SUPREME COURT
OF THE
STATE OF CONNECTICUT

SC 19219

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

v.

THE HARTFORD FIRE INSURANCE COMPANY

BRIEF OF THE PLAINTIFFS-APPELLEES

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PLAINTIFFS-APPELLEES:

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COUNTERSTATEMENT OF ISSUES

This is an appeal from a judgment based on a jury verdict that The Hartford Fire Insurance Company ("The Hartford") committed unfair acts and practices in violation of the Connecticut Unfair Trade Practices Act ("CUTPA") by violating the public policy of Connecticut – clearly expressed in State regulations – that require an automobile physical damage appraiser to conduct "fair and impartial appraisals," to "disregard any efforts on the part of others to influence his judgment or the interests of the parties involved," and to prepare "an independent appraisal of damage." The jury awarded $14.765 million in compensatory damages to the plaintiff class of more than one thousand Connecticut auto body shops based on the suppression of labor rates caused by The Hartford's improper control of its staff appraisers. The trial court awarded $20 million in punitive damages, having found that The Hartford "knowingly and purposefully for the enhancement of its own profits" engaged in the conduct that violated CUTPA, including efforts to cover up its unlawful practices. The trial court also entered a permanent injunction.

The judgment below raises the following issues on appeal.

1. Whether the judgment should be affirmed in all respects because:
   a. The plain language of CUTPA and the congressional record dispositively establish that there is no legal basis for abandoning the cigarette rule (Pages 17-20).
   b. The cigarette rule should be maintained as the well-settled standard in this state unless changed by the state legislature (Pages 20-30).
   c. It would be unjust, inequitable and improper to make any changes in the legal standard for determining unfairness, which this Court has applied for more than three decades, including the more than ten years this case has been pending (Pages 30-31).

d. This case is not suitable for considering whether to change the well-settled standard for determining unfairness where The Hartford was sanctioned for refusing to produce evidence relevant and material to determining unfairness under the substantial injury test-- the very standard urged by The Hartford for adoption here (Pages 31-32).

2. Whether the trial court's denial of The Hartford's motion for reconsideration should be affirmed because the trial court did not abuse its discretion in determining that the materials from the Insurance Commissioner on which The Hartford based its motion did not constitute newly discovered evidence and were not due any judicial deference (Pages 32-34).

3. Whether the trial court's award of punitive damages should be affirmed in all respects because the trial court properly exercised its discretion in awarding punitive damages based on its finding that The Hartford "knowingly and purposely for the enhancement of its own profits" engaged in conduct that violated CUTPA and made "efforts to hide or cover up its conduct" (Pages 34-36).

4. Whether the trial court's award of injunctive relief should be affirmed in all respects because:

   a. The trial court properly exercised its discretion in awarding limited injunctive relief that was narrowly tailored to address The Hartford's unlawful conduct (Page 37).

   b. Although the trial court in fact found that the Plaintiff class suffered irreparable harm, injunctive relief can be awarded pursuant to CUTPA without requiring a finding of irreparable harm or lack of an adequate remedy at law. (Pages 37-39).

5. Whether The Hartford's claim of preemption under the Connecticut Unfair Insurance Practices Act ("CUIPA") should be rejected because:

a. The Hartford waived and failed to preserve any argument that Plaintiffs' CUTPA claim was preempted by CUIPA by: (i) failing to plead preemption, (ii) failing to request a jury charge on preemption or otherwise object to the jury charge on that basis, and (ii) failing at any point to present the issue to the trial court for determination (Pages 39-41).

b. Even had such a preemption argument been preserved for appeal, Plaintiffs' claims would not be preempted in this case because the relationship between an insurer and auto body shops is not within the "business of insurance," which defines the scope of CUIPA, and regulations governing the conduct of motor vehicle physical damage appraisers found in § 38a-790-8, adopted pursuant to C.G.S. § 38a-790, provide an independent basis for a CUTPA violation (Pages 41-43).

6. Whether any outcome would allow judgment to enter for The Hartford given errors by the trial court in certain evidentiary rulings, particularly relating to Plaintiffs' ability to satisfy the substantial injury prong of the cigarette rule (Pages 43-45).

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INTRODUCTION

After more than a decade of litigation, a prior appeal to this Court on class certification, and a seventeen day jury trial, The Hartford does not assert a single error by the trial court in any evidentiary ruling, in its charge to the jury on the CUTPA standard that has been the law of this State for more than thirty years, or argue that the jury's verdict was not supported by the evidence – the usual bases for attacking a judgment on appeal. Instead, faced with the jury's finding that The Hartford violated public policy and well-settled law, The Hartford takes the approach that if you don't like the verdict, change the facts, if your conduct violates the law, change the law, and if all else fails, argue against claims Plaintiffs are not making. Based on evidence unchallenged on this appeal, the jury returned a verdict of $14.7 million, finding that The Hartford violated the Connecticut Unfair Trade Practices Act ("CUTPA") by eliminating the independent judgment of its in-house, state-licensed, staff appraisers, with the effect of dramatically lowering the labor rates paid to the Plaintiff Class of licensed auto repairers. Confronted with this verdict, a punitive damages award of $20 million and imposition of reasonable, limited injunctive relief, The Hartford now invites this Court to nullify the verdict, overturn the trial court's well-reasoned decisions, and provide it with what is, essentially, a retroactive pardon. This Court should reject The Hartford's invitation. As the jury found, The Hartford caused enormous harm to the many small business owners throughout the State that compose the Plaintiff Class by engaging in the very type of unfair trade practices CUTPA was designed to prohibit. The jury verdict, punitive damages award, and injunctive relief should be affirmed in all respects.

1. Plaintiffs' Claims of Unfair Trade Practices.

This class action was commenced more than a decade ago by the Auto Body Association of Connecticut ("ABAC") and three auto body shops on behalf of a class of more than one thousand Connecticut auto body shops to challenge unfair practices by which The Hartford forced its staff appraisers to use an artificially low labor rate for auto body repair work in Connecticut. According to The Hartford's own staff appraisers, the labor rate The

Hartford requires them to use in their appraisals is not actually a "prevailing" or "market" rate. A140, 399.[1] Rather, this rate is obtained through The Hartford's manipulation and control over a small group of direct repair shops with whom The Hartford has a contractual relationship. Id., A417. See infra at 9-12. The Hartford suppresses labor rates paid to the Plaintiff Class by directing an increased volume of repairs to its "direct" repair shops so that they will accept a range of concessions on repairs, including accepting a single, uniform, lower labor rate. Id. The Hartford then requires its staff appraisers to use the same labor rate it pays to these direct repair shops in virtually every appraisal, for every auto repair shop, throughout the State, including Plaintiffs' independent repair shops. Id.

As Plaintiffs' expert, Dr. Frederic Jennings, established at trial (A346-56), The Hartford is able to impose these conditions based on abuse of power derived from (1) the control and superior knowledge it asserts over its insureds at the time of an accident; (2) the reality that auto body shops depend on it for their very livelihoods; and (3) its status as employer of its staff appraisers. The impact of The Hartford's conduct on the Plaintiff Class is evident in the growing disparity between labor rates paid to mechanics and auto body repairers in the State. A137-39, 192-95, 345, 364-65, 399. Despite the fact that both mechanics and auto body repairers share the same license in Connecticut and perform similar functions, mechanics, who are paid directly by consumers, earn in a range of $70 to $95 an hour, while auto body repairers, which have much higher capital costs, were paid by The Hartford, at the time of trial, a uniform rate throughout the State of about $46 an hour. A192, 344-45. The jury concluded that The Hartford's imposition of this suppressed, uniform labor rate caused significant harm to the more than one thousand members of the Plaintiff Class, quantifying that harm to be approximately $14.7 million. A63-65.

The important public policy violated by The Hartford's conduct is both simple and clear – the State regulations setting forth the Code of Ethics for motor vehicle physical

[1] All citations to Plaintiffs' appendix shall be designated as "A1" etc., with citations to Defendant's appendix as "Def. A1" etc.

damage appraisers require that physical damage appraisers be fair and impartial when appraising the costs of repairing a vehicle. The regulations mandate that 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 interests of the parties involved; [and] (4) prepare an independent appraisal of damage.

Conn. Agencies Regs. § 38a-790-8 ("Code of Ethics"). A469-70. This public policy is not, however, subject to selective application by The Hartford for its commercial advantage. The duty of appraisers to be fair and impartial is not abrogated merely because an appraiser is employed by an insurance company. Nor does it apply only to some of the appraiser's responsibilities, but not others. The appraisal of the costs of repair must be fair all the time, for all elements of a damage appraisal, and for all parties involved. Webster's Dictionary defines "appraiser" as one who "sets a price for" or "decides the value of." The appraisal regulations expressly define the responsibility of appraisers as including "agreeing on a **price** for repairing damaged motor vehicles." Conn. Agencies Regs. §§ 38a-790-3 and 790-5. A469 (emphasis added). Because the labor rate is an essential element of the price of a repair (i.e. cost of labor = labor time x labor rate), and is included in every damage appraisal, determination of those rates must be conducted by appraisers in accordance with their Code of Ethics established by state regulation. It is that simple.

2. The Hartford's Efforts to Change the Facts of the Case.

The Hartford devotes much of its brief to talking about anything other than the relevant facts of record. The Hartford persistently discusses its market share as a distraction from Plaintiffs' straightforward claim that The Hartford unlawfully interferes with the independence of its staff appraisers in every one of the twelve to fifteen thousand repair claims it handles a year in the State of Connecticut. A357. The Hartford misleadingly focuses its arguments exclusively on consumers, even though CUTPA protects businesses,

as well as consumers. No less than thirty-eight (38) times throughout its brief The Hartford uses the word "negotiate" to describe its conduct, even though the overwhelming evidence presented to the jury was that The Hartford absolutely prohibits any negotiation of labor rates by its staff appraisers, instead dictating to them the rate they must include in their estimates. See infra at 9-12. The Hartford repeatedly suggests that it has behaved under an "honest claim of right," even though the evidence demonstrated, and the trial court found, that The Hartford intentionally took steps to cover up its unlawful conduct, demonstrating its consciousness of wrongdoing. Def. A243; See infra at 12-13. And The Hartford couples this with a shameful and knowingly misleading attack on the integrity and intentions of the hardworking class of men and women who merely seek to earn a fair price for their skilled labor, while The Hartford makes billions in corporate profits and pays millions to its corporate executives. A70-75.

3. The Trial Court Rejected The Hartford's Efforts to Avoid the Consequences of its Violation of "Deeply Rooted" Public Policy.

Not content with mischaracterizing the evidence, The Hartford invents a legal fiction intended to evade the professional obligations imposed on appraisers by State regulation. The Hartford declares that "when appraisers engage in negotiations, they act as employees, not as 'licensed appraisers'" (Def. Br. at 2) – a bizarre proposition with no basis in the law. The Hartford also contends that all elements of a damage appraisal except the labor rate are within the professional responsibility of appraisers – a contention soundly rejected by the trial court (Def. A183-86), rebuffed by its own longtime staff appraiser, Michael O'Mara (infra at 9-12), belied by its own "Best Practice" documents and admissions at trial (Def. A184, 376; A383-84), and at odds with the regulations governing the conduct of physical damage appraisers. A469-70. It is no wonder that The Hartford's efforts to parse the professional obligations of its staff appraisers were soundly rejected at trial. Def. A180-86.

The Hartford's machinations do not end there. Unable to prevail in the case it actually tried in 2009, The Hartford has concocted an *ex post facto* argument that Plaintiffs'

claim is somehow at odds with the Department of Insurance's ("DOI") interpretation of its own regulations. This claim was first asserted almost two years after the jury's verdict under the false pretense of "newly discovered evidence" by reference to letters authored in 2007 and 2008 by then Commissioner Thomas Sullivan.[2] Contrary to the impression The Hartford attempts to leave with this Court, the trial court flatly rejected the notion that these letters were "newly discovered," entitled to any judicial deference, or otherwise persuasive. Def. A180-85. See infra at 13-15. Describing the operative public policy as "**deeply rooted** in the appraiser's independence from outside influence – even from the company that employs the appraiser," the trial court held, in no uncertain terms, that:

> Despite what Commissioner Sullivan says in his letter, appraisers have to 'determine' labor rates. There is no other way the appraiser could get to the bottom line dollar amount of the appraisal.... **[I]t is undisputed that the appraiser must make a determination of a labor rate** which reflects the cost of repairing the car and, in making that determination. [sic] The Code of Ethics requires him to do so fairly and honestly without outside influence from anyone." Def. A185-86 (emphasis added).

