The End of the Commercial Relationship Test and Other Recent Significant Developments in CUTPA Jurisprudence

September 14, 2020
2:00 p.m. – 4:00 p.m.

CT Bar Association
Webinar

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As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

I will endeavor to be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client’s interests as well as to the proper functioning of our system of justice;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Lawyers' Principles of Professionalism

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not quarrel over matters of form or style, but will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party’s opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client’s interests as well as to the proper functioning of our system of justice;

While I must consider my client’s decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;
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Connecticut Legal Conference  
September 14, 2020  
2:00 p.m. to 4:00 p.m.

Agenda for:  
The Impact *Soto v. Bushmaster*  
Upon The Scope Of CUTPA And Product Liability Law  
Presented by: Robert M. Langer & Daniel P. Scholfield

I. **Introduction.** 2:00 p.m. to 2:05 p.m. (Bob and Dan)

II. **Four Important Holdings in *Soto v. Bushmaster* Regarding Interpretations of CUTPA.** 2:05 p.m. to 2:35 p.m.
   a. Commercial Relationship Test (Bob)
   b. Personal Injury Damages Are Actionable (Dan)
   c. Statute of Limitations (Bob)
   d. Preemption by the Connecticut Product Liability Act (Dan)

III. **Petition for Certiorari to United States Supreme Court.** 2:35 p.m. to 2:45 p.m.
   a. Protection of Lawful Commerce in Arms Act (Dan)
   b. Aftermath of Petition for Certiorari (Bob)

IV. **Cases Which Have Cited *Soto*.** 2:45 p.m. to 3:00 p.m.
   a. Citations to *Soto* Re Standing (Dan)
   b. Cases to *Soto* re CPLA (Bob)
   c. Citations From Other Jurisdictions (Bob)
   d. Cases that Fail to Cite *Soto* (Dan)

V. **Unresolved CUTPA Issues that May Be Subject to Reconsideration in Light of *Soto*.** 3:00 p.m. to 3:45 p.m.
   a. The Defendant’s “Primary” Trade or Commerce (Bob)
   b. The Future of the Cigarette Rule (Bob)
c. Damages for Emotional Distress (Dan)
d. The Entrepreneurial Exception to Professional Services (Dan)
e. Contributory Negligence as a Complete Defense to the Third Prong of the Cigarette Rule (Bob)
f. Insurance Law (Dan)
g. Lodestar Four-Part Test (Bob)
h. Employer/Employee and Intracorporate Disputes (Bob)
i. Unfairness Established by Reference to Ethical Requirements of Private Actors or Groups (Dan)
j. Does Injunctive Relief Require Proof of Irreparable Harm? (Bob)
k. Does CUTPA Apply to Non-Merchant Sellers? (Dan)
l. Can a Customer Violate CUTPA? (Dan)
m. The Geographical Reach of CUTPA (Bob)
n. CUTPA’s Application to Independent Contractors (Bob)
o. The Availability of Disgorgement Under CUTPA (Bob)
p. CUTPA and Municipalities (Dan)
q. CUTPA and Breaches of Contract (Dan)
r. Reliance and Causation Principles in Deception Cases (Bob)
s. Can Conduct in Litigation Violation CUTPA? (Bob)

VI. Q&A Session. 3:45 p.m. to 4:00 p.m. (Bob and Dan)
Robert M. Langer, Wiggin and Dana LLP
Bob Langer is Co-chair of his firm’s Antitrust & Consumer Protection Practice Group. He has extensive experience litigating and counselling in the areas of antitrust, unfair trade practices and constitutional law, representing clients in both federal and state courts, before the Federal Trade Commission, the Antitrust Division of the US Department of Justice, the offices of state attorneys general, state consumer protection agencies, and other state regulatory bodies. He is the co-author of Volume 12 of the Connecticut Practice Series, the definitive treatise on CUTPA and the Connecticut Antitrust Act. Bob has taught antitrust, unfair trade practices and constitutional law for forty years as an adjunct professor at UConn Law School and in UConn’s MBA Program. Prior to joining Wiggin and Dana in 1994, Bob served as Connecticut’s Assistant Attorney General in charge of both antitrust and consumer protection.

