case, Justice Johnson disagreed with the plurality's position on the standing issue.⁹¹ Justice Johnson's concurrence contained a thorough discussion of both the language and purpose of LUTPA.⁹² She noted that when reading the statute in its entirety, the language indicates the legislature's intent to create a private cause of action for only consumers and competitors.⁹³ Additionally, she reasoned that the purpose of LUTPA is to protect consumers.⁹⁴ She cited inadequate remedies for consumers and competitors who suffered losses from unfair trade practices, as well as consumer dissatisfaction as the impetus for the creation of LUTPA.⁹⁵

In her concurrence, Justice Johnson recognized the statute's broad language, but explained that the jurisprudence in both the state and federal systems endorsed a narrow interpretation that limits the private cause of action to consumers and competitors.⁹⁶ Finally, the concurrence stressed

89. *Cheramic Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1063. Plaintiffs were unable to refute the affidavits of the employees in question. *See id.* One of the employees stated that he inquired about a job with Filco and switched employers because of the \$10,000 salary increase from what he was earning with Ceramic Services. *Id.* at 1062. Additionally, the court noted that "the appellate court's conclusion is not supported by the record and is mere speculation that there was a conspiracy between the two defendants." *Id.* at 1063.

90. *Id.*

91. *Id.* (Johnson, J., concurring). Additionally, Justices Guidry and Knoll concurred in the result only. *Id.* at 1065 (Guidry, J., concurring) (Knoll, J., concurring).

92. *Id.* at 1063-64 (Johnson, J., concurring).

93. *Id.* at 1064 (Johnson, J., concurring). The concurrence specifically cited the language "competition" and "trade or commerce" from § 51:1405(A) to argue that a limitless private right of action was not the legislature's intention. *Id.*

94. *Id.*

95. *Cheramic Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1064 (citing Patrick D. Breeden & William A. Lovett, *Louisiana's New Unfair Trade Practice and Consumer Protection Law*, 20 LA. B.J. 307, 308 (1973)).

96. *Cheramic*, 35 So. 3d at 1064-65 (Johnson, J., concurring). The majority of the state appellate courts and the Louisiana federal courts have interpreted the Act to provide a private cause of action for consumers and competitors only. *See Tubos de Acero de Mexico, S.A. v. American Int'l Inv. Corp.*, 292 F.3d 471, 480 (5th Cir. 2002); *Computer Mgmt. Assistance Co. v. DeCastro, Inc.*, 220 F.3d 396 (5th Cir. 2000); *Gardes Directional Drilling v. U.S. Turnkey Exploration Co.*, 98 F.3d 860 (5th Cir. 1996); *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 975 F.2d 1192, 1205 (5th Cir. 1992); *Landreneau v. Fleet Fin. Group*, 197 F. Supp. 2d 551, 557 (E.D. La. 2002); *Cashman Equip. Corp. v. Acadian Shipyard, Inc.*, No. 01-2411, 2002 WL 1433876 (E.D. La. June 28, 2002); *Schenck v. Living Centers-East, Inc.*, 917 F. Supp. 432 (E.D. La. 1996); *Indest-Guidry, Ltd. v. Key Office Equip., Inc.*, 2008-599 (La. App. 3 Cir. 11/5/08); 997 So. 2d 796; *Dominion Exploration & Production, Inc. v. Waters*, 2007-0386 (La. App. 4 Cir. 11/14/07); 972 So. 2d 350; *Vermilion Hosp., Inc. v. Patout*, 2005-82 (La. App. 3 Cir. 6/8/05); 906 So. 2d

that despite the almost uniform interpretation of LUTPA, which reserved the private cause of action to consumers and competitors in cases throughout Louisiana since its enactment, the legislature had not amended the statute to increase its scope beyond the popular judicial interpretation.⁹⁷

V. ANALYSIS

The Louisiana Supreme Court reached the proper conclusion in its plurality opinion in *Cheremie Services*. After analyzing the language of LUTPA, the court determined that the words “any person” were clear and unambiguous, requiring no further clarification from the legislative intent or prior judicial interpretations.⁹⁸ This opinion, however, failed to address the possible implications of adopting this expanded position on standing. Further, the plurality opinion offered by Justice Weimer adopted the minority position and purported to be a change in the law, renouncing nearly thirty years of contrary holdings.⁹⁹ However, the Louisiana Supreme Court’s failure to offer a majority opinion on the *res nova* issue of standing under LUTPA may only provide false hope to potential plaintiffs and lead to confusion in Louisiana courts.

