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# SUPREME COURT

OF THE

# STATE OF CONNECTICUT

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SC 20607

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MARJORIE GLOVER, *ET AL.*,

*Plaintiffs-Appellants,*

v.

BAUSCH & LOMB INC., *ET AL.*,

*Defendants-Appellees.*

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BRIEF FOR *AMICUS CURIAE* CONNECTICUT TRIAL LAWYERS ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE

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## I. INTEREST OF THE AMICUS CURIAE[1]

Connecticut Trial Lawyers Association ("CTLA") is a non-profit Connecticut corporation dedicated to the preservation of the rights of injury victims. The general goal of CTLA's members is to maintain full and fair access for victims to redress their injuries in the courts. CTLA seeks to participate as amicus curiae in cases raising important or novel issues likely to affect injury victims beyond the plaintiff in the particular case.

American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Connecticut. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Injury victims generally do not possess the financial means or the organizational ability to protect their interests as a group. Narrow issues in any particular case can have the potential for broad implications affecting countless individuals. Such individuals rely on trial lawyers' organizations, including CTLA and AAJ, to represent their interests in a professional and responsible manner.

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[1] Pursuant to Practice Book § 67-7, undersigned counsel hereby states that this brief was written by undersigned counsel on behalf of the amicus curiae without contribution from any other persons.

## II. FACTUAL BACKGROUND

For a detailed summary of the facts and procedural history of this case, the Amicus Curiae respectfully refer this Court to the decision of the Second Circuit, *see Glover v. Bausch & Lomb Inc.*, 6 F.4th 229 (2d Cir. 2021), and the Brief of the Plaintiffs-Appellants, *see* Pl. Br. at pp. 5-14.

## III. ARGUMENT[2]

This certified appeal requires this Court to determine the scope of the exclusivity provision of the Connecticut Product Liability Act ("CPLA"), which mandates that "[a] product liability claim . . . may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product." Conn. Gen. Stat. § 52-572n(a). The Defendants-Appellees (hereinafter collectively "Bausch") propose that the CPLA's exclusivity provision bars all claims under the Connecticut Unfair Trade Practices Act ("CUTPA") whenever a plaintiff is injured by a defective product. Such a bright-line rule is a misconstruction of the CPLA and CUTPA that would allow product sellers to avoid liability for blatantly unfair and unscrupulous business conduct and foreclose an avenue of recovery for injured consumers in contravention of the intent and purpose of CUTPA.

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[2] This amicus brief is addressed to the second question certified by the Second Circuit, namely whether the Connecticut Product Liability Act's exclusivity provision bars a claim under the Connecticut Unfair Trade Practices Act for wrongful marketing where the manufacturer knows that the product presents a substantial risk of injury.

### A. Reading the CPLA's Exclusivity Provision to Preclude CUTPA Claims in Every Action with a Viable CPLA Claim is Inconsistent with the Text and Legislative History of Both the CPLA and CUTPA.

By their terms, the CPLA and CUTPA provide remedies for harm caused by different types of wrongdoing. The CPLA addresses injuries caused by the manufacture, design, or sale of a defective product;[3] while CUTPA addresses harm resulting from deceptive or unfair practices perpetrated in the course of trade or commerce.[4]

Bausch argues that the CPLA's exclusivity provision precludes all CUTPA claims in every action brought by a plaintiff who was injured by a defective product – regardless of the defendant's underlying conduct. As a practical matter, the fact that the product happens to be defective should have no bearing on the defendant's liability for its deceptive marketing of the product under CUTPA. Indeed, it would make little sense for a product seller who aggressively and deceptively marketed a defective product to be able to avoid liability under CUTPA when a product seller who aggressively and deceptively marketed a product that was *not* defective could be subject to liability under CUTPA. In determining whether the CPLA precludes a particular CUTPA claim, the decision should be based on the defendant's conduct; not merely on the involvement of a defective product or the existence of a CPLA claim.

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[3] *See* Conn. Gen. Stat. § 52-572m(b) ("'Product 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. 'Product liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent.").

[4] *See* Conn. Gen. Stat. § 42-110b ("No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.").