Daniel P. Scholfield, Pullman & Comley LLC
Dan is an attorney in his firm’s litigation department, where he focuses on unfair trade practices, business torts, and other types of commercial disputes. He also has extensive experience prosecuting and defending appeals before both the Connecticut Supreme and Appellate Courts. He has represented a wide variety of clients, ranging from large corporations to small local businesses. Since 2015, he has been a contributing author to Volume 12 of the Connecticut Practice Series on Unfair Trade Practices, Business Torts, and Antitrust. He also teaches a course on Civil Procedure in the Legal Studies Department at the University of New Haven.
THE IMPACT OF
SOTO V. BUSHMASTER
UPON THE SCOPE OF CUTPA
AND PRODUCT LIABILITY
LAW

Robert M. Langer – Wiggin and Dana LLP
Daniel P. Scholfield – Pullman & Comley LLC
SOTO V. BUSHMASTER FIREARMS INTERNATIONAL, LLC, 331 Conn. 53, 202 A.3d 262 (2019)
At least four important holdings regarding interpretations of CUTPA

1. Eliminates the “commercial relationship” test.

2. Provides that “at least with respect to wrongful advertising claims” damages for personal injuries are recoverable under CUTPA.

3. Wrongful conduct up to the time of filing can satisfy the statute of limitations.

4. CUTPA not always preempted by the Connecticut Product Liability Act.
COMMERCIAL RELATIONSHIP TEST

*Soto v. Bushmaster Firearms International, LLC, 331 Conn. 53 (2019)*
COMMERCIAL RELATIONSHIP TEST

The test required some sort of “commercial” or “business” relationship between a plaintiff and a defendant in order for the plaintiff to have standing to bring a CUTPA claim. *Ventres v. Goodspeed Airport, LLC, 275 Conn. 105* (2005).

This test was utilized by lower courts as early as 1987.
Soto found that any party “directly injured by conduct resulting from [unscrupulous or illegal] ... advertising” can bring a CUTPA action, whether a commercial relationship exists or not.
In *Soto*, the allegation was that Bushmaster’s advertising unscrupulously encouraged Lanza’s massacre.

The Court concluded that the plaintiffs had standing to bring CUTPA claims for this conduct even though they were not Bushmaster customers.
PERSONAL INJURIES ARE ACTIONABLE

PERSONAL INJURIES ARE ACTIONABLE

Prior to 2019, there was a split of authority as to whether damages for personal injuries were recoverable under CUTPA.
PERSONAL INJURIES ARE ACTIONABLE

*Soto* held: “at least with respect to wrongful advertising claims” that damages for personal injuries are recoverable under CUTPA.
PERSONAL INJURIES ARE ACTIONABLE

The Dissent stated that it assumed, without deciding, “that the majority properly concludes [that] . . . personal injuries . . . are cognizable under CUTPA.”
STATUTE OF LIMITATIONS

*Soto v. Bushmaster Firearms International, LLC, 331 Conn. 53 (2019)*

STATUTE OF LIMITATIONS
Although the three-year statute of limitations under CUTPA for the sale of the XM15-E2S assault rifle to Lanza’s mother would have begun to run on the date of the sale, the wrongful advertising claims included conduct up to both the date of the massacre and the date that the Complaint was filed, and thereby satisfied the statute of limitations.
CONNECTICUT PRODUCT LIABILITY ACT

CONNECTICUT PRODUCT LIABILITY ACT

*Soto* fundamentally changed Connecticut product liability law.
CONNECTICUT
PRODUCT LIABILITY ACT

Before Soto . . .
A “[p]roduct liability claim includes all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product.” Conn. Gen. Stat. §52-572m(b) (internal quotation marks omitted; emphases added).
CONNECTICUT PRODUCT LIABILITY ACT

Also before Soto . . .
Product liability claims are exclusive, preempts “all other claims against product sellers ... for harm caused by a product.” Conn. Gen. Stat. § 52-572n(a) (emphasis added).
CONNECTICUT PRODUCT LIABILITY ACT

So before Soto . . .
The Court only permitted a CUTPA claim to accompany a CPLA claim where the plaintiff alleged financial injuries arising from an artificially inflated price for the product.

