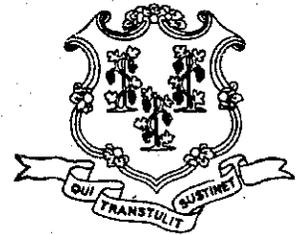


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Department of Consumer Protection



Testimony of William M. Rubenstein Commissioner of Consumer Protection

General Law Committee Public Hearing
February 26, 2013

Raised Senate Bill 922, "An Act Concerning the Connecticut Unfair Trade Practices Act"

Sen. Doyle, Rep. Baram, Sen. Witkos, Rep. Carter and honorable members of the General Law Committee. I am William M. Rubenstein, Commissioner of Consumer Protection. Thank you for this opportunity to provide testimony in opposition to Raised Senate Bill 922, "An Act Concerning the Connecticut Unfair Trade Practices Act."

This is the fortieth anniversary year of enactment of the Connecticut Unfair Trade Practices Act, known as CUTPA. I do think that after forty years, we should evaluate CUTPA's effectiveness, determine whether its interpretation has been appropriate and consistent with its purpose and debate whether it should be enhanced or clarified. However, as I will explain, I do not believe that any problems with CUTPA are the result of it using the Federal Trade Commission Act (FTC Act) for guidance. Indeed, it may be that CUTPA has suffered from insufficient guidance in how to apply its substantive provisions. Therefore, I do not believe that the proposed bill is helpful.

Let me start by identifying the sources of my perspective on this issue. As you know, the Commissioner of Consumer Protection is the chief administrator of CUTPA. The Commissioner is empowered to create regulations that identify marketplace conduct

that violates CUTPA. The Commissioner is also empowered to administratively adjudicate whether certain acts or practices violate CUTPA. Additionally, the Commissioner may request the Attorney General to bring practices before the courts to determine whether such practices violate CUTPA.

I have only served as Commissioner for 2 years, but my perspective on CUTPA is far broader. I have been closely involved in consumer protection and marketplace behavior for my entire 32 year law career. I started my law career at the Federal Trade Commission in the early 1980's. After a short stint in private practice, I spent 11 years as a Connecticut Assistant Attorney General assigned to the office's Consumer Protection and Antitrust Department, serving Attorneys General Lieberman, Riddle and Blumenthal. During that tenure, I was one of the principal drafters of amicus briefs concerning CUTPA issues, providing the Attorney General's best guidance to the courts for interpreting CUTPA so as to fulfill its purpose of protecting consumers from deception and unfairness in the marketplace. Between then and my appointment as Commissioner, I spent 13 years in private practice concentrating almost exclusively on trade regulation cases. I represented both plaintiffs and defendants in CUTPA and other trade regulation matters.

I tell you all this so you know that my views on CUTPA are borne from a governmental enforcement perspective at both the federal and state level, as well as from the interest of private litigants, consumers and businesses alike.

CUTPA is Connecticut's overarching consumer protection statute. Its substantive provision declares simply that: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." The simplicity of those 24 words and the breadth they give to CUTPA, however, was not designed by the General Assembly out of thin air. Rather, when enacted in 1973, CUTPA was specifically patterned after the FTC Act and it adopted the exact substantive language making unfairness and deception in the marketplace unlawful. Indeed, CUTPA was one of several contemporaneous statutes enacted in other states, referred to generally as "little FTC acts."

Connecticut's Supreme Court, in the case of Associated Investment Co. v. Williams Associates IV, 210 Conn. 148, 156-57 (1994), described the connection between CUTPA and the FTC Act this way:

The expansive nature of the CUTPA scheme, which we have described as establishing an action more flexible and a remedy more complete than did the common law may be traced directly to § 5 (a) (1) of the Federal Trade Commission Act (FTCA); 15 U.S.C. § 45 (a) (1); the statutory provision on which CUTPA is modeled and the interpretation of which serves as a lodestar for interpretation of the open-ended language of CUTPA. The FTCA, enacted in 1914, authorizes the Federal Trade Commission to define, identify and prevent "unfair methods of competition" and "unfair or deceptive acts or practices," language used by Congress to reach conduct beyond that proscribed at common law. Indeed, when Congress created the Federal Trade Commission in 1914 and charted its power and responsibility under § 5 of the FTCA, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply. Instead, it adopted a concept that does not admit of precise definition but the meaning and application of which must be arrived at by the gradual process of judicial inclusion and exclusion.

Likewise, our General Assembly, in adopting the sweeping language of § 5 (a) (1) of the FTCA, deliberately chose not to define the scope of unfair or deceptive acts proscribed by CUTPA so that courts might develop a body of law responsive to the marketplace practices that actually generate such complaints.