A. THE LOUISIANA SUPREME COURT’S RELIANCE ON BASIC STATUTORY INTERPRETATION TO DEFINE “ANY PERSON” UNDER THE LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT

The court properly began its statutory interpretation by looking to the language of the Act.¹⁰⁰ Since LUTPA offers a private cause of action to

688; *National Gypsum Co. v. Ace Wholesale, Inc.*, 98-1196 (La. App. 5 Cir. 6/1/99); 738 So. 2d 128; *Monroe Med. Clinic, Inc. v. Hosp. Corp. of Am.*, 522 So. 2d 1362 (La. App. 2 Cir. 1988); *J.B.N. Morris v. Rental Tools, Inc.*, 435 So. 2d 528 (La. App. 5 Cir. 1983); *Gil v. Metal Servs. Corp.*, 412 So. 2d 706 (La. App. 4 Cir. 1982); *Nat’l Oil Serv. of La. v. Brown*, 381 So. 2d 1269 (La. App. 4 Cir. 1980); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. App. 4 Cir. 1979). However, the first circuit has declined to limit the private cause of action under LUTPA to consumers and competitors. *See Plaquemine Marine, Inc. v. Mercury Marine*, 03-1036 (La. App. 1 Cir. 7/25/03), 859 So. 2d 110; *Capitol House Preservation Co. v. Perryman Consultants, Inc.*, 98-1514 (La. App. 1 Cir. 12/10/98), 725 So. 2d 523; *Jarrell v. Carter*, 577 So. 2d 120, 123 (La. App. 1 Cir. 1991); *Roustabouts, Inc. v. Hamer*, 447 So. 2d 543 (La. App. 1 Cir. 1984).

97. *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1065 (Johnson, J., concurring).

98. *Id.* at 1057. The court also looked to the definition of “person” under § 51:1402(8), which states: “‘Person’ means a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity.” LA. REV. STAT. ANN. § 51:1402(8) (2003 & Supp. 2011).

99. *Cheremie*, 35 So. 3d at 1058.

100. Under Louisiana law, legislation and custom are the only sources of law. *See* LA. CIV. CODE ANN. art. 1 (2011). The law clearly distinguishes these authoritative sources of law from persuasive sources such as jurisprudence, “that may guide the court in reaching a decision in the

“any person who suffers an ascertainable loss,”¹⁰¹ it would have been outside the court’s discretion to limit the protected class. Louisiana law on statutory interpretation clearly states that “when a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and *no further interpretation may be made* in search of the intent of the legislature.”¹⁰² The language of LUTPA is clear and unambiguous, thus the court should not have limited its application in an attempt to pursue its spirit.¹⁰³

The concurrence explained that when reading the statute as a whole, the language “competition” and “trade or commerce” reveals the legislature’s intent to limit the cause of action. However, this language likely reveals the nature of the claims and the injuries, rather than the intended claimants. Like the FTC Act, LUTPA seeks to prevent and remedy damages resulting from unfair and deceptive trade practices and does not purport to provide a cause of action for any person who suffers any injury.¹⁰⁴ As the court noted, there are limitations on the cause of action, namely a plaintiff must show an ascertainable loss as a result of “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹⁰⁵ Overall, the court was limited by LUTPA’s broad language and gave the statute the only interpretation that would not alter the written law.

The Louisiana Supreme Court was faced with overwhelming jurisprudence contradicting its broad reading of “any person” in reference to who has standing to bring a cause of action under LUTPA. The court properly maintained its position without relying on prior contrary holdings throughout the state. Although the decision to overrule the majority judicial position on standing has garnered some criticism, the court was in no way bound to either adhere to or even address these prior holdings.¹⁰⁶ The court, however, looked to jurisprudence to counter the argument that the prior holdings limiting standing under LUTPA were based in the law.¹⁰⁷ The

absence of legislation and custom.” *Id.* at cmt. b.

101. LA. REV. STAT. ANN. § 51:1409 (2003 & Supp. 2011).

102. LA. CIV. CODE ANN. art. 9 (2011) (emphasis added).

103. *See* *Cheramic Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1056 n.4 (citing LA. REV. STAT. ANN. § 1:4 (2003)).

