The Costs and Consequences of the Louisiana Unfair Trade Practices and Consumer Protection Law

by Joanna Shepherd
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I. INTRODUCTION

Consumer protection litigation developed with the goal to protect American consumers in commercial transactions from fraudulent and deceptive business practices. Initially, Congress, through the Federal Trade Commission (FTC) Act, sought to effectively define and deter a new class of wrongs to consumers that the existing legal system largely failed to remedy. Subsequently, states localized and individualized these rights while maintaining a careful balance between protecting consumers and preventing the proliferation of lawsuits that harm both consumers and businesses.

But in recent decades, this thoughtful balance has yielded to damaging legislative and judicial overcorrections with a common theoretical mistake: the assumption that increased consumer protection litigation automatically protects consumers more. This misguided expectation is dispelled by basic economic theory, empirical scholarship, and common sense, all of which collectively affirm that more consumer protection is not necessarily better. Yet courts and legislatures have gradually abolished many of the procedural and remedial protections designed to ensure state consumer protection acts (CPAs) do not become all-purpose business litigation statutes.

The Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA) has been victim to such overcorrections and expansions. While the intent of LUTPA was to protect consumers from unfair and deceptive practices, in recent years it has been applied in expansive ways that are inconsistent with this goal. Indulgent amendments and overly permissive interpretations of LUTPA have allowed enterprising litigants and lawyers to bring claims unrelated to the original intent of the legislature. This has resulted in a dramatic increase in consumer protection litigation, which inflicts costs on Louisiana consumers through higher product costs, lower employment, an overburdened justice system, and socially-harmful frivolous litigation.

Fortunately, enacting a few simple legislative reforms will prevent abuse of the current law. With these amended protections, Louisiana lawmakers can be confident that LUTPA will protect consumers without risking the unintended harm currently experienced by them.

This report proceeds in five additional parts. Part II outlines a brief history of American consumer protection laws, beginning with the common law and FTC Act, and proceeding to the introduction of traditional state CPAs. Part III describes the origins of LUTPA and subsequent expansions and interpretations of various provisions in the Act. Part IV analyzes data on Louisiana’s consumer protection litigation, including how it compares to other states and how it has changed since 2000. Part V explains the predictable litigation consequences of the expansions in LUTPA, including harm to consumers themselves, litigants, and the judicial system. Part VI concludes, recommending several salutary policy prescriptions for lawmakers considering amending LUTPA.
II. THE HISTORICAL DEVELOPMENT OF AMERICAN CONSUMER PROTECTION LAW

Under American common law, consumer purchases were largely governed by principles of *caveat emptor*—“let the buyer beware”—that assumed buyers and sellers had equal responsibility and ability to judge the quality of goods.¹ The law presumed that market pressures would provide sufficient incentives to most merchants to maintain a reputation for honesty and fair dealing, and that consumers could negotiate additional contractual terms when necessary.² Contract and tort law provided some remedies for major breaches of the merchant-consumer relationship, with aggrieved consumers resorting to fraud claims for misrepresentations as to the nature or quality of purchased goods for single transactions.³

However, the requirements of common-law fraud claims—an intentional misstatement of fact made for the purpose of deceiving the victim, the victim’s justified reliance, and demonstrable damages—presented significant hurdles that limited access to justice for many consumers.⁴ The consumer’s burden to prove intent to deceive and justifiable reliance was notoriously difficult and expensive,⁵ and the typical damage award was so meager that it rarely economically justified the expense of bringing a fraud claim.⁶ Nevertheless, the requirements reflected common law assumptions about the symmetry of the consumer-merchant relationship. A consumer claiming fraud had to demonstrate that the merchant’s misstatement was intentional, as opposed to accidental, as both the merchant and consumer were in approximately equal positions to ascertain the truth of the claim at the time of the sale.⁷ The consumer further had to show that his reliance was justified: that a reasonable person in his position, dealing with the merchant as a peer, evaluating the goods and transaction at the time, would have reasonably believed the false claim was true.⁸ And the consumer had to prove some demonstrable, quantifiable harm in damages for the purported deception, under the assumption that both parties could affordably and readily ascertain the value difference between his reason-

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² William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 725 (1971) (suggesting that while these roles were assumed, there was an ever increasing breakdown of these responsibilities and incentives, particularly on the side of the merchant); see also Joshua D. Wright, *State Consumer Protection Acts: An Empirical Investigation of Private Litigation* 6 (Searle Civil Justice Inst., Preliminary Report, 2009), available at http://ssrn.com/abstract=1708175 (hereinafter “Searle Study”).
⁶ Schwartz & Silverman, supra note 4, at 7.
⁷ Id.
⁸ Id.
able expectations and the defective goods he received.\(^9\)