The trial court further noted (Def. A185) that the 2008 letter actually endorses Plaintiffs' common sense claim, stating that the job of appraisers includes exercising "judgment" in "determining labor rates" based on those "in the marketplace in general," (A679) statements nowhere acknowledged by The Hartford in its selective and misleading discussion of these letters in its brief to this Court.

In the course of dismantling The Hartford's claims regarding the DOI letters, the trial court also rejected The Hartford's argument that, because the DOI has stated it has no authority to "set" or "regulate" labor rates, it somehow follows that the appraiser Code of Ethics does not apply to determination of labor rates used to prepare damage appraisals. Def. A185-86. This argument is misleading. Whether or not the DOI can set or regulate

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[2] Former Commissioner Sullivan had previously spent more than twenty years as an employee of The Hartford and his wife served in Defendant's legal department at the time these letters were written. A255-56, 393. Plaintiffs have come to learn through discovery in another case that, contrary to its representations to the trial court, The Hartford's paid lobbyist was in possession of the September 27, 2007 letter all along, acquiring it in or about 2007 (A703-05), and that it was his custom and practice to provide such information to his clients, including The Hartford. A697-702, 707-712.

labor rates has no bearing on the issue in this case, which is whether appraisers are bound by Connecticut State regulations to be fair and impartial in preparing damage appraisals. The trial court did not abuse its discretion in denying Defendant's belated motion to reconsider based on these two letters (see infra at 32-34), and this Court, likewise, should not be taken in by such gamesmanship.

Following the denial of its motion to reconsider, The Hartford engaged in yet another effort to contrive an *ex post facto* document for appeal, this time privately lobbying in 2013, without public hearing, for issuance of Bulletin No. IC-34, which, in any event, does nothing more than restate one paragraph from the 2007 letter. Notably, the Insurance Association of Connecticut (the "IAC"), the leading insurance industry lobbyist in Connecticut, did not participate in this back door lobbying process because it was not considered to be within the "collective" interests of its members. A720-21. The Hartford was so desperate to nullify the jury's verdict by post-hoc administrative fiat that it actually attempted to contact the Insurance Commissioner while he was on vacation in Switzerland in order to obtain issuance of the 2013 bulletin. A723-24.

The Hartford also misleadingly contends that the jury verdict rests on a "never-before-articulated penumbra of a written law," repeatedly misquoting the trial Court's decision on punitive damages (Def. A239) as supporting that proposition. Def. Br. at 11, 17, 33, 38. This invented phrase has no basis in the record. In fact, Plaintiffs established a direct violation of public policy based on the jury's finding that The Hartford forces its staff appraisers to violate their Code of Ethics as a condition of employment and The Hartford is legally responsible for their violation under the doctrine of *respondeat superior*, which was part of the jury charge. Def. A419. As a procedural matter, the general verdict rule precludes this Court from concluding that the verdict was based on violation of the penumbra of a public policy because the jury interrogatory does not state whether or not the verdict is based on a penumbra of a right. A59. Even assuming, *arguendo*, that it was

relied upon by the jury, the concept of penumbra is firmly established in the law and has strong evidentiary support in the record. See infra at 25-27.

4. The Hartford's Effort to Change the Law.

At the heart of this appeal is The Hartford's effort to change the "well-settled" legal standards for determining liability under CUTPA by abandoning the cigarette rule and more than three decades of legal jurisprudence in Connecticut. The effort is misguided from the outset. As a threshold matter, the plain language of CUTPA stating that "courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to § 5(a)(1) of the Federal Trade Commission Act," ("FTC Act") neither compels nor supports such a change. See infra at 17-20. The substantial injury test standard proposed by The Hartford was actually included by Congress in a 1994 amendment to § 5(n), **not** § 5(a)(1), of the FTC Act. Because the test proposed by The Hartford is not in the section of the FTC Act referenced in CUTPA, rules of statutory construction dictate that no change is warranted. This conclusion is consistent with the intent expressly stated by Congress in the Senate record that the amendment to § 5(n), as opposed to § 5(a)(1), was only intended to limit the FTC's jurisdiction, without affecting, in any way, the development of the law of unfairness under the various state unfair trade practices statutes, of which CUTPA is one. The Hartford's efforts to rewrite the CUTPA liability standard thus proceeds from a false premise.

Should the Court proceed beyond this threshold issue, there are compelling legal and public policy reasons briefed in detail below (infra at 20-32) why the standard should not be changed from the cigarette rule to the more restrictive and far more vague substantial injury test. The reasons – most of which have never before been fully briefed to this Court, see Ulbrich v. Groth, 310 Conn. 375, 478-79 (2013) (Zarella, J. concurring in part and dissenting in part) – provide compelling grounds for rejecting the change urged by the Hartford.[3]

[3] The Hartford attempts (Def. Br. at 41-42) to spin the trial court's narrow decision lifting the stay of injunctive relief pending appeal into some crystal ball prediction of what this Court

Plaintiffs further set forth below (infra at 31-32) why serious discovery violations by The Hartford render this case unsuitable for considering a change of the law. The Hartford was sanctioned for failing to produce financial information relating to insurance costs, the non-disclosure of which materially impaired Plaintiffs' ability at trial to challenge claims going directly to the substantial injury test – the very standard The Hartford is urging this Court to adopt. The Hartford cannot withhold evidence and then argue on appeal that the case should be decided under a new legal standard that would make the withheld evidence vital to Plaintiffs' case.

5. The Hartford Cannot Avail Itself of Preemption Under Acordia.

Defendant belatedly argues that Plaintiffs' CUTPA claim is supposedly preempted by the Connecticut Unfair Insurance Practices Act ("CUIPA"), citing this Court's recent decision in State v. Acordia, Inc., 310 Conn. 1 (2013). This is wrong for three reasons: (1) Defendant failed to preserve the claim for appeal; (2) a dispute between auto body repair shops and an insurance company regarding appraisal and payment for repair services does not constitute "the business of insurance" and is, therefore, outside the scope of CUIPA; and (3) the Appraiser Code of Ethics provides an independent basis for a CUTPA violation. See infra at 39-43. Remarkably, Defendant advances this argument without even acknowledging the United States Supreme Court's pronouncement in Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979), that business arising between insurance companies and auto body repairers does not constitute the "business of insurance."

6. The Awards of Punitive Damages and Injunctive Relief Must Stand.

Lastly, in order to avoid the trial court's award of punitive damages and injunctive relief, The Hartford twists the law of punitive damages and injunctions beyond recognition. See infra at 34-39. Based on the overwhelming trial record cataloguing the severity of The

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might do with regard to the CUTPA standard, a fanciful argument ignoring the reality that the trial court repeatedly applied the well-settled cigarette rule in this case, stated that it did not "project that those rulings will be found erroneous," and was not privy to the extensive briefing of the issue presented here. Def. A262.

Hartford's misconduct, its knowing efforts to conceal said conduct, and its stated intention to continue its unfair trade practices with impunity, the trial court has not abused its discretion in its measured and well-reasoned rulings.

STATEMENT OF FACTS AND PROCEEDINGS

I. The Jury Verdict and Jury Interrogatories.

This appeal arises from entry of a jury verdict and award in favor of the Plaintiff Class of $14.7 million premised upon the jury's finding that "plaintiffs prove[d] by a preponderance of the evidence that the Defendant's conduct or practices regarding hourly labor rates to be paid to the plaintiffs for auto body repair services was an unfair trade practice" offending the public policy found in "Sec. 38a-790-8 of Conduct of Motor Vehicle Physical Damage Appraisers." A63-65.

II. The Hartford's Conduct Clearly Violates CUTPA Because it Offends Connecticut Public Policy Under the Physical Damage Appraisers' Code of Ethics.

A. The Evidence at Trial was Clear; The Hartford Required its Appraisers to Violate their Responsibility to Conduct Fair and Impartial Appraisals.

When a Hartford insured is in an accident, the damaged vehicle must be appraised by in-house, staff appraisers, employed and controlled by The Hartford, referred to as Auto Service Representatives ("ASRs"). Def. A290. The Hartford successfully eliminated the use of independent appraisers employed by outside agencies through a campaign entitled "Just Say No to IA's." A421. See also A208-09, 447.

The Hartford systematically eliminates the independence of its staff appraisers. The most compelling evidence at trial was offered by its own long-time employees. A399-401; 104-96. In a 2002 letter to the Attorney General, copied to the DOI, four staff appraisers, each of whom had been writing damage estimates at The Hartford for decades (A108-9; 128-29; Def. A290-91), voiced significant concerns that The Hartford's practices caused them to violate their Code of Ethics. The appraisers stated:

> The Insurance Company **established parameters for what labor rates are paid and directs its staff accordingly**. Labor rate disputes are normally escalated

> to the Team Leader, at which point the most common approach seems to be for the Team Leader to tell the shop that they are able to get the work done, and obtain agreed figures with other shops in that area, for what they are paying. That labor rate, therefore, is what they consider the prevailing rate to be and they won't pay more than that.…Our concern here is from the appraiser's position. Wouldn't the Code of Ethics require an appraiser to write their estimates at whatever rate they honestly felt was fair and reasonable?
>
> **Considering the widening gap between autobody repair and mechanical service rates, we cannot honestly say that we believe the current 'prevailing rate' of 40-42 dollars an hour is fair. In fact, we believe that is very low due to Insurer influence, and not due to market influence.**
>
> **The problem is obvious. If we were to write estimates at a rate we believe to be fair and reasonable, as we believe the law mandates, we would be terminated**. A399 (emphasis added).

One of the authors of the 2002 letter, Michael O'Mara, who had prepared more than twenty thousand appraisals during his decades at The Hartford (A108-09, 194), further testified at trial that: (1) The Hartford won't pay more than what it considers to be the prevailing rate (A131-32, 136); (2) the rate The Hartford was telling O'Mara to write was not fair and reasonable and was very low due to The Hartford's influence (A137, 140); and (3) if The Hartford did not impose limits upon him, he would have written a rate at what he believed to be fair and reasonable. A192-93. Indeed, the labor rates paid by The Hartford were virtually uniform throughout the state (A141-42, 165-67), and stayed constant at $38 an hour for a five to seven year period, despite increases in the cost of living. Def. A382. Mr. O'Mara testified that body shops have never agreed to these lower rates. A135-36.

Mr. O'Mara further testified that "there were certain pressures being applied that limited our ability to produce what we felt was a fair and unbiased appraisal." A130. Such "pressures" included that appraisers' compliance with The Hartford's "Best Practices" affected their performance evaluations and whether or not they received a salary raise or bonus. A115-116, 161-62. The Hartford's staff appraisers were forced to toe the line by a rigorous employee evaluation and review procedure (e.g. A312-316) which included, among other things, (1) preprogrammed "master profiles" (A446) set on the staff appraisers' laptops mandating a predetermined labor rate, and software utilizing "QAAR rules" that created notifications if the appraiser deviated from that set labor rate (A427; see also A211-215;

317-321, 436); (2) daily, weekly, monthly and annual reviews of staff appraiser estimates to determine whether they complied with metrics established and imposed by The Hartford (e.g. A168-71, 176-78), including the labor rate (A323-325); and (3) a painstaking and rigorous structure of reviews up the line of authority, from staff appraiser, to their team leaders, to state managers, each conducted not only by their immediate supervisors, but also by a separate corporate audit department, referred to as "reinspection services" (e.g. A412, 413, 422); even the audit employees were reviewed to see whether they had properly identified estimate deviations as defined by The Hartford. See also A430-32 (complaints about RIS). In addition to affecting employee evaluations and bonuses, failure to comply with The Hartford's appraisal standards resulted in employee discipline. E.g. A425, 143-46, 208-09, 311, 330-34. See also email of April 17, 2000 from Louis J. Chasse to staff appraisers (Def. A382) cited by the trial court as just one example of the "heavy dose of control over labor rates to be written by its licensed appraisers." Def. A243.

