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A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of themselves and all Others Similarly Situated, Plaintiffs, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No. 3:07-CV-929 (WWE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Motions 929; 2008 U.S. Dist. Ct. Motions LEXIS 7757

February 7, 2008

Motion to Strike

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s); Pleading(s)

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**TITLE: DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTIONS TO STRIKE AND DISMISS**

**TEXT:** Plaintiffs' complaint contains three critical holes, which their opposition brief has done nothing to fill:

. Plaintiffs have not pleaded or contended that defendants were parties to the 1963 Consent Decree.

. Plaintiffs have not pleaded or contended that the conduct alleged in the complaint is the same as that addressed in the Consent Decree.

. Plaintiffs have not cited a single case holding that a consent decree can be used as an indicia of public policy (for any purpose, let alone for establishing a violation of CUTPA).

As will be seen, those undisputed facts clearly establish the irrelevance and impertinence of the Consent Decree, and, therefore, defendants' motion to strike should be granted.

Similarly, as will be seen, defendants' motion to dismiss plaintiffs' CUTPA [**2] deception count should be

granted because:

[*2] . Plaintiffs have not pleaded proximate cause.

. Plaintiffs have not pleaded that defendants' statements to their insureds were false or misleading, and, therefore, those statements cannot be found to be "deceptive" under CUTPA as a matter of law.

**I. The Consent Decree Should Be Stricken.**

Defendants' motion to strike provided three reasons why the 1963 Consent Decree is irrelevant: (1) defendants were not parties to the Consent Decree; (2) the conduct at issue in the Consent Decree-collusive agreements between competitors (i.e., horizontal restraints)-is unrelated to the conduct alleged in the complaint-the business practices of a single insurer (i.e., vertical behavior); n1 and (3) no case has held that a consent decree can be used as an indicia of public policy (for the purposes of establishing a violation of CUTPA or otherwise), as plaintiffs seek to do here.

n1 Despite conceding that the Consent Decree involved different conduct by different parties, plaintiffs maintain that the Consent Decree is somehow "relevant to whether defendants acted willfully and in bad faith." Pls' Br. at 13. However, plaintiffs cannot explain how the Consent Decree could bear on defendants' state of mind if it does not relate to their underlying conduct.

[**3]

Instead of citing a fact pled or legal authority contradicting those three critical points, n2 plaintiffs sidestep defendants' motion by asking the Court not to decide it at this stage because determining relevance will require the resolution of a "host of factual issues." Pls.' Br. at 15-16. That is not true. Because plaintiffs have not disputed the facts above, there is no factual dispute to resolve, and the strictly *legal* conclusion to be drawn from the undisputed facts is that the Consent Decree is irrelevant. This is precisely what Rule 12(f) is for. n3

n2 Indeed, in each and every case relied on by plaintiffs, unlike here, (1) the defendants were parties to the consent decrees, and (2) the consent decrees directly addressed the conduct at issue in the subsequent litigation. n3 *See* Fed. R. Civ. P. 12(f) ("The court may strike from a *pleading* . . . any redundant, immaterial, impertinent, or scandalous matter" and may act "on motion made by a party . . . *before responding to the pleading*.") (emphasis added); *Chao v. Linder*, 421 F. Supp. 2d 1129, 1137 (N.D. Ill. 2006) (Rule 12(f) "provides a useful and appropriate tool where the parties disagree only on the legal implications to be drawn from uncontroverted facts . . . .").

[**4]

[*3] With respect to plaintiffs' suggestion that the Court should delay a decision on defendants' motion for some unspecified amount of time, *see* Pls.' Br. at 15-16, plaintiffs do not-and cannot-say that they intend to prove that defendants were parties to the Consent Decree and that defendants' conduct is addressed by the Consent Decree. Therefore, as nothing else can be learned concerning the relevance of the Consent Decree, defendants are entitled to Rule 12(f) relief now, not later. n4

n4 *See, e.g., Pratt v. Phoenix Home Life Mut. Ins. Co.*, 285 B.R. 3, 6 (D. Or. 2001) ("The function of a 12(f)

motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial."); *Resolution Trust Corp. v. Schonacher*, 844 F. Supp. 689, 691 (D. Kan. 1994) ("The purpose of the rule is to minimize delay, prejudice, and confusion by narrowing the issues for discovery and trial."); *NN&R, Inc. v. One Beacon Ins. Group*, 362 F. Supp. 2d 514, 525 (D.N.J. 2005) ("The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.").

[**5]

Finally, plaintiffs assert that there is "no real prejudice" if the irrelevant Consent Decree is left in the complaint, "as the complaint will not be shown to the jury." *See* Pls.' Br. at 15. Plaintiffs miss the point. Even if it were true that a complaint cannot be shown to the jury at *trial*, it clearly is prejudicial to leave the Consent Decree in the complaint now because defendants will be forced to expend time and resources having to explain its irrelevance in *pretrial* proceedings, such as discovery and class certification. In any event, the predicate of plaintiffs' assertion is wrong, as pleadings may be submitted to a jury in the sound discretion of the trial court. n5

n5 *See, e.g., Svege v. Mercedes-Benz Credit Corp.*, 329 F. Supp. 2d 285, 287 (D. Conn. 2004) (Kravitz, J.) ("As a general rule, of course, a party's pleadings are admissible as admissions, either judicial or evidentiary, as to the facts alleged in that pleading.") (citing *E. Natural Gas Corp. v. Aluminum Co. of Am.*, 126 F.3d 996, 1002 (7th Cir. 1997), and *U.S. v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984)); KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 101.46 ("In some jurisdictions, it is customary to read the pleadings to the jury at the commencement of the trial."); *Barry v. Legler*, 39 F.2d 297, 302 (8th Cir. 1930) ("No reversible error result[ed]" from the submission of complaint to the jury); *Boyle v. Stephens, Inc.*, 1998 WL 80175, at *7 (S.D.N.Y. Feb. 25, 1998) ("[A]t trial, a jury may examine . . . inconsistent pleadings.").

[**6]

[*4] **II. The Deception Count Should Be Dismissed.**

***A. Suppression of Labor Rates.*** In PP 43-45 of the complaint, plaintiffs allege that defendants falsely represented to them that (1) defendants paid "fair market" labor rates, and (2) defendants' appraisers provided "unbiased" appraisals. Plaintiffs do not dispute that they must plead a causal link between those alleged misrepresentations and their injury, but maintain that they have done so simply by contending that "defendants illegally suppressed the labor rates . . . by making [the] misrepresentations." Pls.' Br. at 9.

However, as in *Abrahams v. Young & Rubicam, Inc.*, 240 Conn. 300 (1997), plaintiffs' theory of proximate cause is not viable as a matter of law. The Court in *Abrahams* held that the plaintiff had not stated a cause of action under CUTPA for purposes of Rule 12(b)(6) because the causal link pleaded there-i.e., that the defendant's bribery scheme itself had harmed plaintiff-was not, in fact, the proximate cause of the injury to the plaintiff's reputation-i.e., the confession that the defendant gave to state and federal authorities implicating the plaintiff as having accepted [**7] bribes. *Id.* at 308-09. Put simply, the *Abrahams* Court was "persuaded that, as a matter of logic and of law, [the defendant's] confession, and not the underlying bribery scheme, was the proximate cause of the plaintiff's injuries." *Id.* at 308 n.9.

Under precisely the same reasoning, here, the proximate cause of the alleged suppression of labor rates is defendants' alleged acts of ***paying*** below-market labor rates and ***writing*** appraisals at below-market rates-not defendants' ***characterization*** of the labor rates and appraisals to the plaintiffs as "fair" and "unbiased." It is impossible for any reasonable person to conclude that defendants' characterization of their labor rates as "fair" and appraisals "unbiased" to the plaintiffs could have caused labor rates in the market to be lower than they otherwise would have been. Therefore,

as in *Abrahams*, plaintiffs have failed to plead the proximate cause of their injury.

[*5] ***B. Steering.*** Plaintiffs further contend that their "steering allegations that give rise to the deception count are contained in paragraphs 12 to 15 of the complaint, and concern deceptive [**8] acts and statements made by defendants to their insureds." Pls.' Opp'n at 7. This theory turns "most notably" on P 13 of the complaint, *id.* at 7, which contains the statements in question. However, plaintiffs have failed to allege that those statements were false or otherwise misleading, as required to state a deception claim under CUTPA. *See Caldor, Inc. v. Heslin*, 215 Conn. 590, 597 (1990). Consequently, plaintiffs' deceptive steering claim under CUTPA must be dismissed.

**III. Conclusion**

For the foregoing reasons, and those stated in the opening memorandum of law, defendants respectfully request that the Court grant their motions to strike and dismiss, and enter their proposed order.

DEFENDANTS
PROGRESSIVE CASUALTY INSURANCE COMPANY
PROGRESSIVE DIRECT INS CE COMPANY

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**CERTIFICATE OF SERVICE**

I hereby certify [**9] that, on February 7th, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Kevin M. Smith
Kevin M. Smith

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A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of Themselves and all Others Similarly Situated, Plaintiffs, - against - PROGRESSIVE CASUALTY INSURANCE COMPANY and PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No. 3:07 CV 0929 (WWE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Motions 929; 2008 U.S. Dist. Ct. Motions LEXIS 7756

January 24, 2008

Motion to Dismiss

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s); Pleading(s)

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**TITLE: PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND CAUSE OF ACTION OF THE AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6), AND MOTION TO STRIKE CERTAIN PORTIONS OF THE AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(F)**

**TEXT:** Plaintiffs, A&R Body Specialty, Skrip's Auto Body, Family Garage, and the Autobody Association on Connecticut ("Plaintiffs"), through their undersigned counsel, submit this memorandum of law in opposition to Defendants' Motion to Dismiss the Second Cause of Action for Failure to State a Claim [**2] pursuant to Fed. R. Civ. P. 12(b)(6), and Motion to Strike Certain Portions of the Complaint Pursuant to Fed. R. Civ. P. 12(f). Instead of advancing legitimate grounds for their motion, defendants resort to mischaracterization and the gratuitous trumpeting of their illegal auto body repair program that stands this entire action on its head. By doing so, defendants attempt to construct an issue regarding causation where none otherwise exists. Plaintiffs' deception claim is quite straightforward, as is plaintiff's reliance on the federal consent decree. As shown more fully below:

[*2] (1) defendants' Rule 12(b)(6) motion to dismiss Count II of the amended complaint for failure to state a claim should be denied because: (a) plaintiffs have satisfied the notice pleading requirements under Fed. R. Civ. P. 8 for asserting a claim of deceptive conduct under CUTPA; and (b) plaintiffs have properly asserted a causal nexus between the defendants' misrepresentations and their ascertainable loss; and

(2) defendants' Rule 12(f) motion to strike from the amended complaint [**3] any reference to the "Consent Decree" should be denied because (a) it is based on disputed factual assertions by defendants that this court cannot resolve at this early stage of litigation, and (b) defendants flatly mischaracterize the nature of the Consent Decree and purpose for which it is offered. Plaintiffs are not seeking private enforcement of the Consent Decree or to use it for purposes of collateral estoppel, but merely as an indicia of public policy as adopted by the principal trade associations representing approximately 265 insurance companies comprising the auto body repair field.

**BACKGROUND**

Plaintiffs filed this class action on behalf of themselves and all other licensed auto body repairers in the State of Connecticut who have performed repairs during the class period for any person with automobile insurance underwritten and/or administered by Progressive Casualty Insurance Company and Progressive Direct Insurance Company (collectively "Progressive" or "defendants"). Plaintiffs seek to recover for the harm caused by Progressive's consistent pattern of unfair and deceptive acts and practices.

Progressive is a major nationwide insurer selling automobile insurance [**4] to thousands of Connecticut residents. In order to extract enormous profits from the automobile insurance programs in the State of Connecticut, Progressive has instituted and managed a program of direct repair shops and in-house, non-independent appraisers, in order to illegally suppress labor rates [*3] paid to auto body repair shops and to illegally steer its insureds to a network of preferred body shops that it controls.

This conduct violates public policy, as expressed by state statute and regulation, and consent decree, all of which were designed to prohibit the insurance industry from illegally fixing and controlling the costs of auto body repairs through such illegal practices as control of the appraisal process, steering and suppression of labor rates. For example, in 1963, the United States Justice Department and the major trade associations in the insurance industry entered into a consent decree, which provided, in relevant part, as follows:

> (A) Each defendant is enjoined from placing into effect any plan, program, or practice which has the purpose or effect of
>
> > (1) sponsoring, endorsing or otherwise recommending any appraiser of damage to automobile [**5] vehicles;
> >
> > (2) directing, advising or otherwise suggesting that any person or firm do business or refuse to do business with (a) any appraiser of damage to automotive vehicles with respect to the appraisal of such damage, or (b) any independent or dealer franchised repair shop with respect to the repair of damage to automotive vehicles;

> (3) exercising any control over the activities of any appraiser of damage to automotive vehicles;
>
> (4) allocating or dividing customers, territories, markets or business among any appraisers of damage to automotive vehicles;
>
> (5) fixing, establishing, maintaining or otherwise controlling the prices to be paid for the appraisal of damage to automotive vehicles, or to be charged by independent or dealer franchised automotive repair shops for the repair of damage to automotive vehicles or for replacement parts or labor in connection therewith, whether by coercion, boycott, or intimidation or by the use of flat rate or parts manuals or otherwise.

