

# PLEADING THE CUTPA CLAIM: LANDMINES AND OPPORTUNITIES

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# PREPARING TO PLEAD A CUTPA CLAIM

## WHAT KIND OF CUTPA CLAIM DO I HAVE?

- Unfair acts or practices, deceptive acts or practices, unfair competition
- Does another statute expressly state that a violation would also be a CUTPA violation
- Does case law hold that a violation would constitute a CUTPA violation?
- Creates a roadmap for the elements that we need to plead

# ARE THERE THRESHOLD ISSUES THAT NEED TO BE CONSIDERED AND ADDRESSED?

- Is the defendant's conduct exempt from the application of CUTPA or preempted by other legislation (securities, professional services, employment relations, intracorporate disputes, CUIPA)?
- Does the plaintiff have statutory standing to assert a CUTPA claim (e.g., did it suffer an ascertainable loss of money or property proximately caused by the violation)?
- Was the injury suffered proximately caused by the CUTPA violation?
- Are there any statute of limitations issues?



LANDMINES IN THE PATH TO  
SUCCESSFULLY PLEADING A  
CUTPA CLAIM

# FAILING TO PLEAD THE SUBSTANTIAL INJURY CRITERIA OF THE CIGARETTE RULE

- When pleading the most common CUTPA violation – Unfair Acts or Practices – some defendants continue to assert that unfairness cannot be found without satisfying the substantial injury criteria.
- For forty years, the test for determining unfairness has been embodied in the Cigarette Rule, and continues as the applicable standard.

# THE CIGARETTE RULE HAS THREE CRITERIA:

1. Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
2. Whether it is immoral, unethical, oppressive or unscrupulous;
3. Whether it causes substantial injury to consumers (or competitors or other businessmen).

ALL THREE CRITERIA OF THE  
CIGARETTE RULE DO NOT NEED  
TO BE SATISFIED IN ORDER TO  
ESTABLISH UNFAIRNESS UNDER  
CUTPA.

THE THIRD CRITERIA OF THE CIGARETTE RULE HAS  
BEEN HELD TO HAVE THREE ELEMENTS,  
ALL OF WHICH MUST BE SATISFIED.

THE THREE ELEMENTS ARE:

1. the injury must be substantial;
2. it must not be outweighed by any countervailing benefits to consumers or competitors that the practice produces; and
3. it must be an injury that consumers themselves could not reasonably have avoided.

# PLEADING COMMON LAW NEGLIGENCE IN ADDITION TO CUTPA CLAIM (the “Williams Ford Conundrum”)

There is a significant risk in pleading a common law negligence claim in addition to a CUTPA claim.

1. When a CUTPA claim is based on negligent conduct, the claimant must, at least where contributory negligence is asserted, also plead and prove the third, or unjustified substantial injury criterion of the Cigarette Rule.
2. The CT Supreme Court has equated the requirement that claimant prove the injury could not reasonably have been avoided with proof of freedom from contributory negligence.
3. The CT Supreme Court has also held that statutory comparative negligence applicable to negligent injury to persons or property, also applies to purely commercial losses.
4. Therefore, if a CUTPA case is based on negligent conduct, it appears that the CUTPA claimant must plead and prove freedom from *any* degree of contributory fault.

# SOLUTIONS:

- a. Avoid basing your CUTPA claim on negligent conduct;
- b. Base your CUTPA claim on the public policy or immoral, unethical, oppressive or unscrupulous criterion of the Cigarette Rule. This could include intentional conduct, persistent misrepresentations or other aggravating circumstances;
- c. Base your CUTPA claim, if applicable, on the deceptive acts or practices prohibition in CUTPA.

## PLEADING THAT THE DEFENDANT’S CONDUCT WAS IN THE CONDUCT OF ITS PRIMARY LINE OF BUSINESS.

- The statutory definition of “trade” or “commerce” does not expressly provide that “trade” or “commerce” includes only the defendant’s *primary* trade or commerce. Conn. Gen. Stat. § 42-110a(4).
- CT Appellate Court in *McCann Real Equities* held that CUTPA only applied to the defendant’s “primary line of business.”
- The breadth of the “primary line of business” requirement is somewhat unclear as is the question of whether the Connecticut Supreme Court has embraced it.

