

# 1, 2,



## Availability of Treble Damages Under the Louisiana Unfair Trade Practices Act

By Alexander M. McIntyre, Jr.

**P**ursuant to the Louisiana Unfair Trade Practices Act (LUTPA), La. R.S. 51:1401-1430, in the case of a LUTPA violation, “[i]f the court finds the unfair . . . 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.” La. R.S. 51:1409(A) (emphasis supplied.)

There is little jurisprudence discussing this provision; to date, there are only two Louisiana federal district court opinions and only one published state appellate court opinion granting treble damages under the LUTPA since the statute was enacted in 1972.

The only published state court opinion in which a treble damage award survived is *McFadden v. Import One, Inc.*, 56 So.3d 1212 (La. App. 3 Cir. 2011).<sup>1</sup>

The final two cases both come from the same section of the federal court sitting in the Western District of Louisiana — *AIM Business Capital, L.L.C. v. Reach Out Disposal*, 2014 WL 1401526 (W.D. La. 4/9/14); and *Hadassa Investment Security Nigeria, Ltd. v. Swiftships Shipbuilders, L.L.C.*, 2016 WL 156264 (W.D. La. 1/12/16). These last two cases, in particular, illustrate a potential flaw in the application of the treble damages provision of the LUTPA. This problem can put a defendant in a totally untenable position of facing the possibility of treble damages without any reasonable means of avoiding such a penalty.



## Current Practice Under La. R.S. 51:1409

Under the statute, after receiving a copy of the LUTPA petition pursuant to La. R.S. 51:1409(B), the attorney general's office<sup>2</sup> sends out an official notice to the defendant that suit has been filed alleging LUTPA violations. The notice is a form letter, noting that the suit alleging LUTPA violations has been filed and stating, *inter alia*:

*This office has not investigated this matter and makes no determination as to the merits thereof.* The purpose of this notice is to place [defendant] on notice of this claim, and provide the defendant with the opportunity to evaluate and if necessary cease such activity. Having received this notice, should the same be found, by a court of competent jurisdiction, to constitute a violation of Louisiana Revised Statute 51:1401, *et seq.*, the Unfair Trade Practices and Consumer Protection Law, the petitioner in said suit will have fulfilled the notice requirement under La. R.S. 51:1409, and may be entitled to treble damages under the statutes. (Emphasis supplied.)

Accordingly, merely by filing suit and sending a copy to the attorney general *alleging* violations of the LUTPA, and before any adjudication by anyone that an unfair trade practice has been or may have been committed, the plaintiff has fulfilled the requirement for a potential award of treble damages.<sup>3</sup>

In fact, as notice of allegations of a violation of the LUTPA, the form is actually either meaningless or contrary to the meaning of the law. Because the attorney general is doing nothing more than informing the defendant that he has been sued (a fact of which the defendant is presumably already aware) and, pointedly, *not* informing the defendant that there has been a determination that an unfair trade practice has or may have been committed, the attorney general is not informing the defendant of anything he does not already know except that a procedural requirement of the statute has been satisfied. Alternatively, if the statute

contemplates some finding of a violation (or the possibility of a violation) by the attorney general, then the notice is nullified by the statement that the attorney general's office takes no position on the matter.<sup>4</sup>

## The Jurisprudence

### *McFadden v. Import One, Inc.*

In the *McFadden* opinion, released in 2011, the 3rd Circuit was the first court to sustain an award of treble damages under the LUTPA. In *McFadden*, a consumer agreed to buy a new car assuming she could obtain a car loan at 7.82 percent interest. She left her Saturn as a trade-in and drove off the lot with a used Infiniti G35. The dealer was unable to obtain a loan for the customer at the agreed-upon interest rate but was able to arrange a loan from a different bank at 9.69 percent interest. The plaintiff rejected the new loan provisions and sought to return the Infiniti and pick up her Saturn. The dealer then undertook a course of conduct to bully the plaintiff to complete the original transaction at the higher interest rate, including refusing to take the Infiniti or to give back the Saturn. The defendant also had the plaintiff arrested for theft and had the Infiniti seized and returned to the dealership. However, even though it now had both cars, the dealership refused to return plaintiff's Saturn for approximately six months after suit was filed and three months after the attorney general's notice issued. After trial, the district court awarded damages and attorneys' fees, but not treble damages.