CONNECTICUT PRODUCT LIABILITY ACT

In Soto . . .
Wrongful marketing did not equate to a product defect and consequently did not fall within the purview of the CPLA.
“[T]he defendants’ fail to offer any explanation as to why the allegation that they wrongfully marketed the XM15-E2S by promoting the gun’s use for illegal purposes – offensive, military style assault missions – amounts to a product defect claim. There is no allegation in the present case, for example, that the marketing of the X15-E2S contained inadequate warnings that made the weapon unreasonably dangerous.”

_Soto_, 331 Conn. at 107 (emphases added).
CONNECTICUT PRODUCT LIABILITY ACT

How about . . .
The CPLA text itself does not distinguish between “warnings,” “instructions,” and “marketing” in defining a “product liability claim.”
CONNECTICUT PRODUCT LIABILITY ACT

Our model jury instructions say that faulty “warnings or instructions” constitute a “product defect.”
CONNECTICUT PRODUCT LIABILITY ACT

Unique incentives – i.e., attorneys fees and punitive damages.
PETITION FOR CERTIORARI
DENIED BY SCOTUS
Nov. 12, 2019

Remington Arms Co., LLC, et al. v. Donna L.
Soto, Administratrix of the Estate of Victoria
L. Soto, et al. (No. 19-168)
PETITION FOR CERT.

*Soto* was decided 4-3. The split concerned the application of the Protection of Lawful Commerce in Arms Act, 18 U.S.C. §921, *et seq.*
PETITION FOR CERT.

Primary issue in the petition for cert. concerned Soto’s conclusion that the PLCAA did not preclude a CUTPA claim under the so-called “predicate” exception.
The predicate exception of the PLCAA permits state-law claims “applicable to the sale or marketing” of a firearm or ammunition. The majority in Soto concluded that CUTPA was one such type of claim.
PETITION FOR CERT.

Petitioners claimed, among other things, that the predicate exception did not contemplate a law of general applicability such as CUTPA but, rather, laws of specific applicability, such as background check laws.
The plaintiffs have since filed a Second Amended Complaint in Superior Court and the defendants moved to strike on June 17, 2020.

Among the defendants’ arguments are that the plaintiffs have not pleaded facts establishing that the shooter saw offensive advertising, and, but for seeing it, would not have planned his crimes.
AFTERMATH OF PETITION FOR CERT.

On July 28, 2020, Remington Arms, one of the defendants, filed a Notice and Suggestion of Bankruptcy in the Superior Court. It is presently unclear how long this may delay the final disposition of the case.
CASES WHICH HAVE CITED SOTO ... AND THOSE WHICH HAVE NOT

*Soto v. Bushmaster Firearms International, LLC, 331 Conn. 53 (2019)*
CITATIONS TO SOTO

23 caselaw citations as of August 18, 2020.

Most cite for generic principles of law, but several have relied on Soto for its substantive holdings.
The first substantive citation to Soto was:

_Caesar, LLC v. Cassarino_, Superior Court, judicial district of Tolland at Rockville, TTD-CV18-5010735-S, 2019 WL 4015668 (Aug. 2, 2019, Farley, J.) (absence of commercial relationship between neighbors did not preclude CUTPA counterclaim that plaintiff illegally parked its vehicles on defendant’s land to save money; but primary line of business test did preclude CUTPA claim).
Another early application was:

Russo v. Thornton, Superior Court, Complex Litigation Docket at Stamford, Complex Lit, X08-CV15-6025380-S, 2019 WL 2005873 (Apr. 1, 2019, Lee, J.) (finding, in response to argument that CUTPA did not apply to claim of wrongful diversion of corporate opportunities because dispute was intra-family and therefore did not involve a commercial relationship, that in light of Soto “defendants may wish to reevaluate what is, in essence, their standing argument.”)
Yet another early citation was:

