

UNFAIR TRADE PRACTICES IN LOUISIANA

I. HISTORY OF LITTLE FTC ACTS

A. The Federal Trade Commission Act

- The Federal Trade Commission Act was originally enacted in 1914 when Congress declared unfair methods of competition unlawful. In 1938, it was amended to prohibit both unfair and deceptive acts. Under §5(a)(1) of the Act (15 U.S.C. 45(a)(1)), the FTC Act, as written, prohibits "unfair or deceptive acts or practices."
- Under the FTC Act there is no private right of action; only the FTC can proceed under the Act.
- The FTC Act does not define the phrase "unfair or deceptive acts or practices." The FTC has the right to promulgate regulations to define unfair or deceptive conduct. The FTC has the power to hold administrative proceedings whereby an administrative law judge can determine what type of activity would be found to be unfair or deceptive behavior. This has produced reports of FTC decisions construing the regulations within the FTC's jurisdiction. There are also court decisions construing the FTC Act.
- The Act gives the FTC broad powers to define and enforce the Act through cease and desist orders. The Act's broad language gives the FTC great discretion in defining what behavior will be found to be in violation of the Act.

B. Genesis of Little FTC Acts

- These acts resulted from a flowering of consumer consciousness in the 1950s. State legislatures enacted statutes which were designed to prohibit deceptive or unfair practices. This legislation came from various model acts.
 - Most state statutes were inspired by, or to some extent follow, the FTC Act.
 - Most statutes adopted are patterned on the model Unfair Trade Practice and Consumer Protection Law (UTP/CPL). This was developed jointly by the Federal Trade Commission and the Committee on Suggested State Legislation of the Council of State Governments. Three different model acts are recommended in this model statute.
 - Other statutes are from the National Conference of Commissioners on Uniform State Laws which developed the Uniform Consumer Sale Practices Act and the Uniform Deceptive Trade Practices Act. (UDTPA)
 - The National Conference of Commissioners on Uniform State Laws and the American Bar Association adopted the Uniform Consumer Sale Practices Act.
 - A third model act, the Uniform Deceptive Trade Practices Act, was adopted in 1964 and revised in 1966 by the National Conference on Uniform Laws. It has been followed in a few states.
 - A few states have enacted different types of legislation called Consumer Fraud Acts. Many states have a combination of model acts and acts with their own special features.
 - Many states, such as California, have more than one act which deals with unfair trade practices or deceptive acts.

- Today, all 50 states have some form of unfair trade practices legislation on the books which are commonly referred to as UDAP Statutes.

II. LITIGATING UNDER LITTLE FTC ACTS

A. The Key - A Private Right of Action

- Under the FTC Act, no private right of action is available. Aggrieved parties were dependent upon the FTC deciding to bring an action against a particular business. Obviously, the FTC could not take actions against all entities that were affecting parties injured by unfair or deceptive practices. This was the reason for the development of Little FTC Acts, which were designed to empower individuals to seek relief on their own, as well as allow state agencies to engage in their own regulatory action. Virtually all Little FTC Acts allow action by an authorized official of the state, usually the attorney general, and almost all of the state acts allow a private right of action.
- The private right of action is the key in allowing the use of Little FTC Acts in private litigation. They can serve as a substantial weapon in the hands of consumers or businesses who can bring claims under these statutes.

B. Who Can Assert A Private Right Of Action

- In some states, only an "individual consumer" can assert a private right of action under a UDAP statute. However, in some states, such as Texas, businesses can assert claims under certain circumstances. The key is to look at your state's statute and precedent established to determine who can be parties. Possible plaintiffs can include:
 1. Individuals injured in a covered transaction
 2. Merchants

3. Corporations
4. Governmental entities

C. Exempted Defendants

- A number of potential defendants are exempted from claims under UDAP statutes. These exempted defendants will vary state to state, but can include:
 1. Regulated industries, such as,
 - a. Insurance
 - b. Securities
 - c. Banks
 2. Doctors
 3. Lawyers
 4. Governmental bodies
 5. Non-profit organizations

D. Exempted Transactions or Activities

- Some types of transactions or activities are exempted by state statutes or by cases interpreting these statutes. Some examples are as follows:
 1. Credit transactions
 2. Real property transfers
 3. Employer-employee relations