Mr. O'Mara testified that in light of the practices in place at The Hartford, he did not feel he could prepare an unbiased appraisal (A152) and that he and the other appraisers were unable to use independent judgment and discretion. A159. Appraisers, according to Mr. O'Mara, "were being influenced by an outside party, in my view. And the insurance department regulations specifically prohibit that." A148.

Plaintiffs' expert, Dr. Frederic Jennings, testified on the issue of causation, explaining that The Hartford, in exchange for directing increased volume of work to its direct repair shops, receives concessions from them to charge lower labor rates, which it then uses as a hammer to force the class members to work for the same rates. A346-55,366-67, A417 (See also A261-67, 405-07) (documents and testimony discussing The Hartford's practices of limiting the number of direct repair shops and "taking steps to ensure significant flow of business to [these] member shops"). Dr. Jennings (A358-63), along with the named Plaintiffs (e.g. A218-42) and a mechanical shop owner, Robert Trez (A 335-343), testified why the mechanic rates are a fair proxy for determining that the labor rates paid by The

Hartford for auto body repairs are unreasonably low. Plaintiffs also testified that, in the infrequent instances where customers without insurance need repairs, they are paid their posted labor rates, which are generally determined by Plaintiffs in consultation with their accountants, taking into account the costs of doing business and the desire to earn a reasonable profit. A88-89, 101-03, 243-54, 303-10.

B. The Hartford's Efforts to Cover Up its Labor Rate Practices Evidences its Knowing Violation of Connecticut Public Policy.

The trial court expressly held that The Hartford attempted to cover up its conduct:

> The Hartford's actions to control the judgment of its appraisers was a **knowing and purposeful disregard** of the policy of independence inherent in the Code of Ethics as evidenced by its efforts to **hide or cover up** its conduct, including instructions to its employees not to write anything down about labor rates, in favor of off-the-record conversations. We have to be VERY careful about publishing anything about Labor Rates. But I may have a solution. Call me tomorrow. (Def. A243; 385) (emphasis added).

The Hartford's effort to conceal its conduct was also made clear by Mr. O'Mara's testimony concerning terminology used by The Hartford to create the impression that its labor rates were fair, when the reality was anything but:

> Q: Why did you put the words prevailing rate in quotation marks?
> A: Because I don't really believe it is a prevailing rate. The argument that insurance companies have always made over the years is that they are paying what the prevailing rate is. But the prevailing rate that they have established because they have shops on the program that are willing to accept that rate, is not really establishing a prevailing rate.

A140. Similarly, Mr. O'Mara testified that other terminology used by The Hartford in its "Best Practices" documents, which are frequently referred to as "suggestions," was similarly misleading and intended to create the false impression that its appraisers had discretion:

> Q: Now, you put the word suggested in quotations; why?
> A: Because I felt that it was just in there to make it appear that we had more independent discretion and judgment than we really did.
> Q: Now, it says here – it goes on to say that these standards are obviously much more than suggestions. …What did you mean by that statement?
> A: Well, the standards were instructing us what we could and could not do, not suggesting. I think, again, the fact that they called it suggesting wanted it to appear that we had more judgment than we really did.

A142. See also A184-85 (referring to "tips" v. "rules"), 257-60 ("goal" v. "target").

When the concerns of these appraisers were raised with their superiors at The Hartford, the response of management was not to change the practices, but rather to provide indemnity agreements to protect the appraisers in case they were directly sued for their illegal conduct. A153-64, 402-04. When members of the Plaintiff Class complained to The Hartford about their practices, The Hartford branded them as "militant" and refused to allow their staff appraisers to negotiate the labor rates. A411. And when efforts were made by Plaintiffs to collect from its customers the difference between what they thought was a fair and reasonable labor rate and cost of repair, and what The Hartford would pay, Defendant obstructed those efforts by instructing the insured not to pay. A40-10.

C. The Trial Court's Charge Provided the Only Reasonable Interpretation of the Code of Ethics.

In response to questions from the jury, the trial court addressed the scope of the Appraiser Code of Ethics, explaining that an appraiser, in carrying out his or her duties, "must" assess the cost of repairing damage, "which necessarily involves estimating the cost of replacement parts, the number of hours needed to complete the repairs **and a reasonable hourly rate to be applied to those hours**." A387-88 (emphasis added). The Court concluded by instructing the jury that:

> [I]f you do find that appraiser independence has been interfered with or has caused favoritism toward or against any party involved or that an appraiser has not disregarded any efforts by any party such as but not limited to an insurance company to influence his or her judgment, then you may find on that basis that the public policy of the code of ethics Section 38a-790-8 has been offended. A389.

III. Post-Trial Decisions

A. Motions to Set Aside the Verdict.

Following trial, Defendant moved to set aside the $14.7 million verdict, which was denied by decision dated October 14, 2010. Def. A116. Over seven months later, on or about June 10, 2011, The Hartford moved to reconsider this earlier denial based on the false claim that the 2007 and 2008 Sullivan letters were "newly discovered" evidence. Def.

A135. The Hartford's claim that it supposedly did not know about these public letters at the time of trial was incredible, given its daily dealings with the DOI and heavy reliance on high-powered insurance industry and in-house lobbyists. A393. The Hartford claims to have received these letters from its lead appellate lawyer on this appeal, purportedly pursuant to a FOIA request served on the DOI by his firm (A168), even though The Hartford's paid lobbyist, Robert Kehmna, actually had a copy of the letter prior to trial and Mr. Kehmna's custom and practice was to provide such documents to his clients, including The Hartford. A697-705, 707-712.[4]

In its well-reasoned decision dated May 3, 2013 (Def. A159), the trial court held that these letters were not "newly discovered" as they could easily have been obtained by the exercise of due diligence by Defendant. Def. A178-80. The trial court also concluded that these letters do not warrant judicial deference as they (1) bore no indication of being an official DOI interpretation of the Code of Ethics (Def. A182), (2) were not enacted in accordance with appropriate rule-making procedures (id.), (3) were not posted at any time 0on the DOI website or otherwise noticed to the public (id.), (4) had never been judicially reviewed (id.), and (5) provided an unreasonable and unworkable interpretation of the regulation. Def. A184-86.

In denying the motion to reconsider, the trial court not only relied upon the common sense, plain meaning of the Code of Ethics, but also The Hartford's own admissions at trial that appraisers must determine the labor rate.

> "The Hartford's own Auto Service Representative Best Practices . . . states 'Unless the shop's labor rates have already been agreed to between the Hartford and the

[4] In yet another mischaracterization of the record, The Hartford claims that the trial court held that the ABAC had "intentionally" withheld the 2007 letter and found insufficient proof of having knowingly withheld the 2008 letter. Def. Br. at 9, n.8. The trial court did neither; rather it did not find evidence that the ABAC deliberately withheld the 2007 letter or any proof that the ABAC possessed or was otherwise aware of the 2008 letter. Def. A170, 187. The Hartford's fixation on trying to disparage the Plaintiffs regarding production of this one public document is particularly unbecoming given that The Hartford made the motion to reconsider based on a deception to the trial court and has not, to this day, corrected the trial record to advise the court that its paid lobbyist in fact had the 2007 letter prior to trial.

> shop, **the ASR [appraiser] has authority to negotiate labor rates** [with body shops] in accordance with local markets." Def. A185, 376. (emphasis added).

"The Hartford's counsel [also] agreed on the record that an appraiser is obliged to use his knowledge and experience to determine which labor rate to use from within the range of rates known by him to be used in the marketplace." Def. A185-86.

> THE COURT: What if the range were $35 to $65, isn't [the appraiser] obliged to use his knowledge and experience to pick something other than that wide range to come up with an ultimate cost? Isn't he obliged to settle on some rate within that range? MR ROHBACK: I think so, Your Honor. I think so. He's not setting the labor rate. All he's doing is saying within whatever the range is of the market, I can tell you what it's going to cost to get your car fixed. So he may look at it and say, I'm going to give you an estimate right in the middle of that range or I'm – if you're going to choose this particular shop, I know what they are charging, and this is what your labor rate is going to be or I know I can get you the same job done at this labor rate at other shops, but here's what the estimate is. A383-84.

B. Trial Court's Award of Punitive Damages.

By Order dated June 5, 2013, the Court awarded $20 million in punitive damages against The Hartford. Def. A255. After carefully weighing the aggravating and mitigating factors (Def. A251-55), the trial court deemed that punitive damages were appropriate as a means of deterrence against The Hartford and other actors in the market and applied a conservative multiplier of 1.35 to the jury award to arrive at the amount awarded. Id.

C. Trial Court's Award of Injunctive Relief.

By Order dated May 24, 2013, the trial court granted Plaintiffs' motion for a permanent injunction against The Hartford. Def. A227. The trial court's measured ruling, denying the specific relief requested by Plaintiffs in their motion, proposed alternate relief, narrowly-tailored to the finding of the jury that The Hartford's conduct offended the public policy found in the Appraiser's Code of Ethics. The largely proscriptive relief prohibits The Hartford from further interfering with the independence of its appraisers, and imposes modest mandatory relief, primarily requiring The Hartford to subscribe to certain reporting measures on a quarterly basis. Def. A229-32.

Given the breadth, care and clarity with which the trial court ruled on post-trial motions, Plaintiffs respectfully refer the Court to the full text of those opinions. Def. A116-34; 159-87; 212-233; 236-55.

ARGUMENT

I. The Court Should Not Change the Longstanding, Well-Settled Law Under CUTPA for Determining Unfair Trade Practices, Especially After Ten Years of Protracted Litigation in This Class Action.

The Hartford argues that, after more than three decades, this Court should abandon the well-settled cigarette rule in favor of the substantial injury test, which now serves as the third prong of the cigarette rule. Def. Br. at 26. Although dressed up as supposedly "modernizing" CUTPA, The Hartford is intentionally vague in explaining what it is really asking this Court to do, and selectively misleading in discussing the established law on this issue. The cigarette rule provides three bases for finding a CUTPA violation: (1) whether the conduct violates public policy as established by statutes, the common law or other established concepts of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; or (3) whether it causes substantial injury to consumers, competitors or other businesspersons. Harris v. Bradley Memorial Hosp. and Health Center, Inc., 296 Conn. 315, 350 (2010). It is deeply ironic that, while criticizing the cigarette rule standard as vague, The Hartford's solution is to replace it with the substantial injury criteria set forth in § 5(n) of the FTC Act, which is significantly more vague, would virtually eliminate the ability of any party to bring an unfair trade practices claim under CUTPA, and would create uncertainty in the law, where now there is order. To establish the substantial injury criteria, the Attorney General or a private CUTPA plaintiff must prove each of three elements: that "[1] such act or practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by

countervailing benefits to consumers or competition." 45 U.S.C. § 45(n). No such change is warranted or necessary. Nor is this case suitable for enacting this sweeping change.[5]

A. The Plain Language of CUTPA and the Congressional Record Dispositively Establish That There is No Legal Basis for Abandoning the Cigarette Rule.

Contrary to Defendant's assertion (Def. Br. at 29), the language in § 42-110b(b) of CUTPA does not "mandate" this Court replace the cigarette rule with the substantial injury test. Indeed, the plain language of CUTPA and the actions of Congress dispositively establish that there is no legal basis to make such a change.[6]

First, there is nothing in the current statute requiring any change to the unfairness standard. This Court has held that the purpose of the 1976 amendment to § 5(a)(1), replacing language that unfair practices under CUTPA were to be those "determined by" the FTC and federal courts, with the "guided by" language now in the statute, "was to permit . . .

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[5] The Hartford devotes pages to arguing that the liability in this action supposedly "undermines" the purpose of CUTPA to protect consumers, that "consumers are protected when competitive markets work effectively," and this case "contravenes the statute's purpose of consumer protection." (Def. Br. at 24-26). This conclusory position has no basis in the law or the facts of this case as: (1) CUTPA also protects businesses (see Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 496-98 (1995)("although consumers were expected to be a major beneficiary of its passage, the Act was designed to provide protection to a much broader class of businessmen against deceptive or unscrupulous businessmen or those who won't play fair"); McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 566-67 (1984)); (2) The Hartford has been found to have interfered with the ability of Plaintiffs to obtain fair and impartial appraisals (A57); and (3) The Hartford's own expert, himself a former Bureau Chief of economics at the FTC, as well as Plaintiffs' expert, Dr. Jennings, testified at trial that the idea of competitive markets assumes every player in the market is following the law (A364, 367-68, 372), which is obviously not the case here, where Plaintiffs' labor costs are controlled by The Hartford's interference with the independence of its staff appraisers.

