

LUTPA STANDING:

Plus Ça Change,
Plus C'est La Même Chose....¹

By Alexander M. McIntyre, Jr. and Brian M. Ballay

In response to nationwide dissatisfaction with the treatment of consumers in the marketplace, in 1972, the Louisiana Legislature enacted the Louisiana Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1401-1430 (LUTPA or the Act). The Act is directed at preventing fraud, deceit and misrepresentation in the marketplace and deterring injury to competition.² It broadly declares that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”³

With respect to who has standing or a right to bring a claim, the LUTPA provides:

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 R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages.⁴

Notwithstanding the inclusive language of the statute, most Louisiana courts outside of the 1st Circuit found that the right to bring a claim under the LUTPA belongs only to consumers and business competitors.⁵ Thus, these courts jurisprudentially grafted onto the LUTPA the requirement that the complainant be a consumer or business competitor of the respondent. Unlike the other circuit courts, however, the Louisiana 1st Circuit maintained that standing under LUTPA is granted to any person.⁶

In 2010, after almost 20 years of the state circuit split, the Louisiana Supreme Court appeared to have resolved the issue. In *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So.3d 1035 (La. 2010), the court ruled against limiting LUTPA standing. However, as explained below, *Cheremie* is a non-precedential plurality opinion which should not end the debate. Ignoring that *Cheremie* is not, in fact, precedent, a number of courts have cited the opinion as authority for the proposition that standing under the LUTPA is not limited to consumers and business competitors. Ironically, however, if *Cheremie* continues to be incorrectly cited as precedential authority, it may, over time, result in correcting an original misinterpretation of the LUTPA by removing the jurisprudentially-imposed restriction on LUTPA standing.

The Confusion Begins

It did not take long for individuals to avail themselves of the private right of action afforded by the Act. Shortly after its enactment, litigants began alleging violations of the LUTPA on behalf of

individual consumers⁷ and business competitors.⁸

For example, in *Reed v. Allison & Perrone*, 376 So.2d 1067 (La. App. 4 Cir. 1979), two attorneys sued two competitors, alleging that defendants' deceptive advertising violated the LUTPA. The district court denied injunctive relief on the grounds that the matter was one for the state bar association and was not properly before the court. The appeals court affirmed, but on different grounds, finding that private injunctive relief was available under the LUTPA, but such relief required the usual showing of irreparable harm or lack of adequate remedy in monetary damages. 376 So.2d at 1069. While the parties were, in fact, competitors, the only actual mention of LUTPA standing is the majority's observation that "section 1409 of the Act authorizes private actions by individuals to recover actual damages suffered as a result of any method, act or practice unlawful under section 1405." *Id.*

A concurring opinion in *Reed* may have led to the confusion over LUTPA standing. In his concurring opinion supporting the availability of injunctive relief, (then) Judge Lemmon wrote:

Violations of R.S. 51:1401 *et seq.* are illegal acts which presumably result in damages to members of the class for whose benefit the statute was enacted. Actual damage to one member of a large class, however, is as a practical matter generally impossible to prove, and Section 1409's authority for an individual (not in a representative capacity) to recover actual damages probably does not provide an effective means of deterring such practices. Moreover, when the agency created to control methods and practices *unfair to consumers and competitors* does not have the resources and manpower to effectuate the purposes of the act, private actions by individuals who have a real and actual interest in deterring unfair methods of competition and unfair trade practices are necessary to make the legislative purpose effective.

376 So.2d at 1070-71 (emphasis supplied).

Judge Lemmon thus introduced the idea that there is a class (or there are classes) of individuals to whom the LUTPA applies — and by implication that there are classes of plaintiffs to whom the LUTPA would *not* apply. Moreover, by specifically naming consumers and competitors, this opinion assigned them membership in the favored class to whom the LUTPA applies. It is important to note, however, that Judge Lemmon did not say that *only* consumers and competitors had standing under the LUTPA. Moreover, he wrote in the context of *competitors* suing over allegedly misleading advertising *aimed at consumers*.

Shortly after *Reed*, the consumer/competitor standing requirement was engrafted upon the LUTPA in *Gil v. Metal Service Corp.*, 412 So.2d 706 (La. App. 4 Cir. 1982).⁹ In *Gil*, the plaintiff was an ex-employee of the defendants who, plaintiff alleged, fired him for refusing to obliterate marks from foreign steel shipments and sell the steel as domestic product. The appeals panel affirmed the district court's ruling that plaintiff had no standing to bring his LUTPA claims:

[The LUTPA] has been construed to give protection only to consumers and business competitors. *National Oil Service v. Brown*, 381 So.2d 1269 (La. App. 4 Cir. 1980) . . . ; *Reed v. Allison & Perrone*, 376 So.2d 1067 (La. App. 4 Cir. 1979). [Plaintiff] is not a member of one of the protected classes; he does not have a cause of action under this statute.

