

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

SC 19219

ARTIE'S AUTO BODY, INC., et al.

v.

THE HARTFORD FIRE INSURANCE COMPANY

**BRIEF OF DEFENDANT-APPELLANT
THE HARTFORD FIRE INSURANCE COMPANY
WITH SEPARATE APPENDIX**

**ATTORNEYS FOR
DEFENDANT-APPELLANT:**

**Jonathan M. Freiman
Aaron S. Bayer
Robert M. Langer
Carolina D. Ventura
Benjamin M. Daniels
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
(203) 782-2889 (fax)
jfreiman@wiggin.com
abayer@wiggin.com
Juris No. 67700**

**TO BE ARGUED BY:
Jonathan M. Freiman
or Aaron S. Bayer**

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STATEMENT OF ISSUES

This is an appeal from a \$34.77 million judgment in favor of a plaintiff class of auto body repair shops based on a finding that Hartford Fire Insurance Company (Hartford) violated CUTPA by negotiating with the shops to pay lower hourly labor rates for repairs. After Hartford offered certain rates to Plaintiffs to perform auto body repair work, Plaintiffs accepted the work at those rates and were paid for it, then sued under CUTPA, claiming that the rates represented an “unfair” “suppression” of labor rates. Liability was based solely on Plaintiff’s theory that Hartford’s oversight of its employee-appraisers in their rate negotiations with body shops offended a public policy in a “penumbra” of a Department of Insurance (“DOI”) ethics regulation requiring independent appraisals. That unwritten policy had never been articulated by any court – or by the DOI, which has long maintained that its regulation has nothing to do with labor rates. The jury awarded \$14.77 million in compensatory damages, after which the trial court awarded \$20 million in punitive damages and entered a permanent injunction.

The judgment below raises the following issues on appeal.

1. Must the judgment in its entirety be reversed because:
 - a. Under *State v. Acordia, Inc.*, 310 Conn. 1 (2013), and *Mead v. Burns*, 199 Conn. 651 (1986), insurance-related conduct that is not prohibited by CUIPA cannot violate CUTPA (Pages 16-20)?;
 - b. Under *Mead v. Burns*, 199 Conn. 651 (1986), CUTPA liability cannot be based on the violation of a public policy found in the “penumbra” of a DOI Regulation when DOI has made it clear that such a policy is inconsistent with the scope of its regulation and the operation of its regulatory scheme. (Pages 20-24)?;

- c. CUTPA is not intended to be used by sellers to avoid the constraints of a competitive market and raise prices on their consumers (Pages 24-26)?; or
 - d. CUTPA liability is precluded because the jury found no “substantial injury to Plaintiffs not outweighed by countervailing benefits to consumers or competition,” and the proper test for determining unfair acts or practices under CUTPA is the “substantial unjustified injury” test long ago adopted by the FTC and Congress, not the old “cigarette rule” test abandoned by federal law? (Pages 26-34).
2. Must the \$20 million punitive damages award be reversed because:
- a. The court refused to defer to the jury’s express factual finding that Hartford did not engage in any “immoral, unethical, oppressive or unscrupulous conduct,” and while ignoring that finding, concluded that Hartford’s conduct in labor rate negotiations amounted to “reckless indifference to the rights of others or an intentional and wanton violation of those rights”? (Pages 34-36); or
 - b. A defendant whose conduct conforms precisely to an agency’s interpretation of its own regulation, and who therefore acts under an honest claim of right, cannot be subjected to punitive damages for violating a never-before-articulated “penumbra” of the regulation? (Pages 36-39)
3. Must the injunction be reversed because the trial court erred in:
- a. Holding that CUTPA absolves private plaintiffs seeking an injunction from the long-standing common law requirement of establishing irreparable harm (Pages 39-41)?;
 - b. Justifying the entry of a permanent injunction solely on the fact that Hartford exercised its right to challenge the trial court’s legal conclusions in a post-verdict motion and on appeal – particularly where, as here, the court

recognized that Hartford took the appeal in good faith and was likely to prevail on appeal (Pages 41-42)?; or

- c. Failing to weigh the harms to Hartford, the free market, and consumers, even as the court found that enjoining “just one insurance company with only a 6% market share . . . potentially could upset the competitive balance in the market to the serious disadvantage of the one company under review while its competitors are not under review” and “could result in an unworkable chaotic market for insurance to the detriment of certain competitors and the advantage of others, with unanticipated effects on Connecticut automobile insurance policyholders”? (Pages 42-43)

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INTRODUCTION

This appeal asks whether an insurer violates CUTPA when it tries to negotiate lower prices for auto body repairs. Hartford Fire Insurance Company (Hartford) offered certain hourly rates to the plaintiff class of Connecticut auto body repair shops for repair work. After accepting the work and being paid for it, the auto body repair shops sued under CUTPA, claiming that the rates represented an “unfair” “suppression” of labor rates. By endorsing that theory, the judgment below turns CUTPA on its head. It allows sellers to use a pro-consumer statute to avoid market forces and raise prices – and it punishes Hartford for seeking lower consumer prices.

This case therefore raises two fundamental questions about CUTPA's scope. The first is a question to which this Court has already answered no: can a violation of an unwritten (and never-before-articulated) “penumbra” of a written law amount to a CUTPA violation when the newly-discovered penumbra is inconsistent with the law itself? The second is an old question that this Court has not yet answered: does CUTPA's mandate that courts be guided by developments in federal unfairness law require abandonment of the “cigarette rule,” which federal law tossed aside long ago as an unsuitable test for unfairness? If the cigarette rule – so named from its origin in a federal agency proceeding – permits the result in this case, then the time has come to answer that question.

The CUTPA claim here arises at the intersection of two highly competitive markets: the auto insurance market and the auto body repair market. Competition in both markets helps consumers. Market forces require Hartford, with only a 6% share of the auto insurance market, to work vigorously to keep down costs so it can compete effectively, which ultimately benefits its policyholders. Auto body shops must also compete to get work from insurers – who pay for over 90% of all auto body repairs. That too keeps prices down and benefits consumers.

Like any seller of goods or services, Plaintiffs wanted to increase profits by charging more. Unable to convince their customers, including Hartford, to pay more, the auto body

shops aimed to use CUTPA to force them to pay more – at the expense of consumers and competition. Plaintiffs sold body shop work to Hartford at rates consistent with what other consumers paid because if they didn't, competing body shops would have sold the work at those rates. Then the shops cried foul, bringing a class action suit alleging that Hartford suppressed labor rates in violation of CUTPA. Negotiating for lower prices is not “unlawful rate suppression,” and it flies in the face of CUTPA’s animating principles to say that CUTPA forbids negotiating for lower prices.

Plaintiffs offered a host of legal norms that they claimed Hartford violated by trying to keep its auto body repair costs down¹ – including claims that Hartford improperly steered customers to a preferred provider network and that its conduct violated the Connecticut Unfair Insurance Practices Act (CUIPA) and the Connecticut Department of Insurance (DOI) Guidelines on body shop labor rates. The jury rejected all but one: a claim that Hartford’s interactions with its employee-appraisers violated CUTPA by infringing a public policy found in a never-before-articulated “penumbra” of a DOI regulation governing the conduct of appraisers.

That regulation requires licensed appraisers to assess damage to a vehicle fairly and impartially. The DOI, which wrote and enforces the regulation, has said repeatedly that the regulation governs the assessment of vehicle damage and needed repairs, but does not apply at all to labor rates. Instead, the DOI states that such rates are to be negotiated with auto body shops and that insurers may train and use employee-appraisers to negotiate body shop labor rates; when appraisers engage in negotiations, they act as employees, not in their capacity as “licensed appraisers.” The jury was nevertheless permitted to find that Hartford’s use of its employee-appraisers to negotiate lower labor rates offended a penumbra of the regulation, which in turn violated a single prong of the cigarette rule defining unfairness under CUTPA. That led to \$14.7 million in compensatory damages.

¹ See *Artie’s Auto Body, Inc. v. Hartford Fire Ins. Co.*, 287 Conn. 208 (2008).

The trial court then entered a permanent injunction against Hartford, even though it recognized that enjoining a single company “could upset the competitive balance in the market to the serious disadvantage of the one company under review” and even though it found no evidence that policyholders “were harmed or dissatisfied in any way by the pricing policies here at issue.” Disregarding the jury’s factual finding that Hartford never acted unethically or unscrupulously, the court also ordered \$20 million in punitive damages. But the court expressed doubts about its own opinions. It recognized that they could lead to an “unworkable chaotic market for insurance . . . with unanticipated effects on Connecticut automobile insurance policyholders.” And in its last decision before this appeal, the trial court recognized that this Court was likely to reverse the judgment.

Outright reversal is necessary for two reasons. First, a CUTPA claim based on the penumbra of a regulation must be consistent with the underlying regulatory principles. In the insurance context, that means that plaintiffs bringing insurance related CUTPA claims must first establish CUIPA violations. Here the jury found none. Moreover, the DOI regulation that supplies the sole source of the jury’s finding does not establish a public policy against insurers’ efforts to pay lower body shop labor rates, and so cannot support the outcome Plaintiffs seek.

Second, the jury rejected Plaintiffs’ contention that Hartford caused a substantial injury not outweighed by countervailing benefits to consumers or competition. Federal law uses that “substantial unjustified injury” test to define unfairness, having long ago abandoned the cigarette rule. CUTPA’s text states that its definition of unfairness “shall be guided” by federal unfairness law, and under the substantial unjustified injury test, the judgment below cannot stand.

Apart from these bases for across-the-board reversal, the punitive award and permanent injunction cannot stand. The trial court abused its discretion by awarding punitive damages in the face of a jury finding that Hartford acted ethically and scrupulously. Moreover, a defendant does not wantonly disregard the rights of others when it violates a

never-before-articulated public policy derived from a regulation that does not even govern the conduct at issue – let alone when the agency that wrote the regulation considers the conduct lawful and appropriate. As for the injunction, the court erred in absolving Plaintiffs of the need to show irreparable harm, and it abused its discretion in entering an injunction that, as it recognized, would hobble a single company acting in accord with industry norms, would risk chaos in the market, and would lead to unpredictable results for policyholders.

STATEMENT OF FACTS AND PROCEEDINGS

A. Auto body repair services and auto insurance are competitive markets.

1. Hartford is a consumer of auto body repair services.

Hartford offers auto insurance in Connecticut, competing against about twenty other insurance carriers. A346-48.² It only has a 6% market share, A348, but distinguishes itself through customer service; JD Power & Associates rates its claims process the best in the nation. A349-50. The process works like this: insureds who suffer a loss call Hartford, schedule an appraisal, and tell Hartford where they want the car fixed. See A303-04. “[T]he customer has ultimate control” over the process, A306 (Devoe), and may choose to have the car repaired by an independent shop (like those owned by Plaintiffs) or by a member of Hartford’s Direct Repair Program (DRP), which functions much like a preferred provider network in the healthcare industry. A304.

If the customer chooses an independent shop, Hartford sends an appraiser, *id.*, generally an employee-appraiser. See A320-21. The appraiser independently assesses the damage, determines what repairs are needed, and estimates how long the repairs should

² All testimony cited in this brief was undisputed unless otherwise indicated. The witnesses that testified at trial include: Skrip (named plaintiff body shop owner and president of ABAC); Ferraiolo (named plaintiff shop owner); Platz (same); Walsh (same); O’Mara (former Hartford employee-appraiser employed at time of trial by Plaintiff body shop); Devoe (Hartford employee); Cirish (former Hartford employee); Yellen (Hartford employee); Iverson (former Hartford employee); Cornelius (former Hartford employee); Kemp (Hartford employee); Brandt (Hartford employee); Jennings (Plaintiffs’ expert); Salinger (Defendant’s expert).

take. A292.

