



# House of Representatives

General Assembly

**File No. 414**

February Session, 2016

Substitute House Bill No. 5561

*House of Representatives, April 4, 2016*

The Committee on Banking reported through REP. LESSER of the 100th Dist., Chairperson of the Committee on the part of the House, that the substitute bill ought to pass.

## ***AN ACT CONCERNING FAIRNESS IN CONSUMER CONTRACTS.***

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective July 1, 2016*) For the purposes of this  
2 section and sections 2 and 3 of this act:

3 (1) "Consumer contract" means a contract prepared by or on behalf  
4 of a business or commercial party for use in such party's routine  
5 business or commercial transactions with consumers;

6 (2) "Consumer" means an individual who uses, purchases, acquires,  
7 attempts to purchase or acquire or receives an offer for any real  
8 property, tangible or intangible goods, services or credit for personal,  
9 family or household purposes; and

10 (3) "Business or commercial party" means the party on behalf of  
11 which a standard form contract is prepared.

12 Sec. 2. (NEW) (*Effective July 1, 2016*) (a) The following contractual

13 terms shall be deemed substantively unconscionable when included in  
14 a consumer contract that was not drafted by the consumer:

15 (1) A requirement that resolution of legal claims take place in a  
16 venue that is inconvenient to the consumer;

17 (2) A waiver of the consumer's substantive rights to assert claims or  
18 seek remedies provided by state or federal law;

19 (3) A waiver of the consumer's right to seek punitive, minimum,  
20 multiple or other statutory damages as provided by law or attorney's  
21 fees if authorized by statute or common law;

22 (4) A requirement that any action brought by the consumer with  
23 regard to the contract be initiated within a time period that is shorter  
24 than the applicable statute of limitations;

25 (5) A requirement that the consumer pay fees and costs to bring a  
26 legal claim that substantially exceed the fees and costs that would be  
27 required to bring a claim in a state court or that makes no provision for  
28 the waiver of fees and costs for a consumer who cannot afford such  
29 fees and costs; and

30 (6) A failure to permit a party to present evidence in person or to  
31 ensure that the consumer can obtain, prior to a hearing, any  
32 information that is material to the issue to be determined at such  
33 hearing.

34 (b) In determining whether the terms described in subsection (a) of  
35 this section are unenforceable, a court shall consider the principles that  
36 normally guide courts in the state in determining whether  
37 unconscionable terms are enforceable. The common law and the  
38 Uniform Commercial Code shall also guide the court in determining  
39 the enforceability of unfair terms not specifically identified in  
40 subsection (a) of this section.

41 (c) In determining whether the rebuttable presumption that a term  
42 in a consumer contract found to be unconscionable is unseverable from

43 the provision in which it is situated has been rebutted, the court may  
44 consider the general principles of contract law regarding the  
45 severability of unenforceable terms.

46 (d) It shall be an unfair and deceptive practice in violation of the  
47 Connecticut Unfair Trade Practices Act, sections 42-110a to 42-110q,  
48 inclusive, of the general statutes, to include any of the presumptively  
49 unconscionable terms identified in subsection (a) of this section in a  
50 consumer contract that was drafted by a party other than the  
51 consumer. A party who prevails on a claim under this section shall be  
52 entitled to all damages and remedies available pursuant to the  
53 Connecticut Unfair Trade Practices Act.

54 Sec. 3. (NEW) (*Effective July 1, 2016*) (a) A person harmed by a  
55 violation of the Connecticut Unfair Trade Practices Act may initiate on  
56 behalf of the state an action to recover civil penalties on behalf of the  
57 state and to seek injunctive, declaratory or other equitable relief that  
58 the state would itself be entitled to seek.

59 (b) In initiating an action under this section, a person may allege  
60 multiple violations that have affected different consumers, provided  
61 such violations are of a sufficiently similar kind such that they may be  
62 efficiently managed in a single action.

63 (c) A court may award a person who initiates an action under this  
64 section an incentive award of up to twenty-five per cent of the total  
65 monetary recovery if such person pursues the action to final judgment  
66 or settlement as the prevailing party, or up to ten per cent of the total  
67 monetary recovery if the state intervenes in the action and pursues  
68 such action to final judgment or settlement as the prevailing party.

69 (1) A person initiating an action under this section shall serve a copy  
70 of the complaint and a letter describing the action on the Attorney  
71 General, at which point the action shall be stayed for thirty days. The  
72 state may intervene in the action and proceed with any and all claims  
73 in the action: (A) As of right within the thirty-day stay; or (B) for good  
74 cause, as determined by the court, after the expiration of the thirty-day

75 stay.