### SOLUTION:

- Expressly plead that the defendant’s acts or practices were in the conduct of its primary trade or commerce and describe that trade or commerce broadly enough to encompass the defendant’s acts or practices.

# PLEADING THE CUTPA CLAIM WITH SUFFICIENT PARTICULARITY.

- Some decisions have held that a CUTPA claim must be pled with particularity to allow evaluation of the legal theory of the claim.
- By contrast, the CT Supreme Court in *Macomber v. Travelers* stated that there is no “special requirement of pleading particularity connected with a CUTPA claim, over and above any other claim.”

## SOLUTIONS:

- Don’t merely allege the elements of the Cigarette Rule in conclusory language;
- Allege the criteria on which you base your claim and the conduct which may satisfy that criteria.

# PLEAD SOME SORT OF CONSUMER, COMPETITOR OR BUSINESS RELATIONSHIP WITH THE DEFENDANT.

- Numerous decisions have stated that standing to assert a CUTPA claim is limited to persons in consumer, competitor or commercial relationship with the defendant.
- Other cases have held it unnecessary to consider whether standing is confined to these relationships.

## SOLUTIONS:

- Plead a consumer, competitor or direct business relationship with the defendant.
- If there is no clear relationship exists, allege an injury proximately caused by an act or practice in the conduct of the defendant's trade or commerce.

# PLEAD THAT THE PLAINTIFF SUFFERED AN ASCERTAINABLE LOSS OF MONEY OR PROPERTY AS A RESULT OF THE ALLEGED CUTPA VIOLATION.

- Conn. Gen. Stat. §42-110g(a) provides: “Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by §42-110b may bring an action...to recover actual damages.”
- In order to establish “ascertainable loss,” a plaintiff is not required to prove actual damages of a specific dollar amount. “Loss” has been held to be “synonymous with deprivations, detriment and injury.”
- “Whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known.”
- A plaintiff who has established an ascertainable loss but not “actual damages” may be able to recover nominal damages and would be able to obtain equitable relief and attorneys’ fees.

# PLEAD THE TIMELINESS OF THE ACTION.

- The statute of limitations applicable to CUTPA is set forth in the Act itself, and has been held to be substantive, with the burden on the plaintiff to plead and prove the timeliness of the action.
- Because it is a substantive element of a plaintiff's claim, the failure to raise it as a defense does not waive the necessity for the plaintiff to establish timeliness.



## SOLUTION:

Plead facts showing that the violations complained of occurred within three years of the time suit was commenced or that the running of the statute of limitations was tolled.

# PLEAD PROXIMATE CAUSE

1. Even where the CUTPA violation is clear, as in the case where a separate statute expressly makes a violation of that statute a violation of CUTPA, it is necessary for a private plaintiff to plead and prove that the injury claimed was proximately caused by the CUTPA violations.
2. The ascertainable loss requirement does not displace the traditional common law doctrines of remoteness and proximate cause as a standing limitations.

# MAKE SURE YOU HAVE A PROPER NAMED PLAINTIFF IN A CUTPA CLASS ACTION

- Conn. Gen. Stat. § 42-110g(a) does not distinguish between residents and nonresidents of Connecticut concerning who may bring an action for a CUTPA violation.
- However, Conn. Gen. Stat. § 42-110g(b) provides that a class action may be brought only on behalf of the named plaintiff and “other persons similarly situated who are residents of this state or injured in this state.”
- Two federal district courts have held that a nonresident of Connecticut injured outside of Connecticut could not bring a national class action for CUTPA violations.