See United States v. Association of Casualty and Surety Companies, American Mutual Insurance Alliance and the National Association of Mutual Casualty Companies, 1963 U.S. Dist. Lexis 9949, [**6] at *2-3 (S.D.N.Y.) (the "Consent Decree") (Exhibit A). The terms of this decree were [*4] binding upon not only the defendant trade associations, but also on "all other persons in active concert or participation with any defendant" who received notice of this judgment. Id., at *1.

Statutes and regulations in Connecticut are consistent with the Consent Decree and were designed to prevent insurance companies from forcing their policy holders to use specific appraisers or auto body repair shops to repair damage to automobiles within the State of Connecticut. See Conn. Gen. Stat. § 38a-354; Conn. St. Reg. § 38a-790-8. These provisions, along with the Consent Decree, attempted to regulate the obvious conflict of interest of every insurance company between paying its insureds for quality auto body repairs, and the temptation to bloat its profits by controlling the content of physical damage appraisals, refusing to pay suitable labor rates, cutting corners on permissible repairs and imposing rules on its insured that stifle choice in the auto body repair industry. n1

> n1 Progressive's claim that "[u]nquestionably, reduced labor rates for auto body repairs . . . result in lower premiums for Connecticut insureds" (Def.. Br., p. 2), while parroting the company line, is far from unquestionable. Progressive's public filings paint another picture, of a company aggressively managing its bottom line to enormous profits for shareholders and corporate officers, at the expense of the class and its insureds, whose premiums go up year after year. Progressive could surely achieve lower premiums for Connecticut residents through fair and legal auto body repair practices, and the elimination of excesses in its fiscal priorities.

[**7]

Progressive's conduct has caused substantial injuries to the class of hardworking, highly skilled, auto body repair shops that are trying to earn an honest living in their industry. Plaintiffs commenced this action alleging that Progressive's conduct amounted to both unfair practices (First Cause) and deceptive conduct (Second Cause) under CUTPA. Plaintiffs also seek recovery for Unjust Enrichment (Third Cause) and injunctive relief (Fourth Cause).

[*5] **ARGUMENT**

**I. PLAINTIFFS' COMPLAINT SUFFICIENTLY ALLEGES A CAUSE OF ACTION FOR DECEPTIVE BUSINESS PRACTICES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.**

**A. Standard For Determining Motion To Dismiss**

When ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b), the Court "must accept as true all factual allegations of the complaint and must draw all reasonable inferences in favor of the plaintiff." Ganino v. Citizens Utilities Co., 228 F.3d 154, 161 (2d Cir. 2000). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief." Williams v. Vincent, 508 F.2d 541, 543 (2d Cir. 1974). [**8] Under the notice pleadings rules of Rule 8 of the Federal Rules of Civil Procedure, plaintiffs need only allege a "short and plain statement of the claim showing that the pleader is entitled to relief." "Although detailed allegations are not required, the complaint must include sufficient facts to afford the defendants fair notice of the claims and the grounds upon which they are based and to demonstrate a right to relief." Mele v. Hill Health Center, 2008 WL 160226 (D. Conn.)(SRU)(citing Bell Atlantic v. Twombley, 127 S. Ct. 1955, 1964-65 (2007)) (Exhibit B).

In contrast, Connecticut is a fact-pleading jurisdiction. See Martin v. American Equity Ins. Co., 185 F.Supp.2d 162, 167 n.3 (D.Conn. 2002). Although the pleading requirements for CUTPA in state court require detailed factual allegations, such is not the case in federal court under the notice pleading requirements. Id. See also, Conntect, Inc. v. Turbotect, Ltd., 1998 WL 91067, at *3-4 (D.Conn., Feb. 23, 1998) (Nevas, J.) (denying motion to dismiss where plaintiff did not allege the "magic words of CUTPA," addressing the [**9] three elements of the cigarette rule, but provided three examples of the type of conduct that allegedly violated CUTPA) (Exhibit C); Green v. Konover Residential Corp., 1997 WL 736528, at *7 (D.Conn., Nov. 24, 1997) (Goettel, [*6] J.) (in light of the broad remedial purpose of CUTPA, and the fact that plaintiff incorporated by reference the preceding 92 allegations in its complaint, plaintiff's claims of unfair and deceptive trade practices were pled with sufficient particularity) (Exhibit D); Fed. Paper Bd. Co., Inc. v. Amata, 693 F.Supp. 1376, 1390 (D. Conn. 1988) (Blumenfeld, Sr. D.J.) (holding that the heightened pleading requirements of Fed. R. Civ. P. 9(b) did not apply to actions under CUTPA).

As the amended complaint clearly satisfies the notice pleading requirements for federal court, and suffices to allege a causal nexus at the pleadings stage, the defendants' motion to dismiss Count II of the amended complaint should be denied.

**B. Defendants' Argument Relies Upon An Inaccurate Statement of Plaintiffs' Complaint.**

Arguing that the amended complaint n2 is "fundamentally flawed," defendants [**10] contend that plaintiffs have not established the causal nexus between the defendants' misrepresentations and the decision of insureds to choose another body shop, specifically stating that "[a]ny deceptive statement made by Progressive to the Auto Body Shops simply cannot be the proximate cause of insureds **choosing to use another body repair shop.**". (Def. Br., p. 3) (emphasis added). This argument makes no sense, as it rests on an obvious misunderstanding of plaintiffs' deception claim.

> n2 In their initial complaint, plaintiffs clearly satisfied the notice pleading standards articulated by the federal rules. In an abundance of caution, however, plaintiffs amended their initial complaint in response to arguments raised in defendants' first motion to dismiss. (See Plaintiffs' Opposition to Defendants' First Motion to Dismiss, pp 27-29).

First, defendants' argument simply ignores the express allegations of the deception count that relate to the suppression of labor rates. Plaintiffs allege, inter [**11] alia, that:

> 43. Defendants represented to plaintiffs and members of the putative class that they pay labor rates constituting fair market rates, while at all times knowing that said rates result from insurer pressure, are well below [*7] posted labor rates for work not covered by insurance, and are not reasonable rates for the State of Connecticut.

> 44. Defendants represented to plaintiffs and members of the putative class that their appraisers produce fair and unbiased appraisals, when in fact defendants prohibit the use of independent appraisers, set strict parameters for their appraisers to follow, and dictate the labor rates to be used by its appraisers, even where the appraisers do not consider said rates to be fair and reasonable for the State of Connecticut.
>
> 45. Defendants' conduct and statements were designed to mislead and manipulate both plaintiffs and members of the putative class for the principal purpose of increasing corporate profit.
>
> * * *
>
> 49. As a result of defendants' conduct, plaintiffs and the members of the Class have suffered ascertainable loss and substantial money damages.

In sum, plaintiffs contend that, "as a result of" [**12] defendants' misrepresentations directly to the plaintiffs about the reasonableness of the labor rates defendants pay, and the content of damage appraisals produced by their appraisers, plaintiffs have suffered an ascertainable loss. The principal injury alleged in this count is not, as suggested by defendants, that insureds decided to use other body shops. Rather, the harm caused by defendants' deceptive conduct is the illegal suppression of labor rates, which resulted in ascertainable loss and substantial injury to the plaintiffs, who received less than reasonable market compensation for their work.

The steering allegations that give rise to the deception count are contained in paragraphs 12 to 15 of the complaint, and concern deceptive acts and statements made by defendants to their insureds, which had the effect of steering insureds to direct repair shops and injuring business opportunities of members of the class. Most notably, the complaint alleges with regard to steering that:

> 13. Progressive employees tell insureds, among other things, that Progressive does not do business with a non-DRP shop, that a claim may not get paid if done at another shop, that it is "easier" [**13] to have the car repaired at one of its shops, that the insured can receive free towing if the [*8] vehicle is brought to a DRP shop, that the insured can receive a discount off of his or her deductible by using a DRP shop, and that it will not guarantee work done at a non-DRP shop, but will guarantee the work at its DRP shops for the life of the vehicle.

With respect to the relationship between the alleged deception and plaintiffs' steering claims, proximate cause is manifest given that the injury flowing from the alleged misrepresentations is also sufficiently direct and the claim satisfies the standards for standing. See, e.g., Phoenix Bond & Indemnity Co. v. Bridge, 477 F.3d 928, 932 (7th Cir. 2007) (despite the fact that plaintiff was not the direct recipient of defendants' misrepresentations, plaintiff sufficiently alleged causation as it was clearly the injured party). n3

> n3 Although Phoenix Bond & Indemnity Co. v. Bridge, 477 F.3d 928 (7th Cir. 2007), concerns a RICO claim, it is instructive on this issue. The courts have looked at how causation is established under common law and RICO when addressing similar issues in the context of CUTPA. See e.g., Allstate Ins. Co. v. Seigel, 312 F.Supp.2d 260, 276-77 (D. Conn. 2004) (Kravitz, J.) (where at the pleading stage, plaintiff made the requisite showing of causation on its RICO claim, the court declined to dismiss plaintiffs' CUTPA claim by reference to its analysis under RICO).

[**14]

The causation alleged here for both the labor rate and steering claims is a far cry from the attenuated conduct alleged in Haesche v. Kissner, 229 Conn. 213 (1994), and Abrahams v. Young & Rubicam, Inc., 240 Conn. 300 (1997),

the cases relied upon by defendants. In Haesche, 229 Conn. at 223, decided on summary judgment, plaintiff alleged that the defendant's failure to warn of the potential dangers of an air rifle caused an ascertainable loss, where four teenagers had used the rifle in "war games" in their neighborhood that resulted in a serious eye injury to one of the teenagers. The CUTPA claim was dismissed, after consideration of a factual record developed in discovery, n4 because the defendant's alleged failure to warn could not have been the cause of the plaintiff's injuries. Similarly, in Abrahams, 240 Conn. at 308, the [*9] complaint was dismissed for lack of proximate cause where plaintiff alleged that his reputation was injured as a result of a bribery scheme in which he did not participate, when the injury to his reputation actually resulted from defendant's confession of the bribery scheme to state [**15] and federal authorities, wrongful implication of plaintiff in the scheme and the erroneous indictment of plaintiff for bribery.

n4 By contrast, defendants ask this Court to assess the merits of plaintiff's proof of causation in a vacuum given that no discovery has been taken, and no evidence relating to causation is before the Court on this motion to dismiss.

Here, the causal nexus is clear: by making the material misrepresentations that, *inter alia*, the labor rates were fair, and that their appraisers were unbiased, defendants illegally suppressed the labor rates set by the class members, thereby resulting in ascertainable loss and substantial economic injury to the plaintiffs. And by directing insureds to direct repair shops based on deceptive conduct and statements, defendants proximately caused the loss of business opportunities to the members of the putative class. Consequently, this is clearly not a case, as in Abrahams, where "the mind of a fair and reasonable person could reach only one conclusion. [**16] " Rather, one could reasonably conclude that by engaging in deceptive conduct designed to suppress labor rates and steer repairs to direct repair shops, plaintiffs suffered ascertainable loss.

Accordingly, the allegations of Count II clearly satisfy the notice pleading standards of Fed. R. Civ. P. 8.

**II. REFERENCE TO THE CONSENT DECREE SHOULD NOT BE STRICKEN FROM THE AMENDED COMPLAINT BECAUSE IT IS RELEVANT TO ISSUES OTHER THAN TO PROVE LIABILITY OR DAMAGES BY WAY OF COLLATERAL ESTOPPEL.**

The defendants argue that the Consent Decree should be stricken from the amended complaint pursuant to Federal Rule of Civil Procedure 12(f). (Def. Br., p. 5-9). In particular, they contend that the decree cannot be used as evidence because it has no bearing on public policy, it is inadmissible under Lipsky v. Commonwealth United Corp., 551 F2d 887, 893 (2d Cir. 1976) and its progeny, and it is immaterial and "prejudicial" because they were not parties to [*10] the decree and the conduct at issue in the consent decree is different than that at issue here. Id. These arguments, however, [**17] must fail because: (1) the court cannot, and should not, be resolving disputed factual and legal issues, including admissibility of evidence, at the pleading stage; and (2) the Consent Decree is not being offered for the purpose of proving that liability in the earlier action compels a finding of liability here, but merely as (a) evidence that the conduct proscribed by the Consent Decree, as agreed to by the industry associations on behalf of approximately 265 insurance companies underwriting auto body insurance, has become accepted public policy and sets the standard of conduct for the industry, and (b) evidence of defendants' willfulness and bad faith, which are relevant to plaintiffs' claim for punitive damages. Consequently, whether the defendants were named parties to this agreement, or the decree concerned different conduct than is at issue here, has no bearing on the purpose for which it is being used in this case.

**A. Standard of Review**

Although Rule 12(f) of the Federal Rules of Civil Procedure provides that "the court may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter," these [**18] motions to strike are not favored by the federal courts. See Urashka v. Griffin Hospital, 841 F.Supp. 468, 476 (D. Conn. 1993) (citing Charles A.

Wright, Arthur H. Miller & Edward H. Cooper, Federal Practice & Procedure, § 1380 (1988 & Supp. 1993)). Such motions "have been described aptly as disfavored and 'time wasters'." Nat'l Council of Young Israel v. Wolf, 963 F.Supp. 276, 282 (S.D.N.Y. 1997).