104. *Id.* at 1057-58.

105. *Id.* at 1057; *see also* LA. REV. STAT. ANN. § 51:1405 (2003 & Supp. 2011).

106. *See* Shael Herman, *Fate and Future of Codification in America*, 40 AM. J. LEGAL HIST. 407 (1996). In statutory analysis, “the text of the law is first looked into, and if the law has spoken, *non exemplis sed legibus judicandum est.*” *Id.* at 417 (quoting 2 THE JURIST 55, 58 (1828)). The Latin maxim means that we must *judge in accordance with law, not precedent.* *Humphreys v. Allen*, 101 Ill. 490, 506 (Ill. 1882).

107. *See* *Cheramic*, 35 So. 3d at 1057 (citing *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 707 (La.

court stated that the jurisprudence supporting the limited interpretation was based on flawed reasoning and legal conclusions.¹⁰⁸ As a result, the court used its own interpretation and analysis of the language in concluding that the right to bring a private cause of action under LUTPA is in no way limited to consumers and competitors.

B. POTENTIAL EFFECTS OF EXTENDING THE PRIVATE CAUSE OF ACTION BASED ON THE COURT'S DECISION IN *CHERAMIE SERVICES*

Although the language of LUTPA seems to show the legislature's clear intention, a discussion of the events leading up to its enactment would have better reinforced the court's position. Although consumer mistreatment in the marketplace was one of the reasons cited for the statute's enactment, it was not the sole reason. The FTC Act lacked sufficient remedies for consumer protection, but enforcement was also a problem. LUTPA, like many Little FTC's, offers more aggressive enforcement, as well as the additional remedial provisions. The right to bring a private cause of action is one of the greatest assets available to plaintiffs injured by conduct prohibited under LUTPA.

Under a limited interpretation, many claimants suffered losses that were incidental to clear violations of LUTPA, but were denied recovery.¹⁰⁹ Often these parties were left without adequate remedies, a result which is contrary to one of the main goals of LUTPA—furthering “the public interest by creating an environment conducive to fair competition.”¹¹⁰ Under the limited interpretation, employees generally lacked standing to bring a private cause of action, even when their injury was in furtherance of or a result of what would typically be deemed unfair and deceptive trade practices.¹¹¹ After being denied the right to bring a private cause of action under LUTPA, employees often looked to other protections, such as laws

App. 4 Cir. 1982); *Nat'l Oil Serv. of La. v. Brown*, 381 So. 2d 1269 (La. App. 4 Cir. 1980); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. App. 4 Cir. 1979)).

108. *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1057.

109. *See Potvin v. Wright's Sound Gallery*, 568 So. 2d 623 (La. App. 2 Cir. 1990); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. App. 4 Cir. 1982), *abrogated by Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053. *But see Thibaut v. Thibaut*, 607 So. 2d 587 (La. App. 1 Cir. 1992) (plaintiff partners were neither competitors nor consumers of new business formed by colluding partners, thus lacked standing under LUTPA, but the partnership itself did have standing as a competitor to the new business).

110. *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2007-1231 (La. App. 4 Cir. 3/4/09); 14 So. 3d 1, 3-4 (citing *Andrews*, *supra* note 4, at 776), *rev'd*, 35 So. 3d 1053.

111. *See generally W.A. Offshore Equip. Co. v. Parmatic Filter Corp.*, 767 F. Supp. 125 (E.D. La. 1991); *Potvin*, 568 So. 2d 623; *Gil*, 412 So. 2d 706.

governing wrongful termination.¹¹² These laws generally offer protection from termination based on race, sex, religion, and the exercise of constitutionally protected rights.¹¹³ However, due to Louisiana Civil Code article 2747, a cause of action for wrongful termination often does not extend beyond those limited categories.¹¹⁴ Thus, many employees, like the plaintiff in *Gil*, were left without a remedy for injuries that could be traced back to a clear violation of LUTPA. The court's interpretation of LUTPA in *Cheremie Services* may better promote its goals and allow these injured plaintiffs to get one step closer to recovery.