2. Hartford negotiates for rates using its employee-appraisers.

The appraiser also negotiates a labor rate to be applied to the repair work. A309-10. Labor rates are a significant driver of an insurer's auto repair costs. *See, e.g.*, A269-70 (Scrip) (90-95% of Scrip's Auto Body's revenue derived from labor). As a consumer of body shop repair services and a competitor in the insurance marketplace, Hartford seeks to keep down its costs by negotiating competitive prices for auto repairs. Hartford gives its employee-appraisers the "authority to negotiate . . . in accordance with local markets." A376 (Hartford Best Practices). Hartford's Claim Standards state:

The Estimator should determine the prevailing labor rate for a Standard on a claim by claim basis. The rate should be within the range of rates accepted by competing shops in the particular geographic area, based on the appraiser's knowledge and experience.

A384. Supervisors tell employee-appraisers that they should write estimates at the market rate: "all ASR's in Connecticut are authorized to write their appraisals at the prevailing rate in their assigned area."³ A382 (April 17, 2000 email); *see also* A343. Rates are determined "[b]ased on the ongoing feedback" received from appraisers. A382 (April 17, 2000 email). Appraisers research rates, A307-08; A322-24, then negotiate a rate with the shop. A309-10. When an employee-appraiser and a shop cannot agree, the employee-appraiser generally calls a supervisor, who either authorizes an increase or tells the shop that Hartford will have the repair done elsewhere. A293-94 (O'Mara).

Hartford supervises its employee-appraisers to ensure they use a market rate. *See* A339-340 (Kemp). "[W]hen someone is spending millions of your company's money. . . . flowing through, figuratively speaking the pen of [an] individual it becomes an imperative to check that person's work." *Id.*⁴

³ ASR, or Auto Service Representative, was Hartford's internal term for employee-appraisers. A290.

⁴ *See* A344 (Brandt); A367-81 (Hartford Best Practices); A383-84 (Hartford Claims Standards); A311 (Yellen) (Hartford supervisors compared employee-appraiser's work to

3. Plaintiffs want “posted rates” that almost no one pays.

Like any rational seller, Plaintiffs want to sell their services for as much as they can get. Repair shops are required by state law to post their hourly labor rate in a visible spot on their premises (the “posted rate”), A267-68; C.G.S. § 14-65i(b), and Plaintiffs satisfied this requirement by posting on their walls the rate they wanted to be paid, ranging from \$65 to \$78 per hour. See A267-68 (Skrip); A282 (Ferraiolo); A312-13 (Platz); A331-32 (Walsh). Instead of being based on what the market would bear – i.e., on what buyers would pay – the posted rates are based on profit margins that Plaintiffs feel they deserve. A268 (Skrip); A285-86 (Ferraiolo); A313 (Platz); A333 (Walsh). In posting these rates, Plaintiffs focus on what they think their services are “worth,” rather than on the rates they could actually get when competing in the market:

Q: So if your costs go up to a million dollars a day, your posted rate would reflect that, wouldn't it?

A: I assume.

Q: And if your posted rate was million dollars an hour, it would be unfair for The Hartford not to give you work at a million dollars an hour. Is that what you're saying?

A: If that was the actual cost of running my business, that's what it is.

A286 (Ferraiolo). The only constraint on the posted rate is the fear that if it goes *too* high, the shop owner might “look like a crook.” A279 (Skrip).

Because they think their rates should be based on their expenses and the profits should reflect their “worth,” body shops do not want to compete with other body shops on price. A286 (Ferraiolo); A315 (Platz) (“I don't know what other body shops are charging.”); A280 (Skrip) (“I don't know what other people charge.”). As the owner of Artie's Auto put it:

[I]f somebody comes in with an estimate from another shop expecting me to beat it, I don't give them the time of day because that's not what I'm there for. I'm not there to beat up the guy down the street. . . . I don't want to be part of it.

industry standards); A341-42 (Kemp) (Hartford internal audits uncovered instances of employee-appraiser fraud, waste or mistake); A345 (Brandt) (audit reports helped employee-appraisers improve).

A280 (Skrip).

Although Plaintiffs do not want to compete on price, the market leaves them little choice. Shops know that if they refuse work at the prevailing market rate, a competitor will take it. See A317-18 (Platz) (admitting that Artie's typically noted on invoices that price was agreed on with Hartford); A366 (Artie's invoice expressly stating "agreed per price per estimate"). Plaintiff Walsh testified:

Q: [Y]ou take what the insurance companies are willing to pay or else somebody else in your market area would take the job for that price. Is that right?

A: Yes, sir.

Q: And it's your sense then that if you decided not to take a job from Hartford at \$50 an hour, one of those other shops in East Hartford or Hartford would be happy to take it for that, right?

A: That's why I take it for that price.

A336-37; *see also* A289 (Ferraiolo) ("I have to take jobs in. I have to continue to build my customer base."); A271 (Skrip) ("If I said, I'm not going to do it, that car would just go down the street . . ."). Competition in the market is intense: "I am in an area with lots of shops. . . . If I start charging \$65 an hour [the posted rate], I will have an empty shop." A335 (Walsh).

Because of this competition, almost no one is willing to pay the posted rates. Very few individual consumers pay for their own body repairs and fewer still are willing to pay the posted rate. One of the shop owners said he could only recall one such customer, "a handicapped gentleman driving a handicapped converted van." A334 (Walsh). The other owners likewise recalled few. *See also* A314 (Platz) (four customers paid posted rate); A283-84 (Ferraiolo) (three customers); A276-77 (Skrip) (handful).

Over 90% of all auto body repair services in Connecticut are purchased by insurance companies.⁵ During the relevant period, insurers paid a market rate; in 2006,

⁵ *See* A316 (Platz) ("My business is 99 percent insurance."); A335 (Walsh) ("99 percent of our work, maybe more, is all insurance work."); A298 (O'Mara) (90-95% of business at current body shop is from insurance companies); A273 (Skrip) (almost all business from insurance companies).

between \$44 and \$48 per hour. See A273-75 (Skrip); A287 (Ferraiolo). Hartford paid an average of \$46 per hour that year. A287 (Ferraiolo); A273-75 (Skrip); A386 (Jennings' chart showing average rates paid by Hartford).

B. Plaintiffs use CUTPA litigation to seek higher prices.

Plaintiffs filed this class-action suit in 2003, seeking to use CUTPA to obtain higher prices, both retroactively (as damages) and prospectively (via injunction). They claimed that Hartford had “unfairly” lowered prices in two ways: “suppressing” the hourly labor rate paid to independent body shops through its supervision of its employee-appraisers (the “labor rate” claim), A9-10 (Compl. ¶ 23); and unfairly steering its insureds to its preferred-provider DRP shops (the “steering claim”), A9 (Compl. ¶ 22). After the trial court certified a plaintiff class of auto body shops, this Court affirmed, *Artie's Auto Body, Inc.*, 287 Conn. at 209, and the trial court granted summary judgment for Hartford on Plaintiffs' other claims.⁶

As the litigation progressed (and unbeknownst to Hartford), Plaintiff Auto Body Association of Connecticut (ABAC) asked Attorney General (AG) Blumenthal to consider bringing a CUTPA enforcement action based on Hartford's efforts to negotiate lower body shop labor rates.⁷ ABAC referenced the DOI regulation § 38a-790-8, which states in full:

Every appraiser shall: (1) Conduct himself in such a manner as to inspire public confidence by fair and honorable dealings; (2) approach the appraisal of damaged property without prejudice against, or favoritism toward, any party involved in order to make fair and impartial appraisals; (3) disregard any efforts on the part of others to influence his judgment in the interest of the parties involved; (4) prepare an independent appraisal of damage. No appraiser shall: (A) Receive directly or indirectly any gratuity or other consideration in connection with his appraisal services from any person except his employer or, if self-employed, his customer; (B) traffic in automobile salvage if such salvage is obtained in any way as a result of appraisal services rendered by him.

The regulation says nothing about the prices for labor negotiated between body shop

⁶ See A79 (Mem. of Dec'n on S.J.(Sept. 22, 2009)). Plaintiffs did not cross-appeal.

⁷ See A150-58 (Aug. 27, 2007 letter from AG to DOI Comm'r, attaching ABAC report); see A142-145 (Nov. 14, 2007 memo from ABAC to AG, commenting on DOI's Sept. 27, 2007 letter); see A147-48 (May 25, 2007 letter to ABAC from DOI Comm'r). ABAC is a body shop trade organization and named plaintiff in this case.

sellers and insurer buyers.

The AG presented the issue to the DOI in two letters. The DOI responded, articulating its interpretation of the regulation that it wrote and enforces.⁸ In the letters, the DOI unequivocally stated that the regulation does not apply to labor rates. It made clear that appraisers were licensed to make damage assessments but were not licensed (or trained or qualified) to determine labor rates; labor rates were negotiated by the insurer and auto body shops, with appraisers acting on behalf of the insurer. See A189-94 (Sept. 27, 2007 letter from the DOI) *and* A196-198 (Feb. 25, 2008 letter from the DOI). The DOI stated:

The appraiser does not have any authority, pursuant to his license, to establish a labor rate for auto body repair work. Appraisers do not have particular expertise in the economics and development of labor rates and those matters are not part of their licensing qualification. Their expertise is limited to an assessment of the auto parts in need of repair and the number of hours to do the auto body repair job. **The rate at which a body shop is to be paid is handled by negotiation between the insurer and the body shop.** The Code of Ethics as described above must be analyzed consistent with the work the motor vehicle physical damage appraiser is licensed to perform and consistent with its enabling legislation that **specifically contemplates an appraiser operating on behalf of an insurance company.**

A193 (September 27, 2007, Letter at 5 (emphasis added)). As the DOI later clarified:

It is the Department's position that this regulation is intended to protect consumers from unscrupulous appraisers seeking to charge them more for auto body repair work than is economically justified in an arms-length transaction. A handful of auto body repair shop owners, however, have sought to use this regulation to demand that insurers pay the posted labor rate. In effect, these few auto body shops would like the Department to use this regulation as a 'sword' to protect their own economic interests in a competitive industry rather than as a 'shield' for the protection of insureds. **We do not believe that taking such action would be in the best interests of the insurance-buying public and decline to enforce it in the manner suggested by the ABAC.**

⁸ The letters were discovered after the trial because Hartford's appellate counsel, serving as trial counsel in another case brought by plaintiffs against a different defendant, obtained them through a FOIA request. See A168. The trial court sanctioned ABAC for intentionally withholding the 2007 letter but found insufficient proof of ABAC knowingly withholding the 2008 letter. A175.

A198 (February 25, 2008 Letter at 3 (emphasis added)).

The DOI has consistently maintained that the regulation in no way affects labor rate negotiations between body shops and insurers, even assuring one of Hartford's own employee-appraisers – who later went to work for a Plaintiff – that negotiating labor rates under Hartford's direction would not violate the DOI regulation.⁹

Trial and Verdict. The case was tried in October 2009 on the steering and labor rate claims. Hartford sought a directed verdict, noting, among other things, that CUTPA did not permit the jury to find a public policy in the penumbra of a regulation when that penumbra was inconsistent with the underlying regulatory scheme, and that the substantial unjustified injury test, not the cigarette rule, governed the definition of unfairness under CUTPA. A351-52 (motion for directed verdict incorporating by reference all legal arguments made at summary judgment); *see also* A59, 67-69, 72 (Def. Mem. In Support of Mot. For S.J.). The court denied the motion, noting that it would consider the legal arguments after the verdict. A352-56 (court order).