_Dubois v. Maritimo Offshore Pty Ltd_, No. 3:15-cv-1114(JAM), 2019 WL 4723140 (D. Conn. Sep. 26, 2019) (citing _Soto_ and finding standing for negligent misrepresentation claim, but not for contract claim, by plaintiff whose parents bought defective yacht, where plaintiff was involved in negotiations for the same).
Connecticut Citations to Soto Re CPLA

Phillips-Moldex Co. v. Beaulieu Co., LLC, Superior Court, judicial district of Hartford, Docket No. HHD-CV18-6010659-S, 2019 WL 7499960 (December 6, 2019, Taylor, J.) distinguished Soto, concluding that the unfair advertising at issue in Soto was different from a claim that the defendant failed to honor a warranty for a roof it had installed.

None of the representations related to the roof warranty advocated illegal conduct.
Doe v. Bausch & Lomb, Inc., 443 F. supp. 3d 259 (D. Conn. 2020) similarly found that a plaintiff’s attempt to add a CUTPA claim would be futile, because the claim was really a failure to warn claim covered by CPLA exclusivity, and was not a wrongful advertising claim.
Au New Haven, LLC v. YKK Corp., No. 1:15-cv-3411(GHW)(SN), 2019 WL 1437516 (S.D.N.Y. March 31, 2019) (“[C]laims can be brought for conduct which occurred within the three year statute of limitations period, even if the first instance of challenged conduct happened long before[,]” citing Soto and Izzarelli v. R.J. Reynolds Tobacco Co., 117 F. Supp. 2d 167, 177 (D. Conn. 2000)).
Prescott v. Slide Fire Solutions, LP, 410 F. Supp. 3d 1123 (D. Nev. 2019), relying, in part, on Soto to conclude that Nevada deceptive trade practices act fit within predicate exception of PLCAA.
CPLA CASES THAT FAIL TO CITE SOTO

Three recent CPLA cases, all of which came from federal courts, did not cite Soto.
CPLA CASES THAT FAIL TO CITE SOTO

CPLA CASES THAT FAIL TO CITE SOTO

CPLA CASES THAT FAIL TO CITE SOTO

UNRESOLVED CUTPA ISSUES THAT MAY BE SUBJECT TO RECONSIDERATION IN LIGHT OF SOTO
WHAT IS THE DEFENDANT’S “PRIMARY” TRADE OR COMMERCE?


WHAT IS THE FUTURE OF THE CIGARETTE RULE?


“[A] serious question exists as to whether the cigarette rule remains the guiding rule utilized under federal law,” citing Glazer v. Dress Barn, Inc., 274 Conn. 33, 82 n. 34 (2005).

“Because of the likelihood that this court will be required to address this issue in a future case . . . The legislature may wish to clarify its position with respect to the proper test.”
WHAT IS THE FUTURE OF THE CIGARETTE RULE?


The Supreme Court concluded that a negligence claim was legally insufficient, but a CUTPA claim could proceed under all three prongs of the cigarette rule.

The plaintiffs alleged that the defendant consciously decided to depart from federal and state regulatory standards governing loan modification programs in order to increase the plaintiffs’ debt.

The Supreme Court analyzed the CUTPA claim under all three prongs of the cigarette rule, concluding that the plaintiffs stated a viable claim under each prong. The court rejected plaintiff’s negligence claim, however, refusing to impose a duty on the defendant.
Recovery for emotional distress damages


WHEN IS THE ENTREPRENEURIAL EXCEPTION APPLICABLE TO PROFESSIONAL SERVICES?


“Advertising, independent of treatment, can be an entrepreneurial aspect of the practice of medicine.”