[6] Plaintiffs are mindful of the dissent in Ulbrich vs. Groth, 310 Conn. 375 (2013), in which two Justices suggest they might be inclined to change the CUTPA standard based on the reasons cited in that dissent. Upon review of that case, and every brief that has been presented to this Court on the issue in the last ten years, it is apparent that the issue has never been fully briefed to this Court, and that Plaintiffs set forth herein substantial reasons not before considered by the Court as to why any such change is both unwarranted and directly at odds with the clear mandate of CUTPA.

practices which had not yet been specifically declared unlawful by federal authorities to be nevertheless unlawful under CUTPA." Caldor, Inc. v. Heslin, 215 Conn. 590, 598 (1990), cert. denied, 498 U.S. 1088 (1991). The correct relationship between CUTPA and the FTC Act was explained by former Chief Justice Peters in Johnson Elec. Co., Inc. v. Salce Contracting Associates, Inc., 72 Conn. App. 342, 352 (2002), cert. denied, 262 Conn. 922 (2002), where the court held that "[a]lthough the guidance provided by federal law will often be enlightening, federal law is not a straight jacket. . . . In other words, federal law sets a floor for Connecticut law, not a ceiling."[7] The original reason for including the provision found in C.G.S. § 42-110b(b) and its predecessor was merely "to enable the courts of this state to use the Federal cases that have been decided under the FTC Act and Regulations as the basis for lawsuits in this state" at a time when there was "very little case law in Connecticut on this subject . . . ." See 16 Conn. H.R. Proc. Vol. 16, Pt. 14, 1973 Sess. at 7323. After forty years of applying CUTPA in this state and developing an enormous body of case law, this is no longer the case.

Second, basic principles of statutory construction preclude the change urged by The Hartford. See C.G.S. § 1-2z (requiring use of the "plain meaning rule" of statutory construction). Often lost in the discussion of this issue is that, while advocates seeking to change the standard point to the language in CUTPA referring to "federal interpretations of Section 5(a)(1)," the standard urged by The Hartford is not set forth in § 5(a)(1). Rather, it is set forth in § 5(n) of the FTC Act, 15 U.S.C. § 45(n), added by amendment in 1994. Pub. L.

[7] In fact, in the legislative debates over the 1976 amendment to C.G.S. § 42-110b(b), significant concern was expressed that responsibility for the interpretation of Connecticut statutes should not be delegated to the FTC. See 19 Conn. H.R. Proc., Vol. 19, Pt. 6 at 2188 (remarks of Rep. Alan H. Nevas) and 2190 (remarks of Rep. Raymond L. Ferrari) (quoted in David L. Belt, The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practice Acts, 80 Conn. B.J. 247, 276, n.140 (2006). A610. These same concerns were raised in ASRC Energy Services Power and Communications, LLC v. Golden Valley Electric Ass'n, Inc., 267 P.3d 1151, 1161 (Alaska 2011); Department of Legal Affairs v. Rogers, 329 So.2d 257, 267 (Fla. 1976). See also 16A Am. Jur. 2d, Constitutional Law § 319 ("[I]t is generally held that the adoption, by or under authority of a state statute, of prospective federal legislation or federal administrative rules thereafter to be passed constitutes an unconstitutional delegation of legislative power.").

103-312 § 9 (Aug. 26, 1994). A457. The 1994 amendment did not amend the definition of "unfair" set forth in § 5(a)(1). And the standard in § 5(n) was not *adopted* by the FTC, rather it was imposed by Congress merely as a limit to the FTC's jurisdiction. R. Langer, et al. Connecticut Unfair Trade Practices, § 2.2, at 40-41. Indeed, because the amendment stating the substantial injury test was made to § 5(n) as opposed to § 5(a)(1), not only is there no mandate to adopt the substantial injury test, but also this Court need not even "be guided by" that standard. See e.g., Normand Josef Enterprises, Inc. v. Connecticut National Bank, 230 Conn. 486, 510-12 (1994) (refusing to apply to CUTPA the exemption from the FTC Act for banking because that exemption, which is contrary to CUTPA's broad remedial purpose, was derived from § 5(a)(2) of the FTC Act, as opposed to § 5(a)(1)).[8]

Third, The Hartford conveniently ignores in its brief that the legislative history of the 1994 amendment to the FTC Act clearly expressed Congress's intent to leave the states to develop their own body of case law on unfair trade practices unencumbered and unaffected by Congress' imposition of the substantial injury test in § 5(n) – exactly the opposite of what The Hartford contends on this appeal. In enacting § 5(n), Congress plainly stated it was:

> aware that State attorneys general [had] expressed a concern that limitations on unfairness in this section may be construed to affect provisions in State statutes or State case law[9] . . . [and] intend[ed] no effect on . . . developments under State law."

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[8] While The Hartford could not have been clearer at trial in arguing exclusively for the substantial injury test (A377), it is not surprising that, in order to fuzzy the issues on appeal, Defendant tries to equate the 1980 Policy Statement with § 5(n), even though they are materially different. The 1980 Policy Statement, which predates § 5(n) by almost fourteen years, and was published by the FTC before this Court adopted the cigarette rule in 1983, actually provides that unfairness can be determined by a finding under the substantial injury test and/or by violation of public policy. Def. A628. Thus, even under the 1980 Policy Statement, the jury's verdict should be affirmed insofar as it was based on a violation of public policy expressed in State agency regulations requiring auto body appraisers to prepare estimates that are fair, impartial, and free from outside influence.

[9] When a similar amendment to § 5(a) of the FTC Act was under consideration in 1982 by the House Committee on Energy and Commerce, the Executive Committee of the National Association of Attorneys General ("NAAG") unanimously adopted a resolution expressing NAAG's opposition to, among other things, a codification of the cost-benefit analysis, noting that it "is unnecessarily restrictive as the standard to be used in all cases," "might circumscribe the scope of the consumer protection statutes at the state level and . . .

[The Amendment] should not be understood as suggesting that the criteria in this section are necessarily suitable in the future development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decision-making. Sound principles of federalism limit the impact of this section to the FTC only." Langer et al., supra, § 2.2, at 42-43 n.104 quoting Sen. Rep. No. 130, 103d Cong., 2d Sess. 13 (1994).

B. The Cigarette Rule Should be Maintained as the Well-Settled Standard in This State Unless Changed by the State Legislature.

1. The cigarette rule for determining unfairness was the standard applied by the FTC in 1973 when CUTPA was enacted and has been the well-settled law of this state for decades.

The cigarette rule for determining unfairness under the FTC Act was adopted by the FTC in 1964 in the Statement of Bases and Purpose of Trade Regulation Rule 408, 29 Fed. Reg. 8324, 8355 (1964) (codified at 16 C.F.R. Pt. 13). In 1972, this rule was cited with approval by the United States Supreme Court in F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972). The cigarette rule was the standard for determining unfairness applied by the FTC when CUTPA was enacted in 1973 and this Court has held that its "adoption of the criteria enumerated by the 'cigarette rule' for determining whether a business practice or act violates CUTPA is consistent with the mandate of C.G.S § 42-110b(b) . . ." Associated Inv. Co. Ltd. P'ship v. Williams Associates IV, 230 Conn. 148, 156 n.11 (1994). It was first adopted by this Court in its 1983 decisions in Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc., 190 Conn. 528, 539 n.13 (1983) and Conaway v. Prestia, 191 Conn. 484, 492-93 (1983).

The cigarette rule standard has been applied by this Court at least 34 times since 1983. Langer, et al., supra, § 2.2, at 19 n. 5. And this Court has, since its 1987 decision in Web Press Services Corp. v. New London Motors Corp., 203 Conn. 342, 355 (1987), repeatedly referred to that standard as "well-settled." See e.g., Ulbrich, 310 Conn. at 409; Harris, 296 Conn. at 350; Ramirez v. Health Net of Northeast, Inc., 285 Conn. 1, 19 (2008);

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undermine the ability of states to protect their citizens," that "if the FTC Act is changed, it may moot case law already developed in the states and . . . throw the state consumer protection statutes into a period of great uncertainty." A488.

Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 155 (2005), cert. denied, 547 U.S. 111 (2006); Hartford Electrical Supply Co. v. Allen-Bradley Co., 250 Conn. 334, 367-68 (1999); Cheshire Mortgage Service, Inc. v. Montes, 223 Conn. 80, 105-06 (1992). In addition, numerous Appellate Court decisions and innumerable state and federal trial court decisions have applied that standard. Langer, et al., supra, § 2.2, at 19-20 n.5 (listing cases).[10]

2. The legislature's non-action for three decades in the face of well-settled application of the cigarette rule validates the Court's interpretation of CUTPA, and as held by the most recent state supreme court to confront this issue, the cigarette rule should continue to apply unless changed by the legislature.

The legislative acquiescence doctrine has been described as a "principle of statutory interpretation that requires us to presume that the legislature is cognizant of our interpretations of a statute, and that its subsequent failure to enact corrective legislation is evidence of its agreement with that interpretation." Ulbrich, 310 Conn. at 450 (quoting State v. Lombardo Bros. Mason Contractors, Inc., 307 Conn. 412, 440 (2012). As this Court explained in Hall v. Gilbert and Bennett Manufacturing Co., Inc., 241 Conn. 282, 296-97 (1997):

> [S]tare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . . Stare decisis is justified because it allows for predictability in the ordering of conduct . . .it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture . . . . [O]ur case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . We are bound by the instructions [of the legislature]. . . . More often, however, the legislature takes no further action to clarify its intentions. Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute . . . . **Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative**

[10] In response to what is the well-settled history of the cigarette rule, The Hartford cites to a decision by the Commissioner of Consumer Protection in which the Commissioner states that "the extent to which unfairness may be established absent unjustified consumer injury is uncertain." (Def. Br. at 27, n.29). Aside from the fact that the statement is obviously incorrect based on prevailing case law, The Hartford does not disclose in its brief that the Commissioner was the law partner of The Hartford's trial counsel, Axinn, Veltrop & Harkrider LLP, at the time the firm was paid millions of dollars to defend this case.

acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision. (emphasis added).

There could be no more significant jurisprudential limitation placed on this Court than the nonaction by our State legislature in the face of this Court's repeated application for more than three decades of the "well-settled" cigarette rule. The legislative acquiescence doctrine has been applied by the appellate courts of this state in interpreting CUTPA. See Ulbrich, 310 Conn. at 450 (rejecting the argument that the amount of punitive damages under CUTPA should be limited to the common law measure, noting that "this court and the appellate court have repeatedly, over the course of many years, upheld multiple damages under the punitive damages provision of CUTPA . . . and the legislature has never amended the statute to provide otherwise."); McCann Real Equity Services XXII, LLC v. David McDermott Chevrolet, Inc., 93 Conn. App. 486, 522-23 (2006), cert. denied, 277 Conn. 928 (2008) (applying this principle in limiting CUTPA claims to the defendants' primary trade or business).

Application of the legislative acquiescence doctrine is particularly appropriate in connection with the interpretation of CUTPA because the Connecticut legislature has demonstrated that it will act quickly when it disagrees with this Court's interpretation of the Act. E.g., 1984 P.A. 84-468 §§ 2, 4 (amending C.G.S. § 42-110g(a) and 42-110m(a) to legislatively overrule this Court's decision in Ivey, supra, which had held that proof of a public interest or public injury was required in order to establish a CUTPA violation); 1995 P.A. 95-123 § 1 (enacting Conn. Gen. Stat. § 42-110g(g) to legislatively overrule Associated Investment, supra, which held that there was no right to a jury trial in a CUTPA action).