412 So.2d at 707.

Gil became the first case that held that standing was allowed *only* to consumers and business competitors; however, nothing in either case cited for that proposition actually supports such a strict reading of the Act. Indeed, the issue was not raised in either case. In both cases, plaintiffs were competitors of the defendants and unquestionably within the purview of the LUTPA. The erroneous restriction on standing was then perpetuated in a number of cases citing to *Gil* as authority for the restrictive interpretation of standing under the LUTPA, *see e.g., Morris v. Rental Tools, Inc.*, 435 So.2d 528, 532 (La. App. 5 Cir. 1983), until it became the majority view, outside of Louisiana's 1st Circuit.¹⁰

The *Cheremie* Problem

The LUTPA standing issue over which the circuits were split finally reached the Louisiana Supreme Court in *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So.3d 1053 (La. 2010). In the plurality opinion, after a thorough discussion of the issue and the Act, as well as recitation of Louisiana cases holding that standing under LUTPA is not limited only to consumers and business competitors, Justice Weimer concluded that, “consistent with the definition and usage of the word ‘person,’ there is no such limitation on those who may assert a LUTPA cause of action.” 38 So.2d at 1057. Accordingly, the plurality found that the plaintiffs had standing and went on to address the merits of defendants’ summary judgment arguments, ultimately finding that as a matter of fact plaintiffs could not make out their LUTPA claims. 35 So.3d at 1062-63.

Uncertainty concerning LUTPA standing resolved? Not so fast. While all participating justices agreed that plaintiffs did not establish a LUTPA claim, the ruling concerning LUTPA standing was not endorsed by a majority of the court. Two justices joined Justice Weimer, three justices concurred in the result only, and one justice did not participate. Justice Knoll concurred without comment, effectively disagreeing with some language or rationale of the opinion. *See, State v. Barnard*, 287 So.2d 770, 774 (La. 1974) (“Three Justices dissented, and a fourth concurred, meaning he did not agree with all of the language or rationale of the opinion.”) Justice Johnson agreed with the result of the case but wrote her own concurring opinion, asserting her belief that standing under the LUTPA is indeed restricted to consumers and business competitors. *Cheremie*, 35 So.3d at 1064 (Johnson, J., concurring). Justice Guidry also concurred in the result but wrote separately to note that, because all participating justices agreed that the plaintiffs had made no showing of the use of any “unfair or deceptive method, act or practice,” the discussion of LUTPA standing was unnecessary *dicta*. *Id.* at 1065 (Guidry, J., concurring). Chief Justice Kimball did not participate in the

deliberation of the opinion. *See, id.*, at 1054 n.1.

As a 3-3-1 plurality opinion, *Cheremie* is not precedent beyond the specific facts of the case. *See e.g., Barnard*, 287 So.2d at 774 (“The opinion... is not controlling, since it was not agreed to by a majority of this court. Three Justices dissented, and a fourth concurred.”); *Chaney v. Travelers Ins. Co.*, 249 So.2d 181, 184 (La. 1971) (appellate court erred in considering itself bound by a Supreme Court plurality opinion. “There is, in fact, no majority... on the reasons for judgment, only in the result reached. One justice concurred in the result, meaning he did not subscribe to the language or rationale of the opinion, only the result, while three other members of the court dissented from [the relevant portion of the opinion]”); *Warren v. LAMMICO*, 21 So.3d 186, 210 (La. 2008), on rehearing (Knoll, J., concurring) (“...I disagree with the majority’s reliance upon [a] plurality opinion... which has no precedential authority...”); *Citizen Committee for Better Law Enforcement v. City of Lafayette*, 685 So.2d 289, 293 (La. App. 3 Cir. 1996) (“Nevertheless, *Alliance* was a plurality opinion, with three judges dissenting and one concurring... As a result, the holding of the plurality opinion is of little value as precedent and should properly be limited to the facts of that case only.”) Not only is the standing discussion non-precedential as a plurality opinion, the discussion is also non-binding because it is merely *dicta*. *Cheremie*, therefore, does not change the current state of the law concerning standing under the LUTPA.

Coming Full Circle

As of the writing of this article, there have been several rulings which cite to *Cheremie*’s discussion of LUTPA standing — all but one from the federal district courts in Louisiana. For example, in *Davis v. Karl*, 2010 WL 3312587 (E.D. La. 8/19/10), the plaintiff alleged that the defendants provided financial services to him and, in doing so, made certain misrepresentations and misappropriations to plaintiff’s detriment. The plaintiff, thus, was a consumer, who would have LUTPA standing under either understanding of 51:1409(A) (“any person” or “consumer

or business competitor”). The defendants sought dismissal of the suit on a number of grounds, but apparently did not question plaintiff’s standing to bring his LUTPA claim. The court quoted the standing language from the Act and cited to Justice Weimer’s opinion without any mention of the conflicting interpretations of the standing issue. The defendants’ motions to dismiss were granted in part and denied in part with no reference to LUTPA standing.