"In deciding whether to [grant] a Rule 26(f) motion on the ground that the matter is impertinent and immaterial, it is settled that the motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible." Johnson v. M&M Communications, Inc., 242 F.R.D. 187, 189 (D. Conn. 2007) (Thompson, J.) (citing Lipsky v. [*11] Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976)). "Usually the questions of relevancy and admissibility in general require the context of an ongoing and unfolding trial in which to be properly decided." Id. "And ordinarily neither a district court nor an appellate court should decide to strike a portion of the complaint - on the grounds [**19] that the material could not possibly be relevant - on the sterile field of the pleadings alone." Id. "Moreover, because a complaint is not submitted to the jury, the danger of unfair prejudice is minimal." Id. The extraordinary remedy sought by defendants, which is to strike a pleaded fact injurious to its case at the pleadings stage, is unwarranted and should be denied.

**B. As The Purpose For Referencing The Consent Decree is For Reasons Other Than To Prove Liability Or Damages By Way Of Collateral Estoppel, It Should Not Be Stricken From the Complaint.**

Defendants' broad statement that a consent decree cannot be used as evidence is patently misleading and simply incorrect. Although such a statement may prove true where that decree is offered to prove liability by way of collateral estoppel based on the underlying facts of the consent decree, parties may plead, and courts may certainly admit, such decrees for other purposes.

Defendants rely primarily on the holding in Lipsky v. Commonwealth United Corp., supra, 551 F.2d at 893, for the proposition that a consent decree between a federal agency and a private corporation cannot be used in subsequent litigation. [**20] (Def. Br., p.16). The Lipsky court held that the plaintiff could not include references to an SEC complaint alleging violations of securities laws to prove that the defendants breached their contract by failing to properly register plaintiff's stock with the SEC. Lipsky, 551 F.2d at 894. Since the SEC complaint resulted in a consent decree that was analogous to a plea of *nolo contendre*, and therefore inadmissible as [*12] evidence, the complaint could not be referenced, as its purpose was to prove that defendants violated the securities laws. Id. at 893-94.

Yet, the rule of Lipsky is far from absolute. Lipsky applies in those instances where a plaintiff references the consent decree for the purpose of treating the decree as an admission to be used to prove liability in a subsequent proceeding. Accordingly, the Second Circuit has subsequently distinguished Lipsky in cases that are more closely analogous to the case at bar. For instance, in United States v. Gilbert, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982), the Second Circuit affirmed the trial court's decision to admit [**21] into evidence, under Rule 408 of the Federal Rules of Evidence, an earlier SEC civil consent decree that was signed by defendant, holding that it was material to show that the defendant knew of the SEC reporting requirements involved in the decree. Id. Rule 408 provides that although evidence of a compromise may not be admitted in a subsequent claim, such evidence may be used for other purposes. n5 Id. In subsequent decisions, the courts of the Second Circuit have cited to Gilbert when denying motions to strike references to consent decrees. See Johnson v. M&M Communications, Inc., supra, 242 F.R.D. at 189 (admitting a prior judgment to permit plaintiff to [*13] show that defendant acted willfully and in bad faith); Brotman v. Nat'l Life Ins. Co., 1999 WL 33109, at *2 (E.D.N.Y., Jan. 22, 1999) (admitting consent decree not to prove the truth of the facts contained in the consent decree, but demonstrate plaintiff's ulterior motive in filing a lawsuit) (Exhibit E).

n5 Federal Rule of Evidence 408 provides as follows:

(a) Prohibited uses.-Evidence of the following is not admissible on behalf of any party, when

> offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish-or accepting or offering or promising to accept-a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
>
> (b) Permitted uses.-This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

[**22]

Lipsky was similarly distinguished in the case of ClearOne Communications, Inc. v. Lumbermans Mutual Casualty Co., 2005 WL 2716297 (D. Utah, Oct. 21, 2005) (Exhibit F). ClearOne resolved an SEC proceeding by consent decree, and sought to defend a private shareholders class action. Id., at *8. The Lumbermans action was then commenced by ClearOne to enforce terms of insurance policies against their insurance carrier, following Lumbermans' denial of coverage based on defendant's alleged fraud. Id. Relying on Lipsky, plaintiffs objected to the court's consideration of the consent decree on the parties' cross-motions for summary judgment. Id. The court, however, rejected that argument:

> [Plaintiffs'] reliance on Lipsky is misplaced. In that case, the court explained that consent decrees, like pleas of nolo contendere, may not be used for purposes of collateral estoppel because the issues in the underlying action were not fully litigated. Here, the court considers the consent decree[] only as part of the factual background of this case.

Id. (emphasis added). Thus, so long as the consent decree was not invoked for collateral [**23] estoppel purposes, it was perfectly appropriate to consider it as a fact in the case.

The 1963 Consent Decree is also, as in Johnson v. M&M Communications, Inc., 242 F.R.D. 187, 189 (D. Conn. 2007), relevant to whether defendants acted willfully and in bad faith. Plaintiffs allege that "[d]efendants' conduct was an intentional and wanton violation of plaintiffs' rights and the rights of members of the Class, or was done with reckless indifference to those rights." (Am. Compl. P 48). Plaintiffs seek punitive damages pursuant to Conn. Gen. Stat. §§ 42-100g(d) and/or 52-240(a) and/or common law. (Am. Compl. Prayer for Relief D). Punitive [*14] damages are available pursuant to both statute and common law where the evidence reveals "a reckless indifference to the rights of others or an intentional and wanton violation of those rights." Gargano v. Heyman, 203 Conn. 616, 622 (1987). Even though the defendants contend they are not parties to the Consent Decree, the entry of the Consent Decree in 1963 and defendants' knowledge of it are relevant to whether defendants acted intentionally or with a reckless indifference to whether their conduct violated [**24] plaintiffs' rights. See also Wegerer v. First Commodity Corp. of Boston, 744 F.2d 719, 724 (10th Cir. 1984) (evidence of consent decree properly admitted on issue of knowledge and intent relevant to claim for punitive damages); Jerry J. Kerr v. First Commodity Corp of Boston, 735 F.2d 281, 286 (8th Cir. 1984) (upholding admission of consent decree for purpose of demonstrating knowledge and intent which were relevant to issue of punitive damages); U.S. v. Gilbert, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982) (prior SEC civil consent decree with defendant properly admitted in criminal prosecution to show defendant's knowledge of the SEC reporting requirements involved in the decree).

Here, plaintiffs cite the Consent Decree as support for the fact that for over forty years, public policy has prohibited insurance companies from engaging in, among other things, illegal steering and suppression of labor rates. (See Am. Compl. PP 20-25). Therefore, the offer of the Consent Decree in this action is not analogous to Lipsky, 551 F.2d at

892-93, where it was offered for purposes of [**25] collateral estoppel, or Gatlin v. Lederman, 367 F.Supp.2d 349, 363-64 (E.D.N.Y. 2005), where the court found the consent decree to be wholly unrelated to the issues in that case. Id. (in case alleging, *inter alia*, fraudulent inducement to undergo radiation treatment for cancer, court struck references to consent decree pertaining to medicare fraud and other immaterial issues).

[*15] Accordingly, the plaintiffs' reference to the Consent Decree in their amended complaint is perfectly appropriate, is well within the bounds of Fed. R. Evid. 408, and requires denial of defendants' motion to strike.

**C. Defendants' Remaining Contentions That References To The Consent Decree Would Be "Particularly Prejudicial" Are Without Merit.**

In an effort to further confuse the issue, defendants concoct additional arguments suggesting that the Consent Decree is immaterial and "prejudicial." (Def. Br., p. 17). These claims center around the contentions that (1) defendants were not signatories to the Consent Decree, (2) said Consent Decree is a private agreement incapable of expressing any "public policy," and (3) it involves different [**26] conduct than that alleged in the complaint. These claims are largely irrelevant, particularly in light of defendants' incorrect claim that consent decrees cannot be pleaded or admitted into evidence.

First, there is no real prejudice to defendants by inclusion of the Consent Decree in the complaint, as the complaint will not be shown to the jury. Thus, the entire premise for striking the Consent Decree from the complaint is misplaced and is simply an improper effort to eliminate from plaintiffs' case a fact that defendants do not like.

Second, this Court should not be making evidentiary determinations at this early stage of the case. Defendants ask this Court to accept their characterization of the Consent Decree as a document unconnected to them or the facts of this case. While under any interpretation this fundamentally misrepresents the nature of the Consent Decree, this Court cannot, and should not, he making factual determinations about the Consent Decree on the "sterile field of the pleadings alone." Johnson, 242 F.R.D. at 189. Moreover, these factual arguments amount to strawmen. The Consent Decree was an agreement by the major insurance trade associations [**27] at that time - the Association of Casualty and Surety Companies, the American Mutual Insurance Alliance, [*16] and the National Association of Mutual Casualty Companies - that the industry would operate under certain parameters and restrictions. The standards adopted by these associations are not unlike a position that might be taken by the American Bar Association proscribing certain attorney conduct. Certainly, a statement of conduct by the ABA would inform public policy on the matter. Thus, defendants' arguments about the factual predicates of the Consent Decree are largely irrelevant and, even if they were somehow germane, they cannot be resolved at this stage of the litigation.

Third, without citing any authority, defendants argue that the Consent Decree is "incapable" of expressing public policy under CUTPA, claiming that it has not been enacted or adopted by policymakers and that the Connecticut Supreme Court has never held that a consent decree satisfies a showing of public policy. This argument is also both immaterial and incorrect. By its very nature, defendants' position is dependent on determining a host of factual issues that cannot be decided at the pleading stage, [**28] such as the context in which the Consent Decree was executed, the nature of the industry, the purpose of adopting it, the role of the trade associations, and the extent to which members of the insurance industry were notified about the decree and warned about their conduct. Surely agreements by the principal trade associations in an industry as to the standard of conduct for that industry can inform public policy. Plaintiffs are merely saying that the Consent Decree is one of a number of facts that may be considered in determining the public policy governing this dispute. Moreover, it is equally true that because the Connecticut Supreme Court has not ruled against the offer of the Consent Decree proposed here, and in light of the case law discussed herein, pleading of the Consent Decree is perfectly appropriate and should be sustained in this case.

[*17] **Conclusion**

Based on the foregoing, plaintiffs respectfully request that the court deny defendants' motion to dismiss Count II of

the complaint and motion to strike reference to the Consent Decree.

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CERTIFICATE OF SERVICE

This is to certify that on January 24, 2008, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to all parties that are unable to accept electronic filing. Parties may access this filing through the Court's electronic system.

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[SEE EXHIBIT [**30] A IN ORIGINAL]

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A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of themselves and all Others Similarly Situated, Plaintiffs, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No. 3:07-CV-929 (WWE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Motions 929; 2008 U.S. Dist. Ct. Motions LEXIS 7755

January 3, 2008

Motion to Dismiss

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s); Pleading(s)

**COUNSEL:** [**1] Shaun S. Sullivan (ct04883), Robert M. Langer (ct06305), Seth L. Huttner (ct27197), Wiggin and Dana LLP, One Century Tower, 265 Church Street, New Haven, Connecticut 06510, Phone: (203) 498-4400, Fax: (203) 782-2889, Email: ssullivan@wiggin.com, rlanger@wiggin.com, shuttner@wiggin.com, Their Attorneys.

**TITLE: Defendants' Motion to Dismiss the Second Cause of Action of the Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Motion to Strike Certain Portions of the Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

**TEXT:** Defendants Progressive Casualty Insurance Company and Progressive Direct Insurance Company, as more fully set forth in the accompanying memorandum of law and proposed Order, hereby move to dismiss plaintiffs' second cause of action of the amended complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that it fails to state a claim upon which relief may be granted.

In addition, as more fully set forth in the accompanying memorandum of law and proposed Order, defendants move, pursuant to Federal Rule of Civil Procedure 12(f) [**2] , to strike all references to the 1963 Consent Decree in plaintiffs' amended complaint.

**ORAL ARGUMENT REQUESTED**

[*2] DEFENDANTS

PROGRESSIVE CASUALTY INSURANCE COMPANY
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**Memorandum of Law in Support of Defendants' Motion to Dismiss the Second Cause of Action of the Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Motion to Strike Certain Portions of the Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

This action arises out of the inability of certain auto body shops in Connecticut - namely, plaintiffs A&R Body Specialty, Ship's Auto Body, and Family Garage (hereinafter "Plaintiffs" or the "Auto Body Shops") - to charge individual consumers in Connecticut [**3] ***higher*** labor rates for auto body repairs. Specifically, the Auto Body Shops contend that defendants Progressive Casualty Insurance Company and Progressive Direct Insurance Company (collectively "Progressive" or "Defendants") have engaged in unfair and deceptive business practices, in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), by allegedly reducing labor [*2] rates and allegedly steering Progressive's insureds away from the plaintiffs' shops to less expensive auto body shops in Connecticut.

Unquestionably, reduced labor rates for auto body repairs, which the Auto Body Shops freely admit to be the end result of Progressive's policies, result in lower insurance premiums for Connecticut insureds. Yet, here, the Auto Body Shops seek to turn CUTPA, a consumer protection statute, on its head by attempting to misuse it to extract more money from Connecticut consumers.