This principle was followed by the most recent state supreme court to confront the issue of whether to abandon the cigarette rule in favor of the unfairness standard set forth in 15 U.S.C. § 45(n). ASRC, 267 P.3d at 1161. The Alaska Supreme Court noted that it had "been consistently applying [the cigarette rule] standards for 30 years," and held that in adopting a provision directing Alaska courts to give "due consideration and great weight" to

FTC and federal court interpretations of 15 U.S.C. § 45(a)(1), the 1974 Alaska legislature "did not intend that Alaska courts would be required to abandon Alaska precedent where later changes in the federal approach conflicted with Alaska law." Id. at 1161. The Court concluded that, "to provide broad protection to consumers and business people in Alaska and to achieve the **uniformity** that was the goal of the 1974 legislation, **we will adhere to our precedent standards for unfairness . . . until such time that the legislature sees fit to incorporate the limitations of 15 U.S.C. § 45(n) in to Alaska's UTPA.**" Id. at 1161-62 (emphasis added).

3. The large majority of states with statutes prohibiting unfair acts or practices apply some variation of the cigarette rule.

Notwithstanding the 1980 Policy Statement and 1994 amendment set forth in 15 U.S.C. § 45(n), sixteen of the twenty-one states that have adopted a standard for determining unfair acts or practices continue to apply a form of the cigarette rule. Langer, et al., supra, § 2.2, at 45, n.122, App. M; Belt, Standard for Determining Unfairness, supra, at 303-309 (published before the author's involvement in this action). These include the Supreme Judicial Court of Massachusetts, which this Court has described as being particularly persuasive for interpreting CUTPA. Normand Joseph Enterprises, 230 Conn. at 521. See Morrison v. Toys "R" Us, Inc., 441 Mass. 451, 457 (Mass 2004). These also include all of the New England states except Maine and the commercially significant states of Illinois, Florida and Washington.[11] Langer, et al., supra, at App. M. The two most recent state supreme courts deciding to use the cigarette rule rather than the test in § 5(n) of the FTC Act for determining unfairness found persuasive the fact that most state courts apply

[11] Only four states, by court decision or statute, have adopted the balancing test set forth in § 5(n) as the exclusive basis for determining unfairness. Langer, et al., supra, § 2.2, at 47. The court of one of those states, Tennessee, apparently based its decision, in part, on the mistaken belief that both Washington and Connecticut had adopted the standard set forth in § 5(n). See Tucker v. Service Builders, 180 S.W.3d 109, 117 n.11 (Tenn. Ct. App. 2005). Only one has adopted the standard in the FTC's 1980 Policy Statement, apparently in the mistaken belief that no other jurisdictions had continued to apply the cigarette rule standard. See Legg v. Castruccio, 642 A.2d 906, 917 (Md. 1994); Langer, et al., supra, § 2.2, at 47.

the cigarette rule standard to define unfairness under their consumer protection acts. See ASRC, 267 P.3d at 1161-62; Rohrer v. Knudson, 349 Mont. 197, 205 (2009).[12]

4. Both the FTC Act and CUTPA were intentionally written with expansive language so as to reach conduct beyond existing common law or statutory prohibitions.

The restrictive interpretation of unfairness urged by the Defendant ignores the legislative mandate in C.G.S. § 42-110b(d) that CUTPA "be remedial and be so construed" and is directly at odds with that provision of the statute. "Remedial statutes are to be liberally construed in favor of those whom the legislature intended to benefit." Hinchliffe v. American Motors Corp., 184 Conn. 607, 615 n.4 (1981). See also Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc., 275 Conn. 363, 379 (2005) ("CUTPA was designed to provide protection to businesses as well as to consumers."); Larsen Chelsey Realty Co., 232 Conn. at 496 (noting that the declaration in C.G.S. § 42-110b(d) is consistent with CUTPA's legislative history, noting "although consumers were expected to be a major beneficiary of its passage, the act was designed to provide protection to a much broader class").[13]

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[12] Given the continued, wide-spread reliance on the cigarette rule, it is no surprise that The Hartford can cite to only one case containing comments critical of that rule. Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 185 (Cal. 1999) (Def. Br. at 31). However, Cel-Tech was an antitrust case in which a competitor alleged that the defendant was selling below cost. Id. at 186. Although critical of the cigarette rule standard, the California Supreme Court did not adopt the standard urged by The Hartford and, in fact, criticized a balancing test similar to the substantial injury test proposed by The Hartford as being "too amorphous and provid[ing] too little guidance to courts and business." Id. The court, instead, adopted a standard applicable to threatened violations of the antitrust laws, specifically noting that it did not apply to actions by consumers or by competitors alleging other kinds of violations. Id. at 187 n.12. Importantly, it "express[ed] no view on the application of federal cases such as FTC v. Sperry," the Supreme Court decision quoting the cigarette rule.

[13] In stark contrast to this legislative impetus for CUTPA, change in the FTC standard for determining unfairness was a political response by the Commission to a changing political climate in Washington in which the FTC was "under attack by . . . conservatives, suspicious of the very notion of 'public values' and bent on deregulaton . . . . The Policy Statement clearly had a political purpose — to keep Congress from stripping the FTC of part or all of its

Both the FTC Act and the state unfair trade practices acts were intentionally written with expansive language so as to reach conduct beyond existing common law or statutory prohibitions. See e.g., Sperry, 405 U.S. at 239-40 (Congress rejected "tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply"); Associated Investment, 230 Conn. at 157 ("Likewise, our General Assembly, in adopting the sweeping language of § 5(a)(1) of the FTCA, 'deliberately chose not to define the scope of unfair or deceptive acts proscribed by CUTPA so that courts might develop a body of law responsive to the marketplace practices that actually generate such complaints.'"); see also Sportsmen's Boating Corp. v. Hensley, 192 Conn. 747, 755-57 (1984); ABA Section of Antitrust Law, Consumer Protection Law Developments (2009); Caldor, 215 Conn. at 598 (the purpose of the change was to permit practices not yet declared unlawful by federal authorities to be nevertheless unlawful under CUTPA).[14]

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power to regulate unfairness. The language of this Policy Statement shows the Commission striving to appease free-marketers . . . ." Jean Braucher, Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission, 68 B.U. L. Rev. 349, 408-409 (1988).

[14] In its drive for imposition of a narrower, more vague and more expensive standard, The Hartford includes, in a confusing sentence, the feckless statement (Def. Br at 17) that the Court "has never permitted CUTPA liability based only on a first prong violation unless it was a statutory per se violation," (citation omitted), or the violation of a long-standing public policy." Under any reading, The Hartford's statement is not true. From its earliest adoption of the cigarette rule to recent times, this Court has held that "violation of CUTPA can be based on a violation of public policy alone." See e.g., Conaway, 191 Conn. at 492-93 (1983) (acknowledging that the defendant's conduct was not prohibited by the statutes reflecting the public policy); Am. Car Rental, Inc. v. Comm'r of Consumer Prot., 273 Conn. 296, 310 (2005). Moreover, an "offense to public policy" under the cigarette rule does not require a finding of a direct violation of a statute. See Daddona v. Liberty Mobile Home Sales, Inc., 209 Conn. 243, 254-55 (1988)(sustained determination of unfair trade practice that was not based on *per se* violation of a statute, but rather on "offending the public policy [against self-help remedies] embodied in General Statute § 21-80 which makes summary process available for evicting a mobile home resident").

5. The concept that a statute or regulation has a "penumbra" in which it is applicable beyond its narrow, literal words, has frequently been applied by the courts and is not unique to CUTPA or to the cigarette rule.

Under the guise that the jury's verdict was based on a "never-before-articulated penumbra of a written law," The Hartford attempts to argue that there is supposedly uncertainty created by the penumbra language of the cigarette rule that compels retiring the rule and overturning the jury's verdict. (Def. Br. at 29-33). Stopping short of suggesting that the penumbra concept is in any way constitutionally infirm,[15] The Hartford argues that "penumbra" does not provide sufficient guidelines for businesses. The Hartford is incorrect for three reasons.

First, the evidence in the record established that The Hartford forces its staff appraiser employees to directly violate their Code of Ethics, for which The Hartford is responsible by reason of *respondeat superior*. Def. A419; see also A382, 392. Second, and notwithstanding repeated mischaracterization of the trial court's opinion on punitive damages (Def. A239), even a casual review of the jury interrogatories (A58-61) reveals that the jury made no mention at all of any "penumbra" of the regulations. The Hartford failed to request a specific jury interrogatory concerning whether the jury's finding that The Hartford's conduct offended public policy came within only the penumbra of that public policy. As such, the general verdict rule precludes a claim on appeal that depends on a jury verdict based only on application of the penumbra concept. See Thames River Recycling, Inc. v.

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[15] Although having abandoned any constitutional challenge to the unfairness standard enunciated in the cigarette rule by not having addressed it in its initial brief, in light of its discussion of the penumbra language in the rule, Plaintiffs note that such a violation has never before been found to violate the due process clause of the federal Constitution. Early in its history, § 5 of the FTC Act was held not to be unconstitutional on the ground that its proscription of "unfair methods of competition" was indefinite. See Sears, Roebuck & Co. v. F.T.C., 258 F. 307, 311-12 (7th Cir. 1919) (noting that "[i]f the expression 'unfair methods of competition' is too uncertain for use, then under the same condemnations would fall the enumerable statutes which predicate rights and prohibitions upon 'unsound mind,' 'undue influence,' 'unfaithfulness,' 'unfair use,' 'unfit for cultivation,' 'unreasonable rates,' 'unjust discrimination,' and the like"); Sperry, 405 U.S. at 244.

Gallo, 50 Conn. App. 767, 788 (1998); Crews v. Pudlinski, 129 Conn. App. 807, 811-12 (2011) (general verdict rule applicable where party requests "interrogatories that fail to flesh out the basis of the jury's verdict"), cert denied, 302 Conn. 948 (2011), cert. denied, 132 S. Ct. 1863 (2012).

And third, even if the jury's verdict was based solely on the penumbra of a statutory, common law or regulatory right, the application of "penumbra" beyond the literal words used is well established in both federal and state law.[16] See e.g., Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (The Bill of Rights); Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957) (The National Labor Relations Act); United States v. Dennis, 183 F.2d 201, 212 (2nd Cir. 1950) (L. Hand, J.), aff'd, 341 U.S. 494 (1957) (using the penumbra metaphor to describe the "clear and present danger" exception to the first amendment); McConnell v. Beverly Enterprises – Connecticut, 209 Conn. 692, 700-01 (1989) (employing the penumbra metaphor in support of a constitutional right to refuse medical treatment); Leib v. Bd. of Examiners for Nursing of State of Connecticut, 177 Conn. 78, 89-90 (1979) ("(n)o matter how specific the standard or standards are stated, there is almost always a penumbra which requires the administrative agency to exercise a judgment as to whether the facts before it fall within or outside the legislative design." (internal quotation marks omitted).[17]

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[16] Given the reality that its attack on the penumbra concept is belied by prevailing law and the actual record at trial, The Hartford again invokes its misleading, *ex post facto* argument, based on Commissioner Sullivan's 2007 letter and the 2013 DOI Bulletin, that the jury's verdict is somehow inconsistent with the Department of Insurance regulations. (Def. Br at 22-25). This is plainly wrong. The Hartford advances this argument without citing the language in Sullivan's 2008 letter that appraisers use "judgment" in "determining" labor rates, and rests this argument on mischaracterization of Plaintiffs' claim, which does not contend that appraisers, or anyone else, should "set" labor rates.

[17] There is a significant body of case law in Connecticut, Massachusetts and in other states discussing what conduct does or does not come within the "penumbra of some common law, statutory or other established concept of unfairness." Eder Bros., 275 Conn. at 380-81 ("the defendant, in the present case does not necessarily have to be found to have violated the Liquor Control Act in order to be found to have violated CUTPA . . ."); Conaway, 191 Conn. at 492-93 (applying cigarette rule standard to permit a CUTPA class action regarding violation of penumbra of rent collection statute); Martinez v. Yale-New Haven Hosp. Inc.,

6. Limiting CUTPA to the standard of illegality (i.e. the "substantial injury test") set forth in 15 U.S.C. § 45(n) would restrict the scope of CUTPA, provide less guidance for businesses and consumers and increase the cost and uncertainty of litigation.