The first part of the twentieth century brought new economic developments that undermined then-prevailing assumptions that consumers and merchants stood in equal positions to one another in evaluating and negotiating goods for sale. As products became increasingly more sophisticated and diverse, buyers were no longer equally able to judge the quality and nature of products. New credit and financing arrangements and unfamiliar warranty disclaimers further increased the complexity of transactions for consumers.\(^10\) As consumers grew increasingly ill-equipped to judge the nature of products and transactions, sellers became only more sophisticated. Merchants were no longer the “shopkeeper-neighbors” with knowledge and bargaining power equal to consumers. Instead, as industrialization and mass production expanded, merchants grew increasingly remote from consumers and large enough to deal with product disputes through internal specialization and economies of scale.\(^11\) These changes led to the widespread belief that merchants managed to escape liability for practices that, if not vindicated in fraud claims, were essentially unfair.\(^12\)

Recognizing the common law’s growing inability to adequately protect consumers, Congress sought to address these changes by updating consumer protection law with the newly-created FTC Act. Yet, it recognized that any new law must strike a balance between curbing unfair commercial conduct and ensuring unjustifiable litigation would not be tolerated. Congress carefully deliberated how to effectively define the class of impermissible acts in a way that neither invited constant evasion by merchants nor constant abuse by potentially mischievous litigants.\(^13\) While a narrowly-defined list of prohibited practices would provide consumers clear protection from known undesirable practices, it would also invite sophisticated merchants to modify these practices slightly, requiring yet another new legal intervention to prevent them. In contrast, a broad prohibition against all undesirable business practices could lead to the professional “hunting up and working [of] such suits,”\(^14\) deterring beneficial business dealings, leading to strategic claims by competitors, and chilling commerce through regulatory uncertainty.\(^15\) Ultimately, Congress recognized that consumers

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\(^9\) Id.; see also Lovett, \textit{supra} note 2, at 726–31.

\(^10\) Id. at 725.

\(^11\) See George J. Stigler, \textit{The Division of Labor Is Limited by the Extent of the Market}, 59 J. Pol. Econ. 185, 188–89 (1951) (identifying that increased specialization must entail increased economies of scale).


\(^13\) See, e.g., 51 CONG. REC. 11,084-109, 11,112-16 (1914).


were often employers and merchants themselves, and that only a carefully balanced consumer protection statute would protect consumers as a whole.

The result of this careful balancing was the FTC Act. Rather than prohibiting specifically defined business practices, the Act created a multi-member administrative body—the Federal Trade Commission—and empowered it to define and enforce the prohibition against “unfair or deceptive acts or practices in or affecting commerce.” Recognizing the far-reaching potential of the broadly defined “unfair or deceptive” terms in the Act, Congress limited the broad prohibition (“unfair or deceptive”) with a tightly cordoned enforcement power in three ways: First, Congress entrusted only the FTC to sue under this power, not individual consumers harmed by unfair business practices, and injunctions would be these suits’ primary goal. Second, Congress expected the Commission’s members would have substantial expertise in business and industry, thus enabling them to distinguish malevolent business practices genuinely harming consumers from disingenuous claims of “unfairness” prompted only by self-interested consumer litigation. Finally, Congress required the Commission to consider the public interest, and not merely an individual consumer’s interest, in bringing suit: Congress recognized that some practices might occasionally harm individual consumers, yet prove broadly beneficial to consumers and commerce as a whole, and entrusted the FTC with this calculus in its enforcement discretion.

At its inception, the Commission was initially quite popular, but within a few decades it came to be perceived as ineffective, politically captured, poorly managed, and fundamentally confused about its consumer protection mission. The FTC’s alleged failure to protect consumers inspired states to revisit the FTC Act’s compromise between preventing consumer harm and opening the floodgates to abusive consumer litigation. More over, state-level officers recognized they could more effectively respond to local constituencies than a national commission, and might understand

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differently the “public interest,” in the words of the Commission’s mandate.\footnote{Butler & Johnston, supra note 15, at 8.}

Several states began to adopt their own consumer protection laws in the 1960s and early 1970s. The earliest state CPAs responding to these concerns resembled New Jersey’s “consumer fraud act.”\footnote{See Consumer Fraud Act, ch. 39, §§ 1–12, 1960 N.J. Laws 137 (codified as amended at N.J. Rev. Stat. §§ 56:8-1 to 56:8-148 (2010)).} The consumer fraud acts tracked the FTC Act’s concerns both structurally and in spirit: they focused on preventing ongoing consumer fraud and providing restitution for victims, rather than on attorney’s fees or punitive damages, and charged the state Attorney General with responsibility for enforcing the Act.\footnote{See generally id.}