Given the Auto Body Shops' counterintuitive CUTPA allegations, the presence of serious legal defects in the amended complaint is unsurprising. The Auto Body Shops allege a deception count (Count II of the amended complaint), just as they did in the initial complaint. In their initial complaint, [**4] the Auto Body Shops offered no factual allegations to support their legal conclusion that Progressive engaged in deceptive acts or practices. Forced to amend their complaint in response to Progressive's initial motion to dismiss, the Auto Body Shops now allege that Progressive made deceptive statements to them, but fail to state how those statements could have possibly caused Progressive insureds not to use plaintiffs' shops for repair work. For this reason, the deception count must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Auto Body Shops' amended complaint also refers to a 1963 Consent Decree between the Department of Justice and various insurance trade associations, none of whom is a party to this suit. These references are both immaterial and prejudicial and should be struck from the amended complaint pursuant to Federal Rule of Civil Procedure 12(f).

[*3] **I. The Deception Count Should Be Dismissed**

The Auto Body Shops' deception count is fundamentally flawed. The Auto Body Shops claim that Progressive

represented ***to them*** that Progressive paid [**5] market rates for auto body repairs, when in fact Progressive paid below-market rates, and that Progressive appraisers produce fair and unbiased appraisals, when in fact Progressive closely regulates said appraisals. Amend. Compl. PP 17 & 18, 43 & 44. Even assuming that these statements can be classified as "deceptive," the Auto Body Shops do not - and, indeed, cannot - explain how Progressive's allegedly deceptive statements to them caused their injury.

In addition to failing the "common sense" test, the Auto Body Shops' deception count fails under Connecticut law. The count cannot survive Conn. Gen. Stat. § 42-110g(a), which provides, in pertinent part, that "[a]ny person who suffers any ascertainable loss of money or property, real or personal, *as a result of the use or employment of* a method, act or practice prohibited by section 42-110b may bring an action . . . to recover actual damages." *Haesche v. Kissner*, 229 Conn. 213, 223 (1994). The "as a result of" language in § 42-110g(a) "requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff," *Abrahams v. Young & Rubicam, Inc.*, 240 Conn. 300, 306 (1997), [**6] and plaintiffs cannot meet this standard. Any deceptive statement made by Progressive to the Auto Body Shops simply cannot be the proximate cause of insureds choosing to use another auto body repair shop - which is plaintiffs' alleged harm.

Connecticut courts have not hesitated to dismiss CUTPA claims on this ground. In *Haesche*, the plaintiff alleged that defendant's failure to warn about the dangers inherent in an air rifle violated CUTPA. 229 Conn. at 215-16. The trial court granted summary judgment for the defendant, and the Supreme Court affirmed. The Connecticut Supreme Court held, as a matter of [*4] law, that the failure to warn was not the proximate cause of the injury to plaintiff's eye, where there was no showing that a warning would have prevented the plaintiff's injury. *Id.* at 224.

The Connecticut Supreme Court reached the same conclusion in *Abrahams*, this time at the 12(b)(6) stage. n1 In *Abrahams*, plaintiff alleged that the defendants' bribery scheme violated CUTPA and caused damage to his reputation. 240 Conn. at 304-05. The Court, in distinguishing between causation in fact and proximate cause, concluded [**7] that the plaintiff's alleged harm was not a foreseeable consequence of the defendants' wrongful conduct. n2 *Id.* at 306-08. Affirming the lower court's dismissal of the CUTPA count ***at the pleadings stage***, the Court noted that while "the issue of causation generally is a question reserved for the trier of fact . . . the issue becomes one of law when mind of a fair and reasonable person could reach only one conclusion[.]" *Id.* at 307 (citations omitted).

n1 *Abrahams* began in federal court. The District Court dismissed the CUTPA claim for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). *Abrahams v. Young & Rubicam, Inc.*, 793 F. Supp. 404 (D. Conn. 1992). The plaintiff appealed to the Second Circuit, *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 239 (2d Cir. 1996), which certified the following question to the Connecticut Supreme Court: "Whether the plaintiff's allegations, if proven, constitute 'unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce' within the meaning of General Statutes § 42-110b, and whether the plaintiff is 'a person who has suffered a loss of money or property as a result of the use or employment of such a method, act, or practice' within the meaning of General Statutes § 42-110g(a)?" *Abrahams v. Young & Rubicam, Inc.*, 240 Conn. at 303 n.3. The Supreme Court answered in the negative.
[**8]

n2 The Court explained that the proximate cause of plaintiff's injury was actually "the confession that Young & Rubicam gave to state and federal authorities after its scheme was discovered[.]" *Id.* at 308. Without opining on whether Young & Rubicam's confession is the type of activity that violates CUTPA, *id.* at 308 n.10, the Court found that the plaintiff never asserted that the confession was the proximate cause of his injuries, *id.* at 308.

As in *Abrahams*, here, for good reason, there are no allegations that Progressive intended or could have foreseen that the allegedly deceptive statements made to the Auto Body Shops would cause Progressive insureds to use other repair shops. Even more importantly, unlike *Abrahams* - where the bribery scheme was at least the "but for" cause of plaintiff's injury, *id.* at [*5] 308 - here, there is simply no allegation of a link between any alleged deceptive statement made by Progressive to the Auto Body Shops, and the Auto Body Shops' claimed loss of business. Thus, given the [**9] legal insufficiency of *Abrahams'* deception count, the Auto Body Shops' deception count should, *a fortiori*, be dismissed as well.

**II. All References to the Consent Decree Should Be Stricken From the Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

Federal Rule of Civil Procedure 12(f) provides that "[u]pon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Plaintiffs' amended complaint contains numerous references to an immaterial and prejudicial Consent Decree, *see* Exhibit A, and Progressive respectfully requests that the Court strike these references from the amended complaint.

While this Court has often held that "motions to strike are disfavored and will not be granted routinely," *SEC v. Packetport.com, Inc.*, 2006 WL 2349452, at *5 (D. Conn. July 28, 2006), it is equally settled that "[i]n spite of this reluctance, allegations may be stricken if they have no real bearing on the case, will likely prejudice [**10] the movant, or where they have criminal overtones," *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 555 (S.D.N.Y. 2002). Here, the Consent Decree referenced in multiple paragraphs of plaintiffs' amended complaint has nothing to do with the issues in this case and its only purpose is to unfairly prejudice Progressive in its defense of this action.

The Consent Decree has no bearing on this case for three reasons. First, the Auto Body Shops rely on the Consent Decree as an expression of "public policy," the violation of which is sufficient to state a CUTPA violation. *See, e.g., McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 [*6] Conn. 558, 567-68 (1984). But, unlike Connecticut statutes and regulations, *see* Amend. Compl. PP 23-25, a consent decree is neither enacted nor adopted by policymakers. Rather, consent decrees are between the government and private corporations and are the "result of private bargaining," *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 894 (2d Cir. 1976), rendering them more analogous to contracts than statutes or regulations. *See May Department Stores Co. v. First Hartford Corp.*, 435 F. Supp. 849, 852 (D. Conn. 1977) [**11] ("A consent order, . . . being the product of compromise and negotiation between two parties has only the attributes of a contract. Unlike legislation, it is not the expression of broad and conscious policymaking, . . . nor does it have the imprimatur of a neutral decision maker as does a judicial decree."). Indeed, the Connecticut Supreme Court has never held that a consent decree constitutes the requisite expression of public policy capable of satisfying the first prong of the cigarette rule.

Second, Progressive was not a party to the Consent Decree and plaintiffs do not contend otherwise. Other than the Department of Justice, the only parties to the Consent Decree were the Association of Casualty and Surety Companies, American Mutual Insurance Alliance, and the National Association of Mutual Casualty Companies, three insurance industry trade associations whose membership comprised multiple competitors in the insurance industry.

Third, and perhaps most importantly, the conduct at issue in the Consent Decree - agreements between and among competitors - is completely unrelated to the conduct alleged in the amended complaint - the business practices of a single insurer. Stated in [**12] antitrust terms, the Department of Justice's suit against three trade associations was concerned with horizontal agreements among competitor insurance companies, while the amended complaint is concerned with vertical relationships between one insurance company and auto body shops.

[*7] By including the Consent Decree in the amended complaint, plaintiffs attempt to conflate two very different types of conduct. *See e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those

imposed by agreement between firms at different levels of distribution as vertical restraints."). This distinction, however, is one of the most basic precepts of antitrust law because, "[u]nlike agreements among rivals, vertical agreements are a customary and even indispensable part of the market system. They are not even presumptively 'suspect.'" AREEDA & HOVENKAMP, ANTITRUST LAW P 1902d at 217 (2005). In fact, the Supreme Court has gone to great lengths, on numerous occasions, to highlight the differing analyses governing vertical and horizontal [**13] agreements. Specifically, the Court has explained that while a particular agreement between competitors may constitute a *per se* violation of the antitrust laws, that same agreement between vertical firms would not be *per se* unlawful and may be perfectly legal. *See e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-39 (1998). Stated simply, the Consent Decree concerns conduct which is fundamentally different than the business practices alleged in the amended complaint, and it is therefore entirely irrelevant to the issues in this case.

For all these reasons, the Consent Decree has "no real bearing on the case," and on this basis alone should be struck. *G-I Holdings, Inc.*, 238 F. Supp. 2d at 555. Indeed, other courts within this Circuit have not hesitated to strike allegations concerning consent decrees where they had no relevance to the case. For example, in *Gotlin v. Lederman*, 367 F. Supp. 2d 349, 352-53 (E.D.N.Y. 2005), plaintiffs alleged that physicians and a hospital misleadingly marketed a cancer treatment program. In the complaint, plaintiffs included references to an agreement by the defendant-hospital to pay $ 45 [**14] million dollars (plus an additional $ 39 million in free services) to [*8] the New York Attorney General's Office to settle a prior Medicaid fraud case. *Id.* 363. Because the "[a]llegations about a Medicaid fraud case," were "not relevant to th[e] action," the consent decree was properly struck under Rule 12(f). *Id. Gotlin* is directly on point here, where the Consent Decree is aimed at the collusive behavior of competitors and has no bearing at all on the legality of Progressive's unilateral conduct in attempting to obtain less costly repair services for its insureds.

The Consent Decree also should be struck because it is prejudicial. As a practical matter, if the reference to the 1963 Consent Decree remains in the case, Progressive, for no good reason, will be forced to expend time and resources to explain that it was not a party to the Consent Decree and that the alleged improper conduct in this case has nothing to do with collusive agreements among competitors. In that regard, plaintiffs' initial set of interrogatories and requests for production, *see* Exhibit B, leave little doubt about the prominent role the Consent Decree will play in this action [**15] if the allegations are not struck from the amended complaint.

As long as the allegations concerning the Consent Decree remain in the amended complaint, there exists a risk that an inference will be drawn that in 1963 Progressive agreed with the Department of Justice that the conduct plaintiffs complain about in this suit was improper. Even plaintiffs do not contend that ever happened but, until the reference to the Consent Decree is removed from the amended complaint, Progressive will have the unfair burden of rebutting that inference throughout the course of this case.

Finally, courts within the Second Circuit have repeatedly held that a party may not refer to or rely on a consent decree because "a consent judgment between a federal agency and a private corporation . . . is not the result of an actual adjudication of any of the issues. Consequently, it can not [sic] be used as evidence in subsequent litigation between that [*9] corporation and another party." *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976). *See also In Re Merrill Lynch & Co., Inc.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003) ("Second Circuit case law makes it [**16] clear that references to preliminary steps in litigation and administrative proceedings that did not result in an adjudication on the merits or legal or permissible findings of fact are, as a matter of law, immaterial under Rule 12(f) of the Federal Rules of Civil Procedure."). Citing *Lipsky*, Judge Glasser in the Eastern District of New York held that even if the allegations in an agreement with state or federal agencies were relevant, references in pleadings to matters that were not the result of adjudication of the underlying issues are immaterial and can properly be struck. *Gotlin*, 367 F. Supp. 2d at 363. The Auto Body Shops' attempt to rely on the 1963 Consent Decree by including it in their amended complaint cannot be squared with this long line of Second Circuit precedent. n3

n3 While some cases have distinguished Lipsky and its progeny, *see, e.g., Johnson v. M&M Communications,*

*Inc.*, 242 F.R.D. 187, 189-90 (D. Conn. 2007) (denying a motion to strike where the consent decree was relevant to show bad faith); *ClearOne Communications, Inc. v. Lumbermens Mut. Cas. Co.*, 2005 WL 2716297, at *8 n.10 (D. Utah Oct. 21, 2005) (allowing the defendant to rely, in part, on a consent decree entered into between the SEC and the plaintiff because it was used "only as part of the factual background," and not "for purposes of collateral estoppel"), these cases are inapposite. In both *Johnson* and *ClearOne*, the business named in the consent decree was a party in the subsequent action and the conduct at issue in the consent decree and suit were clearly related. In the instant case, however, there is no dispute that Progressive was not a party to the Consent Decree and, as has been seen, the conduct in the two proceedings is entirely unrelated.

[**17]

[*10] **III. Conclusion**

For the foregoing reasons, Progressive respectfully requests that the Court dismiss plaintiffs' second cause of action for failure to state a claim upon which relief may be granted and strike all references in the amended complaint to the immaterial and prejudicial 1963 Department of Justice Consent Decree.