The court did, however, agree to provide the jury with targeted interrogatories, separating out the three prongs of the cigarette rule into separate questions. A431-34 (Jury Interrogs.). That way it would be obvious whether the jury had found that Plaintiffs satisfied the substantial unjustified injury test, as that test stood alone in its own interrogatory as prong three. For the first “public policy” prong, the court gave the jury a list of possible public policies that Hartford had offended, asking the jury to specify in writing which, if any, was violated. A409-12 (Charge to Jury); A432 (Jury Interrogs.). These interrogatories ensured that, if the cigarette rule continued to govern CUTPA, and if the jury found that

⁹ Several Hartford employee-appraisers had written to the AG and copied the DOI, claiming that the DOI regulation required them to set labor rates without direction from their employer. A363-65 (Letter dated 2/12/02). When the AG did not respond, A299 (O'Mara), one (O'Mara) met with the DOI, which told him he could keep “conducting business as usual,” A300 (O'Mara), and assured him that the DOI would not take any action with regard to his complaints about negotiated labor rates. A301 (O'Mara). O'Mara later became an employee of a Plaintiff body shop. A291 (O'Mara).

Hartford had violated only prong one – the public policy prong – the reviewing court would know exactly which public policy the jury considered to have been offended.

The jury returned a verdict that rejected Plaintiffs' steering claim entirely. It found for Plaintiffs on the "labor rate" claim – but only on a very narrow ground. Responding to targeted interrogatories, the jury found that Hartford had **not** violated two of the prongs of the cigarette rule: its interaction with the appraisers it supervised was not "immoral, unethical, unscrupulous, or oppressive" (prong two), and did not cause any "substantial injury to plaintiffs that was not outweighed by countervailing benefits to consumers or competition" (prong three). A431 (Jury Interrog. # 1).

The jury found that Hartford's supervision of its appraisers had violated only prong one of the cigarette rule: it "offended public policy." The jury had been presented with several public policies that Plaintiffs claimed had been offended. One was the Connecticut Unfair Insurance Practices Act ("CUIPA"). Another was a set of DOI Guidelines that directly address how **insurers** may determine "the prevailing labor rate" in the "market place."¹⁰ A412 (Jury Instructions). But the jury did not find them to have been offended. Instead, it identified only *one* public policy that Hartford's supervision of its appraisers offended: the unwritten, and never before enunciated, penumbra of Insurance Department Regulation § 38a-790-8. That regulation broadly addresses appraisers' conduct, but does not address labor rates or insurers. A446-47; A432 (Jury Interrog.). The jury then awarded \$14,765,556 million in compensatory damages for "offense" to a regulatory penumbra that the trial court described as a "vague, indefinite, or borderline area," A239 (Mem. of Dec'n on Mot. for Punitive Damages, at 4 n.2 ("Punitive Damages Dec'n")).

¹⁰ The Guidelines, set forth in the jury instructions, provide insurers with several factors to consider in determining the prevailing labor rate. See A412. They specifically address the effect of rates paid to DRP shops: "Relying solely on the Labor Rates paid to direct repairs shops is not a true indication of the Labor Rate in the marketplace. There should be a distinction between the Labor Rate that is determined as a result of contractual arrangements with Direct Repair shops compared with Non-Direct Repair shops that are relevant in the marketplace overall." *Id.*

Post-Verdict Motions. Hartford moved for judgment notwithstanding the verdict, noting that the jury had found no substantial unjustified injury—i.e., the test of unfairness that replaced the cigarette rule decades ago under federal law. A121-24. The trial court denied the motion. The court also held that even a weak violation of prong one of the cigarette rule—here, based on a policy in the penumbra of a regulation governing appraisers that had never before been interpreted to address labor rates or insurers—was sufficient to support CUTPA liability. A130-31. Finally, the court held that even though Hartford only had a 6% share of the auto insurance market in the state, its supervision of its employee-appraisers was somehow a “substantial producing factor” suppressing labor rates for all body shops statewide. A131-32.

Motion for Reconsideration. During deliberations, the jury had sent a question to the court: “[the Code of Ethics regulation] reads in section two, approach the appraisal of damaged property without prejudice, etc. Our question: Is this to suggest the code of ethics has to do solely with damaged property and not the labor rate, at which is paid?” A360 (Jury Question). Over defendant’s objection, the court told the jury that the regulation covered all aspects of the appraisal, including labor-rate negotiations.¹¹ Hartford moved for reconsideration based on the DOI letters to the AG, which had said exactly the opposite but had not been disclosed by Plaintiffs prior to trial.¹² See A193 (September 27, 2007, Letter at 5) and A198 (February 25, 2008, Letter at 3). The trial court denied Hartford’s motion to reconsider, saying the letters would not have changed its answer to the jury’s question or its JNOV decision. See A180, 187 (Mem. of Dec’n on Def. Mot. for Reconsideration and

¹¹ “[A]n appraiser’s responsibility to appraise is not limited solely to damaged property. He or she must assess the extent of physical damage and also . . . appraise the cost of repairing that damage which necessarily involves estimating . . . an hourly rate which the apprais[er] fairly and honestly determines in his or her independent judgment to reflect the cost of the labor component of the repairs.” A361-62 (Answer to Jury).

¹² The court held that ABAC had knowingly withheld the 2007 letter and sanctioned it, A175-76, 187, but found insufficient proof of ABAC knowingly withholding the 2008 letter, A175.

Sanctions (“Reconsideration Dec’n”). The court gave no deference to the DOI Commissioner’s construction of his own regulation, believing that it was not “an official Department of Insurance interpretation” of the regulation. A181-82. The court recognized that the regulation does not regulate labor rates, but nonetheless concluded that, even if Hartford’s supervision of its employee-appraisers could not violate the regulation, it could violate the regulation’s unwritten penumbra. A185-86.¹³

Injunctive Relief. Three weeks later, the court imposed a permanent injunction against Hartford. A212 (Mem. of Dec’n on Pl. Mot. for Permanent Inj. (“Injunction Dec’n”). It determined that Plaintiffs were “not required to make the traditional showings of irreparable harm [or] lack of an adequate remedy of law to be entitled to the equitable remedy of an injunction under CUTPA,” declining to follow the one Appellate Court decision addressing the issue. A217-220 & 217 n.3. The court found that injunctive relief was proper because the company “continues to maintain in post-trial proceedings that its conduct was not improper,” A220—i.e., because Hartford exercised its right to challenge and appeal the trial court’s rulings.

The court fashioned an injunction compelling Hartford to refrain from interfering with its own employee-appraisers’ “determination of the hourly labor rate to be applied,” and from threatening or taking any adverse employment action against its employee-appraisers based on their determination of hourly labor rates. A229-31. In other words, the court established a set of operating rules in a competitive market that only Hartford, and none of its competitors, had to follow.

¹³ The trial court also held that it did not have to consider the DOI’s Sept. 27, 2007 letter because Hartford had not met the standards for presenting newly discovered evidence. See A177-78. But Hartford asked the court reconsider an issue of law – the scope of the DOI regulation – based on new information about how the agency has interpreted its own regulation. P.B. 11-12 permits not just a request to reconsider a “misapprehension of facts,” but also, as relevant here, “some decision or some principle of law which would have a controlling effect, and which has been overlooked.” *Chartouni v. DeJesus*, 107 Conn. App. 127, 129 (2008) (internal quotation marks omitted).

The trial court recognized that its decision was deeply problematic. It acknowledged that “[t]he Code of Ethics does not purport to regulate the fairness or reasonableness of hourly labor rates.” A226. It also recognized that the injunction did economic harm:

[O]versight over just one insurance company with only a 6% market share of the automobile insurance market in Connecticut potentially could upset the competitive balance in the market to the serious disadvantage of the one company under review while its competitors are not under review.

A231-32. It conceded that “the prospect of inconsistent rulings could result in an unworkable chaotic market for insurance to the detriment of certain competitors and the advantage of others, with unanticipated effects on Connecticut automobile insurance policyholders.” A233. Recognizing the problems inherent in the relief it was ordering, it called upon others, presumably the Insurance Department or the legislature, to provide “comprehensive guidance applicable to all competitors in the market as to the interplay between independent appraisers and the direct repair shop factor.” A232.

Punitive Damages. Despite its misgivings about its own decisions, the trial court two weeks later awarded \$20 million in punitive damages. See A236. It found that Hartford “engaged in conduct in willful or reckless disregard of the rights of its employed licensed motor vehicle damage appraisers under their Code of Ethics to conduct their independent appraisals” A241-42. Hartford’s supervision of its employee-appraisers had, the court held, hurt body shops’ ability to negotiate labor rates.

The court recognized that it was piling punitive damages on top of a large jury verdict and an injunction that “puts The Hartford at a significant competitive disadvantage” by forcing it to pay “a higher hourly labor rate . . . than any of its competitors.” A253. It also acknowledged that “The Hartford did not actually violate the appraiser’s Code of Ethics” and that the DOI had taken no enforcement action against Hartford or its employee-appraisers. A254. Finally, while the court noted that the jury had found that Hartford had *not* engaged in “immoral, unethical, oppressive or unscrupulous” conduct and had *not* caused Plaintiffs substantial unjustified injury, it held that it could disregard the jury’s findings in

awarding punitive damages. A254-55.

Stay Pending Appeal. Hartford appealed on June 12, 2013; the trial court stayed its injunction on August 8, 2013. A266 (Mem. of Dec'n on Def. Mot. for a Stay ("Stay Dec'n")). The court found there was "a likelihood of success on appeal" because "the cigarette rule may well be abandoned on appeal and replaced with the current FTC rule," which "would result in a reversal of this verdict." A261-62. While it stood by its rulings on other CUTPA issues, the court recognized that "the issues were very serious and a finding of error on even one of them could result in reversal of the verdict." A262-63.

The trial court also found that, "[a]lthough the jury verdict was based on the public policy prong of the cigarette rule, there is no 'public interest involved in this case,' including no evidence that policyholders "were harmed or dissatisfied in any way by the pricing policies here at issue." A263. It further found that "[n]either party has suffered irreparable harm," specifically noting that before trial Plaintiffs "were operating at a profit," but that:

[Hartford] would suffer economic harm in the form of competitive disadvantage as the only Connecticut automobile insurance company bound by this injunction while its competitors, 94% of the market suppliers of auto insurance, would not be so bound.

A263-64. Finally, although it had granted an injunction partly because Hartford had challenged the verdict, the court now concluded that the "appeal of this case and the motion for stay . . . have been brought and made in good faith and not just for purposes of delay." A265.

C. The DOI has provided the "comprehensive guidance" the court requested.

Two months after the court made its plea for "comprehensive guidance" (and a month after Hartford appealed), the DOI issued a formal Bulletin making clear that the position taken by the Commissioner in 2007 reflected the Department's longstanding, consistent interpretation of the regulation. Specifically referring to the September 27, 2007, DOI letter to the AG, the Bulletin stated: "Following the adoption of this regulation [§38a-790-8], the Department has consistently interpreted the provisions of this section as not encompassing

the determination of labor rates or the process by which hourly labor rates are negotiated under the authority of the motor vehicle physical damage appraiser license.” A591-92 (Ins. Comm’r Bull. IC-34 (#3), 2013 WL 3716608 (July 16, 2013)). Moreover, the Bulletin reiterated that the Code of Ethics regulation specifically “contemplates an appraiser operating on behalf of an insurance company” when negotiating labor rates with body shops. *Id.* In short, comprehensive guidance had been there all along: the regulation has nothing to do with labor rates. Like other prices in a free market economy, labor rates are negotiated between sellers (here, auto body shops) and buyers (here, insurance companies and individuals).

