



House of Representatives

General Assembly

File No. 734

February Session, 2016

Substitute House Bill No. 5561

House of Representatives, April 26, 2016

The Committee on Appropriations reported through REP. WALKER of the 93rd 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 Sec. 3. (NEW) (*Effective July 1, 2016*) (a) A person harmed by a
47 violation of the Connecticut Unfair Trade Practices Act may initiate on
48 behalf of the state an action to recover civil penalties on behalf of the
49 state and to seek injunctive, declaratory or other equitable relief that
50 the state would itself be entitled to seek.

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

55 (c) A court may award a person who initiates an action under this
56 section an incentive award of up to twenty-five per cent of the total
57 monetary recovery if such person pursues the action to final judgment
58 or settlement as the prevailing party, or up to ten per cent of the total
59 monetary recovery if the state intervenes in the action and pursues
60 such action to final judgment or settlement as the prevailing party.

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

68 (2) The court may stay such discovery for a period of not more than
69 sixty days upon a showing by the state that certain actions of discovery
70 by the person initiating the action would interfere with the state's
71 investigation or prosecution of a criminal or civil matter arising out of
72 the same facts, whether or not the state proceeds with the action. Such
73 a showing shall be conducted in camera as necessary. The court may
74 extend the sixty-day period upon a further showing in camera that the

75 state has pursued the criminal or civil investigation or proceedings
76 with reasonable diligence and any proposed discovery in the action
77 will interfere with the ongoing criminal or civil investigation or
78 proceedings.

79 (3) No action may be brought by a private party acting pursuant to
80 this section for any violations previously alleged as the basis for an
81 action brought by the state or by another private party under this
82 section, and no action may be brought by the state for any violations
83 previously alleged as the basis for an action brought by a private party
84 pursuant to this section. Furthermore, when a person initiates an
85 action under this section, no person other than the state may intervene
86 or bring a related action under this section based on the facts
87 underlying the pending action.

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

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

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

106 (7) An action initiated by a private person under this section shall

107 not bar such person or any other individual from filing a private action
108 based on the same nucleus of operative facts, nor shall a prior private
109 action based on the same nucleus of operative facts bar an action under
110 this section.

111 (8) Actions under this section are prosecuted on behalf of the state,
112 not on behalf of an individual, and mandatory arbitration agreements
113 between private parties do not apply to actions under this section. No
114 contract shall waive or limit a private party's right to bring suit under
115 this section by preventing such party from being able to bring an
116 action in a public forum or an action alleging multiple violations
117 committed against multiple consumers pursuant to subsection (b) of
118 this section.

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

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

This act shall take effect as follows and shall amend the following sections:		
Section 1	July 1, 2016	New section
Sec. 2	July 1, 2016	New section
Sec. 3	July 1, 2016	New section

APP 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: See Below

Municipal Impact: None

Explanation

The bill allows persons harmed by the Connecticut Unfair Trade Practices Act (CUTPA) to initiate action, on behalf of the state, to recover allowable civil penalties. Such action may only proceed with the consent of the Attorney General and initiators may be awarded a portion of total recoveries.

The state may potentially realize increased revenue by allowing an additional method for pursuit of civil penalties under CUTPA. The potential revenue gain from these provisions is anticipated to be minimal and may be reduced, in part, by increased costs at the Office of the Attorney General.

The bill also declares six types of contract terms unconscionable if included in a consumer contract. These provisions of the bill result in no fiscal impact to the Department of Consumer Protection as the increase in actionable complaints to the agency is anticipated to be minimal.

The Out Years

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation and the additional number of cases brought under CUTPA.

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.

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 affecting 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 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 not 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 the bill's provisions.

The bill 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 (a) in a public forum or (b) alleging multiple violations committed against multiple consumers.

State Intervention in Action

The bill requires a person bringing an action to serve on the attorney general a copy of the complaint and a letter describing the action. 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 from 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 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 or not the state is proceeding with an action.

Penalties

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

Incentive Award

The bill allows a court to award a 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 to oppose the settlement, the court must deny approval. 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's fees or costs included in the settlement are reasonable, and (3) the person who brought the action does not recover an incentive payment of more than 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 declares these provisions severable, meaning 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.

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 for 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 to rebut the presumption that an unconscionable term is unseverable from the provision in which it is situated, the court may consider the general principles of contract law on the severability of unenforceable terms.

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 attorney's fees; and impose civil penalties of up to \$5,000 for willful violations and \$25,000 for a violation of a restraining order.

Legislative History

On April 12, the House referred the bill to the Appropriations Committee, which reported a substitute bill eliminating a provision making it an unfair and deceptive practice under CUTPA to include any of the bill's unconscionable terms in a consumer contract.

COMMITTEE ACTION

Banking Committee

Joint Favorable Substitute

Yea 10 Nay 8 (03/15/2016)

Appropriations Committee

Joint Favorable Substitute

Yea 30 Nay 25 (04/18/2016)