Other early adopters of state CPAs that did enact consumer fraud acts generally had one of two responses. Some states adopted the Uniform Deceptive Trade Practices Act (UDTPA) developed by the National Conference of Commissioners on Uniform State Laws which provided a “laundry list” model that enumerated twelve deceptive trade practices, such as false advertising and misleading trade identification, and included an open-ended prohibition against “any other conduct which similarly creates a likelihood of confusion or misunderstanding.”\footnote{Comm’rs on Unif. State Laws, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Seventy-Third Year 253, 262 (1964); see Butler & Wright, supra note 22, at 170; see also Pridgen & Alderman, supra note 5, at § 2:10; Mark D. Bauer, The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent, 73 Tenn. L. Rev. 131, 145 (2006).}

Other states, like Louisiana, modeled legislation directly after the FTC Act relying on broad, generalized prohibitory language. This parallel to the federal FTC Act led these state-level variants to earn the moniker “little FTC Acts,”\footnote{Council of State Gov’ts, 1970 Suggested State Legislation 142 (1969).} though many commentators now use the term “little FTC Act” to refer to consumer protection laws more generally—a tribute to these laws’ origin.

Although the early state CPAs were by necessity more aggressive than the original FTC Act, they each sought to find a balance between the twin concerns underlying the FTC Act in light of the FTC’s perceived failure. All of these early laws contained significant restrictions to prevent consumer abuses through frivolous litigation as well. The earliest consumer fraud acts contemplated at least primary enforcement by the relevant state Attorney General; the little FTC Acts tracked known FTC jurisprudence and provided some measure of predictability; the UDTPA enumerated specific forbidden acts, did not originally contain a general damages remedy, and narrowed attorneys’ fees sharply to penalize only deliberate offenders.\footnote{See generally Butler & Wright, supra note 22, at 165; Jeff Sovern, Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model, 52 Ohio St. L.J. 437, 438–39 (1991).}
Although each of these state laws were enacted for the same purpose, reflecting a compromise between consumer protection and preventing excessive consumer litigation, they created a patchwork of wildly divergent laws. The FTC, chastened by its poor reputation in the consumer protection sphere, sought to rehabilitate its position and standardize these state laws through the Model Unfair Trade Practices and Consumer Protection Law (UTPCPL). ³⁰ “’[L]ess innovative than comprehensive,’” the UTPCPL synthesized many of the various state acts into one model Act.³¹ The UTPCPL provided three liability formulations against unlawful practices that closely tracked the developments in then-current State law.³² Like the state CPAs, the UTPCPL also empowered state Attorneys General to enforce the consumer protection law through injunctions against prohibited acts, disgorgement of any property gained by defrauding consumers, restitution to victims of forbidden acts, and civil monetary penalties against knowing violators.³³

Although similar in many ways to state CPAs, the UTPCPL drastically deviated from the State acts in its treatment of private suits and private remedies.³⁴ Early state CPAs were hesitant to allow consumer suits for money damages; this hesitancy was evinced either by explicitly disallowing consumer suits, entrusting the state Attorney General with enforcement discretion, or granting private rights of action without damages and with only equitable or injunctive remedies.³⁵ In contrast, the UTPCPL radically expanded potential vehicles for suit and available damages by authorizing class actions for consumer protection violations, granting an individual right of action for the greater of actual damages suffered or $200, and providing attorneys’ fees at the court’s discretion against any violator, not merely knowing violators.³⁶ Contrary to the FTC Act, the UTPCPL shifted balance away from restraint and towards much greater enforcement.

States responded to the UTPCPL by reasserting the need for restraint to prevent lawsuits that would ultimately harm consumers. The National Association of Attorneys General warned that private class actions would “provide too great an opportunity for frivolous suits,” and many states proved slow to adopt the UTPCPL’s class action provision.³⁷ Many states also continued to require proof of actual injury to recover under these acts,

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³⁰ Butler & Wright, supra note 22, at 170. This model was developed by the FTC and adopted by the Committee on Suggested State Legislation of the Council of State Governments; Id. (citing NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE ATTORNEY GENERAL 390 (1971) (hereinafter “ATTORNEY GENERAL REPORT”)).
³¹ Id.
³² COUNCIL OF STATE GOV’TS, supra note 27, at 142, 146.
³³ Pridgen & Alderman, supra note 5, at § 2:10; see also COUNCIL OF STATE GOV’TS, supra note 27, at 145-152; Butler & Wright, supra note 22, at 172.
³⁴ COUNCIL OF STATE GOV’TS, supra note 27, at 148–49.
³⁵ Id. (listing section 8(a) as allowing for such private rights of action for only equitable or injunctive remedies).
³⁶ Id. at 149.
³⁷ ATTORNEY GENERAL REPORT, supra note 30, at 409.
even while relaxing other requirements from the common-law fraud standard. These restraints meant that early state CPAs provided a robust, even aggressive medium for consumers, while still remaining conscious of the potential consumer and business harms from abusive or frivolous state CPA lawsuits.