4. Investments
5. Residential leases
6. Personal injury lawsuits
7. Practices permitted by law

E. Proving a Claim Under Little FTC Acts

- Proof of a claim under a Little FTC Act is generally easier than proving all the elements of common law fraud or deception. The language in any of the statute is amorphous, thus allowing the creating of standards which are not as stringent as those developed in case law or codified in other state statutes.
- Benefits can include:
 1. Actual deception not necessary
 2. Reliance on statement may not be necessary
 3. Knowledge is unnecessary
 4. Statute of frauds, parole evidence rules do not apply
- One commentator points out that because of the broad language of these acts and their potential to be so sweeping, that a number of state courts have overly limited claims available and disallowed relief that should have been granted. See, Sovern, *Private Actions Under the Deceptive Trade Practices Act: Reconsidering the FTC Act as Role Model*. 52 Ohio St.L.J. 437 (1991).
- In Texas, the statute has been used in a variety of contexts. Courts have been expansive in scope of activities covered. Businesses, as well as consumers, can sue. Surveys have found litigation under the Texas statute are the most frequent

in the nation. Sovern, *Private Actions Under the Deceptive Trade Practices Act: Reconsidering the FTC Act as Role Model*. 52 Ohio St.L.J. 437 (1991), at 462-463; Dunbar, *Consumer Protection: The Practical Effects of State Deceptive Trade Practices Legislation*: 59 Tul. L. Rev. 427, 449 (1984)

F. Types of Relief Available in Actions Under Little FTC Acts

- The relief available is much broader than common law remedies offered in most states. Relief available can include the following:
 1. Actual damages
 2. Statutory minimum damages
 3. Treble or multiple damages
 4. Punitive damages
 5. Class actions
 6. Injunctions
 7. Rescission or voiding of contractual agreements
 8. Attorney's fees

III. SPECIAL CONSIDERATIONS IN LITTLE FTC ACT LITIGATION

A. Use of FTC Precedent in Little FTC Cases

- Since Little FTC Acts are derived from the FTC Act, most states interpreting their statutes acknowledge FTC precedent. When looking for support, it is important to consider FTC

precedent to rely on as resources that can support a claim. FTC precedent can take various forms, including:

1. FTC administrative decisions
 2. FTC cease and desist orders
 3. FTC consent decrees
 4. Court opinions interpreting the FTC Act.
 5. FTC regulations
 6. Industry guides
 7. Advisory opinions
 8. Policy statements
- All of these are valid uses of FTC precedent. Take note, however, this precedent is not binding on a court and should only be considered persuasive. There will be occasions when state courts will offer more aggressive interpretations of statutory language than one of these forms of FTC precedent. In representing a client, you should look at FTC precedent and also look at precedent in other states which could be more far reaching and use whatever is better for your case.
 - There's one caveat to remember. In 1980, the FTC, in a letter to Congress, revised its unfairness standard, requiring a substantial consumer injury to justify a finding of unfairness. In 1983, the FTC altered its standards regarding what is deceptive in a statement submitted to Congress. These policy changes were more conservative and can actually serve to benefit defendants in these cases. *See, Fullerton and Larson, Using FTC Act Precedents in State Consumer Protection Cases, 3 Fall Antitrust 24 (Fall 1988).*

B. The Availability of Piggybacking

- Some states allow violations of other laws to be considered as per se violations of UDAP statutes.
- Many statutes list specific prohibited practices. You should examine your specific state statute to determine if a violation exists.
- You can next look to any other state regulations which may have been violated to claim a per se violation.
- The more difficult per se claims will be to allow violations of other statutes to constitute per se violations, whether state or federal. This issue is not resolved in many states.

C. Coupling Claims Under Little FTC Acts With Other Causes of Action

- You can couple or join claims under these statutes with other types of claims. In any transaction related litigation, you should always consider whether you can also make claims under your state's FTC statute.
- Examples include:
 1. tortious interference with contract
 2. wrongful seizure
 3. wrongful debt collections
 4. breach of contract, fraud, misrepresentation
 5. deceptive sales practices
 6. car sales - lemon laws
 7. trade secrets

8. lender liability, usury
9. trademark and copyright violations

IV. LOUISIANA'S LITTLE FTC ACT

A. Background

- Louisiana's "Little FTC Act" was enacted in 1972. LA. R.S. 51:1401-18. The pertinent language is "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Section 51:1402(9) provides:

"Trade" or "commerce" means the advertising, offering for sale, sale, or distribution of any services and any property, corporal or incorporeal, movable or immovable, and any other article, commodity, or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of the state.

- The Act is extremely broad and can potentially reach all aspects of commercial relationships.

B. Parties

- While the attorney general of Louisiana is authorized to proceed under the Act, it is also available to private litigants.
- The Act permits actions by consumers, which can include businesses. It also applies to business competitors or potential competitors.

- It has been held, however, that in an employer-employee dispute, the terminated employee did not have a right of action against his employer because he was not a member of a protected group under the Act. *Gil v. Metal Services Corp.*, 412 So.2d 706 (La. App. 4th Cir. 1982).