Creating a loophole for product sellers to escape CUTPA liability was plainly not the intention of the legislature in enacting the CPLA. The text of the CPLA itself demonstrates that it was not intended to affect existing statutory schemes not listed in § 52-572n(a). The exclusivity provision does not expressly preclude CUTPA or any other statutory claims. Instead, it specifically precludes claims of "negligence, strict liability and warranty." Conn. Gen. Stat. § 52-572n(a). The legislature could have easily included CUTPA claims in the list of causes of action expressly precluded in § 52-572n(a) but chose not to do so. The absence of any reference to CUTPA in the CPLA's exclusivity provision clearly reflects the legislature's intention, when it passed the CPLA, that CUTPA retain its independent vitality as a distinct remedy for unfair or unscrupulous business practices occurring in connection with the sale of a product. *See Doucette v. Pomes*, 247 Conn. 442, 457 (1999) ("Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended [a] list to be exclusive.").[5]

Moreover, the legislative history of the CPLA makes clear that the legislature did not intend § 52-572n(a) to impact the availability of remedies under CUTPA or any other consumer protection statutes:

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[5] As former Justice Vertefeuille noted while sitting as a judge on the Superior Court:

> The court can presume that laws are enacted in view of existing statutes and that the legislature created a consistent body of law. . . . Because § 52-572n was adopted when the CUTPA statutes already existed and the CUTPA cause of action was not expressly precluded in the statute, the court presumes that the legislature did not intend to preclude the joining of a CUTPA claim with a claim under CPLA.

*Gaetano v. Reich*, No. CV97-0142920S, 1998 WL 128922, at *1 (Conn. Super. Ct. Mar. 11, 1998); *see also Feliciano v. State,* 336 Conn. 669, 683 (2020) ("[T]he legislature is always presumed to have created a harmonious and consistent body of law. . . .") (internal quotation marks and citation omitted).

> [The exclusivity provision] sets forth that the Bill is intended as a substitute for prior theories of harm caused by a product. This section is intended to cut down on the number of counts in a complaint for injuries caused by a product. *It is not intended to affect other state statutory schemes such as anti-trust acts or the state unfair trade practices act.*

*Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 128-29 (2003) (quoting 22 S. Proc., Pt. 14, 1979 Sess., pp. 4636-37) (emphasis in *Gerrity*). The CPLA "was intended to merge various theories into one cause of action rather than to abolish all prior existing rights." *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 292 (1993). Accordingly, the text and legislative history of the CPLA allow for the possibility that concurrent claims can be brought under the CPLA and CUTPA.

This Court recognized as much in *Gerrity*, where it undertook a thorough construction of the CPLA before holding that a CUTPA claim is not, *per se*, barred by the CPLA's exclusivity provision. *Gerrity*, 263 Conn. at 129-30 (holding that a CUTPA claim alleging a financial injury may be brought "in conjunction" with a CPLA claim). The Court concluded that the CPLA "was not designed to eliminate claims that previously were understood to be outside the traditional scope of a claim for liability based on a defective product," and that only those CUTPA claims that were "nothing more than a product liability act claim dressed in the robes of CUTPA" would be precluded. *Id.* at 128-29; *see also Hurley v. Heart Physicians, P.C.*, 278 Conn. 305, 325 (2006) (same). In *Soto*, the Court underscored this reasoning when it held that wrongful advertising claims involving assault rifles were not precluded by § 52-572n(a) because they did not represent "veiled product liability claims." *Soto v. Bushmaster Firearms, Int'l, LLC*, 331 Conn. 53, 109 (2019).[6]

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[6] In addition, *Soto's* recognition that the legislature intended for personal injuries to be recoverable under CUTPA, just as they are under the CPLA, bolsters the argument that the legislature intended for consumers to be able to recover damages for personal injuries

Bausch's interpretation of § 52-572n(a) attempts to expand the holdings in *Gerrity*, *Hurley* and *Soto* in order to create a bright-line rule that all claims brought by a plaintiff who was injured by a defective product are "veiled" CPLA claims. Such a position is an untenable misconstruction of both the CPLA and CUTPA. It is undisputed that the aggravating conduct that supports a traditional CPLA claim may overlap at times with the conduct that supports a CUTPA claim, as it does in this case. This does not mean that the CUTPA claim is a "masked" or "veiled" product liability claim, as Bausch proposes. Unlike a CPLA claim, a CUTPA claim cannot be based on allegations of negligence alone.[7] *See AG- Foods, Inc. v. Pepperidge Farm, Inc.*, 216 Conn. 200, 216-17 (1990) (holding that, where the claim is one founded in negligence, a CUTPA claim cannot be established on the first criterion of the cigarette rule alone and that negligence is not inherently immoral, unethical, oppressive or unscrupulous so as to satisfy the second criterion) (internal quotation marks omitted); *Ulbrich v. Groth*, 210 Conn. 375, 410 n.31 (2013) (acknowledging that "mere negligence . . . will not support a CUPTA claim under the second prong of the cigarette rule in the absence of proof of immoral unethical, oppressive, or unscrupulous conduct") (citing *Naples v. Keystone Bldg.*

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resulting from the wrongful marketing of a product under CUTPA, notwithstanding the availability of remedies under the CPLA.