Defendant’s statement that he “was one of the country’s leading doctors in his field . . . simply represents to the public that defendant will meet the standard of care applicable to a ‘leading doctor.’”
Contributory Negligence as a complete defense to the third prong of the Cigarette rule

Mead v. Burns, 199 Conn. 651, 665 (1986) (CUTPA claim, premised on CUIPA claim, must be “consistent with regulatory principles established by the underlying statutes.”)

State v. Acordia, Inc., 310 Conn. 1, 37, (2013) (“Because CUIPA provides the exclusive and comprehensive source of public policy with respect to general insurance practices, we conclude that, unless an insurance related practice violates CUIPA or, arguably, some other statute regulating a specific type of insurance related conduct, it cannot be found to violate any public policy and, therefore, it cannot be found to violate CUTPA.”)
Chicago Title Ins. Co. v. LaPuma, Superior Court, judicial district of Ansonia-Milford, Docket No. AAN-CV15-6018031-S, 2016 WL 5339456, at *5 n. 9 (August 23, 2016, Stevens, J.) (“[T]he most rational view of the court’s dicta [in Acordia] may be that a CUTPA claim involving an unfair insurance practice may be premised on a statute other than CUIPA when the legislature explicitly provides that that statute’s violation constitutes an unfair or deceptive insurance practice, thereby preserving the legislative design that the General Assembly’s statutory enactments occupy the field of defining unfair insurance practices.”)
CUTPA AND CUIPA CONT’D

But see Durham v. Metropolitan Group Property and Casualty Co., No. 3:16-cv-01643(VLB), 2017 WL 3097590, at *4 (D. Conn. July 20, 2017) (“In the absence of pleading a CUIPA violation or other offense to public policy, Plaintiff must satisfy the second or third prong of the ‘cigarette rule.’”)

(1) The applicability of the FTC Act and its rules, as well as the presence or absence of any FTC regulatory activity with regard to the suspect practices (none);

(2) The existence and scope of an alternative comprehensive regulatory scheme or system (CUSA);

(3) The presence or absence of any activity by the commissioner of consumer protection within the area of suspect practices (none);

(4) And, the case law of other jurisdictions (comparable Little FTC Acts not applied to the deceptive sale of registered securities).
THE LODESTAR
FOUR-PART
TEST
CON’TD

See also Connelly v. Housing Authority of the City of New Haven, 213 Conn. 354, 365 (1990) (“[T]he failure of the defendant to provide adequate and stable heat and hot water to tenants does not give rise to a claim for damages against it under CUTPA.”)

Normand Josef Enterprises, Inc. v. Connecticut National Bank, 230 Conn. 486, 521 (1994) (“Applying this four part analysis to the circumstances of this case we conclude that the banking industry, unlike the securities industry, is governed by CUTPA.”)
Employer/employee and intracorporate disputes


Whether unfairness may be established by reference to ethical requirements of private actors or groups

Do private litigants seeking injunctive relief under CUTPA require proof of irreparable harm?

*Fairchild Heights Residents Ass’n v. Fairchild Heights, Inc.*, 310 Conn. 797 (2014) (no)
Does CUTPA apply to non-merchant sellers?


_Silva v. Aparo_, 42 Conn. L. Rptr. 345, 2006 WL 3491866 (Nov. 8, 2006, Shapiro, J.) (no)
Can a customer violate CUTPA?


What is the geographical reach of CUTPA?

Application of CUTPA to independent contractors


Siji Yu v. Pitney Bowes, Inc., Superior Court, judicial district of Stamford, Docket No. FST-CV19-6039771-S, 2019 WL 4060118 (August 8, 2019, Sommer, J.) (no, because p did not allege conduct that would take his claim outside of what was otherwise an employer-employee relationship)
Is disgorgement an available CUTPA remedy?

CUTPA and municipalities

*Connelly v. Housing Authority of the City of New Haven*, 213 Conn. 354, 365 (1990) (CUTPA does not apply to municipal housing authorities)
CUTPA and breaches of contract

Reliance and causation principles in deception cases


*Abrahams v. Young and Rubicam, Inc.*, 240 Conn. 300 (1997)

Is conduct in litigation within the scope of CUTPA?


Thank you.

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