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Raised Bill No. 922
Public Hearing: 2-26-13

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TO: Members of the General Law Committee Committee

FROM: Connecticut Trial Lawyers Association (CTLA)

DATE: February 26, 2013

RE: Support for Raised Bill No. 922 – An Act Concerning The Connecticut Unfair Trade Practices Act

The purpose of the amendment proposed in Raised Bill 922 is to protect consumers and small businesses by deleting a provision in the Connecticut Unfair Trade Practices Act that states that in construing the provision of the Act providing that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts and practices,” “the Commission [for Consumer Protection] and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.”

It has been argued that this provision should require the courts of our state to interpret the prohibition of “unfair. . . acts or practices” in the same restrictive way that Congress has imposed on the Federal Trade Commission by a 1994 amendment to the Federal Trade Commission Act.

For decades, the Connecticut Supreme Court has applied the standard for determining unfairness employed by the Federal Trade Commission in 1973 when the Connecticut Unfair Trade Practices Act was adopted. As the Connecticut Supreme Court has held,

in determining whether a practice violates CUTPA [the Connecticut Supreme Court has]. . . adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - 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, [competitors or other business persons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. (Internal quotation marks omitted.)

Edmands v. Cuno, Inc., 277 Conn. 425, 450 n.16, 892 A.2d 938, 954 n.16(2006); (quoting Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 155, 881 A.2d 937, 969 (2005)).

In 1994, Congress amended the Federal Trade Commission to limit the Commission's jurisdiction to find acts or practices unfair. It prohibited the Commission from finding an act or practice unfair unless it satisfied the third criteria above.

Pub. L. 103-312 § 9 (August 26, 1994, codified as 15 U.S.C.A. § 45(n), provides:

(n) The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

This amendment effectively reduced what had been three independent bases for finding a violation based on unfairness to only one. In addition, it imposed in every case, a requirement to apply a complex test balancing the injury to consumers against countervailing benefits to consumers or competition. It also, as this provision has been interpreted by the Connecticut Supreme Court, may impose a burden on consumers to prove the absence of any contributory fault on their part.¹

The statutory language that Raised Bill 922 seeks to delete from the Act has been urged by defendants accused of having committed unfair acts or practices as a reason for the Connecticut courts to adopt the standard for determining unfairness currently used by the Federal Trade Commission as the sole criteria for determining unfairness under the Connecticut Act.

Requiring the current Federal Trade Commission standard to be proved in every unfairness case brought under the Federal Trade Commission Act would likely significantly reduce the vigor of enforcement, both private and public, under the Act and make the Act far less effective as a consumer remedy.

There are at least eight important reasons why Raised Bill 922, deleting the requirement for Connecticut courts to be guided by decisions interpreting the Federal Trade Commission Act in interpreting the Connecticut Unfair Trade Practices Act.

¹ See Williams Ford, Inc. v. Hartford Courant, Co., 232 Conn. 559, 592-93 (1995) (holding that plaintiffs could not recover on a CUTPA claim based on negligent conduct where the jury found them to be 10% contributorily negligent).

1. The effect of applying the current Federal Trade Commission’s standard for determining unfair acts or practices would result in a significant reduction in enforcement activity, both private and governmental.

Almost all of the thousands of cases brought under the Connecticut Unfair Trade Practices Act have been brought as “unfair acts or practices” cases rather than “deceptive acts or practices” or “unfair methods of competition” cases. The effect of allowing “unfair acts or practices” cases to be brought only if they satisfied the narrow criteria currently applied by the Federal Trade Commission is likely to reduce significantly the number of acts that could and would be brought.

This conclusion is supported by the facts that one of the apparent purposes of Congress in forcing changes to the Federal Trade Commission’s unfairness authority was to restrict the FTC’s use of its power to regulate unfair practices; the significant reduction in FTC enforcement activity concerning unfair acts and practices after it issued its 1980 Unfairness Policy Statement; and the significantly larger number of cases brought based on claims of unfairness in states that apply some form of the Cigarette Rule criteria in contrast to those that apply the criteria in the Unfairness Policy Statement or in the 1994 amendment to the Federal Trade Commission Act.²

2. Although there may have been a sound reason for referring to interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act in 1973, when the Connecticut Unfair Trade Practices Act was adopted, because at that time there was no existing body of state law providing guidance on how the prohibitions in the act were to be interpreted, that reason no longer exists because there is now a very substantial body of decisions by the Connecticut courts explaining the types of conduct that constitute “unfair” acts or practices in violation of the act.