ARGUMENT

I. Liability Here Is Inconsistent With *Acordia* And *Mead*.

CUTPA prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” C.G.S. § 42-110b(a). CUTPA’s definition of “unfairness” follows federal law: the “courts of this state **shall be guided** by interpretations given by the [FTC] and the federal courts.” C.G.S. § 42-110b(b) (emphasis added). Connecticut courts have for years applied the old federal “cigarette rule,” which uses a 3-prong test to determine “unfairness”:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (competitors or other businessmen).

McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 568 (1984). The third prong – substantial injury – “is the most important of the three criteria for determining whether there has been a violation of CUTPA.” *Thames River Recycling, Inc. v. Gallo*, 50 Conn. App. 767, 785 (1998); *Prishwalko v. Bob Thomas Ford, Inc.*, 33 Conn. App. 575, 586 (1994).¹⁴

¹⁴ Federal law abandoned the cigarette rule years ago, adopting the substantial injury test. That test should now govern CUTPA, and it requires reversal. See Pt. II below.

The jury here expressly rejected two prongs of the cigarette rule as a basis for liability, finding that Hartford's supervision of its employee-appraisers did not cause substantial injury to anyone, and that it was not immoral, unethical, oppressive or unscrupulous. A431 (Jury Interrogs.). The jury based liability only on the first prong, finding that Hartford's conduct "offended public policy." The jury did not find that Hartford offended any public policy articulated in a statute or regulation. For instance, Plaintiffs proffered CUIPA as a source of public policy, but the jury found no offense to it.

Instead, the jury based its finding entirely on the penumbra of a DOI regulation (Conn. Agencies Reg. § 38a-790-8) requiring appraisers to evaluate vehicle damage independently, free from outside influence. A432 (Jury Interrogs.); A411 (Charge to Jury) (describing § 38a-790-8); *see also* A254 (Punitive Damages Dec'n) (acknowledging that jury found offense to "the 'penumbra' of the regulation, and not a direct violation [of the regulation] by the Hartford.").

That regulation does not address labor rates, and no court or agency had ever interpreted it to do so. To the contrary, the agency that wrote and enforces the regulation has consistently and steadfastly stated that the regulation does *not* apply to labor rates. As the trial court frankly noted, the regulatory "penumbra" was at best a "vague, indefinite, or borderline area." A239 (Punitive Damages Dec'n at 4 n.2).

This Court has never permitted CUTPA liability based solely on a "vague, indefinite, or borderline area." Indeed, it has never permitted CUTPA liability based only on a first prong violation unless it was a statutory *per se* violation, *see, e.g., Woronecki v. Trappe*, 228 Conn. 574, 579 (1994) (violation of the Home Improvement Act is *per se* violation of CUTPA), or the violation of a long-standing public policy, *see, e.g., Daddona v. Liberty Mobile Home Sales, Inc.*, 209 Conn. 243, 257-59 (1988) (dismantling a person's mobile home, rather than pursuing eviction under summary process procedures, violates "long-standing public policy" reflected in C.G.S. § 47a-43 and other statutory "enactments dating back to colonial times" protecting a tenant's "peaceable possession . . . from disturbance by

any but lawful and orderly means.”). The judgment below transgresses clear limits on CUTPA liability.¹⁵

A. The court improperly allowed CUTPA liability for insurance-related conduct not prohibited by CUIPA.

This Court has recognized that CUIPA defines the universe of unfair insurance practices and that the public policy prong of unfairness liability under CUTPA cannot be used to circumvent CUIPA’s definitive list of unfair insurance practices. In *Mead v. Burns*, 199 Conn. 651 (1986), a plaintiff claimed that an insurer had refused in bad faith to settle an insurance claim, violating both CUIPA and CUTPA. The CUIPA claim failed, and the CUTPA claim necessarily fell with the CUIPA claim. *Id.* at 665. While there is no private right of action under CUIPA, *Mead* held that a plaintiff may make a “CUIPA through CUTPA” claim. But a claim that an insurance practice is unfair, and so violates CUTPA, “must be consistent with the regulatory principles established by the underlying statutes,” *id.*, i.e., it must be based on an actual violation of CUIPA. *Id.* at 664-66. Because CUIPA comprehensively lists those insurance-related practices that the legislature has determined are unfair, allowing a CUTPA claim to “override a CUIPA regulatory pattern” would run roughshod over the legislatively defined public policy. *Id.* at 666.

This Court’s recent decision in *State v. Acordia, Inc.*, 310 Conn. 1 (2013), took *Mead* a step further. In *Acordia*, the government accused an independent insurance broker of violating CUIPA and CUTPA by referring clients to certain insurers in exchange for those insurers paying the broker a cut of the policy premiums. The government charged that the insurance broker’s clients didn’t know of the arrangement and relied on the broker to give neutral advice on insurance. After concluding that the allegations, even if true, did not violate CUIPA, this Court held that the CUTPA claim was “barred by *Mead* because

¹⁵ The determination of the proper legal standard presents a question of law subject to this Court’s plenary review. See *Fish v. Fish*, 285 Conn. 24, 37 (2008); *State v. Acordia, Inc.*, 310 Conn. 1, 15 (2013).

conduct by an insurance broker or insurance company that is related to the business of providing insurance can violate CUTPA **only if it violates CUIPA.**" *Id.* at 27 (emphasis added). The Court noted that *Mead* had "strongly suggested that the legislative determinations as to unfair insurance practices embodied in CUIPA are the **exclusive and comprehensive** source of public policy in this area," *id.* at 35 (emphasis added), and then made that suggestion a definitive rule of law. Because CUIPA occupies the entire field of unfair insurance practices, the Court saw "no reason why an allegation of a specific type of insurance related conduct that the legislature has expressed no opinion about should be found to support a CUTPA claim." *Id.* at 36. Accordingly, "[b]ecause 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." *Id.* at 37.

Plaintiffs' CUTPA claim here clearly focused on insurance related practices and conduct. Plaintiffs alleged that Hartford, acting as an *insurer*, unfairly influenced its *insurance* company employees, who were hired to evaluate damage suffered by *insurance policyholders*, and thereby unfairly suppressed labor rates in order to increase profits from its *insurance business*. Indeed, Plaintiffs specifically alleged that Hartford's practices constituted a violation of CUIPA, *i.e.*, an unfair insurance practice. See A10 (Compl. ¶¶ 26, 27).

The jury rejected the allegation that Hartford so much as offended a penumbra of CUIPA, much less committed a direct CUIPA violation. In charging the jury on the public policy prong of the cigarette rule, the court explained that Plaintiffs had identified CUIPA as a principal source of public policy supporting their labor rate claim. A409-10 (Jury Instructions). But when asked to identify the source of public policy it deemed offended by Hartford, the jury identified *only* the penumbra of the DOI regulation – *not* CUIPA. A432

(Jury Interrogs.).

The jury's CUIPA finding, of course, makes sense. CUIPA enumerates 22 specific categories of conduct that the legislature established as unfair insurance practices. See C.G.S. § 38a-816. None pertains – even remotely – to an insurer's efforts to negotiate for lower labor rates for auto repair, which is the only conduct that the jury found problematic here. Hartford did not offend CUIPA, A92 (Summary J. Dec'n) (noting that Plaintiffs "have failed to allege any facts or any specific provision of CUIPA allegedly violated"), and so under *Acordia* cannot have violated CUTPA.¹⁶

In short, the court allowed the public policy prong of the cigarette rule to expand the statutorily fixed set of unfair trade practices related to the business of insurance. *Acordia* forbids that expansion, and thus requires reversal.

B. The court improperly allowed CUTPA liability based on a "penumbra" that is inconsistent with the DOI regulation itself.

Mead held that any CUTPA claim based on offense to a public policy emanating from a statute "must be consistent with the regulatory principles established by the underlying statutes." 199 Conn. at 665; see also *Acordia*, 310 Conn. at 31. Liability here was based entirely on the finding that Hartford improperly influenced its employee-appraisers' determination of hourly labor rates, supposedly in violation of a public policy found solely in the penumbra of a DOI regulation. Because that finding is not "consistent

¹⁶ Even if *Acordia* permitted CUTPA liability for a violation of an insurance *regulation*, rather than only on a violation of CUIPA or another insurance-related *statute*, it would not permit CUTPA liability here, where no violation of an insurance-related regulation occurred. See A254 (Punitive Damages Dec'n) (acknowledging that the jury found "'offense to the public policy' of the 'penumbra' of the regulation, and not a direct violation [of the regulation] by the Hartford."). The DOI has of course stated that Hartford did not violate this regulation, see A188-95 (Sept. 27, 2007 letter from DOI Comm'r), and it reiterated that statement both during the litigation, A196-98 (Feb. 25, 2008 letter from DOI Comm'r), and afterwards. A591-92 (Ins. Comm'r Bulletin, IC-34 (#3), 2013 WL 3716608 (July 16, 2013)). As the DOI Bulletin notes, the DOI "has consistently interpreted the provisions of this section as not encompassing the determination of labor rates or the process by which hourly labor rates are negotiated under the authority of the motor vehicle physical damage appraiser license." *Id.*

with the regulatory principles” embodied in the regulation itself, *Mead* requires reversal.

The DOI has repeatedly made clear that its regulation does not affect the determination of labor rates, which are set through negotiations between insurers and auto body shops, with employee-appraisers acting for the insurers, but in their employee capacity, not their licensed appraiser capacity. As even the trial court recognized, “there is nothing in the [DOI] Code of Ethics or the entire scheme of the Department of Insurance for regulating automobile damage reimbursements that requires rates of repair labor to be ‘fair and reasonable,’” and the DOI “has no power to, and does not, control labor rates.” A224, 226 (Injunction Dec’n). While the regulation does not hinder insurers’ abilities to negotiate body shop labor rates, it does ensure appraiser independence regarding the appraiser’s central function: the determination of what is broken and what needs to be done to get it fixed. By ensuring the appraiser’s independence in making those repair determinations, the regulation protects the policyholder (from an insurer colluding with a body shop to do less than is necessary to properly fix the vehicle) and it protects the insurer (from a body shop colluding with a policyholder to do more than is necessary to properly fix the vehicle).

In a formal letter responding to a legal inquiry by the AG, the DOI Commissioner made that clear. He noted that under his agency’s regulation:

The appraiser does not have any authority, pursuant to his license, to establish a labor rate for auto body repair work. Appraisers do not have particular expertise in the economics and development of labor rates and those matters are not part of their licensing qualification. Their expertise is limited to an assessment of the auto parts in need of repair and the number of hours to do the auto body repair job.

See A193 (Sept. 27, 2007 letter from DOI Comm’r to AG) (emphasis added).¹⁷ The

Commissioner explained that his regulation contemplated normal market interactions:

¹⁷ AG Blumenthal wrote the letter at the behest of Plaintiff ABAC. See A189 (referencing ABAC report sent by AG to DOI); see also A150-58 (Aug. 27, 2007 letter from AG to DOI Comm’r attaching ABAC report); see A142-45 (Nov. 14, 2007 memo from ABAC to AG, commenting on DOI’s Sept. 27, 2007 letter).