The 3rd Circuit reversed on this point and trebled the award. The court noted: "[Defendant] continued its conversion of [plaintiff's] Saturn causing [plaintiff] damages for the loss of use of her Saturn in an attempt to coerce [plaintiff] into a sale until September 2008. Thus, the conduct continued after June 19, 2008, the date notice was received by [defendant.]" 56 So.3d at 1223. While it appears that the defendant was clearly in the wrong, in fact, the conduct being penalized by the treble damage award was not *adjudicated* to be a violation of the LUTPA until after trial, far past the September 2008 date.<sup>5</sup>

### *AIM Business Capital, L.L.C. v. Reach Out Disposal*

In the *Reach Out Disposal* case,

decided in 2014, the plaintiff, a factoring business, was defrauded by defendants who manipulated and fabricated invoices sent to the plaintiff in the amount of almost \$500,000. Plaintiff sued and the attorney general's notice went out shortly after suit was filed. Liability was never seriously in doubt, and the court granted plaintiff's motion for partial summary judgment, awarding treble damages of almost \$1.5 million under the LUTPA. The court held:

After notification from the Louisiana Attorney General's Office, [defendant] failed to pay [plaintiff] on outstanding invoices it verified. This failure to honor the invoices, leaving [plaintiff] with worthless paper, constitutes part of the overall scheme. Additionally, those acts taken which hindered [plaintiff's] ability to investigate, leading to possible further damage, are considered by this Court to be bad acts. Consequently, treble damages are recoverable in this case. 2014 WL 1401526 at \*3.

The court ruled that the *continued failure* of the defendant to repay the sums reflected on the invoices after notification by the attorney general justified the treble damage award, even though no further invoices were submitted after the attorney general's form letter was received.

### *Hadassa Investment Security Nigeria, Ltd. v. Swiftships*

Late last year, another treble damages case was decided in the Western District. In *Swiftships*, the defendant accepted a \$500,000 down payment from the plaintiff for a boat. But, thereafter, the defendant sold the boat to a third party and failed to return the down payment. The court found that the defendant's conduct constituted a clear violation of the LUTPA and awarded actual damages and attorneys' fees and treble damages under 51:1409(A). The court did so notwithstanding that the LUTPA claim was not raised until plaintiff's Third Amended Complaint, filed over a year after suit was originally brought, which prompted the attorney general's notification at that time. The court ruled: "To date, the ongoing violation is occurring as the funds have not been returned or deposited into the registry of the court . . . . As such,



it is held the plaintiff is entitled to treble damages.” *Swiftships* at \*7. According to the court’s ruling, even though the form letter sent by the attorney general’s office is nothing more than a standard notification that a LUTPA suit has been filed and not an adjudication that there actually has been an unfair trade practice, a defendant accused of an unfair trade practice is automatically penalized with treble damages if he loses.

## Discussion

The outcomes of these cases may have been warranted from a visceral standpoint, but the same result would appear somewhat less defensible in cases where the defendant has colorable (even if weak) defenses. Further, these cases suggest that, pursuant to the statute, if the form letter is sent by the attorney general, then, *despite any defenses the defendant may have had*, if the verdict is for the plaintiff, the court has no discretion in the matter: “The court *shall award* three times the actual damages sustained.” *See*, La. R.S. 51:1409(A) (emphasis added).

Allowing treble damages merely because plaintiff *makes allegations* of unfair trade practices in his petition and sends a copy of the lawsuit to the attorney general puts a defendant in the position of, for example, having to return funds *only alleged* to have been misappropriated by an act or practice violative of the LUTPA before there has been any adjudication that the funds were wrongly obtained and only thereafter to seek return of the monies from the plaintiff if the unfair trade allegations are not proved. The alternative is to run the risk of treble damages, even though the defendant may have a valid, or at least colorable, argument that there was no wrongdoing or LUTPA violation.

The result of these opinions effectively is a presumption of guilt instead of innocence.<sup>6</sup> If an unfair trade practice can be said to continue because the effects of a past wrong perpetuate each day the *alleged* wrong is not rectified, then a defendant served with the attorney general’s form letter is forced to tender the disputed amount *before there is any adjudication of wrongdoing* in order to avoid the possibility of a treble damage award.<sup>7</sup>

## Conclusion

A defendant sued for purported violations of the LUTPA who receives the standard attorney general’s notice must be very careful about its moves and actions during litigation since the defendant could face treble damages for actions not as yet adjudicated to be violative of the statute.<sup>8</sup> This could be particularly sensitive in businesses where corporate policies concerning the processing of claims may be implicated. In addition, it remains unclear what happens in situations where an alleged unfair trade practice creates an obligation “to do” on the part of the defendant, but the extent of the obligation is not ascertainable from the allegations in the petition.