The effect of the unfairness standard urged by The Hartford is clear. It would reduce the potential bases for establishing unfairness in violation of CUTPA from three to only one. The remedial character of this legislation dictates that it "must be liberally construed in favor of those whom the legislature intended to benefit." Fairchild Heights Residents Ass'n, Inc. v. Fairchild Heights, Inc., 310 Conn. 797, 817 (2014). As former Chief Justice Peters noted in Johnson Electric, "[o]n several occasions, the legislature has amended the statute so as to broaden its application....To the best of our knowledge, it ha[s] **never** amended CUTPA so as to limit its coverage." 72 Conn. App. at 350 (emphasis added).

The Hartford complains about supposed ambiguity and vagueness of the cigarette rule. It argues at the same time that this rule should be replaced by a test that requires, in every case, the balancing of unspecified harms and benefits produced by the practice challenged as unfair – a test that is clearly more ambiguous and provides less guidance for businesses, consumers and creditors than the cigarette rule. "Regardless of their breadth, the [first] two factors [of the cigarette rule] establish points of reference for the identification of considerations for judging the lawfulness of conduct. . . .The substantial-consumer-injury criterion, on the other hand, is vulnerable to a more fundamental objection: it provides no clue concerning the class or characteristics of the behavior it purports to proscribe." David

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2005 WL 2364901(Conn. Super. Ct. 2005); Minally v. Arrow Home Inspections, 2002 WL 31758670 at *2 (Conn. Super. Ct. Nov. 19, 2002) (defendant "within the penumbra of unfairness on business practices and representations intended to be protected under CUTPA"); Shell Oil Co. v. Wentworth, 822 F.Supp. 878, 885 (D. Conn. 1993) (sales of gasoline "without adequate debranding signage . . . was 'within at least the penumbra of some common law, statutory or other established concept of unfairness.'"); Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 743 (2008); Dahlborg v. Middleboro Trust Co., 16 Mass. App. Ct. 481, 486, (1983); Chroniak v. Golden Invs. Corp., 983 F.2d 1140, 1146 (1st Cir. 1993) (applying New Hampshire law); Kapunakea Parlines v. Equilor Enterprises, LLC, 679 F. Supp. 2d 1203, 1214 (D. Haw. 2009).

A. Rice, Consumer Unfairness at the FTC: Misadventures in Law and Economics, 52 Geo. Wash. L. Rev. 1, 26 (1984). See also Harne v. Deadmond, 287 Mont. 255, 258 (1998) (noting jury instruction framed in terms of § 5(n) of the FTC Act "did not directly state what type of practice constituted an unfair trade practice" and that "[u]nderstandably, the jury was confused as to what, in lay terms, constituted an unfair trade practice"). The balancing test was not intended to be a legal definition of unfairness which actually attempts to define an act that would violate the FTC ACT or specify the elements of a violation rather than merely stating the ultimate aims of the FTC Act as a guide for the commission. Richard Craswell, The Identification of Unfair Acts and Practices by the Federal Trade Commission, 1981 Wis. L. Rev. 107, 114 (1981). See also Neil W. Averitt, The Meaning of "Unfair Acts or Practices" in § 5 of the FTC Act, 70 Geo. L. J. 225, 248 (1980).

This uncertainty is heightened by the relatively small number of decisions applying the standards in either the FTC's 1980 Policy Statement or § 5(n) of the FTC Act. See R. Langer, et al., supra, § 2.2, at 42-43; Belt, Standard for Determining Unfairness, supra, at 272-73. In contrast, in Connecticut and Massachusetts alone, there are hundreds of decisions elucidating the cigarette rule standard in connection with a large variety of circumstances. Id. at 50. Abandoning the cigarette rule standard would eliminate the precedential value of almost all of these decisions, very few of which specifically address the balancing test set forth in the third cigarette rule criterion.

Exclusive use of the balancing test would also "make litigation more time-consuming and expensive," because "[i]n a general balancing test . . . all facts relevant to a price and relevant to the number of issues that might be briefed and argued are greatly increased." Averitt, supra at 249. This is "particularly true of major trade regulation cases, in which the stakes can be so high that all parties are motivated to pursue every possible argument as fully as possible." Id. And, "if cases are decided by a weighing of all relevant costs and benefits, companies seeking to comply with the law will not have discrete legal principles to

follow" and "[t]he resulting uncertainty would impose burdens on honest businessmen" and would "make judicial review very difficult." Id. at 248-50.

Finally, requiring exclusive use of the balancing test set forth in § 5(n) in all unfairness cases would require the Attorney General and private CUTPA plaintiffs to prove freedom from contributory fault and that their injuries could not reasonably have been avoided. Not only would this be an invitation for abuse by large businesses intent on advancing fantastic rationalizations why their bad conduct is actually good for consumers, this would also make proof of a CUTPA unfairness claim even more difficult than proof of common law negligence. Under the three prong test of § 5(n) the plaintiff must, in all cases, prove that his or her injury was not reasonably avoidable, whereas in common law negligence cases, the burden of proving contributory fault is on the defendant and is subject to our state's comparative negligence statute. See Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 592-93 (1995); Langer, et al., supra, § 2.2 at 49-50.

7. Under no circumstances should any change be applied retroactively in this case.

It defies logic and basic notions of fairness that, after more than three decades of jurisprudence, in which the cigarette rule has been "well-settled" law, that this Court could or would change the legal standard that was reasonably relied upon by thousands of working men and women based merely on an academic exercise urged by a large insurance company that is neither mandatory nor necessary. Ironically, given this more than decade-old battle, The Hartford, with the assistance of its high powered lobbyists, easily could have proposed legislation to change the standard, rather than wait until the end of a protracted legal battle to seek what amounts to a retroactive pardon. Plaintiffs suspect The Hartford did not do so because, in light of the legislature's non-action and acquiescence on the unfairness standard, and the detrimental effect such a change would have on small businesses and consumers, it was highly unlikely that this State's legislature would make the change urged here.

There are compelling reasons that even if a new standard were adopted, it should not be applied retroactively in this case. This Court looks to three factors, all satisfied here, for determining whether a judicial decision should be applied retroactively:

> (1) Does the decision establish a new principle of law, either by overruling past precedent on which litigants have relied...or by deciding an issue of first impression whose resolution was not clearly foreshadowed ... (2) given its prior history, purpose and effect, retrospective application of the rule would retard its operation; and (3) retroactive application would produce substantial inequitable results, injustice or hardship.

Ostrowski v. Avery, 243 Conn. 355 (1997) (citing Chevron Oil Co., v. Huson, 404 U.S. 97, 106-07 (1971)). Each of these factors weighs heavily against retroactive application in this case: (1) the Court would clearly be overruling past precedent on which the litigants have relied, (2) given The Hartford's sanctionable discovery conduct preventing Plaintiffs from obtaining information needed to meet the standard under the substantial injury prong, retroactive application of the rule in this case would retard its application, and (3) it would obviously produce substantial inequitable results, injustice or hardship, given that plaintiffs have litigated for more than a decade and incurred millions of dollars in attorneys' fees and costs relying on the well-settled precedent of this Court.

C. This Case is Not Suitable for Considering Whether to Change the Well-Settled Standard of Unfairness.

The Hartford's discovery violations, for which it was sanctioned at trial, renders this case inappropriate for considering adoption of the substantial injury test. It would be anomalous for this Court to change the rule to the standard proposed by the Defendant, in the very same case where the Defendant refused to produce the evidence upon which a balancing under the substantial injury test would rely.

The Hartford continues to argue on this appeal that Plaintiffs' claims come "at the expense of consumers" (Def. Br. at 2), despite the fact that it was sanctioned at trial for its failure to produce any information that could be used to challenge its assertions about costs. A196-207. Defendant took the position that information relating to determination of insurance premiums was irrelevant, and refused and failed to produce any actuarial or other

financial data in discovery. Id. The trial court noted that such evidence would be "relevant because ...it would relate to a possible outweighing benefit to competition or consumers, namely Hartford insureds" and precluded the Defendant from "offering any evidence relating to insurance premiums paid by its insureds" as a "proportional remedy" to the "defendants' failure to meet their duty to produce." Id. at 202-03.

Exacerbating this issue, Plaintiffs specifically argued to the trial court that this discovery breach and other erroneously precluded evidence would harm its ability to prevail under the substantial injury test, which requires the balancing of factors relating to consumers and competition, such as costs and quality of repairs. While The Hartford opened the door on multiple occasions by touting the supposed benefits of its direct repair program, Plaintiffs were repeatedly precluded by the trial court from offering any rebuttal evidence relating to the quality of repairs, which Plaintiffs contended were compromised by a variety of cost driven decisions on aftermarket parts, repair versus replace decisions, and the time allotted for various repair jobs. E.g. A275-82. It would be inappropriate to consider adoption of this test in this action given The Hartford's discovery violations.

II. The Trial Court Did Not Abuse its Discretion in Denying Defendant's Belated Motion for Reconsideration.

"The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. 'As with any discretionary action of the trial court ... the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did.'" Shore v. Haverson Architecture & Design, P.C., 92 Conn. App. 469, 479 (2005). In addition to the reasons stated in the trial court's well-reasoned decision, (Def. A182-85) the Court should affirm the trial court's denial of Defendant's belated motion to reconsider for several reasons.

First, given the trial court's holding that the subject letters do not constitute "newly discovered evidence," they are not properly before this Court and should not be considered on this appeal. Terracino v. Fairway Asset Mgmt., Inc., 75 Conn. App. 63, 80 (2003) (where

trial court had not abused its discretion in determining that there was no newly discovered evidence, there was no basis to consider the substance of the proffered evidence).

Second, The Hartford should not be allowed to retry this case on appeal, particularly given its decision not to call at trial a senior DOI official, Anthony Corporale, who had been disclosed on Defendant's witness list. A44. As Plaintiffs' counsel argued (A394-95), The Hartford chose not to call him presumably because he was expected to testify that the DOI has never issued a formal ruling, or taken an official position, on the responsibility of staff appraisers under their Code of Ethics. Id. This decision was coupled with the position taken by The Hartford to oppose introduction of other DOI materials on the ground that, because the DOI does not have authority to regulate labor rates, it has nothing authoritative to offer on the issue. E.g. A379. Indeed, one of the documents The Hartford sought to exclude was the DOI's 2007 Guidelines For Determining Labor Rates (A683), a document incorporated by reference into Bulletin No 34, which it now seeks to rely upon in this appeal. A681. The Hartford should not be permitted to take a different position here just because it changed counsel. See Byrne v. Trice, 170 Conn. 442 (1976) (court summarily rejected "valiant but futile effort of [new appellate counsel] to retry the case [on appeal]").

Third, while Sullivan's "understanding" of the responsibilities of appraisers as stated in his February 25, 2008 letter is that appraisers are to exercise judgment and determine rates from the market in general, the facts established at trial demonstrated that The Hartford dictates rates to its appraisers based on what it pays its DRP shops, not the market in general, and prohibits all negotiation by its staff appraisers under threat of termination.[18]

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[18] Following Sullivan's September 27, 2007 letter, the Attorney General wrote a second letter dated December 18, 2007 to Sullivan, describing Sullivan's initial response as "disappoint[ing]," pressing him for additional explanation, noting that "the law . . . provides that an appraiser must exercise independent judgment," and citing evidence of a "take it or leave it approach of many appraisers – an approach that belies a fair negotiated settlement on the costs of repair." A676. Pressed on the issue, Sullivan stated in his February 28, 2008 letter that, "When appraisers are determining the labor rate they will offer to the auto body shop during a negotiation, **it is my understanding** that they consider the labor rate paid in the marketplace in general, including those paid to DRPs with whom the insurer has

This reinforces why the letters and Bulletin No. IC-34 are not due any judicial deference, as they are based on false assumptions not asserted or tested in any case or controversy before the DOI or as part of any public rule making process. See Hasselt v. Lufthansa German Airlines, 262 Conn. 416, 432 (2003) (holding commissioner's policy directive containing interpretation not adopted pursuant to formal rulemaking or adjudicatory procedures is not entitled to judicial deference); New Haven Firebird Society v. Bd. of Fire Comm'rs, 32 Conn. App. 585, 590 (1993)("[W]here the judicial interpretation of a rule conflicts with the administrative interpretation, the judicial interpretation prevails.") cert. denied, 228 Conn. 902, 634 A.2d 295 (1993).