The rate at which a body shop is to be paid is handled by negotiation between the insurer and the body shop. The Code of Ethics as described above must be analyzed consistent with the work the motor vehicle physical damage appraiser is licensed to perform and consistent with its enabling legislation that **specifically contemplates an appraiser operating on behalf of an insurance company.**

Id. (emphasis added).

In short, the DOI regulation does not address labor rates. The DOI Commissioner has stated that under the regulation, appraisers have neither the authority nor the training to determine labor rates and, under the regulation, labor rates are negotiated by body shops and insurance companies – with employee-appraisers acting on behalf of the insurer, as employees, not appraisers. The regulation is “intended to protect consumers from unscrupulous appraisers seeking to charge them more for auto body repair work than is economically justified in an arms-length transaction”; it is not a “sword” for a “handful of auto body repair shop owners” to advance “their economic interest in a competitive industry.” A198 (Feb. 25, 2008 letter from DOI Comm’r). Yet the court let the jury conclude that Hartford acted unfairly when it influenced its employee-appraisers who were negotiating labor rates on Hartford’s behalf, even though the *only* basis of liability was the unwritten and unspoken penumbra of the very regulation that *permits* such conduct. In other words, the court let the jury find that the penumbra of the regulation forbids what the regulation itself permits.

The court saw no problem with that for two reasons. First, it wrongly thought that it owed no deference to the Commissioner’s interpretation of his own regulation. A182 (Reconsideration Dec’n). This Court has held that “it is the well-established practice of this court to ‘accord great deference to the construction given a statute by the agency charged with its enforcement.’” *Griffin Hosp. v. Comm’n on Hosps. & Health Care*, 200 Conn. 489, 496 (1986). Importantly, “[t]his principle applies with even greater force to an agency’s interpretation of its own duly adopted regulations.” *Id.* at 497. That makes sense: an agency that writes and enforces its own regulations knows best what they mean. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency’s interpretation of its regulation, even when

presented in an amicus brief, is “controlling” unless plainly erroneous); *Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871, 881 (2011) (deferring to agency’s interpretation of its own regulation presented in amicus brief because “there is no reason to believe that the interpretation advanced by the [agency] is a ‘*post hoc* rationalization’ taken as a litigation position. The [agency] is not a party to this case.”); *id.* (noting that deference is required as long as the agency “interpretation is neither ‘plainly erroneous’ nor ‘inconsistent with’ the indeterminate text of the regulation”).¹⁸

Here, the DOI Commissioner wrote a formal letter to the AG, the State’s chief legal officer, explaining the DOI’s interpretation of a regulation that it wrote and enforces. And when the court saw fit to ignore that interpretation, lamented that its decisions could cause “chao[s]” in the automobile insurance market, and then called out for “comprehensive guidance” on the issue, A232-33 (Injunction Dec’n), the DOI reiterated its “longstanding” interpretation of its own regulation in a formal bulletin intended to guide the regulated community. A591-92 (Ins. Comm’r Bull. IC-34 (#3), 2013 WL 3716608) (noting the DOI had “consistently interpreted” regulation in same way). The Bulletin quoted the Commissioner’s official letter to the AG interpreting the regulation, noting again that the regulation lets insurers and body shops negotiate labor rates, with employee-appraisers acting for the insurers, but as employees, not appraisers. *Id.* The Bulletin reiterated that the DOI “has no statutory or regulatory authority to regulate or otherwise fix or set hourly labor rates charged by or paid to auto body repair shops.” *Id.* The court should have deferred to the DOI’s longstanding and consistent interpretation of a regulation that it wrote and enforces.

Second, the court wrongly thought that Hartford could offend the penumbra of the

¹⁸ The trial court erroneously looked to cases involving an agency’s interpretation of a *statute* written by the legislature, A181 (Reconsideration Dec’n), but the issue here is an agency’s interpretation of a *regulation* that it wrote and enforces. While an agency’s interpretation of a statute is not entitled to special deference if it has not been previously subjected to judicial scrutiny, *MacDermid, Inc. v. DEP*, 257 Conn. 128, 137 (2001), an agency’s interpretation of its regulation “is granted deference by the courts,” *id.* at 139.

regulation by trying to keep down labor rate costs, even if the regulation itself didn't regulate labor rates. A185 (Reconsideration Dec'n). That conclusion violates the requirement that any penumbral basis for public policy "be consistent with the regulatory principles established by the underlying statutes." *Mead*, 199 Conn. at 665. The underlying regulation allows insurers to negotiate labor rates with body shops, with appraisers working *for the insurer* in that process. Hartford could not offend the regulation's penumbra by working with appraisers to try to get the best possible labor rate, because the regulation permits it to do so.¹⁹

In sum, the jury's only basis for liability violates the limits set by *Mead* and the DOI's interpretation of its own regulation.

C. The trial court improperly allowed CUTPA liability that contravenes the statute's core purpose of consumer protection.

The legislature intended CUTPA to protect consumers.²⁰ Consumers are protected when competitive markets work effectively. See *Bridgeport Harbor Place I, LLC v. Ganim*, 303 Conn. 205, 214 (2011) ("Consumer welfare is maximized when economic resources are allocated to their best use . . . and when consumers are assured competitive price and quality."). The liability finding here undermines those core purposes.

The Connecticut auto insurance market is highly competitive. A131-32; A231-32 (Injunction Dec'n). With only a 6% market share, Hartford did not have the market power to set body shop labor rates in the overall market, as evidenced by the fact that Hartford on average paid in the range of \$46 per hour, right in the middle of the \$44 to \$48 per hour

¹⁹ DOI Guidelines also allow insurers to negotiate labor rates with body shops. They directly address how insurers may determine "the prevailing labor rate" in the "marketplace." See A412 (Jury Instructions).

²⁰ See *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 497 (1995) ("[C]onsumers were expected to be a major beneficiary" of CUTPA); 16 H.R. Proc., Pt. 14, 1973 Sess., p. 7324 (Rep. Newman) (purpose of CUTPA was to "to put Connecticut in the forefront of state consumer protection").

prevailing rate. See A386 (Jennings' Chart); A273-75 (Skrip); A287-88 (Ferraiolo).²¹ The body shop market is highly competitive as well. Plaintiffs sold their services at the prices that Hartford was willing to pay because they knew that their competitors would take the work if they didn't. See, e.g., A317-18 (Platz); A336-37 (Walsh).²² Plaintiffs didn't like that. They didn't want to compete. A286 (Ferraiolo); A315 (Platz); A280 (Skrip) ("If somebody comes in with an estimate from another shop expecting me to beat it, I don't give them the time of day because that's not what I'm there for."). The Plaintiffs instead wanted to set prices based on a desired profit margin over costs, not on the prices that the market would bear, i.e., the prices that willing buyers would pay.²³ In their world, there is no incentive to keep costs down, since the seller can always just mark up its costs by the desired profit margin. The absurdity of that proposition was made clear by one Plaintiff, who testified that if his costs and desired profit margin meant he had to charge a million dollars an hour, well, then the law should require Hartford to pay him that rate. A286 (Ferraiolo). At the end of the day, what Plaintiffs wanted was fundamentally anti-competitive and anti-consumer.

The DOI sees the auto body shops' position for precisely what it is: an effort to circumvent the free market. "[T]hese few auto body shops would like . . . to use this regulation as a 'sword' to protect their own economic interests in a competitive industry

²¹ Plaintiffs offered various theories about anticompetitive practices by Hartford, but all were rejected. The court found Plaintiffs had offered no evidence of collusion, see A359 (evidentiary ruling barring plaintiffs' counsel from questioning witness on supposed conspiracy among insurers, stating "we are not going to get into that area. There is no evidence of it in this case."), and it held that a 1963 consent decree addressing antitrust violations by insurance *trade associations* was irrelevant in a case against a "single insurance company acting unilaterally," A327-30.

²² See A336-37 (Walsh) ("Q: And it's your sense then that if you decided not to take a job from The Hartford at \$50 an hour, one of those other shops in East Hartford or Hartford would be happy to take it for that, right? A: That's why I take it for that price."). Plaintiffs' witness O'Mara testified that he continues to use the prevailing rates used by The Hartford even after he became employed as an appraiser by one of the plaintiff class members. A295-97, 302 (O'Mara).

²³ See, e.g., A338 (Walsh) ("Q: But your goal in this lawsuit is to charge consumers more for the work you do, is that right? A: Absolutely.").

rather than as a ‘shield’ for the protection of insureds.” A198 (Feb. 25, 2008 letter from DOI Comm’r). Neither CUIPA nor any DOI regulation establishes any public policy that would insulate auto body shops from free market negotiations over labor rates. CUTPA was not passed to let sellers avoid competition so they can set higher prices. Allowing the verdict to stand would hurt the market,²⁴ hurt Hartford (a consumer here), and ultimately hurt the insurance-buying public.²⁵ That outcome would turn CUTPA on its head.

II. The Substantial Unjustified Injury Test, Not the Cigarette Rule, Defines Unfairness under CUTPA

CUTPA prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” C.G.S. § 42-110b(a). That language is modeled after Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (the “FTC Act”).²⁶ This Court has used the “cigarette rule” to analyze “unfairness” under CUTPA. Like CUTPA itself, the language of the cigarette rule originated in federal law: a test developed by the FTC in 1964. 16 C.F.R. Part 408 (1964).²⁷ It defines “unfairness” under the FTC Act, asking three questions:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).²⁸

²⁴ A231 (Injunction Dec’n) (trial court recognizing that its judgment will “upset the competitive balance in the market”).

²⁵ A233 (Injunction Dec’n) (noting its judgment “will result in an unworkable chaotic market for insurance . . . with unanticipated effects on Connecticut automobile policyholders”).

²⁶ “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful.”

²⁷ The “cigarette rule” name came from its first use in an agency regulatory proceeding involving cigarette advertising. See 29 Fed. Reg. 8355 (1964). It’s also sometimes called the *Sperry* rule, *Sperry and Hutchinson* rule, or *S&H* rule because the U.S. Supreme Court cited it in dicta in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

²⁸ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

Id. The FTC and federal law abandoned the cigarette rule decades ago, replacing it with the substantial unjustified injury test. Connecticut law should do the same.²⁹ The determination of the proper legal standard presents a question of law subject to this Court's plenary review. *See Fish*, 285 Conn. at 37; *Acordia*, 310 Conn. at 15.

A. CUTPA requires courts to be “guided by” federal law in evaluating unfairness, and federal law has long used the substantial unjustified injury test.

The legislature linked CUTPA strongly to the FTC Act. It stated its intent that, when interpreting CUTPA, “the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended.” C.G.S. § 42-110b(b) (referring to C.G.S. § 42-110b(a)). Likewise, it ordered the Commissioner of Consumer Protection, when implementing CUTPA and determining what practices to deem unfair, to promulgate regulations “consistent with the rules, regulations and decisions of the [FTC] and the federal courts in interpreting the provisions of the [FTC] Act.” C.G.S. § 42-110b(c).