In *Home Builders Ass’n of Northwest Louisiana v. Martin*, 2010 WL 5109987 (W.D. La. 12/8/10), however, the court cited to *Cheremie* and concluded that the issue is now settled and that standing under the LUTPA is available to “any person” notwithstanding status as a consumer or business competitor. The case concerned the use by an owner-builder of copyrighted material (a map of home locations) owned by the plaintiff, a homebuilder trade association. Plaintiff brought copyright infringement and LUTPA causes of action. Defendants challenged the latter claims on the grounds that, *inter alia*, the parties are neither consumers nor business competitors. The court held, however, that “[this] argument... was based on a Fifth Circuit *Erie* interpretation of Louisiana law that is no longer valid in light of” *Cheremie*. *Martin* at *1. Significantly, the opinion lacked any discussion of the precedential value of the plurality opinion and, in doing so, failed to recognize that *Cheremie* does not in fact change the law.¹¹

However, that *Cheremie* is non-precedential has not gone totally unnoticed. In April 2011, Judge Fallon of the Eastern District of Louisiana entered his “Order and Reasons” in *Doctor’s Hospital of Slidell, L.L.C. v. United Healthcare Ins. Co.*, 10-3862 (U.S.D.C. E.D. La. 4/27/11) (slip op., available on PACER at “Case 2:10-cv-03862-EEF-SS Document 45”). In that order, Judge Fallon recognized that *Cheremie* is a plurality opinion and declined to follow it, instead ruling that plaintiffs, neither competitors nor direct consumers of defendants, did not have standing to assert LUTPA claims. *See*, “Order and Reasons,” at 15. This has not been nearly enough to stem the tide of reliance on *Cheremie*. Judge Fallon,

in *dicta* in a footnote, suggested that despite his previous reasoning in *Doctor's Hospital*, LUTPA standing may indeed be broader than only consumers and business competitors. See, *Abene v. Jaybar, L.L.C.*, 2011 WL 2847435 at *5 n.5 (E.D. La. 7/14/11). In *Administrators of the Tulane Educational Fund v. Biomeasure, Inc.*, 2011 WL 3268108 at *6 (E.D. La. 7/28/11), the court squarely held that *Cheremie* has changed the law to once and for all remove the “consumer/competitor” standing restriction from the LUTPA.¹² The issue has not yet been addressed by the U.S. 5th Circuit Court of Appeals.

Finally, a panel of the Louisiana 2nd Circuit Court of Appeal joined the courts incorrectly holding that “[t]he supreme court has recently interpreted and explained... that [the LUTPA] grants a **right of action** to ‘[a]ny person who suffers any ascertainable loss’ from a violation of this prohibition.” See, *Bogues v. Louisiana Energy Consultants, Inc.*, 2011 WL 3477033 at *3 (La. App. 2 Cir. 8/10/11) (emphasis in original). There was no recognition that *Cheremie* is a non-precedential plurality, and the *Bogues* opinion offers no substantive analysis of the issue. Notably, as in *Cheremie* and *Biomeasure*, the court found that while the non-competitor/consumer had standing to assert its LUTPA claims, the conduct complained of did not rise to the level of an unfair trade practice. *Bogues* may, therefore, be another opinion that will perpetuate the incorrect interpretation of *Cheremie* without being subject to further appeal.

Conclusion

An interesting jurisprudential evolution appears to be coming full circle. In a concurring opinion in the 1979 case of *Reed v. Allison & Perrone*, the notion arose that there might be classes of persons to whom the LUTPA is not applicable. Consciously or not, in *Gil v. Metal Service*, that notion was transformed into an affirmative requirement that to have LUTPA standing, the complainant has to be a business competitor or consumer of the respondent. With occasional variations,¹³ the standing requirement has persisted (at least outside the Louisiana 1st Circuit). Now, by incorrectly viewing the *Cheremie* plurality

opinion as precedent for the proposition that LUTPA standing is indeed available to “any person,” courts may have stumbled back to an understanding of the LUTPA before it was jurisprudentially altered in *Gil*. Is it possible that, in this instance, two wrongs have indeed made a right?

FOOTNOTES

1. Karr, Jean-Baptiste Alphonse in *Les Guêpes* (January 1849), (translation, “the more things change, the more they stay the same”).

2. See, e.g., *Spillway Investments, L.L.C. v. Pilot Travel Centers, L.L.C.*, 2004 WL 2988491 *8 (E.D. La. Dec. 14, 2004).