III. The Trial Court Did Not Abuse its Discretion in Awarding Punitive Damages.

Defendant's attack on the trial court's award of punitive damages is based on a clever, but false, argument – namely that the award somehow "disregards the jury's finding that The Hartford did not act in an "immoral, unethical, unscrupulous, or oppressive manner" and "fails to identify conduct sinking to the level of wantonness, malice or evil." (Def. Br. at 35). Despite Defendant's best efforts to obfuscate the facts, and conflate the meaning of the cigarette rule standard with that for punitive damages under CUTPA, the trial court did not abuse its discretion in awarding punitive damages.[19] Ulbrich, 310 Conn. at 450 (punitive damages reviewed for abuse of discretion standard).

A. An Award of Punitive Damages Under CUTPA Does Not Require a Finding of Immoral, Unscrupulous, Unethical, or Oppressive Behavior.

As the trial court correctly stated, in order to award punitive damages the "evidence must reveal a reckless indifference to the rights of others *or* an intentional and wanton

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a contractual relationship," the understanding proven to be incorrect relating to The Hartford's staff appraisers (emphasis added). See also Attorney General Letter dated August 27, 2007 further agreeing with both Plaintiffs' and the trial court's common sense reading of the law governing the conduct of State licensed appraisers.

[19] The Hartford does not challenge the amount of the punitive damages award, but merely whether there was a basis to make any punitive damages award, no matter the amount. Thus, as Plaintiffs contend, in the absence of an abuse of discretion, the Court must affirm the punitive damages award in its entirety.

violation of those rights." Def. A241; Gargano v. Heyman, 203 Conn. 616, 622 (1987). While the Gargano Court characterized such conduct as "described in terms of wanton and malicious injury, evil motive, and violence," id., the trial court correctly noted that the standard itself is expressed in the alternative, "reckless indifference *or* intentional and wanton conduct having the flavor of evil motive." Def. A241. See also United States Technologies v. American Home Insurance Company, 118 F. Supp. 2d 174, 177 (D. Conn. 2000) (in awarding $16 million in punitive damages under CUTPA against an insurance company, court held that reliance on the "flavor of evil" language is misplaced as it "neglects to include the full standard, which allows a punitive damages award based on a finding of 'reckless indifference to the rights of others").

The use of punitive damages as a deterrent to unfair acts or practices is essential to carrying out the broad remedial purpose of CUTPA, explained by this Court, as follows:

> The plaintiff who establishes CUTPA liability has access to a remedy far more comprehensive than the simple damages recoverable under common law. The ability to recover both attorneys' fees; General Statutes §42-110g(d); and punitive damages; General Statutes §42-110g(a); enhances the private CUTPA remedy and serves to encourage private CUTPA litigation. The legislative history . . . demonstrates that CUTPA seeks to create a climate in which private litigants help to enforce the ban on unfair or deceptive trade practices or acts.

Hinchliffe v. American Motors Corp., 184 Conn. 607, 618 (1981). See also Smith v. Wade, 461 U.S. 30 (1983) (quoting Restatement (Second) of Torts, § 908(1) (1979) regarding deterrence). Indeed, punitive damages are particularly necessary to deter the conduct of insurance companies because of their "quasi-public" status and inherent conflict of interest between paying benefits owed, and drive for profits. Barry v. Posi-Seal International, Inc., 40 Conn. App. 577, 586 (1996); Grand Sheet Metal Products Co. v. Protection Mutual Insurance Co., 34 Conn. Supp. 46, 51 (1977).

The Defendant cannot parlay the fact that the jury did not find the second prong of the cigarette rule regarding "immoral, unscrupulous, unethical, or oppressive" conduct into an attack on the punitive damages award. Not only do these words not have the same meaning as those describing the punitive damages standard, but also such a finding is not

required to support a punitive damages award. Connecticut courts have held that reckless indifference to the rights of others justifying an award of punitive damages may arise from violation of public policy. See e.g., Smith v. Snyder, 267 Conn. 456, 467-68 (2004) (award of punitive damages appropriately based on claim of breach of fiduciary duties); Barry, 40 Conn. App. at 586 (punitive damages recoverable in wrongful termination case where plaintiff alleged termination was in violation of public policy); see also Banks v. Vito, 1 No. 267551, 1992 WL 43624, *6 (Conn. Super. Ct. March 2, 1992) (award of punitive damages under CUTPA where conduct "offend[ed] our State's public policy"...); Peets v. Define, No. 307304, 1992 WL 175112 (Conn. Super. Ct. July 21, 1992) (award of punitive damages based on defendants' breach of public policy).

B. The Evidence at Trial Supports the Trial Court's Finding That The Hartford's Conduct Reveals Reckless Indifference to the Rights of Appraisers and Body Shops.

Lastly, given The Hartford's extraordinary "efforts to hide or cover up its conduct," (A 243, see supra at 12-13), and to deceive both the Plaintiffs and its insureds, there is ample evidence of reckless, wanton and intentional behavior precluding a reversal for abuse of discretion. The Hartford's claim to have "plainly acted under an honest claim of right here" (e.g. Def. Br. at 37) are meaningless words, in light of the trial court's finding that it "knowingly and purposefully for enhancement of its own profits" engaged in "willful and reckless" conduct, "which had the known effect of suppressing hourly labor rates in disregard of the rights of the plaintiff class." Def. A241-423. The Hartford's effort to claim that it could not have acted recklessly because its conduct conformed to the opinions it alleges are contained in one of two DOI letters and the 2013 Bulletin is belied by its cover up. Commissioner Sullivan's "understanding" as expressed in the 2008 Letter was that appraisers "consider the labor rate paid in the marketplace in general, including those paid to DRP's with whom the insurer has contractual relationships." A679. The Hartford precluded this very thing from happening, dictating the use of uniform rates paid to their DRPs and prohibiting negotiation, knowing full well what it was doing and that it was wrong.

IV. The Trial Court Did Not Abuse its Discretion in Awarding the Carefully Crafted Injunctive Relief to Remediate The Hartford's Unfair Trade Practices.

The importance of injunctive relief cannot be overstated in this case, as it is the cornerstone of the efforts of the Plaintiff Class to assure fair and impartial appraisals as required by State regulation. The trial court did not abuse its discretion in awarding the limited relief that is narrowly tailored to address the unlawful conduct at issue here. Broadnax v. City of New Haven, 270 Conn. 133, 170 (2004) (injunctive relief reviewed for abuse of discretion).

Insofar as The Hartford argues that the trial court erred in granting a permanent injunction without a finding of irreparable harm or lack of an adequate remedy at law (Def. Br. at 41), this was conclusively rejected as a matter of law by this Court in Fairchild Heights, which cited this very case for the proposition that CUTPA "does not require allegations of irreparable harm." 310 Conn. at 805 n.6, citing Artie's Auto Body, Inc. v. Hartford Fire Ins. Co., 287 Conn. 208, 219 (2008).[20] Further quoting Conservation Commission v. Price, 193 Conn. 414, 429-30 (1984), this Court explained:

> Irreparable harm need not be shown in statutory injunction case[s] because 'the enactment of the statute by implication assumes that no adequate alternative remedy exists and that the injury was irreparable, that is, the legislation was needed or else it would not have been enacted,' . . . Fairchild, at 805 n.6.

Despite The Hartford's claim otherwise, the trial court did in fact find irreparable harm as an alternative basis for entry of injunctive relief, stating that:

> [e]ven if traditional requirements for the exercise of the equitable power to conform should be held to apply, the plaintiffs in this case would nonetheless be entitled to injunctive relief under CUTPA in order to prevent a multiplicity of legal actions for

[20] In so doing, this Court apparently rejected the dictum in New Breed Logistics v. CT Indy NHTT, LLC, 129 Conn. App. 563, 569-70 n.7, which suggested that this proposition may be limited to actions brought by a public official charged with enforcement of the statute. The injunction in New Breed was granted pursuant to a common law claim, not under CUTPA, and the court failed to consider that "[t]he public policy underlying CUTPA is to encourage litigants to act as private attorneys general and to engage in bringing actions that have as their basis unfair or deceptive trade practices." Jacques All Trades Corp. v. Brown, 42 Conn. App. 124, 131 (1996), aff'd, 240 Conn. 654 (1997).

> continuing damages against The Hartford, which continues to maintain in post-trial proceedings that its conduct was not improper, and has given no indication of any intent to change its procedure regarding hourly labor rates." Def. A220

The trial court's alternative finding is soundly grounded in traditional principles of equity. See Berin v. Olson, 183 Conn. 337, 342-43 (1981) ("injunctive relief is designed to prevent . . . a multiplicity of lawsuits"); Hammerberg v. Leinert, 132 Conn. 596, 602 (1946). The trial court's finding of irreparable harm could not be more apt than in the case at bar, where the parties have litigated for more than a decade, the litigation costs alone have exceeded $1 million, and it is simply impossible to conceive that this class of small businesses, or its lawyers, could or would have to start all over again to preclude conduct going forward that has already been found to be unlawful.

The Hartford's complaint that the injunctive relief award somehow places it at some theoretical competitive disadvantage (Def. Br. at 42) is groundless for several reasons. First, The Hartford can hardly claim that merely refraining from interfering with the independence of its appraisers, and reporting its compliance to the court, would place it at some competitive disadvantage. Second, not only did The Hartford's expert, Dr. Salinger, affirm at trial that his opinion rested on the assumption that all actors in the market were following the law, but he offered his general economic view that one would simply expect the market to adjust when parties are compelled to follow the law. A373. Third, it is no defense for a large insurance company to say that because everyone else in the marketplace is breaking the law, it should be able to do so as well. If that were the case, a court could never award injunctive relief to remediate unfair commercial practices. Rather, the broad remedial purpose of CUTPA not only contemplates that injunctive relief remediate the unlawful conduct of individual defendants such as The Hartford, but also that it serve as a deterrent to others who would consider violating the law. And fourth, because of The Hartford's refusal to produce information on insurance premiums, there is simply no support in this record for the illusory parade of horribles to consumers trotted out by The Hartford to avoid the injunctive relief carefully crafted by the trial court.

Defendant also makes the novel argument that, as a matter of law, an injunction is not warranted just because The Hartford "still maintains post-trial that its actions were perfectly legal and proper." Def. Br. at 41. Given that The Hartford had its day in court and a jury found its conduct to be illegal, it is completely irrelevant what The Hartford believes about its conduct. See e.g., Joseph General Contracting, Inc. v. Couto, 144 Conn. App. 241, 258 (2013); Labbadia v. Bailey, 152 Conn. 187, 192 (1964) ("Past conduct may be considered in determining . . . the probability of future conduct warranting injunctive relief."). The trial court's finding that The Hartford concealed its conduct precludes The Hartford's contention of an "honest claim of right" and shows The Hartford was well aware of the illegality of its own conduct. Def. A243.