Respectful of this legislative mandate, this court “has repeatedly held, in accordance with [C.G.S. § 42-110b(b)], that [FTC] rulings and cases under the Federal Trade

²⁹ This Court has noted several times that a question exists as to whether CUTPA is governed by the old cigarette rule or the substantial unjustified injury test. *See, e.g., Ulbrich v. Groth*, 310 Conn. 375, 422 (2013); *Acordia*, 310 Conn. at 29-30 n.8. The Commissioner of Consumer Protection has also indicated uncertainty, noting recently that “the extent to which unfairness may be established absent any unjustified consumer injury is uncertain.” A620 (Final Dec'n and Order, *In re Christopher C. Shuckra, et al.*, Conn. Department of Consumer Protection, Feb. 7, 2013, at 10 n.1, available at http://www.ct.gov/dcp/lib/dcp/pdf/administration_and_policy/final_order_innovative_sentencing_solutions_2-7-13.pdf.) This lingering question presents itself clearly for resolution in this case. The jury answered targeted interrogatories on each prong of the cigarette rule, finding no “immoral, unethical, oppressive, or unscrupulous” conduct and no “substantial injury.” *See* A431-32 (Jury Interrogs.). It based its unfairness finding on only one thing: its conclusion that Hartford had “offended” the previously undiscovered “penumbra” of a DOI regulation. *Id.* Under the substantial unjustified injury test, the court below acknowledged there could be no liability; under the cigarette rule, as applied by the trial court, there was liability. A262 (Stay Dec'n).

Commission Act (FTC Act) serve as a lodestar for interpretation of the open-ended language of CUTPA.” *Russell v. Dean Witter Reynolds, Inc.*, 200 Conn. 172, 179 (1986). *Russell* held that CUTPA does not apply to securities transactions, relying heavily on federal court and FTC authority, and noting that it had found “no case in which the FTC or a federal court has applied the FTC Act to a securities transaction.” *Id.* at 180. The Court also relied on an FTC statement that “list[ed] the types of transactions and conduct to which the FTC Act applies . . . [but] makes no mention of securities.” *Id.*³⁰ Indeed, the cigarette rule entered CUTPA jurisprudence precisely *because* this Court believed federal law used the rule to define unfairness under the FTC Act. See *Ivey, Barnum & O’Mara v. Indian Harbor Props., Inc.*, 190 Conn. 528, 539-40 (1983).³¹

The FTC and federal law left behind the cigarette rule decades ago. See A625-32 (*FTC Statement on Unfairness*, Dec. 17, 1980 (“1980 Policy Statement”) (found at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>) (“Unjustified consumer injury is the primary focus of the FTC Act, and the most important of the three [cigarette rule] criteria.”)). By 1982, the FTC held that offense to public policy cannot by itself constitute unfairness under the FTC Act.³²

The legislative choice to tightly link CUTPA and federal unfairness law—not to mention *Russell’s* admonition that FTC rulings and cases “serve as a lodestar for interpretation of the open-ended language of CUTPA,” 200 Conn. at 178—requires that the

³⁰ See also *Heslin v. Conn. Law Clinic*, 190 Conn. 510, 518-20 (1983) (turning to federal cases and FTC statements to determine that CUTPA applies to legal services).

³¹ While the FTC abandoned the cigarette rule in 1980, the case in which it announced the rule’s demise was not published; there were not yet electronic databases of unpublished decisions. Accordingly, in *Ivey, Barnum* the parties did not brief the issue of the cigarette rule’s demise, and this Court did not address it. The Policy Statement did not become more widely known until 1984, when the FTC attached it to a published case, *In the Matter of Int’l Harvester Co.*, 104 FTC 949, 1070-76, 1984 WL 565290, at *95 (FTC 1984).

³² See A608-10 (*FTC’s Letter to Senate Subcommittee on Bill to Restrict Agency’s Jurisdiction Over Professionals and Unfair Acts or Practices*, H.R. Rep. No. 98-156, pt. 1, at 27-33 (1983), reprinted in *ANTITRUST & TRADE REG. REP.* (BNA) 1055, at 568-70 (March 11, 1982)).

cigarette rule exit CUTPA jurisprudence the way it entered: on the coattails of federal law.

As *Russell* recognized, the legislature chose “open-ended language” in CUTPA. 200 Conn. at 178. It did not try to set out a precise definition of unfairness, and it did not try to compile a comprehensive set of unfair trade practices. But it also did not leave CUTPA’s broad language unmoored. The legislature chose instead to link CUTPA’s definition of unfairness to federal law—not just to a static time-bound federal law, but to *evolving* federal law, to federal law “as from time to time amended.” C.G.S. § 42-110b(b). The legislature presciently recognized that the FTC and Congress would learn from their experiences over time, and it chose to link CUTPA to developing federal unfairness law so that CUTPA would not be limited to a single state’s experience: instead, it would benefit from the FTC’s nationwide experiences, learning and growing alongside it. That decision to create a dynamic and evolving statute represents a clear legislative policy choice.

Given that policy choice, this Court need not – and should not – unmoor itself from federal law in order to ask broadly whether the substantial unjustified injury test promotes commercial fairness better than the cigarette rule. The legislature chose to link CUTPA’s definition of unfairness to the evolving federal experience, and pursuant to that experience federal law has embraced the substantial unjustified injury test. Given the explicit mandate to follow federal law as “from time to time amended,” and the fact that both the FTC and Congress abandoned the cigarette rule decades ago based on clearly articulated concerns about its effectiveness and consistency with the FTC Act’s purposes, it is difficult to see how the Court can be “guided by” federal law while still embracing its abandoned rule.

Unless there is evidence that federal law has deviated sharply from its course, the federal “lodestar” lights CUTPA’s way, and should be followed. *Cf. Russell*, 200 Conn. at 178. There is no evidence of such deviation; to the contrary, the FTC and Congress had good reason to abandon the cigarette rule in favor of the substantial unjustified injury test. As it gained experience with the cigarette rule, the FTC learned that its overly broad and unfocused definition of unfairness gave too little guidance to businesses that wanted to

act lawfully. A business could do something that no court, statute or regulation had “previously considered unlawful,” thinking that it was acting lawfully. But after the fact, the FTC or a court could conclude that the conduct ran afoul of some unwritten and unspoken “penumbra” of another legal norm. As a result, the business faced liability – even if the conduct did not cause any substantial injury to consumers, competitors or other businesses.³³

Because it allowed liability for actions “that *either* offended public policy, *or* were immoral, etcetera, *or* caused substantial injury to consumers,” the cigarette rule let the FTC and courts disregard consumer injury and “the offsetting benefits that a challenged act or practice may have on consumers.” A596 (J. Howard Beales, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 2003 WL 21501809 at *2 (FTC 2003) (emphasis in original)). As Beales – then the Director of the FTC Bureau of Consumer Protection – explained, the rule’s focus on unwritten “penumbras” of vague “public policies” led to “overreaching under broad, unfocused, policy-based unfairness,” resulting in:

broad, newly found theories of unfairness that often had no empirical basis, could be based entirely upon individual Commissioner’s personal values, and did not have to consider the ultimate *costs* to consumers of foregoing their ability to choose freely in the marketplace. Predictably, there were many absurd and harmful results.

Id. (emphasis in original). The rule ultimately met its demise when the FTC tried to use it “to ban all advertising directed to children on the grounds that it was ‘immoral, unscrupulous, and unethical’” and violated “generalized public policies to protect children.” *Id.*

Unlike the cigarette rule’s unfocused test of unfairness, the FTC found that the

³³ Where a statute is interpreted to permit liability – including punitive liability or civil fines – on the basis of vague standards that give defendants no fair warning of what conduct is proscribed, it courts unconstitutionality. See *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice” of “the conduct that will subject him to punishment”). It should not be interpreted that way. See *Ziotas v. Reardon Law Firm, P.C.*, 296 Conn. 579, 591 (2010) (doctrine of constitutional avoidance requires interpreting statutes to avoid constitutional problems whenever possible).

substantial unjustified injury test aligns with the core purpose of the FTC Act: protecting consumers and competitors from commercial practices that cause substantial unjustified injury. 1980 Policy Statement.³⁴ The California Supreme Court has aptly described the dangers of the cigarette rule: “An undefined standard of what is ‘unfair’ fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (Cal. 1999); *see also Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1404 (Cal. Ct. App. 2006) (abandoning the cigarette rule in favor of the substantial unjustified injury test and finding, as the FTC had, that the substantial unjustified injury test “is more focused, less dependent on subjective notions of fairness and, for these reasons, easier to apply and administer”).

Congress later codified the substantial unjustified injury test, amending the FTC Act to read:

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. *Such public policy considerations may not serve as a primary basis for such determination.*

15 U.S.C. § 45(n) (emphasis added). Like the FTC before it, Congress rejected the cigarette rule’s vague talk of “offense” to “penumbras” of “public policy.” Like the FTC before it, Congress determined that conduct could not be deemed “unfair” merely on the basis of newly discovered public policies. Instead, federal unfairness law requires – and has long required – proof that conduct causes substantial unjustified injury to consumers.

³⁴ The FTC appended the 1980 Policy Statement to its decision in *In the Matter of Int’l Harvester Co.*, 104 FTC 949, 1070-76, 1984 WL 565290, at *95 (FTC 1984).

B. The federal rationale for abandoning the cigarette rule applies with even more force in Connecticut.

The cigarette rule's vagueness poses greater risks under CUTPA than it did under federal law. That's so for two reasons: far more people can sue under CUTPA, and CUTPA carries more severe consequences.

Only the FTC can sue under the FTC Act: the statute offers no private right of action.³⁵ Moreover, the FTC can sue only when it concludes that suing "would be to the interest of the public." 15 USC § 45(b). So even under the vague language of the cigarette rule, FTC Act suits could only be brought by agency officials seeking to act in the public interest. By contrast, CUTPA provides a private right of action, meaning that anyone can sue, individually or in class actions, whether or not they think the lawsuit is in the public interest. *Cf.* A263 (Stay Dec'n) ("there is no 'public interest' involved in this case").

The FTC Act's core remedy is a cease-and-desist order, requiring a defendant to stop the unfair trade practice. The FTC Act does not allow punitive damages or attorney's fees, or even compensatory damages, and it permits civil penalties only rarely, as when a defendant violates a cease-and-desist order.³⁶ CUTPA, by contrast, permits punitive damages, attorney's fees and, in actions brought by the state, civil penalties.³⁷

As this case aptly shows, CUTPA, if governed by the cigarette rule, poses risks that the FTC Act never did. Here, it is undisputed that Hartford did not violate any statutes, regulations, or guidelines. To the contrary, the DOI clearly and consistently declared the inapplicability of any of its regulations and declined to authorize any enforcement action against Hartford. Yet in a suit brought under "CUTPA's private enforcement provision," it

³⁵ See, e.g., *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988 (D.C. Cir. 1973); *Beckenstein v. Hartford Elec. Light Co.*, 479 F. Supp. 417, 422-23 (D. Conn. 1979).

³⁶ See e.g., 15 U.S.C. § 45(l) (authorizing civil penalty for violation of cease and desist orders); 15 U.S.C. § 45(m)(1) (authorizing civil penalty for knowing violation of trade regulation rule, or for knowingly engaging in unfair or deceptive practices established by prior cease and desist order to which defendant was not a party).

³⁷ See C.G.S. §§ 42-110g(a), 42-110g(b), 42-110g(d), 42-110o(a) and 42-110o(b).

was left to a jury to “determine policy . . . in the auto insurance marketplace,” A233 (Injunction Dec’n), by searching the “penumbras” emanating from various statutes and regulations, and then to apply those new-found policies retroactively. The trial court saw this for what it was: a legal version of blind man’s bluff, with juries groping for public policy, the “prospect of inconsistent rulings” risking “an unworkable chaotic market . . . to the detriment of certain competitors and the advantage of others, with unanticipated effects” on consumers. *Id.* The jury found that the defendant’s conduct violated a policy discovered in the “vague, indefinite, or borderline” penumbra of a regulation, A239 (Punitive Damages Dec’n at 4 n.2), even though the agency that wrote and enforces the regulation interprets it to permit the conduct. By the time the game was done, there was a \$14 million compensatory damage award, a \$20 million punitive damage award, and an injunction that “potentially could upset the competitive balance in the market” A231 (Injunction Dec’n). By contrast, an enforcement action under the FTC Act – even if brought decades ago, when still governed by the cigarette rule – would never have carried these risks. These are precisely the kinds of outcomes that the substantial unjustified injury test is designed to prevent.