76 (2) The court may stay such discovery for a period of not more than  
77 sixty days upon a showing by the state that certain actions of discovery  
78 by the person initiating the action would interfere with the state's  
79 investigation or prosecution of a criminal or civil matter arising out of  
80 the same facts, whether or not the state proceeds with the action. Such  
81 a showing shall be conducted in camera as necessary. The court may  
82 extend the sixty-day period upon a further showing in camera that the  
83 state has pursued the criminal or civil investigation or proceedings  
84 with reasonable diligence and any proposed discovery in the action  
85 will interfere with the ongoing criminal or civil investigation or  
86 proceedings.

87 (3) No action may be brought by a private party acting pursuant to  
88 this section for any violations previously alleged as the basis for an  
89 action brought by the state or by another private party under this  
90 section, and no action may be brought by the state for any violations  
91 previously alleged as the basis for an action brought by a private party  
92 pursuant to this section. Furthermore, when a person initiates an  
93 action under this section, no person other than the state may intervene  
94 or bring a related action under this section based on the facts  
95 underlying the pending action.

96 (4) The court in which the action brought under this section is filed  
97 shall review and approve any proposed settlement of such action to  
98 ensure that the settlement provisions are reasonable in light of state  
99 law. The court shall also ensure that any incentive fees and attorney  
100 fees or costs included in a settlement are reasonable and that the  
101 person initiating such action does not recover, as an incentive  
102 payment, more than twenty-five per cent of the recovery remitted to  
103 the state under the proposed settlement. The proposed settlement shall  
104 be submitted to the Attorney General at the same time that it is  
105 submitted to the court. If the Attorney General opposes the settlement  
106 and expresses such opposition by filing a motion with the court, the  
107 court shall decline approval of the settlement.

108 (5) The state may dismiss any action in which it decides to intervene  
109 under subdivision (1) of this subsection notwithstanding the objections  
110 of the person who initiated the action.

111 (6) The state may settle any action in which it decides to intervene  
112 under subdivision (1) of this subsection notwithstanding the objections  
113 of the person who initiated the action.

114 (7) An action initiated by a private person under this section shall  
115 not bar such person or any other individual from filing a private action  
116 based on the same nucleus of operative facts, nor shall a prior private  
117 action based on the same nucleus of operative facts bar an action under  
118 this section.

119 (8) Actions under this section are prosecuted on behalf of the state,  
120 not on behalf of an individual, and mandatory arbitration agreements  
121 between private parties do not apply to actions under this section. No  
122 contract shall waive or limit a private party's right to bring suit under  
123 this section by preventing such party from being able to bring an  
124 action in a public forum or an action alleging multiple violations  
125 committed against multiple consumers pursuant to subsection (b) of  
126 this section.

127 (9) If any provision of this section or the application thereof to any  
128 person or circumstance is held invalid, such invalidity shall not affect  
129 other provisions or applications of this section that may be given effect  
130 without such invalid provision or application, and, to this end, the  
131 provisions of this section are declared to be severable.

132 (d) Unless state law provides a greater amount as the civil penalty  
133 recoverable by the state for violations of the Connecticut Unfair Trade  
134 Practices Act, a person who commits a violation of such act shall be  
135 subject to a civil penalty not to exceed five thousand dollars per  
136 violation.

This act shall take effect as follows and shall amend the following sections:

---

|           |                     |             |
|-----------|---------------------|-------------|
| Section 1 | <i>July 1, 2016</i> | New section |
| Sec. 2    | <i>July 1, 2016</i> | New section |
| Sec. 3    | <i>July 1, 2016</i> | New section |

***Statement of Legislative Commissioners:***

In Section 2(a)(1), "an inconvenient venue" was changed to "a venue that is inconvenient to the consumer" for clarity; in Section 3(b), "those" was changed to "such" for consistency with standard drafting conventions; in Section 3(c), ",including after settlement of the action in accordance with subdivision (4) of this subsection" was deleted and, in the last line, "or settlement" was inserted before "as the prevailing party," to eliminate redundant language; in Section 3(c)(2), the clauses of the first sentence were reordered and "as necessary" was moved to after "in camera" for consistency with standard drafting conventions; in Section 3(c)(3), "pursuant to" was changed to "under" for consistency; in Section 3(c)(4), "brought under this section" was moved to after "action" for consistency with other provisions of the section, "an" was replaced with "such," and "must" was replaced with "shall" for consistency with standard drafting conventions; and in Section 3(c)(8), "by waiving such party's right to bring such an action in a public forum or" was deleted and "an action in a public forum or" was inserted after "bring" for clarity.