In a similar vein, the FTC continues to employ a variety of structural precautions to guard against frivolous lawsuits: for example, the Commission may still only bring suits that it considers in the “public interest,” and it remains limited to largely equitable relief, including injunctions, cease and desist orders, and disgorgement of profits from prohibited practices.\(^3^8\) Further, the Commission’s 1983 policy statement reintroduced restrictions on consumer protection claims, requiring proof of actual injury for both unfairness and deception, including a demonstration of materiality for deception (and substantiality for unfairness), and applying a “reasonableness” inquiry for both.\(^3^9\) The Commission recognized, as states did in the 1960s and 1970s—and Congress before them—that powerful, open-ended and less precise consumer protection laws required meaningful ties to actual consumer harms in order to protect against frivolous consumer litigation.

Unfortunately, as federal consumer protection law grew more sophisticated, state legislatures began to strip away many of the restraints that were intended to strike a protective balance between consumer protection and preventing excessive consumer litigation. This expansion has turned many state consumer protection statutes into consumer litigation statutes that are ripe for abuse.


III. THE LOUISIANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

Louisiana passed the Unfair Trade Practices and Consumer Protection Law (LUTPA) in 1972. Modeled after the FTC Act, LUTPA includes a broad prohibition against unfair acts or practices: “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” LUTPA does not define which actions constitute unfair or deceptive practices, instead leaving this determination “to the courts to decide on a case-by-case basis.” Louisiana courts have similarly failed to provide a clear standard for discerning LUTPA violations, instead asserting that LUTPA violations include any act that “offends established public policy and...is immoral, unethical, oppressive, unscrupulous, or substantially injurious,” and that a plaintiff can recover under LUTPA if he can prove the defendant committed “some element of fraud, misrepresentation, deception, or other unethical conduct.”

LUTPA allows successful claimants to recover for “any ascertainable loss of money or property, corporeal or incorporeal.” Although “ascertainable” suggests a quantifiable monetary loss, Louisiana courts have yet to clearly define what constitutes an ascertainable loss. This has resulted in damage awards for nonmonetary harms such as mental anguish and humiliation. In addition to actual damages, LUTPA allows recovery for “reasonable attorney[s’] fees and costs.” Although what constitutes “reasonable” has also not been clarified, the promise of this potentially sizable award induces many plaintiffs in ordinary commercial disputes to include a LUTPA claim in an effort to recover attorneys’ fees or at least have a credible threat to do so in settlement negotiations. LUTPA also requires the trebling of damages for certain knowing violations: “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.”

An especially troubling provision in LUTPA was recently interpreted to allow standing to essentially anyone with a claim of harm as a result of

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41 Id. at § 51:1409(A) (Supp. 2011); 15 U.S.C. § 45(a)(1) (2006) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).
42 Chem. Distribs., Inc. v. Exxon Corp., 1 F.3d 1478, 1485 (5th Cir. 1993).
44 Id. (quoting Dufaux v. Creole Engineering, Inc., 465 So. 2d 752, 758 (La. Ct. App. 5th Cir. 1985)).
a deceptive practice. Section 1409 of LUTPA states that claims are available to “[a]ny person who suffers any ascertainable loss of money or movable property, … as a result of the use or employment by another person of an unfair or deceptive method, act or practice…”

Prior to 2010, lower Louisiana courts differed in how broadly they interpreted LUTPA’s grant of standing. Most courts limited standing to consumers and business competitors, with only the First Circuit Court of Appeal consistently interpreting standing more broadly.

In 2010, the Louisiana Supreme Court resolved this split in favor of the minority position in Cheramie Services, v. Shell Deepwater Production. The Court held that the private right of action under LUTPA was not limited to consumers and business competitors. Rather, the Court held that:

LUTPA grants a right of action to any person, natural or juridical, who suffers an ascertainable loss as a result of another person’s use of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Although business consumers and competitors are included in the group afforded this private right of action, they are not its exclusive members. . . . An evaluation of the words of this statute leads to the conclusion that, consistent with the definition of the word “person,” there is no such limitation on those who may assert a LUTPA cause of action.

The Court’s broad interpretation of standing means that even tangentially-related parties may have a valid LUTPA claim as long as they suffer an ascertainable loss as a result of an unfair deceptive practice.