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[SEE ORDER IN ORIGINAL]

**Certificate of Service**

I hereby certify that, on January 3, 2007, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing [**18] through the Court's system.

/s/ Seth L. Huttner

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A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of Themselves and all Others Similarly Situated, Plaintiffs, - against - PROGRESSIVE CASUALTY INSURANCE COMPANY and PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No. 3:07 CV 0929 (WWE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Motions 929; 2007 U.S. Dist. Ct. Motions LEXIS 66324

November 16, 2007

Motion to Dismiss

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s); Pleading(s)

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**TITLE: PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' REQUEST FOR CERTIFICATION, MOTION TO DISMISS THE SECOND CAUSE OF ACTION FOR FAILURE TO STATE A CLAIM PURSUANT TO FED. R. CIV. P. 12(B)(6), AND MOTION TO STRIKE CERTAIN PORTIONS OF THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(F)**

**TEXT:** Plaintiffs, A&R Body Specialty, Skrip's Auto Body, Family Garage, and the Autobody Association on Connecticut ("Plaintiffs"), through their undersigned counsel, submit this memorandum of law in opposition to Defendants' Request for Certification, Motion to Dismiss the Second Cause of [**2] Action for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6), and Motion to Strike Certain Portions of the Complaint Pursuant to Fed. R. Civ. P. 12(f). Confronted with the reality that their conduct squarely violates well-settled standards of liability under the Connecticut Unfair Trade Practices Act ("CUTPA"), defendants seek to change the rules. Rather than reform their illegal practices, and in order to excuse their conduct, defendants brazenly request that this court entertain the possible elimination of more than 25 years of settled [*2] jurisprudence under CUTPA. Simply put, defendants' efforts to change the playing field to suit their own bad conduct are misplaced and should be rejected by this court.

As shown more fully below:

(1) defendants' motion to certify a question to the Connecticut Supreme Court should be denied as it fails to meet the threshold requirement for certifying such a question under Conn. Gen. Stat. § 51-199(d) and Connecticut Practice Book § 82-1, where, as here, there is controlling appellate authority on the standards under CUTPA; [**3] and even if this requirement was met, the discretionary factors, such as the fact that determination of the question will not be determinative of the case, strongly militate against certifying the question;

(2) defendants' Rule 12(b)(6) motion to dismiss Count II of the complaint for failure to state a claim should be denied because plaintiffs have satisfied the notice pleading requirements under Fed. R. Civ. P. 8 for asserting a claim of deceptive conduct under CUTPA, and even if they did not, they have filed contemporaneously herewith an amended complaint with expanded factual allegations supporting the claim of deception; and

(3) defendants' Rule 12(f) motion to strike from the complaint any reference to the "Consent Decree" should be denied because it is based on disputed factual assertions by defendants that this court cannot resolve at this early stage of the litigation and defendants flatly mischaracterize the nature of the Consent Decree and purpose for which it is offered; plaintiffs are not seeking private enforcement of the Consent Decree or to use it for purposes of collateral estoppel, but merely as an indicia of public policy as [**4] adopted by the principal trade associations representing approximately 265 insurance companies comprising the auto body repair field.

[*3] **BACKGROUND**

Plaintiffs filed this class action on behalf of themselves and all other licensed auto body repairers in the State of Connecticut who have performed repairs during the class period for any person with automobile insurance underwritten and/or administered by Progressive Casualty Insurance Company and Progressive Direct Insurance Company (collectively "Progressive" or "defendants"). n1 Plaintiffs seek to recover for the harm caused by Progressive's consistent pattern of unfair and deceptive acts and practices.

n1 Based on representations by defendants' counsel, plaintiffs have filed an amended complaint withdrawing claims against two of the four Progressive entities originally named and are proceeding only against Progressive Casualty Insurance Company and Progressive Direct Insurance Company.

Progressive is a major nationwide insurer selling [**5] automobile insurance to thousands of Connecticut residents. In order to extract enormous profits from the automobile insurance programs in the State of Connecticut, Progressive has instituted and managed a program of direct repair shops and in-house, non-independent appraisers, in order to illegally suppress labor rates paid to auto body repair shops and to illegally steer its insureds to a network of preferred body shops that it controls.

This conduct violates public policy, as expressed by state statute and regulation, and consent decree, all of which

were designed to prohibit the insurance industry from illegally fixing and controlling the costs of auto body repairs through such illegal practices as control of the appraisal process, steering and suppression of labor rates. For example, in 1963, the United States Justice Department and the major trade associations in the insurance industry entered into a consent decree, which provided, in relevant part, as follows:

> (A) Each defendant is enjoined from placing into effect any plan, program, or practice which has the purpose or effect of
>
> > [*4] (1) sponsoring, endorsing or otherwise recommending any appraiser of [**6] damage to automobile vehicles;
> >
> > (2) directing, advising or otherwise suggesting that any person or firm do business or refuse to do business with (a) any appraiser of damage to automotive vehicles with respect to the appraisal of such damage, or (b) any independent or dealer franchised repair shop with respect to the repair of damage to automotive vehicles;
> >
> > (3) exercising any control over the activities of any appraiser of damage to automotive vehicles;
> >
> > (4) allocating or dividing customers, territories, markets or business among any appraisers of damage to automotive vehicles;
> >
> > (5) fixing, establishing, maintaining or otherwise controlling the prices to be paid for the appraisal of damage to automotive vehicles, or to be charged by independent or dealer franchised automotive repair shops for the repair of damage to automotive vehicles or for replacement parts or labor in connection therewith, whether by coercion, boycott, or intimidation or by the use of flat rate or parts manuals or otherwise.

See United States v. Association of Casualty and Surety Companies, American Mutual Insurance Alliance and the National Association of Mutual Casualty Companies, 1963 U.S. Dist. Lexis 9949, [**7] at *2-3 (S.D.N.Y.) (the "Consent Decree") (Exhibit A). The terms of this decree were binding upon not only the defendant trade associations, but also on "all other persons in active concert or participation with any defendant" who received notice of this judgment. Id., at *1.

Statutes and regulations in Connecticut are consistent with the Consent Decree and were designed to prevent insurance companies from forcing their policy holders to use specific appraisers or auto body repair shops to repair damage to automobiles within the State of Connecticut. See Conn. Gen. Stat. § 38a-354; Conn. St. Reg. § 38a-790-8. These provisions, along with the Consent Decree, attempted to regulate the obvious conflict of interest of every insurance company between paying its insureds for quality auto body repairs, and their insatiable [*5] appetites for profit commonly achieved by controlling the content of physical damage appraisals, refusing to pay suitable labor rates and cutting corners on permissible repairs.

Progressive's conduct has caused very substantial injuries to the class of hardworking, highly skilled, auto body repair shops that are trying to [**8] earn an honest living in their industry. Plaintiffs commenced this action alleging that Progressive's conduct amounted to both unfair practices (First Cause) and deceptive conduct (Second Cause) under CUTPA. Plaintiffs also seek recovery for Unjust Enrichment (Third Cause) and injunctive relief (Fourth Cause).

**ARGUMENT**

**I. THIS COURT SHOULD NOT CERTIFY TO THE CONNECTICUT SUPREME COURT A QUESTION**

**INVITING IT TO CHANGE SETTLED CONNECTICUT LAW**

As shown more fully below, defendants' request for certification must be denied because it fails the threshold requirement of Conn. Gen. Stat. § 51-199b(d) and Connecticut Practice Book § 82-1 that there be no controlling appellate authority in Connecticut that answers the question sought to be certified. Moreover, even if defendants' request did not fail to satisfy this threshold requirement for certification, there are a number of additional reasons why the court should exercise its discretion to deny defendants' request, including:

1. Certification of the proposed question would not be dispositive of any claim in this case;

2. The answer to the proposed question will not affect the scope of [**9] discovery or any other aspect of this case;

3. This court is thoroughly familiar with the Connecticut legal standard for determining unfairness under CUTPA;

[*6] 4. Certification of the proposed question is premature before any discovery or record is made in this case so as to provide the Connecticut Supreme Court with the facts showing fully the nature of the controversy;

5. Any risk of waste of judicial resources should the legal standard for determining unfairness change after this case is tried can easily be avoided by use of special verdicts or answers to written questions pursuant to Fed. R. Civ. P. 49;

6. There are numerous reasons why the Connecticut Supreme Court is unlikely to change the legal standard for determining unfairness under CUTPA, which it has described as "well settled" for 20 years;

7. Certifying the proposed question will impose additional expense on plaintiffs and delay the progress of this case;

8. Plaintiffs oppose certifying the proposed question to the Connecticut Supreme Court.

**A. The Legal Standards Governing Certification of Questions to the Connecticut Supreme Court**

Certification of questions [**10] of law to the Connecticut Supreme Court are governed by Connecticut Practice Book § 82-1 et seq. n2 and Conn. Gen. Stat. § 51-199b(d). n3 Both rule and statute give the Connecticut Supreme Court jurisdiction to answer a question of law certified to it [*7] by a court of the United States, "if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute in this state."

n2 Connecticut Practice Book § 82-1 provides in part:

> The Supreme Court may answer questions of law certified to it by a court of the United States. . . when requested by the certifying court if the answer may be determinative of an issue in pending litigation in the certifying court, and if there is no controlling appellate decision, constitutional provision or statute of this state.

n3 Conn. Gen. Stat. § 51-199b(d) provides:

> The Supreme Court may answer a question of law certified to it by a court of the United States or by the highest court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statue of this state.

[**11]

Because of the requirement that there be "no controlling appellate decision" that answers the question, it is improper for a party to seek to use the certification process as a vehicle to afford it the opportunity to persuade a state court to change state law that the state court has already determined. See, e.g., Tarr v. Manchester Ins. Co., 544 F.2d 14, 15 (1st Cir. 1976) ("The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else. The rule of Erie R.R. v. Tomkins, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, calls on us to apply state law, not, if we can be persuaded to doubt its soundness, to participate in an effort to change it."). See also Cantwell v. University of Massachusetts, 551 F.2d 879, 880 (1st Cir. 1977) (". . . plaintiff seeks us to certify this question to the Massachusetts court. . ., in order to afford it the opportunity to change. This is a misconception of the purpose of certification, which is not to permit a party to seek to persuade the state court to change what [**12] appears to be present law."); Heimlicher v. Steele, 2007 WL 2384374, at *6 (N.D. Iowa Aug. 27, 2007) (Exhibit B).

In order for a certification request to be proper, "[t]he questions presented should be such as will be determinative of the case, and it must appear that their present determination would be in the interest of simplicity, directness and economy of judicial action." Connecticut Practice Book § 82-3. See also Remington Arms Co. v. Liberty Mutual Ins. Co., 796 F. Supp. 117, 119 (D. Del. 1992) ("certification of questions that may not be dispositive could put an unnecessary [*8] burden on the resources of the state judiciary and [t]he burden placed on the state judiciary counsels restraint"). The certification process should not be used to obtain advisory opinions from the state court on abstract legal questions divorced from a developed factual record. Connecticut Practice Book § 88-3 requires a certification request to contain "a finding or stipulation approved by the court setting forth all facts relevant to answering the questions certified and showing fully the nature of the controversy in which the questions arose." As noted [**13] in Connecticut Practice Series: Connecticut Rules of Appellate Procedure § 82-4, Authors' Comments, "[t]he certification request must include a stipulation or finding of facts. A narrative of the claims of the parties is insufficient. Karpie v. Eli Lilly & Co., Supreme Court Docket No. 13053 (1986) (unreported order)." See also Conn. Gen. Stat. § 51-199b(f) ("A certification order must contain: . . (2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose . . . .").

As noted by the court in denying certification to the Connecticut Supreme Court in Remington Arms Co. v. Liberty Mutual Ins. Co., supra, 796 F. Supp. at 120, applying an earlier version of the Connecticut certification statute, "the statute enabling this Court to certify a question of law would require 'a statement *of all facts relevant* to the questions certified and showing *fully* the nature of the controversy in which the questions arose.' Conn. Gen. Stat. § 51-199a(c). (emphasis added)." The present version of Conn. Gen. Stat. § 51-199b(f)(2) requires [**14] that "a certification order must contain:. . . (2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose." As the court noted in Remington Arms:

> Without proper factual findings or stipulations, the Connecticut Supreme Court could not limit its decisions to those necessary to the outcome of the case. The proper resolution of the federal courts lies in the necessary resolution of specific disputes and not in hypothetical questions or general policy matters. This [*9] principle is implicit in the history of our jurisprudence as well as Article III of the Constitution. Flast v. Cohen, 392 U.S. 83, 96-97, 88 S. Ct. 1942, 1950-51, 20 L. Ed. 2d 947 (1968). Where a resolution of the questions presented may not be necessary to the resolution of the case, certification runs the risk of offending the policies that prohibit the federal courts from undertaking advisory opinions. Accordingly, certification is less appropriate.

Id. at 120. In addition, Connecticut Practice Book §82-3 provides: [a]ll questions presented shall be specific and shall be phrased so as to require a Yes [**15] or No answer, whenever possible."

