

## **Some Claims That May Arise Under Louisiana's Unfair Trade Practices and Consumer Protection Law:**

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Louisiana's Unfair Trade Practices and Consumer Protection Law<sup>1</sup> ("UTP Law") proscribes "unfair methods of competition" and "unfair or deceptive acts and practices" which occur "in the conduct of "any trade or commerce." The definition of unlawful conduct and the burden of interpreting this statute has fallen principally to private litigants and to the courts. As a result, the statute has developed unevenly and, on several issues, there is case law on both sides. Litigants can sometimes find authority to support a range of positions.

Because the law contains many potential contradictions, clients are advised to seek the counsel of an attorney when dealing with suspected unfair practices. In certain cases, the resort to self-help in an inappropriate fashion has resulted in claims being successfully asserted under the statute against the companies or persons resorting to self-help.

Timely consultation is a necessity. Claims must be filed within a year of the date of the conduct complained of, and this is a preemptive, rather than a prescriptive, period that is not subject to extension. Clients should promptly consult with counsel in order to allow sufficient time to investigate potential claims, in view of the short one-year preemptive period, to consider the desirability of obtaining an injunction in the proper case to stop unfair conduct. Important rights can be lost with the passage of time.

The essential elements of an unfair trade practice claim in Louisiana are proof of:

1. an unfair or deceptive trade practice,
2. that impacts a consumer, business competitor or other person to whom the statute grants a right of action,
3. which has caused ascertainable, i.e., actual, damage,
4. within the year prior to the filing of suit, and

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<sup>1</sup> La. R.S. 51:1401, et seq.

5. the acts complained of affect persons in this State, either directly or indirectly.

A deceptive practice involves an element of fraud, deceit or misrepresentation, and an unfair practice is one that is “immoral, methical, oppressive, unscrupulous, or substantially injurious to consumers.”

Some cases state that there is an additional element to an unfair trade practice claim - that the actions at issue were undertaken “with the specific purpose of harming the competition”. This language is not particularly helpful. Practically all action by a competitor, to increase his market share or to gain new customers, intends to take something away from the competition. And, for the benefit of society, the law generally favors robust competition.

The UTP Law can provide relief to commercial and business customers, as well as individuals. The statute does not create rights only in favor of established businesses. It enables a potential competitor to sue, as well. Thus, a nascent company whose planned entry into the marketplace is impacted by an unfair trade practice should have standing to bring a claim, and Louisiana allows recovery of lost future profits by such start-up business even if they have no earnings history.

Because the language of the statute is so broad, there is a lot of unrealized potential in the statute and the statute can impact a broad range of business and commercial activity. This brief paper does not attempt to be comprehensive or complete. Consultation with counsel to discuss the particulars of your situation is essential.

#### **1. The Law Applies to Conduct Involving “Any Trade or Commerce”:**

“Trade or commerce” are broadly defined as:

“the advertising, offering for sale, sale or distribution of any services and any property, corporeal 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”. La. R.S. 51:1402(9).

The statute has been applied to a broad range of businesses. Lines of business in which the statute has been invoked include insurance agencies, distributors of mechanical products, the business of collecting waste oil products, the business of inspecting pipe and tubular products, the selling of a variety of products from oil paintings to automobiles, the leasing of industrial supplies and products, such as pipe testing equipment and many others.

This statute has been invoked by employers who have made claims against their former employees, by employees against their former employers, by customers against

businesses with which they have dealt, and by businesses taking action against competing businesses or business suppliers.

**2. Damages and Injunctive Relief May Be Obtained In The Appropriate Case:**

The statute provides for recovery of actual damages, which are caused by wrongful conduct. It authorizes punitive or treble damages only under special circumstances defined in the Law. The statute makes no special provision for injunctive relief for injured persons; the injunction provisions of the statute apply only to the attorney general. However, aggrieved persons who can show that a violation of the law poses a threat of irreparable harm will be entitled to injunctive relief under La. C.C.P. Art. 3601. Successful plaintiffs can recover their reasonable attorney's fees and costs. A defendant may seek sanctions, in the form of shifting the defendant's reasonable attorney's fees and costs to a plaintiff who brings a groundless suit in bad faith or for the purpose of harassment.