[7] In order to bring a CUTPA claim, the plaintiff must plead and prove that a defendant engaged in an unfair business practice which: (1) offends public policy as it has been established by statutes, the common law or otherwise such that it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous; and/or (3) causes substantial injury to consumers. *See Cheshire Mortg. Serv. Inc. v. Montes*, 223 Conn. 80, 106 (1992) (applying the Federal Trade Commission's "cigarette rule"); *but see Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 123 n.46 (2019) (noting that the continued application of the cigarette rule may be reexamined in the future in light of the emergence of a test known as "the substantial unjustified injury test," under which an act or practice is unfair if (1) it causes substantial injury, (2) the injury is not outweighed by countervailing benefits to consumers or competition, and (3) the injury is one that consumers themselves could not reasonably have avoided) (citation omitted).

*and Dev. Corp.*, 295 Conn. 214, 228-29 (2010)). Though a CUTPA claim can encompass some acts of negligence, the viability of such a claim is a question of degree and the particular facts in issue. Thus, in many situations, negligent conduct that supports a CPLA claim may not be enough to sustain a CUTPA claim, and preclusion would be appropriate. However, when there *is* a viable CUTPA claim, as there is here, the text and legislative history of the statutes make clear that both CPLA and CUTPA claims may be brought – and should be brought – concurrently. The preclusion of a true CUTPA claim under those circumstances would allow product sellers to escape liability for blatantly unscrupulous conduct and would frustrate CUTPA's remedial purpose.

### B. The Preclusion of CUTPA Claims in Every Action with a Viable CPLA Claim Would Undermine the Expansive Remedial Purpose of CUTPA.

The purpose and intent of CUTPA would be completely subverted if consumers were unable to bring a CUTPA claim simply because they also had viable claims under the CPLA. "The purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce. . . ." *Eder Bros., Inc. v. Wine Merchs. of Connecticut, Inc.*, 275 Conn. 363, 380 (2005). In order to effectuate that purpose, CUTPA provides for a broad range of consumer-based remedies, unavailable at common law or under the CPLA. These statutory remedies include damages for economic loss arising from the consumer's purchase of a product as well as broad equitable relief, including, but not limited to, restitution, disgorgement of profits, and injunctive relief. *See* Conn. Gen. Stat. § 42-110g(a).

An interpretation of the CPLA to exclude a CUTPA cause of action whenever a defective product is involved is inconsistent with the "self-avowed 'remedial'" purpose of CUTPA. *Sportsmen's Boating Corp. v. Hensley*, 192 Conn. 747, 756 (1984) (citing Conn. Gen. Stat. § 42-110b(d)), which mandates that CUTPA's "expansive" statutory scheme be

construed liberally to achieve its public policy goals. *Sportsmen's Boating Corp.*, 192 Conn. at 756. Indeed, as this Court has recognized, "there is no . . . unfair method of competition, or unfair [or] deceptive act or practice that cannot be reached [under CUTPA]." *Associated Inv. C. P'ship v. Williams Assocs. IV*, 230 Conn. 148, 158 (1994) (internal quotations marks and citation omitted).

Like its reach, the remedies provided under CUTPA are also expansive and afford types of relief substantially different from and more comprehensive than the remedies previously available under common law. This Court has recognized that "the sweeping language" of the statute was expressly intended by the legislature to allow the courts to develop a body of case law responsive to evolving marketplace practices. *Id.* at 157-58. As this Court has stated:

> The plaintiff who establishes CUTPA liability has access to a remedy far more comprehensive than the simple damages recoverable under common law. The ability to recover both attorney's fees; General Statutes § 42-110g(d); and punitive damages; General Statutes § 42-110g(a); enhances the private CUTPA remedy and serves to encourage private CUTPA litigation. The legislative history . . . demonstrates that CUTPA seeks to create a climate in which private litigants help to enforce the ban on unfair or deceptive trade practices or acts. *To interpret CUTPA narrowly, perhaps on the ground that a victimized consumer has other, less complete, remedies available to him, effectively negates this legislative intent.*

*Hinchliffe v. Am. Motors Corp.*, 184 Conn. 607, 617-18 (1982) (emphasis added). An injured consumer should not be deprived of the distinct remedies available under CUTPA for a product seller's unscrupulous business conduct simply because there are additional remedies available to her under the CPLA for its distribution of a defective product.