Even where the request for certification meets the mandatory threshold requirements of Conn. Gen. Stat. § 51-199b(d) and Connecticut Practice Book §82-1, a federal court has discretion as to whether to grant a request to certify a question of law to the state court. Lehman Brothers v. Schein, 416 U.S. 386, 390-91 (1974) ("We do not

suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . Its use in a given case rests in the sound discretion of the federal court."). See also Lopez v. Smiley, 375 F. Supp.2d 19, 26 (D. Conn. 2005) ("the decision to certify a question of law to the Connecticut's highest court is within this Court's discretion."); Remington Arms Co. v. Liberty Mutual Ins. Co., 796 F. Supp. 117, 119 (D. Del. 1992) ("certification is not mandatory"); Ulvedal v. Heidelberg Eastern, Inc., 764 F. Supp. 259, 260 (D. Conn. 1991) (Eginton, J.) (holding that "[d]eciding whether to certify a particular question is left to the discretion of the individual federal judge" and [**16] that the mere absence of a clear signal from sources of state law as to how a novel legal question should be decided is not itself grounds to certify the question to the highest state court); Stefano v. Smith, 705 F. Supp. 733, 734-35 (D. Conn. 1989) (Cabranes, J.).

Certification is "not a device to be used indiscriminately." Charles Alan Wright, Arthur H. Miller & Edward H. Cooper, Federal Practice and Procedure: Civil § 4248, p. 502 (2007). A court should exercise judgment and restraint in determining whether to certify a question to the state court and should not abdicate its duties to decide cases. See, e.g., Ormsbee Development Co. v. Grace, [*10] 668 F.2d 1140, 1149 (10th Cir. 1982), cert. denied, 459 U.S. 838 (1986) (certification "to be utilized with restraint and distinction"); Florida ex. rel. Shevin v. Exxon Corp., 526 F.2d 266, 274-75 (5th Cir. 1976) cert denied, 429 U.S. 829 (1976); Barnes v. Atlantic and Pacific Life Ins. Co., 514 F.2d 704, 705 n.4 (5th Cir. 1975) ("[W]e use much judgment, restraint and discretion in certifying. We do not abdicate."); L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc., 629 F. Supp. 1419, 1424 (D. Conn. 1986) [**17] (Cabranes, J.). Questions should not routinely be certified merely because a certification procedure is available. Dorman v. Satti, 862 F.2d 432, 435 (2d Cir. 1988), cert. denied, 490 U.S. 1099 (1989). The federal court should resort "to certification only when doing so would, in the context of the particular case, 'save time, energy and resources. . . .'" L. Cohen & Co., supra, 629 F. Supp. at 1423 (quoting Lehman Bros., 416 U.S. at 391). See also Stefano, supra, 705 F. Supp. at 735. This requirement is similar to that of Connecticut Practice Book § 82-3, which provides that "it must appear that. . .[the] present determination [of the question presented] would be in the interest of simplicity, directness and economy of judicial action." In addition, "[t]he delay inherent in [the case's] resolution and the inherent cost of the procedure counsels against certification." Remington Arms, supra, 796 F. Supp. at 119.

Judge Cabranes' thorough opinion in L. Cohen & Co., Inc., supra, 629 F. Supp. at 1423-24, outlines the considerations that guide a court's discretionary [**18] decision whether to certify a question. These considerations are: (1) The extent to which the issue sought to be certified has truly been left unsettled by the state courts; (2) The availability of resources - such as case law, regulations, legislative histories and agency decisions - that would assist the judge in resolving the issue; (3) The judge's own familiarity with the relevant state law; (4) The age and urgency of the litigation in which the issue is presented, as well as the potential prejudice to the litigants that [*11] may result form the costs and delays associated with certification; (5) The frequency with which the particular issue is likely to recur in future litigation, and the extent to which a decision on that issue would effect the rights of persons not before the court; (6) The other demands on the judge's own docket and the docket of the state judiciary, and the likelihood that a decision on the certified question could be obtained expeditiously from the state supreme court; and (7) The views of the litigants as to whether a particular issue warrants certification, which ought to be accorded substantial but not decisive weight by the federal judge. See [**19] also Kearney v. Phillips Indus., 708 F. Supp. 479, 481 (D. Conn. 1981) (Eginton, J.) ("Judge Cabranes' thorough opinion in L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc., 629 F. Supp. 1419 (D. Conn. 1986) outlines those considerations which guide a court's discretionary decision whether to certify or question."). The list of relevant factors culled by defendants from Caruso v. Siemens Business Communication Systems, Inc., 392 F.3d 66, 71-72 (2d Cir. 2004) (per curiam) (Def. Mem. at 9), does not purport to be exhaustive. In fact, they represented only those factors the Caruso court considered weighed in favor of certification.

**B. Defendants' Request for Certification Must be Denied Because it Fails the Threshold Requirement of Conn. Gen. Stat. § 51-199b(d) and Connecticut Practice Book § 82-1 that there be no Controlling Appellate Authority in Connecticut that Answers the Question Sought to be Certified.**

There is a threshold issue requiring that defendants' request for certification be denied. In order for the Connecticut Supreme Court to be authorized by Conn. Gen. Stat. § 51-199b(d) [**20] and Connecticut Practice Book § 82-1 to

answer a question of law certified to it by a court of the United States, there must be "no controlling appellate decision, constitutional provision or statute of this state" that answers the question. Defendants' request fails to satisfy this condition and, for that reason alone, must be denied. The question defendants seek to have certified is: "What is the legal standard for determining 'unfair acts or practices' in the Connecticut Unfair Trade [*12] Practices Act, Conn. Gen. Stat. § 42-110b(a)?" There are numerous controlling appellate decisions in Connecticut, including numerous decisions by the Connecticut Supreme Court, that answer that question. Therefore, a necessary requirement for certification prescribed by Conn. Gen. Stat. § 51-199b(d) and Connecticut Practice Book § 82-1 is not met and defendants' request for certification must be denied.

The Connecticut Supreme Court adopted the "cigarette rule" standard for determining whether an act or practice is "unfair" in 1983, more than 20 years ago. See Conaway v. Prestia, 191 Conn. 484, 492-93, 464 A.2d 847, 852 (1983); [**21] McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 567-68, 473 A.2d 1185, 1191 (1984). As early as 1987, the Connecticut Supreme Court described this legal standard as "well settled." Web Press Services Corp. v. New London Motors, Inc., 203 Conn. 342, 355, 525 A.2d 57, 64 (1987). Since 1987, and as recently as last year, the Connecticut Supreme Court has continually described the "cigarette rule" standard for determining whether an act or practice is "unfair" as "well settled." See Edmands v. Cuno, Inc., 277 Conn. 425, 451 n.16, 892 A.2d 938, 955 n.16 (2006); Eder Bros. Inc. v. Wine Merchants of Connecticut, Inc., 275 Conn. 363, 381, 880 A.2d 138, 150 (2005); Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 155, 881 A.2d 837, 969 (2005); American Car Rental, Inc. v. Commissioner of Consumer Protection, 273 Conn. 296, 305-06, 869 A.2d 1198, 1205 (2005); Votto v. American Car Rental, Inc., 273 Conn. 478, 484, 871 A.2d 981, 984-85 (2005); Updike, Kelly & Spellacy, P.C. v. Beckett, 269 Conn. 613, 655-56, 850 A.2d 145, 172-73 (2004); Journal Publishing Co. v. Hartford Courant Co., 261 Conn. 673, 695, 804 A.2d 823, 839 (2002); [**22] Hartford Electric Supply Co. v. Allen-Bradley Co., 250 Conn. 334, 367-68, 736 A.2d 824, 842-43 (1999); Willow Spriggs Condominium Assn., Inc. v. Seventh BRT Development Corp., 245 Conn. 1, 43, 717 A.2d 77, 99-100 (1998); Cheshire Mortgage Service, Inc. v. Montes, [*13] 223 Conn. 80, 105-06, 612 A.2d 1130, 1143 (1992); Fink v. Golenbock, 238 Conn. 183, 215, 680 A.2d 1243, 1260-61 (1996); Saturn Construction Co., Inc. v. Premier Roofing Co., Inc., 238 Conn. 293-311, 680 A.2d 1274, 1283 (1996); Jacobs v. Healey Ford-Subaru, Inc., 231 Conn. 707, 725-26, 652 A.2d 496, 505-06 (1995); Normand Josef Enterprises, Inc. v. Connecticut National Bank, 230 Conn. 486, 522, 646 A.2d 1289, 1307 (1994); Associated Investment Co. Limited Partnership v. William Associates IV, 230 Conn. 148, 155-56, 645 A.2d 505, 509 (1994).

This court has also recognized that the "cigarette rule" standard is "well settled" under Connecticut law. See Dinoto v. Rockland Financial Mortgage Co., LLC, 2007 WL 2460674, at *3 (D. Conn. Aug. 2, 2007) (Exhibit C); Frontier Group, Inc. v. Northwest Drafting & Design, Inc., 493 F. Supp. 2d 291, 300 (D. Conn. 2007); [**23] Saye v. Old Hill Partners, Inc., 478 F. Supp. 2d 248, 262 (D. Conn. 2007); Rodriguez v. Auto Sales, Inc., 477 F. Supp. 2d 477, 480 (D. Conn. 2007); Powell v. Harriott, 2006 WL 2349450, at *2 (D. Conn. Aug. 14, 2006) (Exhibit D); Herbert v. Monterey Financial Services, Inc., 2001 WL 1266299, at *4-5 (D. Conn. Sept. 28, 2001) (Exhibit E); Omega Engineering, Inc. v. Eastman Kodak Company, 30 F. Supp. 2d 226, 260 (D. Conn. 1998). This court has applied the "cigarette rule" standard in numerous other cases. See, e.g., O'Brien v. Ragovin Moving & Storage Co., Inc., 2006 WL 3639551 (D. Conn. Dec. 4, 2006) (Eginton, J.) (Exhibit F). In IndyMac Bank, F.S.B. v. Reyad, 2006 WL 2092621 (D. Conn. July 27, 2006) (Exhibit G), cited by defendants, the court noted that "the Connecticut Supreme Court did not adopt a new standard for evaluating CUPTA claims" and, therefore, followed "the traditional cigarette rule in evaluating IndyMac's claims." Id., at *5.

Under the "cigarette rule,"

> in determining whether a practice violates CUTPA [the Connecticut Supreme Court has]. [**24] . . adopted the criteria set out in the cigarette rule by the [F]ederal [*14] [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -in other words, it is within at least the penumbra of some common law statutory, or

> other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other business persons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. (Internal quotation marks omitted.)

Edmands v. Cuno, Inc., 277 Conn. 425, 450 n.16, 892 A.2d 938, 954 n.16 (2006); (quoting Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 155, 881 A.2d 937, 969 (2005)).

Defendants' citation to dicta in four 2005 Connecticut Supreme Court decisions noting that "a serious [**25] question exists concerning whether the cigarette rule remains the guiding rule utilized by the federal trade commission" does not change the fact that there are controlling appellate decisions in this state clearly setting forth the standard applied by the Connecticut courts in determining whether an act or practice is unfair under CUTPA. Indeed, three of the four decisions relied upon by defendant recognize that the "cigarette rule" standard for determining whether an act or practice is "unfair" under CUTPA is "well settled" See Edmands v. Cuno, Inc., 277 Conn. 425, 451 n.16, 892 A.2d 938, 955 n.16 (2006); Votto v. American Car Rental, Inc., 273 Conn. 478, 484, 871 A.2d 981, 984-85 (2005); American Car Rental, Inc. v. Commissioner of Consumer Protection, 273 Conn. 296, 305-06, 869 A.2d 1198, 1205 (2005). The fourth decision states that the court has adopted the "cigarette rule" standard "in determining whether certain acts constitute a violation of the act" and that the Connecticut Supreme Court has "consistently followed the cigarette rule in CUTPA cases." Glazer v. Dress Barn, Inc., 274 Conn. 33, 82, 873 A.2d 929, 959-60 (2005). [**26] The four decisions cited by defendants cite only to a 2003 Connecticut Bar Journal article authored by an attorney who earlier had unsuccessfully argued that Connecticut should abandon the "cigarette rule" standard and adopt the current FTC [*15] standard for determining unfairness under CUTPA in Johnson Electric Company, Inc. v. Salce Contracting Associates, Inc., 72 Conn. App. 342, 357, 805 A.2d 735, 744, cert. denied, 266 Conn. 911, 832 A.2d 70 (2002). See David L. Belt, The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts, 80 Conn. B.J. 247, 250 n.11 (2006). n4 The Appellate Court declined to depart from the "cigarette rule" standard in Johnson Electric and the Connecticut Supreme Court denied certification.

> n4 Defendants have attached David L. Belt, The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts, 80 Conn. B.J. 247, 250 n.11 (2006), and Robert M. Langer, John T. Morgan and David L. Belt, 12 Connecticut Practice Series: Unfair Trade Practices §2.2, 2006 Supp. as Exhibits to their Memorandum of Law. To minimize the volume of filing, plaintiffs are not attaching these articles to their brief, but instead, respectfully refer the Court to the exhibits attached to defendants' brief.