In analyzing a statute, a court should make determinations presuming that the legislature acted "deliberately and with full knowledge of existing laws on the same subject, with awareness of court cases and well-established principles of statutory construction, and with knowledge of the effect of their acts and a purpose in view."¹¹⁵ As part of the analysis of LUTPA, it can be presumed that the legislature was familiar with the inadequacies in other laws governing similar conduct. When the events leading up to the statute's enactment are fully considered, it seems logical that the legislature intended to provide better mechanisms for preventing and remedying damages resulting from all unfair and deceptive trade practices and methods of competition.

The court's finding that LUTPA does not limit private causes of action to consumers and competitors could have a widespread effect on the behavior of participants in trade and commerce, as well as potential litigants under the statute. At a very minimum, more plaintiffs could assume that they have standing to bring a cause of action for losses under LUTPA. Even though the longstanding judicial interpretation limited the private cause of action to consumers and competitors, many plaintiffs outside of those classes filed suit under LUTPA in an attempt to find exclusions to the limitation.¹¹⁶ With the Louisiana Supreme Court's less restrictive interpretation in *Cheremie Services*, these groups could have the opportunity to present their cases.

112. See *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 707 (La. App. 4 Cir. 1982), *abrogated by Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053.

113. *Id.* at 708.

114. See LA. CIV. CODE ANN. art. 2747 (2011) ("A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause.").

115. *Hunter v. Morton's Seafood Restaurant & Catering*, 2008-1667 (La. 3/17/09); 6 So. 3d 152, 155 (citing *State v. Johnson*, 2003-2993 (La. 10/29/04); 884 So. 2d 568, 576; *Theriot v. Midland Risk Ins. Co.*, 95-2895 (La. 5/20/97); 694 So. 2d 184, 186).

116. Cases like *Gil*, which fell under the "in furtherance of" and "conspiracy" case categories would have been dismissed for lack of standing based on the fact that plaintiffs were neither consumers nor competitors.

As the court noted, the statute offers additional limiting features that will prevent the pursuit of unreasonable and unwarranted claims. Since a court can award attorney's fees and costs to a defendant upon finding that a claim was brought in bad faith or for harassment purposes, irresponsible plaintiffs will be forced to consider the risks and the associated financial burden.¹¹⁷ This would likely deter many unwarranted claims.¹¹⁸

Most importantly, removing the limitation on the private cause of action under LUTPA will likely further the legislature's purpose of preventing unfair and deceptive trade practices and methods of competition. The purpose of the statute can best be effectuated by permitting a viable and economical mechanism for recovery for all parties who can prove a loss under the Act. Overall, allowing any person with ascertainable damages resulting from prohibited conduct to bring a cause of action under the Act will likely serve one of its primary goals—furthering the “public interest by creating an environment conducive to fair competition.”¹¹⁹

**C. THE TRUE VALUE OF THE COURT'S DETERMINATION THAT
STANDING UNDER THE LOUISIANA UNFAIR TRADE PRACTICES AND
CONSUMER PROTECTION ACT IS NOT LIMITED TO CONSUMERS AND
COMPETITORS**

The Louisiana Supreme Court's position on standing under LUTPA, offered by three Justices in *Cheremie Services*, could have the effect of changing the limited interpretation supported by nearly thirty years of jurisprudence. In *Cheremie Services*, the court provided greater support for its position on the standing issue than the prior decisions that limited the private cause of action to only consumers and competitors.¹²⁰ However, the lack of support for this new position by a majority of the court leaves the law in a state of limbo.¹²¹

117. Lovett, *supra* note 1, at 749.

118. *Id.*

119. Andrews, *supra* note 4, at 776.

120. Many Louisiana courts that limited standing under LUTPA to consumers and competitors have cited *Gil*. However, the court in *Gil* did not provide a thorough analysis of the relevant statute, stating only that “this statute has been construed to give protection only to consumers and business competitors.” *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 707 (La. App. 4 Cir. 1982) (citing *Nat'l Oil Serv. of La. v. Brown*, 381 So. 2d 1269 (La. App. 4 Cir. 1980); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. App. 4 Cir. 1979)), *abrogated by Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053. The court in *Gil* erroneously relied on *National Oil Service of Louisiana* and *Reed*, two cases that did not address the issue of standing for a private cause of action under LUTPA. *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1057 & n.6.