V. Plaintiffs' CUTPA claim is not Preempted by CUIPA.

A. Defendant Has Waived This Argument Having Not Preserved the Issue for Appeal.

Defendant did not plead a special defense that CUIPA preempted Plaintiffs' CUTPA claim, object to admission of evidence at trial on this basis, or pursue a preemption issue before, during or after trial.[21] Having failed to raise the issue below, it failed to preserve the

[21] It is telling that, apparently concerned that it had not preserved the preemption issue, The Hartford merely refers obtusely, without explanation, to a paragraph on the 42nd page of its summary judgment **memorandum of law** dated September 29, 2008, which is not part of the record, discussing factual and pleading deficiencies in Plaintiffs' CUIPA claim, with a single citation to Mead v. Burns, 199 Conn. 651 (1986). It is evident, however, that Defendant failed to preserve the issue below. First, the only CUIPA issue articulated in Defendant's motion for summary judgment was that "the class's claims based on the [CUIPA] are meritless," having nothing whatsoever to do with preemption. Def. A22. Second, at oral argument on summary judgment, Defendant did not utter the word "CUIPA" at the hearing. Third, the trial court never ruled on preemption, merely denying the motion in response to Defendants' claim that Plaintiffs "failed to allege any facts or any specific provisions of CUIPA allegedly violated." Def. A92. Fourth, The Hartford failed to raise the issue of preemption in exception to the jury charge, and certainly never asked for a charge that, if the jury found no CUIPA violation, it could not find a CUTPA violation. A378-79. Fifth, The Hartford never mentioned CUIPA in its **two** post-trial motions, let alone the issue of preemption. Def. A106, 135. And finally, The Hartford cannot excuse the failure to pursue the preemption issue below by claiming that it could not have anticipated the Acordia decision as it acknowledges that Acordia was based on this Court's decision in Mead, long predating the trial in this case.

issue for appeal and cannot raise it for the first time in this Court some eleven years after this case was commenced. "[O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." Blumberg Assoc. Worldwide, Inc. v. Brown and Brown of Conn., Inc., -A.3d-, 2014 WL 547567 at *8 (February 28, 2014) (quoting Perez-Dickson v. Bridgeport, 304 Conn. 483, 498-99 (2012)). Generally, Connecticut appellate courts "will not address issues not decided by the trial court." Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp., 245 Conn. 1, 52 (1998); Practice Book § 60-5. "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial – after it is too late for the trial court or the opposing party to address the claim – would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." Blumberg, 2014 WL 547567 at *8 (quoting State v. Dalzell, 282 Conn. 709, 720 (2007)). Basic notions of fairness, judicial economy, and finality of judgments preclude Defendant's belated and desperate attempt to raise preemption for purposes of attacking a judgment in a case that has been pending for more than a decade. Id. at 923, fn. 36 (an alternate ground for affirmance may be treated "more leniently than unpreserved claims seeking to reverse the trial court's judgment in the interests of judicial economy and preserving finality of judgments"). In Acordia itself, this Court refused to consider a claim that Defendants had violated a separate insurance-related statute supporting CUTPA liability because the plaintiff had not raised the claim in the trial court and, therefore, had failed to preserve it for appeal. Acordia, 310 Conn. at 34 n.9.[22]

These principles apply to the defense of preemption. Even having been permitted to amend their Special Defenses as late as August, 2009, The Hartford failed to plead the issue of preemption. A1-8. In Stokes v. Norwich Taxi, LLC, 289 Conn. 465, 488-89 (2008),

[22] This Court should likewise refuse to consider The Hartford's CUIPA preemption claim on this appeal. Not only are there no exceptional circumstances that would warrant consideration here, but the prejudice to Plaintiffs is manifest; had the issue been raise by Defendant below, Plaintiffs would have tried the case differently in its pleadings, discovery, presentation of evidence at trial, and in both the charge and interrogatories to the jury.

this Court held that "[b]ecause the defendants did not file a special defense of federal preemption to the plaintiff's claims brought pursuant to §§ 31-68 and 31-72, and did not object to any of the evidence introduced to support the plaintiff's claims based on those statutes, the defendants waived this special defense and cannot now seek plain error review."[23]

B. Even had the Defendant Preserved the Issue, CUIPA Does Not Preempt the CUTPA Claim Made in this Case.

Even had the Defendant preserved the issue, which it most certainly did not, CUIPA does not preempt Plaintiffs' CUTPA claim, which alleges that The Hartford interferes with the independence of its staff appraisers in violation of the public policy set forth in the regulations governing the conduct of motor vehicle physical damage appraisers. In reality, The Hartford's argument is that it should somehow be completely exempt from a claim under CUTPA merely because it is an insurance company – a contention at odds with the law, and certainly not what was proscribed by this Court's decision in Acordia.[24]

As this Court explained in Mead, 199 Conn. at 659, CUIPA was enacted to take advantage of a provision in the McCarren-Ferguson Act, which made the federal antitrust laws and the FTC Act inapplicable to "**the business of** insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). (emphasis added). Consistent with this purpose, CUIPA applies only to "an unfair method of competition or an unfair or deceptive act or practice **in the business of insurance** . . . ." C.G.S. § 38a-815.

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[23] Because the claimed preempting statute does not dictate choice of forum, the preemption issue now raised by The Hartford is not jurisdictional. Stokes, 289 Conn. at 488. See also Mullin v. Guidant Corp., 114 Conn. App. 279, 283, cert. denied, 292 Conn. 921 (2009) ("claim of federal preemption of a state cause of action is waived unless pleaded as a special defense").

[24] The decision in Acordia does not address the meaning of the phrase "business of insurance," which provides the jurisdictional limitation for the reach of CUIPA, presumably because that was not raised in that action. Acordia concerned the fiduciary relationship between insurance company agents and insureds in connection with the sale of insurance products by insurance companies to their customers. Thus, while in Acordia there appears to have been little question that the sale of insurance constitutes the "business of insurance," the business of auto body repair does not.

(emphasis added). The phrase "business of insurance" is not defined in the Connecticut statutes. However, the statutory definition of "insurance" in C.G.S. § 38a-1(10) requires that the assumption of risk by the insurer must "be part of a general scheme to distribute losses among a larger group of persons bearing similar risks in return for a ratable contribution or other consideration." See Op. Atty. Gen. No. 03-014, 2003 WL 22287393 (Sept. 23, 2003) (VIN etching protection service did not fall within statutory definition of insurance).

In Royal Drug Co., a case surprisingly not addressed in Defendant's brief, the United States Supreme Court made clear that claims arising from the relationship between insurance companies and auto body repair shops do not constitute the "business of insurance." 440 U.S. at 205. There, independent pharmacists brought an anti-trust action against a Texas insurance company and three pharmacies alleging that defendants had violated the Sherman Act by entering agreements to fix the retail prices of drugs. The trial court granted summary judgment on the ground that the challenged agreements were exempt from the anti-trust laws under the McCarran-Ferguson Act. The Supreme Court affirmed, holding that "the statutory language . . . exempts the 'business of insurance,' not the 'business of insurers," Id. at 217, and that because "Congress understood the business of insurance to be underwriting and spreading risk," conduct of insurers designed to address costs and maximize profits is not the "business of insurance." Id. at 220-221. In so doing, the Court specifically noted the analogous relationship between insurance companies and auto body repair shops, stating that:

> If agreements between an insurer and retail pharmacists are the "business of insurance" because they reduce the insurer's costs, then so are all other agreements insurers make to keep their costs under control-whether with **automobile body repair shops** or landlords. **Such agreements would be exempt from the anti-trust laws if Congress had extended coverage of the McCarran-Ferguson Act to the "business of insurance companies." But that is precisely what Congress did not do**. Id. at 232-33 (emphasis added)

Courts have applied Royal Drug in holding that dealings between insurers and auto repair shops do not constitute the "business of insurance." See e.g., Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308, 336-37 (D.C. Cir. 1982), cert. denied, 459 U.S. 839

(1982) (auto repair shops); Liberty Glass Co., Inc. v. Allstate Ins. Co., 607 F.2d 135, 137-38 (5th Cir. 1979) (auto glass installer).

Moreover, this case is further distinguishable from Acordia in that the regulations governing the conduct of motor vehicle physical damage appraisers found in § 38a-790-8, adopted pursuant to Conn. Gen. Stat. § 38a-790, provide an independent basis for a CUTPA violation in addition to any claim that might fall within the reach of CUIPA. The holding in Acordia stated 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." Acordia, 310 Conn. at 37; see also id. n. 9. While consideration of some alternate insurance-related statute was not taken up in Acordia, the rule should be extended to reach the conduct complained of here, which reflects a clear violation of the deeply-rooted public policy mandating fair and unbiased appraisals by physical damage appraisers.

VI. Even if the Court Were to Decide Not to Affirm the Jury Verdict, Which it Should Not, it Cannot Enter Judgment for Defendant Because of Material Errors by the Trial Court Regarding Core Evidentiary Issues in the Case.

The trial court made a number of evidentiary rulings that materially prejudiced Plaintiffs' ability to try their case, a reversal on any one of which precludes judgment from entering against Plaintiffs. "Ordinarily the reversal of a jury verdict requires a new trial of all the issues in the case." George v. Ericson, 250 Conn. 312, 332 (1999); Burgryn v. City of Bristol, 63 Conn. App. 98, 112 (2001)("[I]n a civil case, the standard to be used is whether the erroneous ruling would likely affect the result.").

A. The Trial Court Erred in Excluding Evidence Necessary to Meeting its Burden Under the Substantial Injury Prong of the Cigarette Rule.

As discussed supra at pp. 31-32, the trial court erroneously precluded Plaintiffs from introducing evidence intended to rebut The Hartford's claims to the jury that its practices were beneficial to consumers under the substantial injury test. This included: (1) evidence relating to the quality of repairs at The Hartford's direct repair shops, including their use of

aftermarket parts (e.g. A275-82), to refute The Hartford's claims that its direct repair program was beneficial to consumers; (2) evidence demonstrating The Hartford's financial condition, including the substantial profits earned and distributed to its corporate officers (e.g. A370-72); and (3) redaction of portions of the February 12, 2002 Hartford Appraisers' Letter, including portions of the letter concerning The Hartford's practices regarding aftermarket parts and the pressures felt by the appraisers to adhere to those standards. A117-27, A396-401. Exclusion of the evidence likely affected the result regarding the substantial injury prong of the cigarette rule.

B. The Trial Court Erred in Permitting Introduction of Evidence Relating to Labor Rates Paid by Other Insurance Companies and The Hartford's Market Share.

The trial court incorrectly allowed the Defendant to introduce evidence of the labor rates charged by insurance companies other than The Hartford. A90-99. The trial court's ruling conflated what the Plaintiff would be required to prove in a "market" or "anti-trust" case, with the Plaintiffs' actual claim that *The Hartford*'s conduct violated CUTPA by controlling the conduct of its own employee-appraisers. Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199, 265 (1997); State v. Dematteo, 186 Conn. 696, 702-703 (1982). This conflating of anti-trust and CUTPA concepts is also why the trial court erred in allowing The Hartford to introduce evidence of its market share. A60-61. Having allowed this evidence in, the trial court exacerbated the prejudice to Plaintiffs by precluding Plaintiffs from challenging it by inquiry into whether the practices of other insurance companies were also interfering with the independence of their staff appraisers.

C. The Trial Court Erred in Excluding Evidence of a Federal Consent Decree as Indicia of Public Policy under CUTPA.

The trial court erred in granting The Hartford's motion in limine (A76) precluding evidence of a Federal Consent Decree entered into in 1963 by the Justice Department and the leading insurance trade associations (of which one of The Hartford's subsidiaries was a member) to refrain from conduct that directly relates to the claims asserted by Plaintiffs in

this case, including the setting of labor rates, using non-independent, insurance company sponsored and controlled appraisers, and steering. United States v. Association of Casualty and Surety Companies, et. al., 63 Civ. 3106 (S.D.N.Y. 1963). A543. The trial court compounded the error by allowing The Hartford to admit a document referring to the Consent Decree, but denying its admission even though The Hartford had opened the door. A283-303.

The trial court erred in relying on cases where parties without standing sought to enforce the provisions of a consent decree, rather than, rely on it as indicia of public policy. May Department Stores, Co. v. First Hartford Corporation, 435 F. Supp. 849 (D. Conn. 1997; Stephen Harris v. Bradley Memorial Hospital and Health Center, 306 Conn. 304, (2012). There is substantial support for Plaintiffs' contention that this Federal Consent Decree should have been permitted into evidence as an indicia of public policy. E.g., In re TJX Companies Retail Security Breach Litigation, 564 F.3d 489, 496-97 (1st Cir. 2009); Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 747-48 (2008); Price v. Phillip Morris, Inc., 219 Ill. 2d 182 (2006), cert. denied, Price v. Philip Morris Inc., 549 U.S. 1054 (2006); State v. O'Neill Investigations, Inc., 609 P.2d 520, 529 (Alaska 1980); Schubach v. Household Finance Corp., 375 Mass. 133, 135 (1978) (relying on FTC consent decree as indicia of public policy).

There is no question that, had the direct, and expansive terms of the Consent Decree been presented to the jury, and had the jury known that The Hartford simply ignored its provisions for many years, this would likely have affected the entirety of the jury's deliberations and outcome on all issues, including the steering and labor rate claims.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court affirm the jury verdict, and the punitive damages and injunctive relief awards, in their entirety.

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CERTIFICATE OF COMPLIANCE

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

/s/ David A. Slossberg
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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, 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:

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