In the 40 years since the Connecticut Unfair Trade Practices Act has been enacted, more than 6,000 decisions involving CUTPA claims have been issued by the state and federal courts in Connecticut.³ Even as early as 2000, one commentator noted that Connecticut has the “most litigation — by far — concerning unfairness under the state unfair trade practice laws.”⁴ In contrast, there have been only a small number of decisions by the Federal Trade Commission or the federal courts interpreting the standard for unfairness set forth in the 1994 amendment to the Federal Trade Commission Act.⁵

² David L. Belt, “Should the FTC’s Current Criteria for Determining ‘Unfair Acts or Practices’ Be Applied to State ‘Little FTC Acts.’”? *The Antitrust Source*, Feb. 2010, p. 12.

³ Robert M. Langer, John T. Morgan and David L. Belt, *Unfair Trade Practices, Business Torts and Antitrust*, Vol. 12 of the Connecticut Practice Series (West 2012-2013) § 1.1 at 11 n. 75.

⁴ Michael M. Greenfield, “Unfairness under Section 5 of the FTC Act and Its Impact on State Law,” 46 *Wayne L. Rev.* 1869, 1914 (2000).

⁵ David L. Belt, “Should the FTC’s Current Criteria for Determining ‘Unfair Acts or Practices’ Be Applied to State ‘Little FTC Acts.’”? *The Antitrust Source*, Feb. 2010, p. 1, 6 (noting that the Federal Trade Commission has used its unfairness jurisdiction sparingly after 1980, using unfairness and the basis of decision in few than 30 cases between 1980 and 2000).

3. When Congress amended the Federal Trade Commission Act in 1994 to limit the Federal Trade Commission's jurisdiction with respect to "unfair acts or practices," it expressly did not intend to affect provisions in state statutes or state case law. In view of this, it is clearly appropriate to delete the language from the Connecticut Act stating that Connecticut Courts should be guided by the interpretations given by the Federal Trade Commission and the federal courts to the Federal Trade Commission Act.

When the 1994 amendment to the Federal Trade Commission Act was proposed, many state attorneys general expressed concern about the potential impact of the amendment on their state unfair trade practices acts. The legislative history of this amendment makes abundantly clear, however, that Congress did not intend for the 1994 amendment to have any effect on state statutes or state case law. As the Senate Report concerning the amendment expressly stated:

The Committee is aware that State attorneys general have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in state statutes or State case law. Since the mid-1960's, virtually every State has enacted statutes prohibiting deceptive practices, while many States also prohibit unfair practices. These State consumer protection acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts, including unconscionable pricing practices, high pressure sales tactics, uninhabitable living conditions in leased premises, and abusive debt collection practices. The Committee intends no effect on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the FTC's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the future development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decision-making. Sound principles of federalism limit the impact of this section to the FTC only.

Senate Rep. No. 130, 103d Cong., 2d Sess. 13 (1994).

4. The Connecticut Unfair Trade Practices Act was intended by the Connecticut legislature to “put Connecticut in the forefront of state consumer protection....”⁶ and the interpretation of the Act should not be determined by the federal Congress, which has responded to an entirely different set of political pressures.

The Federal Trade Commission’s 1980 modification of the “Cigarette Rule” was in response to a Congressional backlash against the Commission’s aggressive use of its authority to regulate “unfair acts or practices” committed by powerful political constituencies, includes the funeral and used car industries, doctors and lawyers and the television industry in connection with advertising directed toward children.⁷ The 1994 amendment to the Federal Trade Commission Act, which sets forth the standard the Commission presently uses to determine whether an act or practice is “unfair,” was set forth as a limitation on the Commission’s unfairness jurisdiction, not as a definition of what “unfair” means under the Act.