Many provisions in LUTPA—a private right of action, standing for non-consumers and non-competitors, treble damages, and attorneys’ fees—represent significant deviations from the original state CPAs which recognized the need to strike a balance between consumer protection and preventing excessive and meritless consumer litigation. Moreover, many of the indulgent provisions and judicial interpretations of LUTPA currently distinguish Louisiana from other states. For example, Louisiana is among a small handful of states that mandates the trebling of awards in certain cases. In contrast, most states that allow for treble damages under their CPA leave the decision to the court’s discretion in most or all circumstances.

Louisiana also stands apart in not restricting standing to consumers

49 LA. REV. STAT. ANN. § 51:1409(A) (West 1987).
51 35 So.3d 1053 (La. 2010).
52 Id. at 1057.
53 Id. at 1058.
54 See, e.g., Del. Code Ann. tit. 6 § 2583(b) (West 2014); Ind. Code Ann. § 24-5-0.5-4(a) (West 2014); Ohio Rev. Code Ann. § 1345.09(B) (West 2014).
and business competitors. The consumer protection laws of states generally have such restrictions. Some states restrict standing to actual consumers who have suffered harm. Some states that lack such a statutory restriction, the courts have nevertheless restricted standing with multi-part tests that determine who has a valid claim. In contrast, no statutory or judicial restrictions exist in Louisiana. That is, the Louisiana law designed to protect consumers from unfair and deceptive trade practices extends far beyond consumers, not only to business competitors, but to essentially anyone that can prove some ascertainable loss as a result of the practice.

This protection for non-consumers is unnecessary given the proliferation of laws governing business interactions in other areas, such as laws preventing anti-competitive behavior, laws regulating general business torts, and employee-protection laws. Moreover, many provisions built into consumer protection law, such as attorneys’ fees and treble damages, were included in order to induce consumers suffering small but tangible harms to file suit. The same reasoning for these provisions generally does exist for claims between businesses or employers/employees. As a result, the only effect of these indulgent provisions is to over-incentivize enterprising attorneys to file claims in the hopes of extracting large settlements.

Moreover, because LUTPA does not statutorily define “unfair trade practices” or “ascertainable loss,” the recent expansion in standing creates an opportunity for countless new categories of plaintiffs to assert claims. As a result, courts are forced to determine unfair and deceptive acts in new and unfamiliar business contexts, and lawyers and legal scholars fear a corresponding flood of litigation.

IV. THE LITIGATION ENVIRONMENT UNDER LUTPA

The extension of state CPAs beyond their original purposes has driven a surge of consumer protection litigation. Though state CPA litigation has increased steadily since adoption of these acts in the 1960s to 1970s, this trend continues apace in the era of consumer litigation acts. A 2009 study by the Northwestern University Searle Civil Justice Institute (Searle Study) found that the number of reported CPA decisions increased by 119 percent from 2000 to 2007. These increases in CPA litigation far exceed increases in either tort or general litigation over this same period.

56 Hall v. Walter, 969 P.2d 224, 234 (Colo. 1998) (en banc).
58 The Study uses reported decisions as a proxy for total litigation levels. Searle Study, supra note 2, at 17.
59 Id.
Like many states, Louisiana has experienced significant consumer protection litigation. As shown in Table 1, Louisiana ranks 15th in the number of litigated federal and state consumer protection decisions from 2000 to 2009. Because these data include only reported decisions, and not actions filed or filed and settled without generating a reported judicial decision, they necessarily underestimate the amount of consumer protection litigation.
Table 1:  
States With Most Consumer Protection Litigation Activity

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<tr>
<td>1</td>
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<td>15</td>
<td>Louisiana</td>
<td>569</td>
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</table>

Source: Data used in the analysis were provided by researchers from the original Searle Study, supra note 2, and updated to 2009.

When analyzed on a per-capita basis, Louisiana’s consumer protection litigation appears even more pronounced. Table 2 reports that Louisiana ranks 8th in the number of per-capita consumer protection decisions from 2000 to 2009.
Table 2: Ranking of States by Per Capita Consumer Protection Decisions

<table>
<thead>
<tr>
<th>State Rank</th>
<th>State</th>
<th>Consumer Protection Decisions Per 100,000 Residents: 2000-2009</th>
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<tbody>
<tr>
<td>1</td>
<td>Connecticut</td>
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<td>Delaware</td>
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<td>Washington</td>
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<td>Massachusetts</td>
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<td>New Hampshire</td>
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<td>6</td>
<td>California</td>
<td>13.51480341</td>
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<td>7</td>
<td>North Carolina</td>
<td>12.81384167</td>
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<td>8</td>
<td>Louisiana</td>
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<td>Maine</td>
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<td>15</td>
<td>Kansas</td>
<td>10.61835557</td>
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</table>

Source: Decision data used in the analysis were provided by researchers from the original Searle Study, supra note 2, and updated to 2009. Per capita calculations were performed using state population data from the United States Census Bureau, State Intercensal Estimates, Annual Population Estimates (2000-2010), available at http://www.census.gov/popest/data/intercensal/state/state2010.html.

