



Another Route To Enjoining Deceptive Business Practices

The CUSPA can substitute for or supplement its better-known sibling

By EDWARD J. HEATH

Claims under the Connecticut Unfair Trade Practices Act, 42-110a, *et seq.* are a staple of business litigation. When a deceptive practice is at issue, and CUTPA's ascertainable loss element may be difficult to prove, claimants and counter-claimants would be wise to consider including an additional or alternative count under CUTPA's often-overlooked sibling, the private cause of action found in the Connecticut Unfair Sales Practices Act.

Specifically, CUSPA's Section 42-115e brings with it a less onerous standard and key statutory presumptions that together streamline the road to an injunction and the recovery of attorneys' fees and costs.

The reference to "Sales" in the name of the statutory chapter may be the cause of Section 42-115e's relative obscurity, but this private cause of action is not restricted to sales activities. The statute more generally provides that a claimant "likely to be damaged by a deceptive trade practice of another" may be awarded an injunction addressing that practice "under principles of equity and on terms the court considers reasonable." Conn. Gen. Stat. Sec. 42-115e(a).

Although CUSPA does not define "deceptive trade practice," it is reasonable to interpret that phrase consistent with CUTPA. According to the Connecticut Supreme Court, a practice is "deceptive" for purposes of CUTPA if three requirements are met: "First, there must be a representation, omission or other practice likely to mislead consumers. Second, the consumer must interpret the message reasonably under the

circumstances. Third, the misleading representation, omission or practice must be material—that is, likely to affect consumer decisions or conduct." *Caldor v. Heslin*, 215 Conn. 590, 597 (1990)

These three elements have been the subject of extensive analysis that need not be repeated here, but it is worth noting the importance of totality and context. In assessing those elements, and thus a claim under Section 42-115e, "the entire advertisement, transaction or course of dealing will be considered." *State v. American Recycling Technologies Inc.*, No. CV040832985, 2009 Conn. Super. LEXIS 1194, *10 (Conn. Super. Ct. May 5, 2009) (quoting F.T.C. Policy Statement appended to *Cliffdale Associates Inc.*, 103 F.T.C. 110, 174 (1984)).

Lightened Standard

CUSPA's punch comes in the second sentence of Section 42-115e. Unlike CUTPA's "ascertainable loss" requirement, CUSPA expressly relieves a claimant of the need to prove that the challenged practice caused a financial harm or had an impact on its ability to fairly compete. Likewise, a claimant need not show actual consumer confusion or misunderstanding. The test is whether the practice is "likely" to mislead or confuse consumers.

Added to this lightened standard is the presumption that the claimant has suffered irreparable injury and lacks an adequate remedy at law. In other contexts, Connecticut's Supreme and Appellate courts have

concluded that when a statute provides for injunctive relief, a court should conclude that those two customary requirements are implicitly satisfied. See, e.g., *Gelinas v. West Hartford*, 225 Conn. 575, 588, 626 A.2d 259 (1993).

The logic is that the legislature would not have provided for an injunctive remedy unless it had already determined that a violation of the statute necessarily caused irreparable harm and left the claimant without an adequate legal remedy. In an unpublished 2006 decision, Superior Court Judge Samuel Sferrazza thoroughly surveyed the relevant case law to conclude that this presumption should also apply to claims brought under 42-115e, regardless of whether the injunction sought is temporary or permanent, and whether the claimant is a private or governmental entity. *RW Group, Inc. v. Pharmacare Management Services Inc.* No. X07-CV-054003840S, 2006 Conn. Super. LEXIS 1256, *2-6 (Conn. Super. Ct. Apr. 27, 2006).

Finally, even though a claimant must



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demonstrate a “deceptive” practice, proof of an “intent to deceive is not required.” Sec. 42-115e(a). In other words, a deceptive practice that results from negligence, or possibly mere inadvertence, may warrant an injunction under CUSPA. If, however, the claimant proves that the other party has “willfully” engaged in the deceptive practice, then the court may award attorneys’ fees and costs.

It is unclear how the term “willfully” should be interpreted in this context. On the one hand, it could include a defendant who intentionally engages in the challenged practice, unaware of its deceptive potential.

On the other, the term may have a more restrictive meaning and be limited to situations where a defendant intentionally engages in a challenged practice in order to obtain

the benefits of the deception. The section’s limitation of fee awards to “exceptional” cases suggests that the latter application is likely the more reasonable one. Regardless of which interpretation holds, businesses who find themselves embroiled in trade practices litigation should not overlook Section 42-115e and its streamlined injunction standard. ■