**3. The Statute Applies To Intentional, Unscrupulous Or Unethical Acts, Not Negligent Ones:**

The act is aimed only at intentional conduct. Isolated negligent acts, such as a mistaken failure to do something should not be punished under this statute. In addition, intense competition is a virtue and not a vice under this law. Companies are free to compete aggressively for business, even if a competitor is hurt, so long as the means chosen are not egregious.

A mere breach of contract which is not unethical, unscrupulous or otherwise egregious cannot be made the subject of a claim under the Act. Multiple parties who conspire to violate the act can be held solidarily liable.

**4. The Statute Does Not Authorize Representative Actions:**

The statute provides states that actions may be brought "individually, but not in a representative capacity". This is interpreted by most practitioners as forbidding class actions and other representative claims.

**5. Some Business Are Exempted from the Statute:**

The UTP Law exempts acts or transactions subject to the jurisdiction of the Louisiana Public Service Commission or other public utility regulator, the state commissioner of financial institutions, state and federally chartered banks and certain other financial institutions, acts of persons affiliated with certain news media (under certain circumstances), persons who disseminate certain advertisements or other promotional materials received from a manufacturer or other supplier (under certain circumstances), and conduct which complies with Section 5 of the Federal Trade Commission Act. Additionally, certain activities of attorneys have been exempted by court decision.

A body of case law interprets these exemptions. For example, the act has been held not to apply to investors' securities transactions because the state has given authority to the state's Commissioner of Banking to investigate matters relating to securities transactions.

## **6. Manufacturer/Distributor Relationships:**

Claims arising out of these relationships may raise standing problems under the UTP Law, because some cases state that the law confers a right of action for unfair trade practices only upon consumers and competitors and a distributor is neither a consumer of the products it buys nor a competitor of its supplier, in the usual case. In other cases, courts have decided unfair trade practice claims asserted by terminated distributors where defendants have not been reported to argue that the plaintiff lacked standing to sue under the UTP Law.

Thus, a distributor who perceives that he has been treated unfairly in having his distributorship terminated, or who believes he was promised a distributorship that was never given, for example, may have rights to assert under this statute, but he should consult with counsel who will take care to see that the claim is properly constructed and properly presented.

## **7. Activities of Trade Associations and Industry Groups:**

Because the UTP Law is derived from Section 5 of the Federal Trade Commission Act, recent FTC activity in the regulation of trade associations suggests that association activity is an area of the economy to which greater attention might be paid under state UTP Law. Many of the association practices which the FTC has challenged involved activities such as price-fixing which would also be actionable under the Louisiana "Little Sherman Act", and of course the Federal Sherman Act. But the full range of unfair trade practices can include "incipient restraints" which may not rise to the level of full-blown antitrust violations in their effects on the market place.

The Federal Trade Commission maintains a close watch over the activities of associations in exercising its authority under Section 5 of the FTC Act. It recognizes that trade associations are usually positive and beneficial organizations which can provide an efficient means of conveying information of common interest to their members, and they are an efficient means of organizing individuals or entities in the pursuit of legitimate objectives. Their activities, however, can pose a threat of competitive risk, because members of such associations are often competitors. The Commission has a long history of taking action when associations cross the line into inappropriate anticompetitive activities.

A persistent area of interest in the law relating to trade associations, and to the setting of standards for industry, is the situation in which trade associations, or standard

setters, may seek to restrict competition by establishing spurious standards and other rules behind which competition on price or other terms can indirectly be affected.

## **8. State Action and Petitioning Immunities:**

In recent years, a line of decisions has established that the doctrines of *Parker v. Brown* and *Noerr-Pennington* which originally arose in the antitrust context, can be invoked to immunize certain conduct in litigation under the UTP Law, as well.

### **i. *Parker v. Brown: State Action***

State action issues can arise where a state agency undertakes to regulate pricing or other competitive activity, or where it favors one competitor over another, who it awards a contract or a favored status, or sets up a scheme that limits entry into the market place and a disgruntled competitor, potential competitor or consumer challenges the action. Given the enormous reach of state and local governments in contemporary society, state action is frequently encountered in the business world. Given the breadth of the state action doctrine, as currently applied, challenges to these actions can be difficult to make. Close consultation with counsel in this area is essential.

In the case of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), the United States Supreme Court held that restraints on competition imposed by “state action or official action directed by a state” were immune from challenge under the antitrust laws. This determination was based on considerations of federalism and state sovereignty.

That doctrine was subsequently expanded to immunize from attack the anticompetitive activities of subordinate state governmental units such as municipalities, other political subdivisions, and state agencies.