Instead of reporting total numbers of cases, Charts 1-3 present the trend in LUTPA decisions over the ten-year period from 2000-2009. Once again, these data all focus on reported LUTPA decisions, which are by definition substantially lower than the total number of actions filed (or filed and subsequently settled without generating a reported judicial decision) and thus should be understood as a lower-bound conservative estimate of the consumer protection litigation activity in the state. Nevertheless, the data on published decisions are correlated with filings within the state, and thus serve as accurate proxies for the basis of comparison to national trends and to other state court systems in the region.

Chart 1 compares published consumer protection decisions in Louisiana federal court and Louisiana state appellate courts. LUTPA decisions in both federal and state appellate courts have generally been increasing over this time period.
Chart 1:
Published LUTPA decisions in Louisiana State Courts and Federal Courts: 2000-2009

Source: Data used in the trend analysis were provided by researchers from the original Searle Study, supra note 2, and updated to 2009.

Chart 2 compares Louisiana’s per capita published consumer protection decision rate with the national trend. Louisiana has consistently seen more consumer protection cases per capita than the national trend, and has generally accompanied the national trend of increased consumer protection litigation in the last decade.
Chart 2:
Published per capita LUTPA decisions in Louisiana versus the national trend: 2000-2009

Source: Decision data used in the trend analysis were provided by researchers from the original Searle Study, supra note 2, and updated to 2009. Per capita calculations were performed using state population data from the United States Census Bureau, State Intercensal Estimates, Annual Population Estimates (2000-2010), available at http://www.census.gov/popest/data/intercensal/state/state2010.html.

Chart 3 compares Louisiana’s published consumer protection decision rate with several surrounding states, demonstrating that consumer protection litigation activity within the state is already higher than most other states in the region.
Thus, Louisiana’s number of published consumer protection decisions ranks among the highest in the nation and has been trending upward for over a decade. The 2010 *Cheramie Services, Inc.* decision broadening the standing requirement under LUTPA will undoubtedly exacerbate this trend, adding many LUTPA cases to state and federal dockets. The trends in Louisiana’s consumer protection litigation are not surprising given LUPTA’s expansion from the original purpose of consumer protection laws. Data show that CPA statutes that provide for a greater expected value of recovery—through treble damages, attorneys’ fees, etc.—invite more CPA litigation. Consumers respond rationally to litigation incentives, and states that invite additional consumer protection litigation through imprecise standards, low burdens of proof, and more generous awards, ought not be surprised when enterprising lawyers initiate more litigation, whether meritless or not.

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60 *Id.* at xii.
V. THE COSTS AND CONSEQUENCES OF LUTPA

The expansion of state CPAs, while initially celebrated as empowering consumers, has drawn criticism for inspiring abusive and socially-harmful litigation. The gradual but consistent devolution of consumer protection acts into consumer litigation acts carries serious social costs. Low quality consumer protection claims, motivated by the promise of attorneys’ fees and generous remedies, increase litigation costs for businesses that are ultimately passed on to consumers in the form of higher prices and withheld products. These claims also place a costly burden on the Louisiana judicial system and taxpayers. This section will discuss the costs of LUTPA litigation on Louisiana businesses, consumers, courts, and taxpayers.

A. Effects on Business and Consumers

Economic theory predicts that many consumer protection claims are of dubious social value and end up harming the very consumers they are meant to help. Both consumer protection litigation and the threat of consumer protection actions impose significant costs on businesses. Protracted adversarial litigation often results in expensive attorneys’ fees, or otherwise often induces a quick but expensive settlement. Though LUTPA offsets these attorneys’ fees for plaintiffs, businesses must foot the costs of defending against, settling, and paying these claims, unless a court finds that the plaintiff’s action “was groundless and brought in bad faith.” Even the possibility of a consumer protection action under LUTPA forces businesses to incur litigation expenses to determine the scope of the law and acceptable behavior. Moreover, litigation and the threat of litigation impose time costs that are not so easily shifted, and which all parties must bear. These costs are only magnified by the in terrorem effect of class action lawsuits.

Although these costs are initially borne by businesses, they are ultimately passed on to consumers through increased prices, fewer innovations, lower product quality, lower wages, and lower employment. Economic research confirms this theoretical understanding; a 2011 study, for example, confirms that state CPA statutes inflict substantial economic harm on consumers through increased prices, especially when state CPAs assign broad liability with indulgent damages provisions.