5. All but a few states that have unfair trade practice acts with language similar to that of Connecticut, continue to apply the three part “Cigarette Rule” test rather than the test set forth in the 1994 amendment to the Federal Trade Commission Act.

Of the 28 states having unfair trade practice acts that prohibit “unfair acts or practices,” most continue to apply some version of the “Cigarette Rule” criteria, while only five apply the test set forth in the 1994 amendment to the Federal Trade Commission Act. Most recently, in 2011, the Alaska Supreme Court rejected an argument that the unfairness standard it applies be changed from the “Cigarette Rule” to the standard in the 1994 amendment to the Federal Trade Commission Act.⁸

6. Because claims under the Connecticut Unfair Trade Practices Act may be brought by private parties and can be tried before lay juries, it is inappropriate to have the only standard for determining unfairness require a complex cost-benefit analysis that is more appropriate to an expert governmental agency supported by economists.

Unlike the Connecticut Unfair Trade Practices Act, there is no right to a private action under the Federal Trade Commission Act. The Federal Trade Commission is an expert governmental agency supported by substantial staff and professional economists, with a wealth of experience in examining the unfair practices of business. In contrast, private actions under the Connecticut Unfair Trade Practices Act may be brought by private parties and, by reason of an amendment by the Connecticut Legislature in 1995, are triable to a lay jury.

It is questionable whether that complex process of identifying and quantifying the costs and benefits of a challenged process. As one commentator has noted “[t]he Federal Trade Commission, with its staff of economists, is much better able to conduct the necessary inquiry than is a consumer seeking a private remedy or a court determining whether the consumer is

⁶ 16 H.R. Proc., Pt. 14, 1973 Sess., pp. 7321 to 7324 (remarks of Rep. Howard A. Newman).

⁷ David L. Belt, “Should the FTC’s Current Criteria for Determining ‘Unfair Acts or Practices’ Be Applied to State ‘Little FTC Acts.’”? *The Antitrust Source*, Feb. 2010, p. 2.

⁸ See *ASRC Energy Services Power and Communications, LLC v. Golden Valley Electric Association, Inc.*, 267 P.3d 1151 (2011).

entitled to that remedy.” Michael A. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 *Wayne L. Rev.* 1869, 1932 (2000).

7. The unfairness standard currently applied by the Federal Trade Commission is not sufficiently precise to give meaningful guidance to business persons or consumers concerning what conduct will violate the Act.

As a leading commentator has said, referring to the FTC’s 1980 Policy Statement on Unfairness, the balancing test set forth in the “substantial injury to consumers” standard, later enacted in the 1994 Amendment to the Federal Trade Commission Act, “is a sensible and important guide for the Commission, but is no more than that. It is a principle of decision to help in the selection and resolution of cases, not a rule of law in the first place. Indeed, a close examination reveals at least five reasons against the use of the balancing test in the latter role and in favor of a more precise legal standard. The balancing test does not offer sufficient constraint, sufficient predictability, sufficient justiciability, sufficient judicial review, or sufficient justice. . . . The balancing test does not promise sufficient fairness . . . [because it fails to provide a normative element] such as fault on the part of the seller or entitlement on the part of the consumer.” Neil V. Averitt, “The Meaning of ‘Unfair Acts or Practices’ in Section 5 of the Federal Trade Commission Act, 70 *Geo. L.J.* 228, 248-50 (1981).

8. Applying the Unfairness Standard currently used by the Federal Trade Commission may shift the burden of proving freedom of any contributory fault to the consumer — a result at odds with Connecticut general tort law.

The Connecticut Supreme Court, in interpreting the substantial injury test set forth in the third independent basis for holding an act or practice unfair, has held that the plaintiff must prove the absence of contributory fact, — i.e., that the injury could not reasonably have been awarded.⁹ The court did not apply Connecticut’s comparative fault statute, C.G.S. § 52-572h, to the claim under the Connecticut Unfair Trade Practices Act.

⁹ See *Williams Ford, Ins. v. Hartford Courant Co.*, 232 Conn. 559, 592-93 (1955 (holding that the plaintiffs could not recover on a CUTPA claim based on negligent conduct where the jury found them to be 10% contributorily negligent with respect to a common law misrepresentation count.)