# MAIL A COPY OF A CUTPA COMPLAINT TO THE ATTORNEY GENERAL AT THE COMMISSIONER OF CONSUMER PROTECTION



- Conn. Gen. Stat. § 42-110g(c) provides that, “Upon commencement of any action brought under subsection (a) of this section, the plaintiff shall mail a copy of the complaint to the Attorney General and the Commissioner of Consumer Protection and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the Attorney General and the Commissioner of Consumer Protection.”
- The complaint may be transmitted electronically addressed to [cutpa@ct.gov](mailto:cutpa@ct.gov).
- Conn. Practice Book § 10-68 provides that “whenever in an action of tort or upon a statute the plaintiff is compelled to allege the giving of a notice required by statute, the plaintiff shall either recite the same in the complaint or annex a copy thereto.”
- It has been held a failure to give the notice required by § 42-110g(c) is not jurisdictional and is curable.

# SEPARATE THE COMPLAINT INTO SEPARATE COUNTS WHERE REQUIRED

Whether a particular claim must be set forth in a separate count depends on the nature of the claim.

- There is some disagreement concerning when, if ever, a CUTPA claim based on more than one underlying breach of statutory or common law duty must be set forth in multiple counts.
- It is common for plaintiffs to allege in a single count conduct alleged to constitute both unfair and deceptive acts or practices.
- Courts are also divided concerning whether a claim for liability based on conspiracy should be set forth in a separate count.
- It has been held that negligence and willful and wanton misconduct are separate and distinct causes of action.

# PLEAD A CLAIM FOR PUNITIVE DAMAGES IN A SEPARATE COUNT

- Conn. Gen. Stat. §42-110g(a) provides in part that “[t]he court may, in its discretion, award punitive damages....”
- A party claiming punitive damages must establish that the defendant’s conduct was done with a reckless indifference to the plaintiff’s rights or was an intentional or wanton violation of those rights.
- The complaint seeking punitive damages must identify the conduct alleged to have been reckless and must set forth the claim separately.

# OPPORTUNITIES TO USE CUTPA IN BUSINESS LITIGATION

## PLEADING A CUTPA CLAIM IN CONTRACT LITIGATION.

A mere breach of contract, even if intentional, has been held not to violate CUTPA. However, a breach of contract may violate CUTPA if accompanied by sufficient “aggravating circumstances.” The range of activity held to constitute sufficient “aggravating circumstances” has been expanding.

- a. Bad faith breach in order to avoid contract and sell property to third party on more favorable terms.
- b. Increasing price of option contract by seller where seller knew the buyer had expended money to have architectural and landscaping plans drawn.
- c. Refusing to perform contract while retaining the benefit.
- d. Unilateral breach in order to force modification in terms.
- e. Misrepresentations to conceal a breach, to delay enforcement or of intention to correct deficient performance.
- f. Multiple breaches of the contract.

# ASSERT A CLAIM UNDER THE UNDERUSED DECEPTION STANDARD

- Conn. Gen. Stat. § 42-110b prohibits deceptive acts or practices as well as unfair acts or practices. In a case involving a material misrepresentation or omission, it may be easier to satisfy the second criterion of the Cigarette Rule standard.
- The elements of a deceptive act or practice are set forth in *Caldor, Inc. v. Heslin*, 215 Conn. 590, 597, 577 A.2d 1009 (1990). They are:
  - i. There must be a representation, omission or other practice likely to mislead consumers;
  - ii. Consumers must interpret the message, omission or practice reasonably under the circumstances; and
  - iii. The misleading representation, omission or practice must be material—that is, likely to affect consumer decisions or conduct.
- Deception claims are not limited to consumers.

# ASSERT A CLAIM UNDER THE IMMORAL, UNETHICAL, OPPRESSIVE OR UNSCRUPULOUS UNFAIRNESS CRITERION

- This criterion is potentially broader than the public policy criterion.
- What is unethical may be established by nongovernmental bodies.

# BASE YOUR APPLICATION FOR INJUNCTIVE RELIEF ON A CUTPA CLAIM

1. Generally, in order to obtain injunctive relief, you must allege and establish irreparable harm and lack of an adequate remedy at law.
2. However, the Connecticut Supreme Court has held that it is not necessary to allege irreparable harm in order to obtain injunctive relief under CUTPA, which, by implication, assume that no adequate remedy exists and that the injury would be irreparable.