61 Butler & Johnston, supra note 15, at 4, 7; see generally ATRA (2013), supra note 14.
63 See generally Butler & Johnston, supra note 15.
64 Butler & Johnston, supra note 15, at 66 (suggesting that the economic harms caused by class actions are even more magnified than those presented by private lawsuits, and there should be separate rules for consumer class actions under state CPAs to help mitigate these additional costs, such as removal of statutory damages, damage multipliers, and punitive damages).
Furthermore, firms often refrain from informative advertising out of fear of consumer protection liability. 66 Ironically, firms have a disincentive to provide any information at all when they fear the information could be claimed to be deceptive. When this happens, consumers suffer again by either making less-informed purchases or by incurring costs to seek out relevant product information.

Most Louisiana consumers will receive little in exchange for these losses. Many of the claims under LUTPA are likely of marginal quality and concern business practices that cause little direct consumer harm. In standard civil cases, a private plaintiff weighs his costs of litigation against his prospective benefits when determining whether to file suit. Typically, these costs are significant enough that they discourage plaintiffs from needlessly exposing the public to the negative externalities accompanying frivolous litigation.67 However, regular attorneys’ fee awards under LUTPA reduce plaintiffs’ costs to bring suit, subsidizing additional low-value or tenuous claims. In fact, threatening these asymmetrical costs against businesses is used as a force to extract concessions through excessive settlements.68

Indeed, examples abound of recent LUTPA claims with seemingly little value to consumers or claims inconsistent with the original intent of consumer protection legislation. They include a LUTPA claim brought by a former employee against his employer for sending a “cease and desist” letter stating his intent to enforce a non-compete agreement the employee willingly signed during his employment,69 a class-action against major California winemakers and distributors claiming that the marketing of wine in Louisiana violates LUTPA because it does not warn consumers that California wine contains trace amounts of inorganic arsenic,70 a LUTPA claim brought by an aunt against her two nephews for selling property in a family-owned real estate company without her consent,71 and a LUTPA claim brought by a defendant in a patent case against the plaintiff’s attorney, alleging the attorney’s posting of information about the case on the law firm’s website constituted an unfair trade practice.72 LUTPA cases with these and similar marginal claims appear to produce no tangible benefits to Louisiana consumers.

http://www.masonlec.org/site/rte_uploads/files/CPA-Costs-Body-Sept-2011.pdf. In looking at automobile insurance cases and insurance premiums in general, the Task Force found that the expanding liability of state CPAs led to higher automobile insurance premiums. Id.

68 See Butler & Johnston, supra note 15, at 36.
Thus, the costs of LUTPA litigation—increased business litigation costs, higher consumer prices, fewer product innovations, and withheld product information—are established by data and economic theory. In contrast, the benefits of many marginal LUTPA cases are few or nonexistent. As a result, much of the consumer protection litigation under LUTPA harms consumers instead of helping them as intended.\footnote{See Butler & Johnston, supra note 15, at 65 (suggesting through an empirical analysis of case law brought under state CPAs that the state CPAs are actually harming consumers and decreasing consumer welfare).}

\section*{B. Effects on the Louisiana Civil Justice System and Taxpayers}

Louisiana’s civil justice system is also unnecessarily burdened by increasing LUTPA litigation. As previously explained, many of the additional cases would likely be of marginal quality and concern practices that cannot be shown to have caused any direct consumer harm. Indeed, many state consumer protection claims fail to satisfy national consumer protection standards.\footnote{Searle Study, supra note 2, at 44. A “Shadow Federal Trade Commission” compromised of state and federal consumer protection experts commissioned as part of the Searle Study, concluded that only 22\% of a random sample of actual state consumer protection cases would violate the more rigorous federal consumer protection law standards. Id.}

An increase in the number of LUTPA suits would generally slow state and federal dockets in all other cases as well, increasing the delay and cost of unrelated litigation.\footnote{See, e.g., Judicial Council of Cal., Statewide Caseload Trends 2002–2003 Through 2011–2012, 2013 Cr. Stat. Rep. 40–42, available at www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf. In California Superior Courts, as the general trend in filing of Civil Unlimited (driven mostly by civil complaints) and Civil Limited cases have been increasing from Fiscal Year 2003 (“FY03”) to Fiscal Year 2012 (“FY12”), the percentage of cases disposed of within 24 months has been decreasing. Id. at 41. Until Fiscal Year 2011 (“FY11”), the clearance of dispositions to filings was less than 100 percent, indicating that more cases were being filed than disposed of. Id. At the end of FY12, the clearance rate was once again sliding towards a sub-100 percent value. Id.}

Delays impose a cost-increasing, rent-seeking cycle: an increase in filings increases court dockets, which leads to lengthier times to disposition, which increases the value of the threat of a frivolous lawsuit, which encourages additional filings.\footnote{Id. at 41. Until Fiscal Year 2011 (“FY11”), the clearance of dispositions to filings was less than 100 percent, indicating that more cases were being filed than disposed of. Id. At the end of FY12, the clearance rate was once again sliding towards a sub-100 percent value. Id.}

The additional value from frivolous lawsuits encourages additional frivolous threats, and the cycle begins itself anew.