C. Other Precedent

- Since the Act uses broad language, the Louisiana courts have looked to their developing decisions as well as to interpretations of the FTC Act by federal courts and the Federal Trade Commission. *E. G. All v. Goodyear Tire & Rubber Company*, 364 So.2d 630 (La. App. 2d Cir. 1978). As previously suggested, plaintiffs will want to be careful in using the new FTC standards since there is a suggestion that substantial consumer injury must be demonstrated. Therefore, more reliance should be placed on state authorities, if this becomes an issue.
- If there is no precedent in Louisiana for a particular set of facts, you can look to states with similar statutes.

D. Burden Of Proof

- The burden of proof involving prohibited commercial or business conduct is more lax than would be found under Louisiana Civil Code. The only requirement is that an act that was deceptive in an objective sense be shown. A misrepresentation that is also negligent may result in liability under this statute. *See e.g., S. H. Realty, Inc. v. Texaco, Inc.*

E. Actions Permitted

- Trade practices are condemned as unfair when they offend "established public policy, and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1499 (5th Cir. 1990).

- Therefore, courts usually have required a showing that the challenged conduct presents an element of fraud, misrepresentation, deception, breach of fiduciary duty, or other unethical behavior.
- An alleged tortious interference with a contract under circumstances that are not otherwise actionable does not violate the UTPL. *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384 (5th Cir. 1991),
- The actions of an attorney acting on error of law were not held to be unfair or deceptive in *Ford Motor Credit Co. v. Corpello*, 42 So.2d 203 (3d Cir. 1986), *writ not considered*, 484 So.2d 132 (La. 1986).
- Also, the mere negligence of a merchant to fail to install a dust bag in a vacuum cleaner is not an unfair or deceptive practice. See, *Pizzaloto v. Hoover Company*, 486 So.2d 1234 (5th Cir. 1986), *writ denied*, 488 So.2d 202 (La. 1986).
- However, it was held that making of extensive and unnecessary engine repairs by an auto dealer constituted unfair and deceptive practices. *Crown Buick, Inc. v. Bercier*, 483 So.2d 1310 (4th Cir. 1986).
- Soliciting the customers of one's employer, prior to leaving his employ, has been found to be an unfair trade practice. *Huey T. Littleton Claims Service, Inc. v. Mc Guffee*, 497 So.2d 790 (La. App. 3d Cir. 1986), and *Dufau v. Creole Engineering, Inc.*, 465 So.2d 752 (La. App. 5th Cir.), *writ denied*, 468 So.2d 1207 (1985).
- Efforts to develop one's own product, seeking to get one's new company on the approved list of vendors of a major customer of the employer, or efforts to patent or develop one's own process or equipment prior to departure will subject a departing employee to liability. See, *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1499 (5th Cir. 1990).

- The improper use of collection procedures is an unfair trade practice. *Cook v. Spillers*, 574 So.2d 464 (La. App. 2d Cir. 1991) (use of self-help and non-judicial seizure of a debtor's property without the consent of the debtor is an unfair trade practice) and *Jones v. Petty*, 577 So.2d 821 (La. App. 2d Cir. 1991).

F. Damages Recoverable

- Louisiana courts have awarded damages and attorneys fees under the Act for cases involving unauthorized use of trade secrets by ex-employees solicitation of an employers' customers for competitors by employees and have even been used to allow for damages relating to mental anguish and humiliation. *Bank of New Orleans and Trust Co. v. Phillips*, 415 So.2d 973 (La. App. 4th Cir. 1982).
- Although the statute does provide for the recovery of trebled damages, one has to show that the Consumer Protection Division of the attorney general's office has previously declared the activity unfair or deceptive. The prevailing party, however, is entitled to recover attorneys fees and costs. There are no reported cases awarding trebled damages under the attorney general section of the Act.
- The Act has a downside for plaintiff litigants since, if a claim is found to have been groundless or brought in bad faith, the court can award attorneys fees and costs to the defendant. Therefore, it is wise for the potential litigant to seriously consider the claim before it is brought.
- There is some question as to whether loss profits are recoverable because of one federal court which suggested they are not. *Rit & Dye Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981). However, profits have been awarded in other cases. See, *Roustabouts, Inc. v. Hamer*, 477 So.2d 543 (La. App. 1st Cir. 1984). It seems that

when one talks of damages, loss profits would on many occasions be the key damage item.