210 Conn. At 156-57 (internal citations, quotation marks and footnotes omitted)

Hence, it is not without great thought that CUTPA specifically directs our courts and the Commissioner to be guided by decisions interpreting deception and unfairness under the FTC Act. Unfairness, in particular, can be an unduly amorphous concept. The Federal Trade Commission (FTC) and federal courts interpreting the FTC Act had been working to articulate the amorphous concept of unfairness for decades before CUTPA was passed and have continued to refine that articulation in the decades since. Our courts have, likewise, been working at determining how we know unfairness when we see it.

To be clear, our courts are not mandated to follow the FTC, but rather to be guided by the expertise, experience and doctrinal thought that has developed over decades. In my view, it would not be wise to untether CUTPA from the rich body of FTC law defining deception or unfairness – at least without careful thought and replacement with some other source of guidance for determining deception and unfairness that takes into account current thinking on how best to protect consumers while alerting businesses how to avoid violations.

CUTPA wisely was not designed to be static, frozen in 1970's thinking about the contours of deception or unfairness. It should mold and develop to new challenges and new business behaviors. Yet, it must have a workable framework for determining when business behavior crosses the line so as to be declared unlawful and enable the enhanced consumer remedies that CUTPA offers. The current statute points to the decades of experience and doctrinal thinking of the FTC as a source from which our courts can create that framework. That is sensible. Many, many FTC concepts have become embedded in our interpretation of CUTPA for the better.

What is clear from my experience is that, despite its brevity, CUTPA embraces a very complicated and nuanced set of principles. Indeed, the complexity of CUTPA jurisprudence is evident in the treatise on the subject by Msrs. Langer, Belt and Morgan as part of the Connecticut Practice Series. That treatise consisted of a couple of hundred pages of analysis in the mid-1990's when it was first published. Today, it encompasses nearly 1,200 pages of discussion. It cites to nearly 5,000 court decisions, which itself is just a portion of the cases decided under CUTPA. And, a reading of the treatise makes plain that many areas of CUTPA's applicability are still uncertain.

From my own reading of the cases, I discern that our Supreme Court has not fully availed itself of more recent guidance from the interpretations of the FTC Act, settling instead to use a test for unfairness that is difficult to apply in a consistent manner. At the same time, our Supreme Court has limited the reach of CUTPA's unfairness prohibitions in many ways. For example, it has narrowly defined "trade or commerce" to exclude commercial transactions that are not fully within a firm's primary business and to exclude certain intra-corporate activities that may cause unjustified consumer injury. Similarly, the court has created exemptions from CUTPA for, among other things, the sale of

securities, for certain practices in the insurance business and for consumer harm flowing from shady or fraudulent professional behavior, even when intentional. The court has also struggled with how CUTPA should apply to otherwise tortious conduct or to breaches of contract, creating separate rules for unfairness in those circumstances. There are other examples.

It is quite possible that the court has found these ways to narrow CUTPA because the decades old test for unfairness does not provide enough comfort for the court to know unfairness when it sees it. Narrowing CUTPA in these other ways avoids having to apply the unfairness test at all. Several times in the last few years, our Supreme Court has recognized that its test for unfairness may be antiquated and that perhaps it should seek more current guidance from FTC jurisprudence. The court has not done so, not because it believes that it would not be helpful, but simply because it has not had a case that raised the issue effectively. See e.g., Naples v. Keystone Bldg. & Dev. Corp., 295 Conn. 214, 238-39 (2010) (Zarella, J. concurring); Glazer v. Dress Barn, Inc., 274 Conn. 33, 82 n.34 (2005).

Simply untethering CUTPA from the FTC Act, as SB 922 proposes to do, could have even worse consequences by creating more uncertainty as to how we know unfairness when we see it. While too much precision could also be harmful to CUTPA's ability to mold to new circumstances, too little creates uncertainty among consumers about what their rights are, uncertainty in the business community about the lawfulness of their behavior and uncertainty in the courts leading to undue narrowing of CUTPA's reach.

While I oppose SB 922, I do believe that CUTPA should have its forty year check-up. CUTPA's contours have been shaped by several different tools. The Commissioner of Consumer Protection has created many regulations identifying certain practices as CUTPA violations. The General Assembly has enacted dozens of statutes that deem a violation of that statute to also be a CUTPA violation. The courts have also declared certain practices unfair or deceptive in violation of CUTPA, while at the same time excepting or exempting a significant amount of commercial behavior from CUTPA's reach. We should evaluate what has been gotten right and what has been gotten wrong. But at bottom, CUTPA's promise of protecting consumers in our ever

changing commercial world would benefit from more definitional clarity, not less, and from more legislative policy direction, not less. Do not untether CUTPA from its most reliable mooring without replacing it with something better.

Thank you again for permitting me this opportunity to provide testimony on this most important issue.