## FOOTNOTES

1. Late last year, the Louisiana 1st Circuit Court of Appeal issued its opinion in *Pierrotti v. Johnson*, 16-0204 (La. App. 1 Cir. 10/28/16), 2016 WL 6330423. The *Pierrotti* opinion is not designated for publication.

2. While the statute states that, when a LUTPA suit is filed, plaintiff’s counsel “shall” mail a copy of the suit to the attorney general, it also states that failure to send the suit to the attorney general “shall not affect any of plaintiff’s rights under this section.” La. R.S. 51:1409(B). Accordingly, the failure to notify the AG “does not defeat the claim for actual damages and attorney fees, but only defeats the claim for treble damages.” *Laurents v. Louisiana Mobile Homes, Inc.*, 689 So.2d 536, 542 (La. App. 3 Cir. 1997).

3. Any number of courts has recognized that notice by the attorney general is a prerequisite to the award of treble damages. *See, e.g.*, *B&G Crane Service, L.L.C. v. Duvic*, 05-1798 (La. App. 1 Cir. 6/30/06), 935 So.2d 164, 170; *Conry v. Ocwen Financial Corp.*, 2012 WL 5384681 at \*2 (E.D. La. 2012). However, in most of these cases, either there was no attorney general notice or no proper LUTPA claim was alleged or proved. Thus, none of these cases discusses whether the notice requirement refers solely to the ministerial matter of the attorney general forwarding the petition to the defendant or whether it contemplates some *actual finding* by the attorney general that the complained-of activity is or appears to be a violation of the LUTPA.

4. If the reason for the treble damage notification is merely to have the defendant evaluate whether it would be prudent to desist ongoing, affirmative behavior complained of in the lawsuit, then the notice would seem to be redundant — presumably, any reasonable defendant will be put on notice by the lawsuit itself that certain activity is alleged to be causing plaintiff damages for which the defendant could be liable.

5. In the unpublished *Pierrotti* opinion, plaintiff arranged to refinance certain property in which plaintiff and defendant had an interest, thereby releasing defendant from any obligation associated with the property. In return, defendant executed an “Act of Donation,” transferring his ownership interest in the property to plaintiff. Five years later, however, when plaintiff sought to sell the property, technical problems with the Act of Donation were discovered. At that time, defendant refused to execute any corrective documents and, in eventual response to plaintiff’s suit to clear the title to the property, filed a wholly meritless reconventional demand, seeking a 50 percent interest in all income accruing from the property. After five years of litigation, the district court ruled in plaintiff’s favor, finding that defendant’s steadfast refusal to allow plaintiff to sell the property long after defendant had relinquished all his interest in it was an unfair trade practice and, because the standard attorney general notice had been issued, awarded treble damages. With virtually no discussion or analysis, the 1st Circuit affirmed the district court’s award.

6. *C.f.*, *Miller v. Conagra*, 08-0021 (La. 9/8/08), 991 So.2d 445, 456, where the court noted: “It is axiomatic that [defendant] is allowed to explain its reasoning for seeking to terminate the contract without having its assertions construed as a continuing violation of LUTPA. To hold otherwise would be to require a defendant to choose between admitting liability on the one hand and extending prescription by pursuing his defense on the other.” The same logic applies here; a defendant would be required to choose between immediately paying what is asked for in the petition or risk treble damages if the plaintiff is ultimately successful.

7. Consider, too, the situation where the plaintiff can only be made whole by an award of damages (as opposed to, for example, specific performance) yet the amount of damages are not knowable until after trial. Can the defendant be liable for treble whatever the damages that the plaintiff ultimately proves at trial?

8. A defendant probably should raise this issue early as in, for example, an affirmative defense that treble damages are not available to the plaintiff because the conduct alleged in the petition to constitute an unfair trade practice is no longer continuing. That doesn’t necessarily speak to the situation where, for instance, there are allegations of monies due that continue not to be tendered, but at least it preserves the issue of the propriety of awarding treble damages before any LUTPA violation is proved.

*Alexander M. McIntyre Jr., of counsel in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., concentrates his practice in the area of antitrust and trade regulation and serves as chair of the Louisiana State Bar Association’s Antitrust and Trade Regulation Section. (amcintyre@bakerdonelson.com; Ste. 3600, 201 St. Charles Ave., New Orleans, LA 70170)*