**BA**            *Joint Favorable Subst.*

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

**OFA Fiscal Note**

**State Impact:**

| <b>Agency Affected</b>                                    | <b>Fund-Effect</b> | <b>FY 17 \$</b> | <b>FY 18 \$</b> |
|---|--------------------|-----------------|-----------------|
| Resources of the General Fund                             | GF - Revenue Gain  | Up to 15,000    | Up to 15,000    |
| Consumer Protection, Dept.                                | GF - Cost          | 70,230          | 70,230          |
| Comptroller Misc. Accounts (Fringe Benefits) <sup>1</sup> | GF - Cost          | 24,575          | 24,575          |

Note: GF=General Fund

**Municipal Impact:** None

**Explanation**

The bill results in a cost to the state of \$94,805 in FY 17 and FY 18 by declaring six types of contract terms unconscionable if included in a consumer contract. The Department of Consumer Protection (DCP) would require a Special Investigator to examine as many as 280 cases per year. The costs include a salary of \$61,530, fringe benefits of \$24,575 and equipment and other expenses (vehicle, mileage, laptop and other office needs) of \$8,700.

Additionally the bill results in a potential revenue gain of up to \$15,000 due to Connecticut Unfair Trade Practices Act violations associated with unconscionable contract terms.

**The Out Years**

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation and the number of violations.

---

<sup>1</sup>The fringe benefit costs for most state employees are budgeted centrally in accounts administered by the Comptroller. The estimated active employee fringe benefit cost associated with most personnel changes is 39.94% of payroll in FY 17 and FY 18.

**OLR Bill Analysis**

**sHB 5561**

***AN ACT CONCERNING FAIRNESS IN CONSUMER CONTRACTS.***

**SUMMARY:**

This bill allows a person harmed by a Connecticut Unfair Trade Practices Act (CUTPA) violation to bring an action on the state's behalf to recover civil penalties and seek injunctive, declaratory, or equitable relief. The action may allege violations affecting different consumers. A person bringing an action must notify the attorney general and the state can intervene and proceed with the action. The bill allows a court to give a person who brings an action an incentive award. Settlements require attorney general and court approval.

The bill also declares six types of contract terms unconscionable if included in a consumer contract. The bill makes it an unfair and deceptive practice under CUTPA to include these terms and entitles a party who prevails on a claim to all damages and remedies available under CUTPA.

EFFECTIVE DATE: July 1, 2016

**ACTION ON BEHALF OF STATE FOR CUTPA VIOLATIONS**

The bill allows a person harmed by a CUTPA violation to bring an action on the state's behalf to recover civil penalties for the state and seek injunctive, declaratory, or equitable relief that the state could seek. In such an action, a person may allege multiple violations that have affected different consumers if they are sufficiently similar so that they may be efficiently managed in one action.

The bill prohibits:

1. a person from bringing an action under the bill if the state or

another person has begun an action based on the same violation and

2. the state from bringing an action if a party has begun an action based on the same violation.

When a person begins an action under the bill’s provisions, the bill also prohibits anyone other than the state from intervening or bringing a related action under these provisions based on the same facts.

If a private party brings an action, it does prohibit that person or someone else from filing a private action based on the same facts. Similarly, a prior private action based on the same facts does not prohibit an action under these provisions.

It specifies that:

1. mandatory arbitration agreements between private parties do not apply to these actions and
2. contracts cannot waive or limit a private party's right to bring an action under these provisions by preventing a party from bringing an action in a public forum or alleging multiple violations committed against multiple consumers.

***State Intervention in Action***

The bill requires a person bringing an action to serve a copy of the complaint and a letter describing the action on the attorney general. This service stays the action for 30 days to allow the state the option to intervene and proceed with the action’s claims. The court can allow the state to intervene at a later time for good cause.

The bill allows the state to dismiss any action in which it decides to intervene even if the person who initiated the action objects.