For an idea of the economic impact of increasing LUTPA litigation on the Louisiana civil justice system and taxpayers, California’s experience with Proposition 64 provides some guidance. Prior to the enactment of Proposition 64 in 2004, California had one of the most expansive and aggressive consumer protection statutes in the nation, providing for attorneys’ fees, equitable relief, and requiring no demonstration of actual consumer harm. As litigation proliferated and the costs on firms and consumers soared, the State Attorney General disclaimed the existing consumer protection statute as “extortionate.”\footnote{Butler & Johnston, supra note 15, at 15.} Voters responded by passing...
Proposition 64, which amended existing law to limit private claims to individuals who could show they have suffered an injury in fact and have lost money or property as a result. Studies have estimated that requiring plaintiffs to demonstrate actual injury was associated with a 17% decrease in California consumer protection decisions.\textsuperscript{78}

As LUTPA currently does not restrict claims to damages for financial or property loss because of the ambiguity over what constitutes an “ascertainable loss,” the incentives to file claims under LUTPA are comparable to the pre-Proposition 64 incentives in California. Hence if damages under LUTPA claims were restricted to actual financial losses, Louisiana may similarly realize a 17% reduction in consumer protection litigation. Additional reforms to indulgent LUTPA provisions would reduce the litigation caseload even more.

The reduction in consumer protection litigation would, in turn, result in reduced state spending on the Louisiana judiciary. Louisiana regularly spends over $150 million each year on the Louisiana judiciary. As a result, reductions in consumer protection litigation and trials would translate into significant savings for Louisiana taxpayers.\textsuperscript{79}


VI. CONCLUSIONS AND MOVING FORWARD

At its foundation, American consumer protection law was created with the understanding of the need to balance consumer protection with preventing excessive consumer litigation. However, ever-expanding state legislation, like LUTPA, invites predictable abuses through unnecessary and marginal consumer litigation claims. Unfortunately, socially-value-less consumer litigation derives directly and sensibly from the costs and benefits to filing these cases; there are few risks and little costs to plaintiffs and their attorneys, but substantial costs to defendant businesses—and society at large. Fighting these potential abuses is key to ensuring that all consumers, rather than specific litigants and enterprising litigators, benefit from consumer protection acts.

Both empirical scholarship and economic theory suggest that certain reforms could mitigate or reverse LUTPA’s devolution from consumer protection act to consumer litigation act. These include the following:

- **Limiting damages to plaintiffs’ actual out-of-pocket loss** will eliminate the risk that over-zealous juries will punish defendants with damages that are truly speculative. This in turn will drive attorneys towards cases where punishing and deterring unfair business practices is more likely to be socially beneficial: those where the practices actually produce monetary harms for consumers.

- **Requiring detrimental reliance** for consumer protection act claims will ensure that compensation reaches those consumers that are actually misled by a questionable business practice. Consumers should be able to minimally demonstrate that they actually relied on the misrepresentation they challenge. By necessity, requiring reliance will discourage speculative claims by consumers and attorneys hoping to extract damages for a business practice unrelated to their commercial transaction.

- **Restricting standing to harmed consumers** will ensure that LUTPA actually protects the consumers it was designed to protect. LUTPA protection beyond harmed consumers is unnecessary given the proliferation of laws governing non-consumer business interactions. Moreover, many provisions built into LUTPA, such as attorneys’ fees and treble damages, were included in order to induce consumers suffering small but tangible harms to file suit. The same reasoning for these provisions generally does exist for claims by non-consumers. As a result, the effect of these indulgent provisions in non-consumer cases is to over-incentivize enterprising attorneys to file claims in hopes of taking advantage of LUTPA’s indulgent provisions.
The original purpose of LUTPA was to protect consumers from unfair and deceptive commercial conduct. However, expansions and liberal interpretations of this law have produced many harms for consumers, employers, businesses, and taxpayers. Excessive and socially unproductive lawsuits are driven by a few enriched consumers and many lawyers at the expense of higher prices and slower judicial dockets. Fortunately, a solution is simple: restoring the original purpose of consumer protection acts is as easy as enacting a few reforms to prevent abuse of LUTPA. With these protections, Louisiana lawmakers can be confident that LUTPA will protect consumers instead of harm them.