When the conduct involved is not undertaken by an instrumentality of the state, but rather by private parties who assert that their anticompetitive conduct is authorized by State Law, the Supreme Court has enunciated a two part test to be satisfied before state action immunity will attach to immunize the conduct at issue. First, the challenged restraint on competition must be clearly articulated and affirmatively expressed as state policy and, second, the policy must be actively supervised by the state itself. In effect, the private party is required to show that the state actively supervises the conduct at issue in order to assure that that conduct is a product of deliberate state action and not just the product of an agreement between private parties. Similarly, where state action favors non-public third parties, if the state action is immune from attack under *Parker v. Brown* and its progeny, the affected private parties are also immune from liability. Thus, anticompetitive conduct which is injurious to competition or to a competitor cannot be challenged where it is the product of state action nor can actions be brought against private parties for the beneficiaries of such state action.

Thus, on the basis of the generalized federalism concerns underlying the state action doctrine, the United States District Court for the Eastern District of Louisiana has held that the state action doctrine can afford an immunity from liability under the UTP Law, as well.

**ii. *Noerr-Pennington* doctrine:**

The *Noerr-Pennington* doctrine can come into play when one or more private parties seek action from governments or agencies and that action fixes prices, forecloses or limits market entry or licensing, favors one or more competitors or otherwise affect competition or competitors. The doctrine immunizes the petitioning and its consequences. In cases that involve petitioning, litigants are well-advised to search out non-petitioning - and therefore unprotected - activity on which to base alternate or additional claims.

The United States Supreme Court has held that efforts by private entities to obtain governmental action that restricts competition may be immune from challenge under the antitrust laws. The immunity has extended to efforts to influence legislative, administrative, judicial and adjudicatory actions. Further, there is no exception to *Noerr-Pennington* immunity, even if the plaintiffs assert that private parties conspired with public officials to obtain anticompetitive action.

It also extends to indirect attempts to influence government, such as advertising campaigns aimed at influencing the general public to oppose such activities as referenda.

There is an exception to *Noerr Pennington* doctrine, applicable to “sham” litigation, that can be invoked with respect to petitioning addressed to the courts. However, the sham exception has been limited to situations in which parties use the governmental petitioning process as opposed to the outcome of that process, as an anticompetitive weapon.

The Eastern District of Louisiana has held that the *Noerr-Pennington* immunity can be claimed in litigation under the UTP Law.

In one case, the Eastern District of Louisiana considered the application of the *Noerr-Pennington* doctrine and found that the immunity did not attach to the claim at issue therein because, in addition to filing an arguably baseless trade-secrets lawsuit, defendant had also sent letters to the plaintiff’s customers claiming that the plaintiff’s machine incorporated trade secrets from its own patent and infringed on another patent. The court observed that the process of sending letters to a competitor’s customers goes beyond the protective petitioning of a government the governmental agency and, on that basis, the court allowed the case to go forward. Thus, seemingly technical issues can become important and proper assertion of a claim can determine the outcome of a case.

In a relatively recent opinion, the Eastern District of Louisiana has declared that, both with respect to state action (pursuant to *Parker v. Brown*) and to the action of private parties seeking governmental action (pursuant to *Noerr-Pennington*), the Sherman Act

and the UTP Law do not reach political activities “no matter how nefarious those activities may be”. It noted that the United States Supreme Court has rejected the invitation to make any exception to the state action doctrine where the conduct at issue involved bribery or other “element or unlawfulness”. Thus, it held that Edwin Edwards, the former governor of Louisiana was entitled to *Noerr-Pennington* immunity from suit despite his allegedly corrupt attempts to influence state bodies in the awarding of casino licenses. This immunity extends to claims asserted under the UTP Law.

However, we may have reached the high-water mark of the state action doctrine and the *Noerr-Pennington* doctrine. In recent months, the Chairman of the Federal Trade Commission, has expressed substantial dissatisfaction with the breadth of application of both doctrines. He has observed that fully one-third of our nation’s gross domestic product is consumed by government, with 20 percent being consumed by the federal government and the balance by state and local governmental spending. Chairman Muris notes that the *Noerr-Pennington* doctrine and the state action doctrine, as they have been broadly interpreted by some courts, protects and fosters excessive regulatory growth. He echoes the observation of the noted antitrust commentator, Robert Bork, to the effect that the “profusion of such governmental authorities offers almost limitless possibilities for abuse”. Indeed, the antitrust section of the American Bar Association has noted that “[s]tate action immunity drives a large hole in the framework of the nation’s competition laws”.