***State Request to Delay Discovery***

The bill allows the state to ask the court to stay a particular act of discovery by a person bringing the action. Discovery is the stage of a

lawsuit where the parties may obtain documents, depositions, and other information from each other. If the state shows that discovery would interfere with the state's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay aspects of discovery for (1) up to 60 days or (2) a longer period if the state shows that it has pursued the investigation with reasonable diligence and discovery will interfere with the ongoing investigation or proceeding.

The bill allows the court to conduct the initial showing in camera (in chambers and not in public) if necessary and requires an in camera showing to justify an extension. These discovery provisions apply whether the state is proceeding with the action or not.

### ***Penalties***

Unless state law provides a greater amount as the civil penalty recoverable by the state for CUTPA violations, the bill subjects a person who commits a CUTPA violation to a civil penalty of up to \$5,000 per violation.

### ***Incentive Award***

The bill allows a court to award the person bringing the action an incentive award of up to (1) 25% of the total monetary recovery if he or she pursues the action to final judgment or settlement as the prevailing party or (2) 10% of the total monetary recovery if the state intervenes and pursues the action to final judgment or settlement as the prevailing party.

### ***Settlement***

The bill requires court approval of any settlement. The settlement must be submitted to the court and attorney general at the same time. If the attorney general files a motion in court to oppose the settlement, the court must deny approval of the settlement. Otherwise, the court must review the settlement and ensure that (1) its provisions are reasonable in light of state law, (2) any incentive fees and attorney fees or costs included in the settlement are reasonable, and (3) the person

who brought the action does not recover an incentive payment above 25% of the recovery remitted to the state.

The bill allows the state to settle an action in which it intervenes even if the person who initiated the action objects.

### ***Severability of Provisions***

The bill provides that if any provision governing these actions, or the application of them to a person or circumstance, is held invalid, it does not affect other provisions or applications that may be given effect without the invalid provision or application. The bill declares these provisions severable.

### **UNCONSCIONABLE TERMS IN CONSUMER CONTRACTS**

The bill declares a term in a consumer contract not drafted by the consumer unconscionable if it:

1. requires that a legal claim be resolved in a venue inconvenient to the consumer;
2. waives the consumer's substantive rights to assert claims or seek remedies under state or federal law;
3. waives the consumer's right to seek (a) punitive, minimum, multiple, or other statutory damages or (b) attorney's fees if authorized by law;
4. requires a consumer to bring any action on the contract within a period that is shorter than the applicable statute of limitations;
5. (a) requires a consumer to pay fees and costs to bring a legal claim that substantially exceed those otherwise required for bringing claims in state court or (b) does not provide for a waiver of fees and costs for a consumer who cannot afford them; and
6. fails to permit a party to present evidence in person or to ensure that the consumer can obtain, prior to a hearing, any

information material to the issue to be determined at the hearing.

The bill applies to contracts prepared by or on behalf of a business or commercial party to use in routine business or commercial transactions with consumers. A consumer is an individual who uses, purchases, acquires, attempts to purchase or acquire, or receives an offer for real property, tangible or intangible goods, services, or credit for personal, family, or household purposes.

### ***Determining Enforceability***

The bill requires a court, when determining whether a term described above is unenforceable, to consider the principles that normally guide the courts in determining whether unconscionable terms are enforceable. The court must also be guided by the common law and Uniform Commercial Code when determining the enforceability of other unfair terms.

In determining whether the rebuttable presumption that an unconscionable term is unseverable from the provision in which it is situated has been rebutted, the court may consider the general principles of contract law on the severability of unenforceable terms.

### ***Unfair Trade Practice***

The bill makes it an unfair and deceptive practice under CUTPA to include any of the presumptively unconscionable terms described above in a consumer contract that was not drafted by the consumer. The bill entitles a party who prevails on a claim to all damages and remedies available under CUTPA (see BACKGROUND).

## **BACKGROUND**

### ***CUTPA***

The law prohibits businesses from engaging in unfair and deceptive acts or practices. CUTPA allows the consumer protection commissioner to issue regulations defining what constitutes an unfair trade practice, investigate complaints, issue cease and desist orders,

order restitution in cases involving less than \$10,000, enter into consent agreements, ask the attorney general to seek injunctive relief, and accept voluntary statements of compliance. It also allows individuals to sue. Courts may issue restraining orders; award actual and punitive damages, costs, and reasonable attorneys fees; and impose civil penalties of up to \$5,000 for willful violations and \$25,000 for violation of a restraining order.

**COMMITTEE ACTION**

Banking Committee

Joint Favorable Substitute

Yea 10 Nay 8 (03/15/2016)