C. Public policies identified in state statutes and regulations remain relevant under the substantial unjustified injury test.

While the relinquishment of the cigarette rule would eliminate the possibility of liability on the basis of vague, ill-defined and unarticulated “public policies” discovered in the “penumbras” of statutes and regulations that say nothing about those policies, CUTPA would still allow liability for the violation of statutes that, by their terms, also constitute CUTPA violations. The legislature and Commissioner of Consumer Protection have together identified more than a hundred public policies that, if violated, constitute *per se* violations of CUTPA. The legislature has made the violation of nearly eighty statutes a *per*

se violation of CUTPA.³⁸ Likewise, the Commissioner of Consumer Protection, acting pursuant to the legislative power delegated to him under CUTPA, C.G.S. § 42-110b(c), has promulgated nearly thirty regulations identifying public policies that, if violated, constitute *per se* violations of CUTPA. Conn. Agencies Regs. §§ 42-110b-1 through 42-110b-31. The substantial unjustified injury test would have no effect on these 100+ clear and codified public policies, because the legislature and agency have deemed them *per se* violations of CUTPA. Moreover, the legislature and the Commissioner can continue to identify new unfair practices.

In short, the substantial unjustified injury test exists alongside Connecticut's 100+ clearly defined *per se* violations of CUTPA, offering broad consumer protection without subjecting businesses to liability based on violations of previously unarticulated public policies discovered by juries in the penumbras of regulations.

III. The Court Abused Its Discretion in Awarding Punitive Damages.

The punitive damages award rests on two abuses of discretion: it disregards the jury's finding that Hartford did *not* act immorally, unethically, unscrupulously or oppressively; and it fails to identify conduct sinking to the level of wantonness, malice, or evil that is required to warrant punitive damages.³⁹

This Court reviews punitive damage awards under an abuse of discretion standard, *Lydall, Inc. v. Ruschmeyer*, 282 Conn. 209, 245 (2007), but a court exercises its discretion properly only if it follows the legal standard, *Hurley v. Heart Physicians, P.C.*, 298 Conn. 371, 392 (2010): "In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. In fact, the flavor of the basic requirement to justify an award of punitive damages is

³⁸ See Robert M. Langer, John T. Morgan and David L. Belt, *Conn. Practice Series: Conn. Unfair Trade Practices, Business Torts and Antitrust*, Appendix E (2013-14 ed.) (listing statutes).

³⁹ Neither the punitive damages award nor the permanent injunction can stand if no CUTPA violation occurred. See *generally* Pts. I & II.

described in terms of wanton and malicious injury, evil motive and violence.” *Gargano v. Heyman*, 203 Conn. 616, 622 (1987) (internal citations omitted).

A. The court improperly disregarded the jury’s factual findings.

The court asked the jury whether Hartford had acted in an “immoral, unethical, unscrupulous, or oppressive” manner. The jury said no. A431 (Jury Interrog. # 1). The court then disregarded the answer, reasoning that it – not the jury – decides whether punitive damages are appropriate. A254-55 (Punitive Damages Dec’n). To be sure, “the award of punitive damages under CUTPA is reserved to the discretion of the trial court, not the jury.” *Ulbrich*, 310 Conn. at 450. But that hardly means that the court can award punitive damages in the face of actual jury findings like those made here.

A trial court cannot set aside the jury’s factual findings unless they are clearly erroneous. *Saleh v. Ribeiro Trucking, LLC*, 303 Conn. 276, 290 (2011) (trial court is “bound by the jury’s credibility determinations and all reasonable inferences the jury could have drawn from the evidence”); *see also Sorlucco v. New York City Police Dep’t*, 971 F.2d 864, 874 (2d Cir. 1992) (“We held that ‘when a jury has decided a factual issue, its determination has the effect of precluding the court from deciding the same fact issue a different way.’”). The trial court did not find that the jury’s findings were clearly erroneous. It just assumed – erroneously – that the findings had no bearing on punitive damages.

The jury’s finding – that Hartford had not acted immorally, unethically, unscrupulously or oppressively – resolves the question of whether Hartford’s conduct amounted to “wanton and malicious injury, evil motive and violence.” *Gargano*, 203 Conn. at 622. True, the words “immoral, unethical, unscrupulous, or oppressive” are not verbatim the words that this Court has used to describe the punitive damages standard: “wanton,” “malicious,” “evil,” “reckless indifference,” “intentional,” and “violence.” But the words do not have to be identical:

While we have attempted to draw definitional distinctions between the terms willful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that ‘willful,’ ‘wanton,’ or ‘reckless’ conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary

care, in a situation where a high degree of danger is apparent. *Dubay v. Irish*, 207 Conn. 518, 533 (1988) (internal citations omitted). As this Court noted in *Lydall*, the central meaning is that “punitive damages may be awarded only for outrageous conduct.” 282 Conn. at 245. There is likewise no meaningful difference between the words here: if a defendant has acted morally, ethically, scrupulously and without oppression, by definition it cannot have engaged in “outrageous conduct,” *id.*, or in “highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.” *Dubay*, 207 Conn. at 533. Before now, no Connecticut court has ever awarded punitive damages when the jury found no unethical or unscrupulous conduct. In assessing \$20 million in punitive damages against a defendant that the jury found not to have acted immorally, unethically, unscrupulously, or oppressively, the court abused its discretion.⁴⁰

B. In any event, there is no evidence of wantonness, malice, evil or violence.

To award punitive damages, the court had to find that, in encouraging its employee-appraisers to bargain for lower prices from suppliers, Hartford engaged in “outrageous conduct,” *Lydall*, 282 Conn. at 245, *i.e.*, “wanton and malicious injury, evil motive and violence.” *Gargano*, 203 Conn. at 622. A defendant can’t act outrageously or evilly if it doesn’t know it’s doing anything wrong. For that reason, it’s been clear – since before the Civil War – that punitive damages cannot be awarded against a defendant acting under an honest claim of right:

[W]hen the act which produced the injury does not appear to have been wanton or malicious, and when the parties come before the court in the character of bona fide claimants of property, honestly contending for their rights, vindictive or exemplary

⁴⁰ The punitive damages award is also inconsistent with the jury’s finding that Hartford caused no substantial unjustified injury to the plaintiffs. That finding is not surprising. As the court noted, the plaintiffs’ “shops in the years before trial were operating at a profit,” A263-64 (Stay Dec’n), and in any event, any injury was no more than the ordinary effect of marketplace negotiations between sellers (body shops) and a buyer (Hartford). Nor were policyholders (the ultimate consumers here) harmed, as the court recognized. A263.

damages ought not to be allowed.”⁴¹

Hartford plainly acted under an honest claim of right here. The trial court itself described Hartford’s actions in this “vague” area as “slight or indirect,” noting that the DOI assured Hartford’s employee-appraisers that they were not violating the regulation. A229 (Injunction Dec’n). Its interactions with its employee-appraisers were found (erroneously in our view) to contravene a public policy found in the penumbra of a DOI regulation that had *never before* been found to bar insurers from doing what Hartford did. The regulation that is the sole source of this newfound policy had never been applied to labor rates, had never been applied to insurers, and in fact had been construed for years by the DOI as no bar to the conduct at issue – as reiterated in the recent DOI Bulletin.⁴² A defendant can’t act “outrageously” by interpreting a regulation the same way as the agency that wrote it.⁴³

In reaching the opposite conclusion, the trial court focused on two things. First, it noted that Hartford aimed to pay less for labor rates by communicating with its employee-appraisers.⁴⁴ That proves Hartford intended to keep down the prices it paid for labor rates, but supplies no basis for finding a willful violation of the body shops’ legal rights; to the contrary, Hartford’s conduct is consistent with industry practice and the DOI’s interpretation of its own regulation. Second, the court noted that a Hartford employee emailed his co-

⁴¹ *Dibble v. Morris*, 26 Conn. 416, 427 (1857); see also *Curtiss v. Hoyt*, 19 Conn. 154, 159 (1848) (approving jury instruction that “if the defendants had acted bona fide, under a claim of right, doing no wanton or unnecessary injury, the value of the property destroyed, was the proper and legal rule of damages,” not punitive damages).

⁴² See A591-92 (DOI Bulletin No. IC-34) (Regulation §38a-790-8 doesn’t address “the determination of labor rates or the process by which hourly labor rates are negotiated”).

⁴³ Unlike *Ulbrich*, 310 Conn. at 451, which involved a defendant’s conscious departure from known, “standard business norms,” Hartford here followed the industry norm in seeking to limit costs for body shop work. Plaintiffs testified that they accepted the same rate from other insurers. A287-88 (Ferraiolo); A273-74 (Scrip). The disgruntled former employee-appraiser acknowledged the same. A298 (O’Mara) (“All the insurance companies—all the insurance companies pay a similar rate.”); see also A272 (Scrip).

⁴⁴ A242-43 (Punitive Damages Dec’n) (citing A382, Pl. Ex. 315, an email encouraging appraisers to buy at \$38/hour but authorizing purchases on non-specialized repairs up to \$42/hour).

worker, telling him not to write about labor rates.⁴⁵ In making that email the linchpin of a “willfulness” finding, the court ignored the fact that the email was written during the course of this very litigation. It is hardly surprising that a defendant would want to be careful in its written communications about issues that are the subject of litigation, see A325-26 (Iverson), and the fact that a Hartford employee exercised such care does not suffice to support a finding that Hartford willfully violated a public policy that no one had ever heard of prior to the jury’s verdict in this case. Hartford continues to maintain openly that it has the right to work with its employee-appraisers to bargain with body shops for the lowest possible rates, because that is what it has always believed that the market demands and what the law permits. Indeed, the bargaining – far from malicious – is consistent with the DOL’s interpretation of its own regulation.

Subjecting a defendant to punitive damages when it did not know (and had no reasonable way to discover) that its actions were wrongful – and where the defendant’s interpretation of the law accords with that of the agency that wrote the relevant regulation – would violate not just the threshold requirement of wanton or malicious behavior, and not just the “honest claim of right” doctrine, but also the most fundamental notions of due process. See *BMW of N.A.*, 517 U.S. at 574 (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that the State may impose.”). As the trial court frankly noted, the “penumbra” of the regulation here was at best a “vague, indefinite, or borderline area.” A239 (Punitive Damages Dec’n at 4 n.2).⁴⁶ Even if defendants can face *liability* for the violations of (never-before-articulated)

⁴⁵ A243 (citing A385, Pl. Ex. 400) (“We have to be VERY careful about publishing anything about Labor Rates. But I may have a solution. Call me tomorrow.”) This August 25, 2004 email was written thirteen months after Plaintiffs sued.

⁴⁶ The court described Hartford’s actions in this “vague” area as “slight or indirect” pressure on its employee-appraisers to keep down body shop repair costs. A229 (Injunction Dec’n). The court noted that the complaining appraisers were not “subjected to any adverse consequences because of their hourly rate determinations,” that modifications of their

public policies lurking in the penumbra of a regulation, they cannot constitutionally be subjected to *punitive* damages (i.e., punishment) for the “willful” violation of norms that no court, legislature or regulator ever previously expressed. *Gore*, 517 U.S. at 574 (“[T]he basic protection against ‘judgments without notice’ afforded by the Due Process Clause is implicated by civil penalties.”). The canon of constitutional avoidance thus strongly militates against reading CUTPA to permit punitive damages here. See *Ziotas v. Reardon Law Firm, P.C.*, 296 Conn. 579, 591 (2010) (“It is well established that this court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities.”) (citation omitted); *State v. Cook*, 287 Conn. 237, 245 (2008).