The exclusion of CUTPA claims in cases involving product defects would negatively impact not only prospective plaintiffs but also the public at large. As this Court emphasized

in *Hinchliffe*, the private consumer remedy made available under CUTPA is critical to the enforcement of Connecticut's consumer protection legislation:

> The crucial nature of the role envisioned for the private consumer remedy was underscored during debate on chapter 735a and the amendments thereto. Senator Stephen C. Casey, for example, remarked: "The bill in general would promote greater cooperation between public and private efforts to enforce the uniform trade practices act. The Attorney General's office is hampered in this enforcement effort by its limited staff. Private litigation under this act is essential and the proposal would ease the burden on private individuals and thus encourage private litigation."

*Id.* at 615 n.5 (internal citations omitted).[8]

If this Court were to hold that the CPLA exclusivity provision bars all CUTPA claims whenever a consumer is injured by a defective product, as Bausch proposes, private consumers would be unable to enforce CUTPA's provisions in situations where enforcement would be particularly warranted – *i.e.*, situations in which public safety is implicated. *See Soto,* 331 Conn. at 116 (recognizing CUTPA claims for personal injuries caused by wrongful advertising of assault rifles). Product sellers would have little incentive to not engage in deceitful and aggressive marketing when selling a product it knows to be unreasonably dangerous. Moreover, a product seller who failed to issue adequate warnings but did not take affirmative action to deceive consumers would be subject to the same liability as a product seller who engaged in deliberate misconduct by hiding known dangers and making deceitful misrepresentations. This outcome would not only be inherently unfair but would

[8] Significantly, Senator Casey's comments cited above were made in connection with discussion of amendments to the CUTPA statute in 1979 and occurred in the same legislative session that passed the CPLA. It is simply inconceivable that the same legislature that envisioned such an expansive role for CUTPA would have intended, by enacting the CPLA, to eliminate the applicability of CUTPA to conduct in connection with the sale of a product.

also "be inconsistent with the stated intent of the legislature to provide broad protection from unfair trade practices and to incentivize private enforcement of the law." *Id.* at 113.

The expansive remedial nature of CUTPA and its independent availability as a cause of action distinct from the CPLA to remedy unfair business practices in connection with the sale and marketing of a product makes eminent sense. There is an important difference between, on the one hand, a claim that a defendant has engaged in deliberate, deceptive, and aggressive marketing of a product that it knows to be dangerous – a blatantly unfair, deceitful, and oppressive trade practice – and, on the other hand, the classic product liability-type claim that a defendant's failure to issue adequate warnings resulted in an unreasonably dangerous product. Both types of wrongdoing warrant recovery and an injured consumer should not be precluded from pursuing remedies for the former simply because she may also be entitled to relief for the latter.

In enacting CUTPA as a comprehensive consumer-based remedy with injunctive, equitable, sovereign enforcement and punitive damages[9] relief, the legislature did not intend that such relief should be denied in cases of blatantly unfair or unscrupulous misconduct merely because that misconduct arose in connection with the sale of a defective product. Nothing in the texts or legislative histories of either the CPLA or CUTPA suggests that the legislature ever intended such a result. Accordingly, this Court should confirm that § 52-572n(a) of the CPLA does not preempt a cause of action under CUTPA to remedy injuries caused by an unfair trade practice merely because a defective product was involved.

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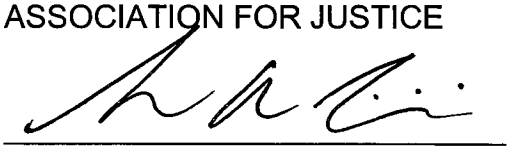
[9] While both the CPLA and CUTPA allow for punitive damages, the remedy under the CPLA is limited to an amount equal to twice the plaintiff's compensatory damages. Conn. Gen. Stat. § 52-240b. There is no such limitation under CUTPA. *See* Conn. Gen. Stat. § 42-110g(a).

## IV. CONCLUSION

CTLA and AAJ respectfully request that this Court answer the second certified question in the negative.

Respectfully Submitted,

CONNECTICUT TRIAL LAWYERS ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE

BY: 

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## PRACTICE BOOK § 67-2 CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of the Amicus Curiae complies with the provisions of Rule of Appellate Procedure § 67-2. Pursuant to Rule § 67-2(i), I further certify that (1) an electronic version of the Brief of the Amicus Curiae has been filed in compliance with the provisions of Rule § 67-2; (2) the Brief is a true copy of the Brief that was submitted electronically pursuant to Rule § 67-2; and (3) the Brief has been redacted and/or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

SARAH A. RICCIARDI

**CERTIFICATION OF SERVICE**
**PURSUANT TO PRACTICE BOOK § 62-7**

I hereby certify that the foregoing has been served electronically on all counsel of record, pursuant to Rules of Appellate Procedure §§ 62-7 and 67-2, on this 15th day of October, 2021, as follows:

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