[**27]

Defendants concede, as they must, that the Connecticut Supreme Court has continued to apply the "cigarette rule" and has not addressed the continued viability of the "cigarette rule" standard for determining unfairness under CUTPA. (Def. Memo at 5-6; Glazer v. Dress Barn, Inc., 274 Conn. 33, 82, 873 A.2d 929, 959-60 (2005)). Thus, it is abundantly clear that defendants' request does not satisfy the threshold requirement of Conn. Gen. Stat. § 51-199b(d) and Connecticut Practice Book § 82-1 that there be "no controlling appellate decisions, constitutional provision or statute in this state" that answers the question of law defendants seek to have certified and that, therefore, certification is improper. As the Comment to § 2 of the Uniform Certification of Questions of Law [Act] [Rule] (1995) states: "The provisions of Section 8 of the 1967 Act have been revised to make clear that certification is appropriate only when there is no 'controlling constitutional provisions, statute or appellate decision' in the receiving state" and the Comment to §3 states: "The existence of a controlling constitutional provision, statute or appellate decision [**28] in the receiving state is a barrier to answering a certified question." Uniform Certification of Questions of Law [Act] [Rule], Comment to § 2 and § 3, 12 [*16] U.L.A. Master Edition 73 (1996). See also In re Microsoft Corp. Antitrust Litigation, 241 F. Supp.

2d 563, 565-66 (D. Md. 2003) ("In light of a recent amendment to the Maryland Uniform Certification of Questions of Law Act. . ., which permits certification only where 'there is no controlling appellate decision . . .,' there is no statutory authority for the certification plaintiffs request"); American Reliable Ins. Co. v. Stillwell, 212 F. Supp. 2d 621, 633-34 (N.D.W. Va. 2002) (denying request for certification where defendants were "not seeking a clarification of an ambiguity or attempting to fill a void in West Virginia law," but were instead "seeking to expand the Supreme Court of Appeal's exceptions to the American rule" (concerning the payment of attorney's fees)).

Because they cannot contest that their proposed question has been answered by decades of controlling Connecticut Supreme Court precedent, defendants seek refuge in dicta by Judge Calabresi in Liriano v. Hobart Corp., 132 F.3d 124 (2d Cir. 1998), [**29] that "[c]certification is particularly appropriate where the state's highest court has cast doubt on the scope or continued validity of one of its earlier rulings, or where there is some law in the intermediate state courts, but no definitive holding by the state's highest tribunal." Id. at 132. However, in Loriano, a review of the applicable precedents indicated that "the law appear[ed] to be unclear," id., and "at least four possible views of New York law present[ed] themselves." Id. at 131. In support of his sweeping assertion in Loriano, Judge Calabresi cited his earlier dissenting decision in McCarthy v. Olin Corp., 119 F.3d 148, 158 n.1 (2d Cir. 1997) (Calabresi, J., dissenting), where he explained more clearly the situations to which he referred, such as "where there is authority from the state's highest court, but that authority is very old and has been ignored in recent years, during which time other jurisdictions have abandoned similar rulings." This is hardly the situation with respect to the unfairness standard under CUTPA. Also noteworthy is the fact that [*17] Judge Calabresi was dissenting in [**30] McCarthy. Judges Meskill and Cabranes, in the majority, concluded that the decisions of the New York Court of Appeals and other New York precedents provided the court with sufficient guidance and declined to certify the question. The status of Connecticut Supreme Court law concerning the unfairness standard under CUTPA is even more clear, as it has been declared as "settled law" in numerous Connecticut Supreme Court decisions, some of them very recent.

It is clear that defendants seek to use the certification process as a vehicle to afford it the opportunity to persuade the Connecticut Supreme Court to change its "well settled" legal standard for determining when an act or practice is "unfair" under CUTPA. This is a patently improper use of the certification process. As the First Circuit Court of Appeals held in Tan v. Manchester Ins. Co., 544 F.2d 14 (1st Cir. 1976),

> The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else. The rule of Erie R.R. v. Tompkins, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, [**31] calls on us to apply state law, not, if we can be persuaded to doubt its soundness, to participate in an effort to change it.

Id. at 15.

**C. There are Numerous Additional Reasons Why the Court Should Exercise its Discretion to Deny Defendants' Request for Certification.**

Even if defendants' request satisfied the threshold requirement for certification that there be no controlling Connecticut appellate authority that answers the question they seek to have certified, which it does not, there are numerous additional reasons why the court should exercise its discretion to deny defendants' request for certification.

**1. Certification of the proposed question will not be dispositive of any claim in this case.**

[*18] As Connecticut Practice Book § 82-3 provides: "[T]he question[] presented should be such as will be determinative of the case. . . ." Not only would an answer to the proposed question not be determinative of the case, it would not even be determinative of the one count of the Complaint asserting a CUTPA violation. Defendants incorrectly assert that plaintiffs' complaint "relies solely [on CUTPA]." (Def. Mem. at 12) The Complaint asserts four [**32] counts: The First Cause of Action asserts a violation of CUTPA based on unfair practices. The Second Cause of Action asserts violations of CUTPA based on deceptive conduct. The Third Cause of Action asserts a claim based on

Unjust Enrichment, and the Fourth Cause of Action asserts a claim for injunctive relief. The proposed question does not relate in any way to the Second and Third Causes of Action and only partially relates to the Fourth Cause of Action. The First Cause of Action asserts a claim for "unfair" practices under CUTPA, the standard under attack by defendants. The Second Cause of Action asserts a claim for "deceptive" practices under CUTPA, a standard not being challenged by defendants. The Third Cause of Action is a claim for unjust enrichment, which shall survive notwithstanding what happens with the CUTPA unfairness count. And the Fourth Cause of Action is a claim for injunctive relief, which turns on whether defendants are engaged in unlawful practices that should be reformed or eliminated altogether. Thus, the case does not turn entirely on whether defendants' acts or practices were "unfair" under CUTPA.

Nor will an answer to the proposed question be determinative [**33] of even the First Cause of Action. Even if the legal standard posited by defendants was applied to this case, the possibility of the First and Fourth Causes of Action being dismissed by dispositive motion is virtually non-existent. Such factors as whether the defendants' conduct caused substantial injury to the plaintiffs, whether the plaintiffs could reasonably have avoided the injury, and whether the injury [*19] was outweighed by the benefits produced by defendants' acts or practices is necessarily a fact-driven inquiry that must be determined by a trier of fact at trial.

As the court noted in Remington Arms Co. v. Liberty Mutual Ins. Co., 796 F. Supp. 117 (D. Del. 1992), in denying a request for certification to the Connecticut Supreme Court, "certification of questions that may not be dispositive could put an unnecessary burden on the resources of the states fiduciary. The burden placed on the state judiciary counsels restraint." Id. at 120. The importance of certified questions being dispositive is borne out by the two district court cases cited by defendants that certified questions with clearly dispositive questions. See e.g. Cweklinsky v. Mobil Chemical Co., 297 F.3d 154, 160-61 (2d Cir. 2002) [**34] (certifying question of whether Connecticut recognizes cause of action for self-defamation where the Connecticut Supreme Court had never ruled on the issue and answer would potentially dispose of the claim because a finding of no cause would compel dismissal); Old Republic Nat'l Title Ins. Co. v. Bank of East Asia Ltd., 247 F. Supp. 2d 197, 199-200 (D. Conn. 2003) (certifying question of whether an insurer, acting as subrogee, could bring a legal malpractice claim against the insured's counsel, where Supreme Court had never spoken on the issue, and a negative determination would require dismissal of the claim.).

**2. The answer to the proposed question will not affect the scope of discovery or any other aspect of the case.**

Defendants contend that the question of the standard under CUTPA should be certified because "it will affect the scope of both class and merits discovery, dispositive motions, class certification, and, of course, any trial on the merits." (Def. Mem. at 12). This sweeping assertion is based on false premises and does not stand up to even modest scrutiny. As noted in the previous section, defendants incorrectly assert that plaintiffs' complaint [**35] "relies solely [on CUTPA]." The complaint is composed of four counts, only the first of which relates to the [*20] question sought to be certified. Two of the remaining three counts would be wholly unaffected by certification and the remaining fourth count would be only partially affected.

Moreover, determination of whether the Cigarette Rule or Substantial Injury Standard shall apply does not have the slightest affect on the scope of discovery. This argument is based on the false assertion that "plaintiffs' unfairness claim is premised exclusively on the first - and now deemphasized and narrowed - prong of the cigarette rule (violation of public policy) . . ." (Def. Mem. at 7). In fact, plaintiffs' claim may be established under each of the three prongs of that test, including whether the CUTPA violation "causes substantial injury to consumers, competitors or other businessmen." Obviously, the unlawful and oppressive practices of Progressive are driving the class of auto body shops out of business and are denying them substantial compensation, all to their substantial injury. Both parties shall be entitled to discovery on all three prongs of the "cigarette rule", which includes [**36] not only the public policy prong, as asserted by defendant, but also the third prong relating to substantial injury. Thus, discovery related to the injury component of the claim is squarely within the scope of discovery, whether or not the test focuses more heavily on public policy or injury.

**3. This Court is thoroughly familiar with the Connecticut legal standard for determining unfairness under**

**CUTPA.**

As evidenced by this Court's own decisions, this Court is thoroughly familiar with the legal standard used by the Connecticut courts in determining whether an act or practice is "unfair" under CUTPA. See, e.g., O'Brien v. Rogovin Moving & Storage Co., Inc., supra, 2006 WL 3639551 (Exhibit F); Namoury v. Tibbetts, 2005 WL 81615 (D. Conn. Jan. 11, 2005) (Exhibit H); Nuclear Management Corp. v. Combustion Engineering, Inc., 1997 WL 43099 (D. Conn. Jan. 22, 1997) (Exhibit 1); Hudson River Cruises, Inc. v. Bridgeport Drydock Corp., 892 F. Supp. 380 (D. Conn. 1994); Brandeweide v. Emery Worldwide, 890 F. Supp. 79 (D. Conn. 1994); [*21] Shell Oil Co. v. Wentworth, 822 F. Supp. 878 (D. Conn. 1993); [**37] Unistress Corp. v. Danbury Hospital, 1991 WL 218545 (D. Conn. July 11, 1991) (Exhibit J); Retail Service Associates v. Conagra Pet Products Co., 759 F. Supp. 976 (D. Conn. 1991). Ironically, O'Brien was decided in 2006 based on the "cigarette rule" well after the Supreme Court suggested, during the 2005 term, that there was any question as to the applicable standard. This Court should simply continue to follow the long established CUTPA standard until a case that reaches the Supreme Court through proper appellate procedures directs otherwise. That is exactly what Judge Droney did in IndyMac Bank F.S.B. v. Reyad, supra, 2006 WL 2092621 at *5, n.8 (applied "cigarette rule" because Supreme Court had not decided whether to change standard).

**4. Certification of the proposed question is premature before any discovery or record is made in this case so as to provide the Connecticut Supreme Court with the facts showing fully the nature of the controversy.**

It would be improper to certify a question at this stage of the litigation, in any event, before discovery is completed and a record developed. This Court has absolutely no factual [**38] context in which to evaluate defendants' sweeping claims about the impact of certification on the claims in this case. On the state of the record, there is no way to know what facts may be developed that would be relevant to determining unfairness under the alternative standard defendants posit. The Connecticut Supreme Court would be asked to determine the applicable legal standard in a vacuum. Moreover, the Court is not in any position to certify a proper question by providing the Supreme Court with facts upon which it can consider the legal questions and any policy considerations attendant to a rule change. See Conn. Gen. Stat. §51-199f(2); Connecticut Practice Book § 82-3. As noted in denying certification to the Connecticut Supreme Court in Remington Arms Co. v. Liberty Mutual Ins. Co., 796 F. Supp. 117, 120 (D. Del. 1992), applying an earlier but similar provision of Conn. Gen. Stat. § 51-1999b(f)(2), "the [*22] statute enabling this Court to certify a question of law would require a 'statement *of all facts relevant* to the questions certified and showing *fully* the nature of the controversy in which the questions arose'." (Emphasis in original). [**39]

It is noteworthy that most of the cases certifying questions to the State Supreme Court come from the Court of Appeals, which typically considers cases after completion of discovery, dispositive motions and/or and trial. See Caruso v. Siemens Bus. Communications Sys. Inc., 392 F.3d 66 (2d Cir. 2004); Liriano v. Hobart Corp., 132 F.3d 124 (2d Cir. 1998). Certifications are rarer from trial courts. Such certifications, when they are made, involve issues, unlike here, implicating threshold questions, dispositive of the action, that have not been addressed at all by state appellate courts. See e.g. Old Republic Nat'l Title Ins., 247 F. Supp. 2d at 199-200.

**5. Any risk of waste of judicial resources should the legal standard for determining unfairness change after this case is tried can easily be avoided by use of special verdicts or answers to written questions pursuant to Fed. R. Civ. P. 49.**

Because the legal standard posited by defendants as a hypothetical alternative to the Connecticut Supreme Court's well settled "cigarette rule" standard for determining unfairness is one element of [**40] the "cigarette rule" test as elaborated by the Connecticut Supreme Court, any risk that judicial resources would be wasted were the Connecticut Supreme Court to change the legal standard after trial in this case but before final resolution can easily be avoided by using special verdicts or by putting written questions to the jury on the individual elements of the "cigarette rule" pursuant to Fed. R. Civ. P. 49.