G. Piggybacking

- There is some question as to whether or not piggybacking will be allowed. Piggybacking involves the violation of another law that would trigger an automatic violation of the Unfair Trade Practices Act. One Louisiana court applied a strict construction of the Act holding that the violation of FTC disclosure regulations would not necessarily constitute an unfair trade practice under Louisiana law. This is because the court found there was no element of fraud, misrepresentation, deceit or unethical conduct in connection with the confection of a particular franchise agreement. The court somehow in reaching this decision overlooked the fact that the law itself was derived from the Federal Trade Commission Act. See, *LeBlanc v. Belt Center, Inc.*, 509 So.2d 135 (1st Cir. 1987). This case would seem to discredit any piggybacking notion in Louisiana courts.

H. Exemptions

- The statute exempts a number of regulated entities from coverage under the Act. Section 51:1406 of the statute exempts actions or transactions subject to the jurisdiction of a number of regulated entities, these being utilities, the state bank commissioner, and insurance commissioner, chartered banks, publishers or media, and sellers of products under certain circumstances.
- There are some areas of practice which have judicially found exemption under the Act. Regulating insurance practices have been held exempt under the Act since the Louisiana Insurance Code, La. R.S. 22:1213, specifically covered unfair practices and deceptive acts. Therefore, that type of conduct was under jurisdiction of the State Insurance Commissioner and therefore exempt. See, *Comeaux v.*

Pennsylvania General Insurance Co., 497 So.2d 1191 (3d Cir. 1986).

- This same rationale has been found in banking where it was regulated within the state. See, *Bank of Commerce v. Demco of Louisiana, Inc.*, 483 So.2d 1119 (5th Cir. 1986). *Autin v. Martin*, 576 So.2d 72 (La. App. 5th Cir. 1991), writ denied, 577 So.2d 51 (1991).
- However, if a bank is found not to be engaged in a purely banking activity, then liability can lie under the Act, such as a case where a bank was attempting to collect a balance under a Visa credit card. See, *Bank of New Orleans & Trust Company v. Phillips*, 415 So.2d 973 (4th Cir. 1982
- Additionally, it has been held that the securities claims are outside the reach of Louisiana statute. See, *More v. A. G. Edwards & Sons, Inc.*, 631 F.Supp. 138 (E.D. La. 1986). Additionally, on the recent case of *Taylor v. First Jersey Securities*, 533 So.2d 1383 (La. App. 4th Cir. 1988), where the Louisiana Fourth Circuit Court of Appeals affirmed a trial court finding of no cause of action in connection with a securities claim, holding that there was no actionable conduct under the Unfair Trade Practices Act.
- Conduct which complies with the FTC Act is excepted from the UTPL, so the FTC Act can be used defensively.
- Generally, where there is a regulatory scheme in place for particular conduct – the Act will not be applicable.

I. Preemption

- The Unfair Trade Practices Act provides for a one year period running from the transaction or act giving rise to the action. La R.S. 51:1409 (E)
- It has been held to be a preemptive period of one year. Suspension or interruption of this period is not permitted.

Canal Marine Supply, Inc. v. Outboard Marine Corp., 522 So.2d 1201 (La. App. 4th Cir. 1988); *Safford v. Paine Webber, Inc.*, 730 F.Supp. 15, 19 (E.D. La. 1990); *Cason v. Texaco, Inc.*, 621 F.Supp. 1518, 1523 (M.D. La. 1985); see also, *Brill v. Catfish Shacks of America, Inc.*, 727 F.Supp. 1035, 1037 (E.D. La. 1989, where the plaintiffs conceded one year's preemption.

- The original authors of the Act did not intend this but the courts have held this on the ground that the statute is punitive and must be strictly construed.

J. Injunctive Relief

- The specific injunctive relief provisions of the UTPPL apply only to the state attorney general. La. R.S. 51:1407.
- There is some authority that it is available to private parties as opposed to the attorney general. See, *E.g. National Oil Service of Louisiana, Inc. v. Brown*, 381 So.2d 1269 (La. App. 4th Cir. 1980). (This case could have also been brought for injunctive relief under the Louisiana trade Secrets Act.) Aggrieved parties who can show irreparable harm will be entitled to injunctive relief under La. Code Civ. P. Art. 3601. *Reed v. Allison & Perrone*, 376 So.2d 1067, 1069 (La. App. 4th Cir. 1979).
- However, there are other cases suggesting only the attorney general can seek injunctive relief. See, *E.g. Tate v. Fedders Corp.*, 524 F.Supp. 52 (E.D. La. 1981).

IV. CONCLUSION

- Litigation under Little FTC statutes offers an expanded opportunity for a flexible cause of action which in many states offer more opportunities than many traditional remedies. They should always be considered whenever there is the opportunity to pursue a claim where injury has resulted from a transaction.

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