3. La. R.S. 51:1405(A). The terms “trade” and “commerce” are defined in Section 1402(9) of the Act: “The advertising, offering for sale, sale, or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of this state.”

4. La. R.S. 51:1409(A).

5. For a cogent and insightful discussion of LUTPA standing in Louisiana courts — including a description of the circuit split on the issue — see Judge Berrigan’s opinion in *Hamilton v. Business Partners, Inc.*, 938 F.Supp. 370 (E.D. La. 1996); see also, “Antitrust and Trade Regulation Law Recent Developments,” 47 La.B.J. 426 (Feb. 2000), “5th Circuit Recognizes Split in Interpreting the LUTPA” (A. McIntyre); “Antitrust and Trade Regulation Law Recent Developments,” 54 La.B.J. 362 (Feb./March 2007), “Standing Under the LUTPA — The Circuit Split Widens” (A. McIntyre, G. Barrios and B. Ballay).

6. In 1991, the 1st Circuit first refused, albeit in *dicta*, to limit LUTPA standing to consumers and business competitors. See, *Jarrell v. Carter*, 577 So.2d 120, 123 (La. App. 1 Cir. 1991).

7. See, e.g., *Faris v. Model’s Guild*, 297 So.2d 536 (La. App. 4 Cir. 1974) (suit by would-be student of modeling school to void installment sales contract entered into along with student registration fee; court found that conduct complained of was not unfair or deceptive under the LUTPA); *Gour v. Daray Motors*, 373 So.2d 571 (La. App. 3 Cir. 1979) (consumer entitled to recover under the LUTPA against dealer and manufacturer of Oldsmobile car equipped with an engine manufactured not by Oldsmobile, but by Chevrolet).

8. See, e.g., *Reed v. Allison & Perrone*, 376 So.2d 1067 (La. App. 4 Cir. 1979); *National Oil Service of Louisiana, Inc. v. Brown*, 381 So.2d 1269 (La. App. 4 Cir. 1980).

9. See also, *Business Partners*, *supra*, 938 F.Supp. at 372.

10. See e.g., *Capital House Preservation Co. v. Perryman*, 725 So.2d 523, 530 (La. App. 1 Cir. 1998) (LUTPA standing not limited to consumers or business competitors); *Plaquemine v. Mercury Marine*, 859 So.2d 110, 117 (La. App. 1 Cir. 2003) (same).

11. At least two other courts have ruled without analysis that *Cheremie* affirmatively establishes that LUTPA standing is not restricted. See, *Silva v.*

Enercept, Inc., 2011 WL 1059110 (E.D. La. 3/25/11) (denying summary judgment due to the presence of issues of material fact); *Corley v. Southeastern Metals Mfg. Co.*, 2011 WL 3665015 (W.D. La. 8/19/11) (granting summary judgment on the merits of the LUTPA claim). *Silva* went to trial resulting in a defense verdict which has apparently not been appealed. *Corley* (ironically a suit brought by an ex-employee against his former employer, compare *Gil, supra*, 412 So.2d 706) seemingly also was not appealed.

12. Notably, as the Supreme Court ruled in *Cheremie*, the district court in *Biomeasure* also found that the complained of conduct did not constitute a LUTPA violation; arguably, then, the standing discussion in *Biomeasure* is also *dicta*, and still of limited precedential value. However, the court’s discussion of standing and the conclusions it reaches are quite possibly sufficiently energetic to outlast arguments that they are discardable *dicta*. Moreover, because of the fact-based ruling on the merits, it is less likely that the LUTPA standing issue will be appealed.

13. For example, there has been some debate whether “consumer” includes “business consumer” or is limited to involvement in statutorily defined consumer transactions. See e.g., *KFC Ventures, L.L.C. v. Metairie Medical Equipment Leasing Corp.*, 2000 WL 1252596 at *2 (E.D. La. 9/1/00) (collecting cases).

Alexander M. McIntyre Jr., of counsel in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., concentrates his practice in antitrust and trade regulation and chairs the Louisiana State Bar Association’s Antitrust and Trade Regulation Law Section. He has published articles on antitrust and state unfair trade practice issues. He has extensive experience dealing with unfair competition and trade regulation issues, including trademark and copyright litigation and counseling. (Ste. 3600, 201 St. Charles Ave., New Orleans, LA 70170)



Brian M. Ballay, an associate in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., practices in the area of commercial litigation, including contract and business litigation, unfair trade practices and trade secrets, employment disputes and construction law. He has represented publicly-traded and privately-owned companies in litigation involving the Louisiana Unfair Trade Practices Act and Louisiana Trade Secrets Act, including requests for injunctive relief. (Ste. 3600, 201 St. Charles Ave., New Orleans, LA 70170)