121. It has been argued that the Louisiana Supreme Court's plurality opinion in *Cheremie Services* does not represent a majority opinion on the issue of standing or a change in the law that has been followed for nearly thirty years. See Brief of Appellants at 12-15, *Input/Output, Inc. v.*

Although all of the Justices agreed with the dismissal of the action in *Cheremie Services*, there was no majority opinion offered on the issue of standing.¹²² Justice Guidry did not offer his opinion on the standing issue, stating that the analysis was unnecessary since the case was disposed on another matter.¹²³ Justice Johnson clearly expressed her opposition to the court's reasoning and limited her support to the dismissal of the action. Further, Justice Knoll offered no opinion on the issue of standing and noted that she agreed only with the result of the case.¹²⁴ In all, three Justices agreed on a particular interpretation of the standing issue. In looking to plurality opinions, it has been said that "those joining in a plurality opinion may speak with the authority accorded wise men, but their voices do not carry the authority of the [court] as an institution."¹²⁵

For example, in *Chaney v. Travelers Ins. Co.*, the Louisiana Supreme Court noted that the first circuit was not bound by a prior supreme court decision that did not result in a majority opinion on the issue in question.¹²⁶ In finding the appellate court's belief erroneous, the Louisiana Supreme Court adopted an interpretation contrary to the plurality opinion previously issued on the topic.¹²⁷ *Chaney* evidences the potential treatment of plurality opinions in Louisiana. Similarly, plurality opinions offered by the United States Supreme Court have been regarded as "useless as guides to lower courts" and as only persuasive authority.¹²⁸ As a result, plurality opinions have left "lower courts [to rely] largely on intuition and common sense."¹²⁹

Wilson Greatbatch Technologies, Inc., 10-CA-477 (La. App. 5 Cir. 2010).

122. See generally *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/2010); 35 So. 3d 1053, 1053. Justice Kimball did not participate in the deliberation of the opinion. *Id.* at 1054 n.1.

123. *Id.* at 1065 (Guidry, J., concurring). Justice Guidry stated that "the majority's discussion of standing to bring an action for damages pursuant to the Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. 51:1401 *et seq.*, is dicta." *Id.*

124. *Id.* (Knoll, J., concurring).

125. John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 61-62 (discussing the effect of plurality opinions from the Supreme Court of the United States).

126. *Chaney v. Travelers Ins. Co.*, 249 So. 2d 181, 184 (La. 1971). Although a majority of the court did agree in the result, the reasoning was split. *Id.*

127. *Id.* at 184-85. Similar to Justice Guidry's concern that the decision of standing under LUTPA solely amounts to dicta, the Louisiana Supreme Court expressed concerns in *Chaney* about the discussion of article 667 of Louisiana Civil Code in *Reymond v. State ex rel. Dep't of Highways*, 231 So. 2d 375 (1970) and its precedential effect. See generally *Chaney*, 249 So. 2d at 184-85.

128. Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130 (1981).

129. Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756 (1980).

Cheremie Services was the first time that the Louisiana Supreme Court offered its opinion on the issue of standing under LUTPA. Although the new interpretation of the Act could have far reaching consequences, the lack of a majority on the issue of standing may present a dilemma for other courts in the state—should they follow nearly thirty years of precedent or a contrary plurality opinion from the highest court in the state?

VI. CONCLUSION

Overall, the court's conclusion was proper in that the plain language of LUTPA does not provide a basis for limiting the right to bring a private cause of action to consumers and competitors. Although the Louisiana Supreme Court's reliance on the plain language of the statute, without any true regard for prior decisions and legislative intent, may appear overly simplistic, any other analysis would have been contrary to the laws governing statutory interpretation in Louisiana under the Civil Code. The possible implications of the court's interpretation of standing under LUTPA could have a dramatic effect on business-related claims brought within the state. However, it is unknown whether the Louisiana Supreme Court's interpretation will lead to excessive litigation and liability or simply lead courts to rely on the other limiting features within LUTPA.

Unfortunately, the court missed a golden opportunity to clarify an area of law that has troubled Louisiana courts for nearly thirty years. As a result of the court's fragmented opinion, it remains to be seen whether Louisiana's lower courts will follow the decision of the three justices that found no limitation on who may bring a private cause of action under LUTPA or simply follow precedent until the Louisiana Supreme Court offers a statement of the law in the form of a majority opinion.

Ashley Melerine Liuzza