Chairman Muris noted that, as originally conceived, *Noerr-Pennington* reserved a narrowly defined sphere of political activity from enforcement of the antitrust laws. However, in recent years, courts have immunized abusive tactics, such as repetitive lawsuits, bribery and misrepresentation, which were clearly intended to delay or foreclose a competitor’s entry into a market, or raise its costs, rather than to accomplish legitimate governmental activity.

Some courts have indicated a willingness to reel in this sort of activity. See, *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9<sup>th</sup> Cir. 1998) (“[I]n the context of a judicial proceeding, its the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed sham if ‘a party’s knowing fraud upon, or its intentional misrepresentations to the court deprive the litigation of its legitimacy’) and authorities cited therein.

Chairman Muris has created an FTC Task Force to study *Noerr*, to evaluate the current state of the doctrine and to suggest ways in which the excesses of the doctrine can be cured. Stay tuned.

In the meantime, clients should understand that claims should be carefully considered and investigated before they are asserted in this area.

**9. Employer/employee relations: Solicitation of customers; preparations to compete; covenants not to compete:**

This has been a fertile area of litigation under the UTP Law. These cases typically arise where an employee is fired or quits and is accused of taking customers from the employer. In general, in the absence of a lawful, enforceable agreement to the contrary an employee has the right to go into a business to compete with a former employer; and the employee may make preparations to enter a competing business while still employed. A former employee may seek to do business with the customers of his former employer after his employment terminates. Where the employee has signed an agreement not to compete with the employer, and where the employee solicits the employer's customers after he has left the employer, the case will often turn on the issue of whether or not the agreement not to compete is enforceable.

Where the employee has not signed an enforceable agreement not to compete, the employer may have a claim for breach of fiduciary duty based on the employee's misappropriation and use of confidential information. There are four basic elements to such a claim:

The former employer must show that:

1. it possessed information that is not generally known;
2. it communicated the information to the employee;
3. that information was communicated under an agreement limiting its use or disclosure by the employee, and
4. that information was used by the employee to injure the employer.

The use of knowledge lawfully derived from one's employment is not an unfair trade practice. Thus, in the absence of a covenant not to compete, an employee is free to take his skills and expertise, and his personal knowledge of his former employer's business and to use them for his own benefit or the benefit of his employer's competitors. These claims are especially prone to misuse by companies that are trying to insulate themselves from competition. For that reason, an employer's claims may be fodder for a counterclaim by the former employee that his right to compete is being interfered with. And if an employee is able to show that a non-competition agreement which was sought to be enforced against him was invalid, he has a basis to make an affirmative claim that the attempted enforcement of the invalid agreement not to compete was itself an unfair trade practice, if the attempted enforcement is not confined to litigation alone, but also involves other conduct such as contacts with customers that are intended to deter customers from dealing with the employee.

Finally, an employer may be tempted to challenge solicitation by the employee of the employer's customers while he was still employed by the complaining employer or immediately upon leaving. In some earlier cases, soliciting the customers of one's employer, prior to leaving his employ, has presented problems of liability. Several more recent cases, however, have declined to hold an employee liable for soliciting business prior to leaving employment.

The status of a business' customer list is a frequently litigated topic. Whether protection to be afforded customer lists under the UTP Law can depend upon the following factors:

1. the manner in which and the purpose for which the customer lists are compiled;
2. the conduct and motivation of the employee surrounding the time when his employment ends;
3. the nature of any representations made to the customers by the former employee;
4. the existence or non-existence of a scheme or intent to take over all or a substantial part of the former employer's business.

It is important to note that an employer's attempt to enforce an invalid covenant not to compete can give rise to a counterclaim for damages under the UTP Law.

The lesson of the reported cases is that this area is highly fact-intensive. Cases under the UTP law are often combined with claims under the Uniform Trade Secrets Act, claims involving breaches of confidentiality agreements and/or covenants not to compete imposed by an employer. Timing, intent and motive are very important in these cases.

## **8. Conclusion:**

In conclusion, it is clear that the UTP Law remains underutilized and that there is still a broad range of potential for wider use of the statute, despite the limit on its utility imposed by the prohibition of representative actions.