IV. The Court Abused Its Discretion in Entering a Permanent Injunction.

The trial court concluded that an injunction did not serve the public interest, and later found that Plaintiffs would not suffer irreparable harm. It recognized that the injunction would subject an insurance company with only a 6% market share to a different set of rules than the rest of the industry, putting it at such a disadvantage that it may no longer be possible to compete. The court nevertheless entered the injunction. In doing so, it erred three times, each fatally: it held that irreparable harm was not a prerequisite to an injunction; it concluded that a defendant is subject to an injunction if it maintains in post-verdict motions or on appeal that the trial court erred in allowing liability; and it ignored the harm to Hartford, the competitive auto insurance market, and consumers.⁴⁷

appraisals involved not labor rates but “factors other than the hourly rate,” and that the DOI assured them they were not violating the regulation. But it found that “pressure put on the Hartford’s appraisers by their employer, no matter how slight or indirect, and regardless of the lack of enforcement action by the [DOI], could be considered as offensive at least to the ‘penumbra’” of the DOI regulation. If “slight or indirect” pressure that “could be considered as offensive” to the never-articulated “penumbra” of a regulation justifies punitive damages, then every CUTPA violation justifies punitive damages.

⁴⁷ The entry of a CUTPA permanent injunction is reviewed for abuse of discretion. See *New Breed Logistics, Inc. v. CT Indy NH TT, LLC*, 129 Conn. App. 563, 570 (2011).

A. A private plaintiff must establish irreparable harm to obtain an injunction.

The trial court held that a private plaintiff seeking a permanent injunction under CUTPA need not establish irreparable harm. A218-19 (Injunction Dec'n). It recognized that there was "no appellate authority" for this proposition,⁴⁸ but nevertheless decided to "extend" the law in this novel direction. A217-18.

Courts do not lightly assume that a statute abrogates the common law, and "the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed." *Caciopoli v. Lebowitz*, 309 Conn. 62, 70 (2013) ("In determining whether or not a statute abrogates or modifies a common law rule the construction must be strict[.]"). If anything, that principle is even stronger when applied to common law principles of equity. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (holding that only a clear legislative statement can displace common law equitable principles). Under federal law, it is clear "that mere statutory authorization of injunctive relief" does not eliminate the need to show irreparable harm. *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998). There is no reason to think that Connecticut law – which like federal law looks askance at silent abrogation of common law principles – differs.

CUTPA says nothing about irreparable harm, see C.G.S. § 42-110g(a), and so should not be presumed to have abrogated this longstanding equitable requirement. The trial court presumed that the legislature silently abrogated the equitable requirement on the basis of cases holding that *public officials* need not establish irreparable harm in order to secure injunctive relief. See A216-17 (citing *Dep't of Trans. v. Pacitti*, 43 Conn. App. 52, 58 (1996), and *Burns v. Barrett*, 212 Conn. 176, 194 (1989)). *Pacitti* and *Burns* waived the irreparable harm requirement for a public official seeking to enforce a statute, based on a doctrine originating in *Johnson v. Murzyn*, 1 Conn. App. 176 (1984) and *Conservation Commission v. Price*, 193 Conn. 414, 429 (1984). Although these cases used broad language, each

⁴⁸ To the contrary, the court deliberately disregarded the only appellate authority on point: *New Breed Logistics*, 129 Conn. App. at 569 n.7.

involved a public official seeking to enforce a statute—“an exceptional case which stands on a different footing” from private plaintiff litigation. *Johnson*, 1 Conn. App. at 177-79. The Appellate Court has recognized this distinction and declined to extend the public-official exception to private litigants. See *New Breed Logistics, Inc. v. CT Indy NH TT, LLC*, 129 Conn. App. 563, 569 n.7 (2011).

While the trial court’s original injunction decision left room for doubt as to whether it had, in the alternative, found irreparable harm, it later made clear that it had not: “In granting this injunction the court did not find that the plaintiffs had been irreparably harmed.” A264 (Stay Dec’n). As such, the court’s error requires reversal.

B. A court cannot use an injunction to punish a party for a good-faith appeal.

The trial court held that an injunction was necessary “to prevent a multiplicity of legal actions for continuing damages against The Hartford, which continued to maintain in post-trial proceedings that its conduct was not improper, and has given no indication of any intent to change its procedures regarding hourly labor rates.” A220. It is true that an injunction can issue to prevent the need for ongoing lawsuits, e.g., *Berin v. Olson*, 183 Conn. 337, 342 (1981) (enjoining ongoing discharge of surface water by neighbor), but no authority supports the notion that a litigant subjects itself to a permanent injunction merely because it challenges the trial court’s legal reasoning. The court gave no reason to think that Hartford would continue to violate the newly-discovered penumbra of the DOI regulation, if in fact it was finally adjudicated as a CUTPA violation. Instead, the court found that Hartford’s good-faith post-verdict motions and appeal were themselves evidence of an intent to violate CUTPA indefinitely.

That finding punishes litigants seeking to correct trial court errors, and so would undermine the appellate system’s legitimacy. It would also trigger injunctive relief for every CUTPA defendant seeking reconsideration or choosing to appeal, an interpretation that the plain text of the statute cannot bear. This error is all the more egregious where, as here, the

trial court subsequently reversed course and recognized not only that Hartford's appeal was "brought and made in good faith," but also that "[t]here is a likelihood of success on appeal." A265, 261 (Stay Dec'n).

C. The court failed to weigh the harms to Hartford, the market, and consumers.

A court is "not mechanically obligated to grant an injunction for every violation of law," *Price*, 193 Conn. at 429, but instead must "balance the competing interests of the parties and the relief must be compatible with the equities of the case," *Dukes v. Durante*, 192 Conn. 207, 225 (1984) (internal quotation marks omitted). The trial court was duty bound to "take into account the gravity and willfulness of the violation, as well as the potential harm to the defendants." *Johnson*, 1 Conn. App. at 183. Influenced by its desire to punish Hartford for challenging its legal reasoning, the court failed to balance the equities.

The trial court recognized the severe harm that Hartford would suffer under an injunction: "oversight over just one insurance company with only a 6% market share . . . could upset the competitive balance in the market to the serious disadvantage of the one company under review while its competitors are not under review." A231. It recognized that Hartford would "suffer economic harm in the form of competitive disadvantage as the only [Connecticut] automobile insurance company bound by this injunction while its competitors, 94% of the market suppliers of auto insurance, would not be so bound." A263-64 (Stay Dec'n). That manifest unfairness led the court to call for someone other than the court to issue "comprehensive guidance applicable to all competitors in the market." A231-32 (Injunction Dec'n).⁴⁹ It nevertheless imposed the injunction.

The trial court also failed to account for the harm to consumers. A CUTPA injunction must be "an effective and efficient means of dealing with violations of the act and regulations properly promulgated under its authority." *Price*, 193 Conn. at 430. Although "consumers were expected to be a major beneficiary" of CUTPA, *Larsen Chelsey Realty*

⁴⁹ As noted above, the DOI Commissioner responded by issuing a Bulletin reiterating its longstanding position – which the court had earlier ignored.

Co. v. Larsen, 232 Conn. 480, 487 (1995), and the purpose of CUTPA was to “to put Connecticut in the forefront of state consumer protection,” 16 H.R. Proc., Pt. 14, 1973 Sess., p. 7324 (remarks of Rep. Newman), Plaintiffs’ purpose in bringing this lawsuit was to *raise* the prices they charged consumers for their services, A338 (Walsh), without improving quality, A277-78 (Scrip). Raising prices *hurts* consumers like Hartford; it doesn’t protect them. And if the injunction forced Hartford from the market, then *its* consumers – the auto insurance buying public – would suffer from decreased competition among auto insurers, predictably leading to a corresponding rise in premiums.⁵⁰ While the court failed to consider the harm to consumers, it recognized the chaos that injunctions could wreak:

And now, with CUTPA’s private enforcement provision, those [public policy] decisions can be made by separate juries, after years of litigation, in cases against individual companies, such as this case. The prospect of inconsistent rulings could result in an unworkable chaotic market for insurance to the detriment of certain competitors and the advantage of others, with unanticipated effects on Connecticut automobile insurance policy holders. A uniform workable and consistent regulatory policy is urgently needed.

A233 (Injunction Dec’n). Imposing an injunction that hurts consumers and threatens to create “an unworkable chaotic market for insurance” is an abuse of discretion.

⁵⁰ See *Webster v. Allstate Ins. Co.*, No. B211390, 2010 WL 60642 at *6 (Cal. Ct. App. Jan. 11, 2010) (rejecting body shops’ claim of price suppression and noting that “as a result of defendants’ business practices, insureds and claimants are charged a *lower* rate for auto body repairs”) (emphasis in original).

CONCLUSION

The Court should reverse the judgment below and enter judgment for Hartford.

Respectfully submitted,

DEFENDANT –APPELLANT
THE HARTFORD FIRE
INSURANCE COMPANY

By: 

Jonathan M. Freiman

Aaron S. Bayer

Robert M. Langer

Carolina D. Ventura

Benjamin M. Daniels

WIGGIN AND DANA LLP

One Century Tower

P.O. Box 1832

New Haven, CT 06508-1832

(203) 498-4400

(203) 782-2889 (fax)

jfreiman@wiggins.com

abayer@wiggins.com

Juris No. 67700

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with all of the provisions of the Connecticut Rules of Appellate Procedure § 67-2.


Jonathan M. Freiman

CERTIFICATION

I hereby certify that on December 16, 2013, a copy of the foregoing brief and separately bound appendix was sent by first-class mail, postage prepaid, to all counsel and pro se parties of record, and to the trial court judge, as follows:

David A. Slossberg, Esq.
Hurwitz, Sagarin, Slossberg & Knuff, LLC
147 North Broad Street
P.O. Box 112
Milford, CT 06460
Phone: (203) 877-8000
Fax: (203) 878-9800

Alan Neigher, Esq.
Sheryle Levine, Esq.
Law Office of Alan Neigher
1804 Post Road East
Westport, CT 06680
Phone: (203) 259-0599
Fax: (203) 255-2570

Ronald J. Aranoff, Esq.
Bernstein Liebhard LLP
10 East 40th Street, 22nd Floor
New York, NY 10016
Phone: (212) 779-1414
Fax: (212)779-3218

Robert J. Berg, Esq.
Law Office of Robert J. Berg
Robert J. Berg PLLC
32 Tisdale Road
Scarsdale, NY 10583
(914) 722-0579
(914) 522-9455 (cell)

Thomas G. Rohback, Esq.
Gail L. Gottehrer, Esq.
Axinn, Veltrop & Harkrider LLP
90 State House Square, 9th Floor
Hartford, CT 06103
Phone: (860) 275-8100
Fax: (860) 275-8101
Berchem, Moses & Devlin, P.C.

75 Broad Street
Milford, CT 06460
Phone: (203) 783-1200
Fax: (203) 878-2235

Matthew J. Budzik, Esq.
Joseph J. Chambers, Esq.
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Phone: (860) 808-5270

Honorable Alfred Jennings
Connecticut Superior Court
123 Hoyt Street
Stamford, CT 06905

Honorable Taggart Adams
Connecticut Superior Court
123 Hoyt Street
Stamford, CT 06905



Jonathan M. Freiman