**6. There are numerous reasons why the Connecticut Supreme Court is unlikely to change the legal standard**

**for determining unfairness under CUTPA which it has described as "well settled" for 20 years.**

Even if at some future time when the issue is properly presented to it, the Connecticut Supreme Court examines the continued viability of the "cigarette rule" standard, there are [*23] numerous reasons making it unlikely that the court will change the standard applicable to CUTPA. See generally Robert M. Langer, John T. Morgan and David L. Belt, 12 Connecticut Practice Series: Unfair Trade Practices §2.2, 2006 Supp. at 9-10; Belt, supra, 80 Conn. B. J. at 318-22.

First, the legislative history of CUTPA strongly indicates [**41] that the Connecticut legislature wished not to require the interpretation of what constitutes a violation of CUTPA to be constrained by interpretations of the FTC Act. As the Connecticut Supreme Court has explained, the apparent purpose of the 1996 amendment to Conn. Gen. Stat. 42-110b(b) of CUTPA, which provided that the Connecticut courts would only be "guided by" interpretations of the Federal Trade Commission Act, was to make clear that in interpreting CUTPA, neither the Commissioner for Consumer Protection nor the courts were to be constrained to find violations only where there was preexisting authority under the FTC Act. See Norman Josef Enterprises v. Connecticut National Bank, 230 Conn. 486, 510-11 n. 23, 464 a.2d 1289, 1301-02 n. 23 (1994); Caldor, Inc. v. Heslin, 215 Conn. 590, 597-98, 577 A.2d 1009, 1013, cert. denied, 498 U.S. 1088 (1991).

Second, at this point, there are literally thousands of Connecticut decisions over the past quarter century applying the "cigarette rule" standard in determining liability under CUTPA, establishing a well-developed body of jurisprudence interpreting the act. [**42] In contrast, there are only a handful of Connecticut decisions interpreting the "substantial injury" criterion of the "cigarette rule" test which lies at the heart of the current FTC standard for determining unfairness. See David L. Belt, The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts, 80 Conn. B.J. 247, 288-91 (2006).

[*24] Third, during almost a quarter of a century of consistent interpretation of "unfair acts or practices" by the Connecticut Supreme Court, the Connecticut legislature has not enacted legislation adopting a different standard. Such legislative inaction in the face of such pervasive interpretation by the courts "may be understood as a validation of that interpretation." Commission on Human Rights and Opportunities v. Sullivan Associates, 250 Conn. 763, 783, 739 A.2d 238, 251 (1999); McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc., 93 Conn. App. 486, 523, 890 A.2d 140, 164, cert. denied, 277 Conn. 928, 895 A.2d 798 (2006).

Fourth, the Connecticut Supreme Court has been aware for more than 20 years that the Federal Trade [**43] Commission had modified its "cigarette rule" standard for determining unfairness under the FTC Act and, despite this, has continued to apply the "cigarette rule" standard. See Langer, et al, supra, 2006 Supp. at 6; Belt, supra, at 279-80. In its 1984 decision in McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 568 n.12, 473 1185, 1191 n.12 (1984), the Connecticut Supreme Court cited to the Federal Trade Commissions 1980 Policy Statement on Unfairness embodied in its December 17, 1980 letter to Senator Ford and Danforth, and, in fact, used a portion of that statement to elaborate the third, or substantial injury criterion, of the "cigarette rule" standard. See also, Web Press Services Corp. v. New London Motors, Inc., 205 Conn. 479, 484, 533 A.2d 1211, 1214 (1987) (same); A-G Foods, Inc. v. Pepperidge Farm, Inc., 216 Conn. 200, 216, 579 A.2d 69, 77 (1990) (same); Cheshire Mortgage Service, Inc. v. Montes, 223 Conn. 80, 113, 612 A.2d 1130, 1147 (1992) (same); Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 592, 657 A.2d 212, 228 (1995) (same).

Fifth, the legislative history [**44] of 15 U.S.C. § 45(n), which Defendants posit as a possible alternative standard for determining unfairness, makes clear that Congress did not intend to [*25] affect the interpretation of unfairness under state unfair trade practices acts. Langer, et al, supra, 2006 Supp. at 9; Belt, supra at 272, 319. Moreover, since 15 U.S.C. § 45(n) is not part of and did not amend 15 U.S.C. § 45(a)(1), the provision in Conn. Gen. Stat. § 42-110b(b) that the Connecticut courts shall be guided by interpretations of Section 5(a)(1) of the FTC Act (15 U.S.C. § 45(a)(1)) does not apply to 15 U.S.C. § 45(n). See Langer, et al, supra, 2006 Supp. at 9; Belt, supra, at 319.

Sixth, among the states with statutory prohibitions similar to CUTPA, the vast majority of the states that have

articulated a legal standard for determining when an act or practice is unfair continue to apply the "cigarette rule" standard. Only a few have adopted the standard currently applied by the FTC. See Langer, et al, supra at 6-7; Belt, supra at 303-08. Of [**45] particular significance, the Supreme Judicial Court of Massachusetts has continued to apply the "cigarette rule" standard, most recently in its 2007 decision in Lambert v. Fleet National Bank, 865 N.E.2d 1091, 1097-98 (Mass. 2007). As noted in CDC Technologies, Inc. v. IDEXX Laboratories, Inc., 7 F. Supp. 2d 119, 132 (D. Conn. 1998), "Connecticut courts look to Massachusetts courts to interpret CUTPA claims because Massachusetts' unfair trade practices act is virtually identical to CUTPA."

Seventh, because the current FTC standard lacks any substantive content, it is highly questionable whether it is an appropriate legal standard to apply to establish unfairness under a state unfair trade practices act, where cases are tried in court and sometimes, as in Connecticut, to juries. See Langer, et al, supra at 8-10; Belt, supra at 320-21.

**7. Certifying the proposed question will impose additional expense on plaintiffs and delay the progress of this case.**

The delay and additional expense of going through the certification process will prejudice plaintiffs. If the question is certified, it can be expected, based on their claim that the [**46] answer to [*26] the question is relevant to the scope of discovery, that defendants will argue that discovery should be stayed until the question is answered. It is likely that certification of the question, if accepted by the Connecticut Supreme Court, would delay the progress of this action for many months, during which defendants will continue to engage in the challenged acts and practices. The time required to obtain an answer to a certified question can be considerable. See, e.g., Enviro Express, Inc. v. AIU Ins. Co., 2005 WL 1038976 (D. Conn. May 2, 2005) (Exhibit K), 279 Conn. 194, 901 A.2d 666 (Conn. 2006) (14 1/2 months); Parrot v. Guardian Life Ins. Co. of America, 338 F.3d 140 (2d Cir. 2003), 273 Conn. 12, 866 A.2d 1273 (Conn. 2005) (18 months); Sealed v. Sealed, 332 F.3d 51 (2d Cir. 2003); Teresa T. v. Ragaglia, 272 Conn. 734, 865 A.2d 428 (Conn. 2005) (19 1/2 months); Jagger v. Mohawk Mountain Ski Area, Inc., 2002 WL 31433376 (D. Conn. Sept. 24, 2002) (Exhibit L), 269 Conn. 672, 849 A.2d 813 (Conn. 2004) (21 months); Cweklinsky v. Mobil Chemical Co., 297 F.3d 154 (2d Cir. 2002), 267 Conn. 210, 837 A.2d 759 (Conn. 2004) [**47] (17 months). "[T]he delay in these cases' resolution and the inherent costs of the procedure counsel against certification." Remington Arms Co. v. Liberty Mutual Ins. Co., 796 F. Supp. 117, 120 (D. Del. 1992) (denying certification of a question to the Connecticut Supreme Court).

**8. Plaintiffs oppose certifying the proposed question to the Connecticut Supreme Court**

In this case, for all the reasons stated above, plaintiffs oppose certifying the proposed question to the Connecticut Supreme Court. Although not dispositive, the views of the litigants are relevant to whether a question warrants certification. See L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc., 629 F. Supp. 1419, 1424 (D. Conn. 1986) (Cabranes, J.).

**II. PLAINTIFFS' COMPLAINT SUFFICIENTLY ALLEGES A CAUSE OF ACTION FOR DECEPTIVE BUSINESS PRACTICES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.**

[*27] Defendants' argument that this Court should dismiss plaintiffs' claim of deceptive business practices for failure to state a claim seeks to impose a higher pleading standard than is required in the federal courts. When ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) [**48] , the Court "must accept as true all factual allegations of the complaint and must draw all reasonable inferences in favor of the plaintiff." Ganino v. Citizens Utilities Co., 228 F.3d 154, 161 (2d Cir. 2000). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief." Williams v. Vincent, 508 F.2d 541, 543 (2d Cir. 1974).

Defendants contend that plaintiffs failed to allege the three prong test of Caldor, Inc. v. Heslin, 215 Conn. 590, 597 (1990) (Def. Mem. at 13-14). In pleading deception in state court under Caldor, a plaintiff must allege a representation or omission that is likely to mislead consumers or businesses, that consumers interpreted the message reasonably under the circumstances, and the misleading representation is material. Defendants improperly seek to impose a state court

pleading standard on this federal action.

Pleadings in the federal court are governed by Rule 8 of the Federal Rules of Civil Procedure, which requires merely a "short and plain statement of the claim showing that [**49] the pleader is entitled to relief." In contrast, Connecticut is a fact-pleading jurisdiction. Martin v. American Equity Ins. Co., 185 F.Supp.2d 162, 167 n.3 (D.Conn. 2002). Although the pleading requirements for CUTPA in state court require detailed factual allegations, such is not the case in federal court under the notice pleading requirements. Id. See also, Conntect, Inc. v. Turbotect. Ltd., 1998 WL 91067, at *3-4 (D.Conn., Feb. 23, 1998) (Nevas, J.) (denying motion to dismiss where plaintiff did not allege the "magic words of CUTPA," addressing the three elements of the cigarette rule, but provided three examples of the type of conduct that allegedly violated [*28] CUTPA) (Exhibit M); Green v. Konover Residential Corp., 1997 WL 736528, at *7 (D.Conn., Nov. 24, 1997) (Goettel, J.) (in light of the broad remedial purpose of CUTPA, and the fact that plaintiff incorporated by reference the preceding 92 allegations in its complaint, plaintiff's claims of unfair and deceptive trade practices were pled with sufficient particularity) (Exhibit N); Fed. Paper Bd. Co., Inc. v. Amata, 693 F.Supp. 1376, 1390 (D. Conn. 1988) [**50] (Blumenfeld, Sr. D.J.) (holding that the heightened pleading requirements of Fed. R. Civ. P. 9(b) did not apply to actions under CUTPA). Indeed, the several cases cited by defendants at page 15 of their brief, while dismissed for a variety of unrelated reasons, do not address the pleading requirements under CUTPA in federal court.

The Second Cause of Action satisfies the pleading requirements under Fed. R. Civ. P. 8(a). Paragraph 12 alleges that "When Progressive's insureds require automobile damage repair, Progressive engages in a pervasive and strictly enforced policy and practice of steering these insureds to Progressive's direct repair shops." Paragraph 13 further alleges that:

> Progressive employees tell insureds, among other things, that Progressive does not do business with a non-DRP shop, that a claim may not get paid if done at another shop, that it is "easier" to have the car repaired at one of its shops, that the insured can receive free towing if the vehicle is brought to a DRP shop, that the insured can receive a discount off of his or her deductible by using a DRP shop, and that it will [**51] not guarantee work done at a non-DRP shop, but will guarantee the work at its DRP shops for the life of the vehicle.

Paragraph 14 alleges the deceptive practice of representing their appraisers as independent and non-biased, when in reality, "These appraisers are not independent; their appraisal content and practices are monitored and controlled by Progressive." Paragraph 15 alleges that the process is further controlled by Progressive through the opening of regional assessment centers. Paragraph 16 alleges that "The appraisers employed by Progressive are prohibited by Progressive from approving labor rates for auto repairs that are above the [*29] artificially low rates imposed by Progressive." Clearly, these allegations, which provide examples of defendants' bad conduct, are more than enough to satisfy federal notice pleading standards, even if the complaint does not contain the "magic words" referenced in state court cases.

Nonetheless, to eliminate any doubt, plaintiffs respectfully refer the court to their amended complaint filed contemporaneously herewith, particularly PP 17-19, 42-49, that not only satisfies federal notice pleading standards, but also by definition [**52] satisfies even the heightened fact pleading standards enunciated by our state courts. Accordingly, defendants' motion to dismiss Count II of the complaint should be denied.

**III. THE CONSENT DECREE SHOULD NOT BE STRICKEN FROM THE COMPLAINT WHERE IT IS REFERRED TO AS AN INDICIA OF PUBLIC POLICY.**

The defendants argue that the Consent Decree should be stricken from the complaint pursuant to Federal Rule of Civil Procedure 12(f). (Def. Mem. at 15-20). In particular, they contend that the decree cannot be used as evidence under Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976) and its progeny, and that the Consent Decree is "immaterial and prejudicial." See Def. Memo at 17. Neither argument is availing because: (1) the court cannot, and should not, be resolving disputed factual and legal issues, including admissibility of evidence, at the

pleading stage; and (2) the Consent Decree is not being offered for the purpose of proving that liability in the earlier action compels a finding of liability here, but merely as evidence that the conduct proscribed by the Consent Decree, as agreed to by the industry [**53] associations on behalf of approximately 265 insurance companies underwriting auto body insurance, has become accepted public policy and sets the standard of conduct for the industry.

[*30] **A. Standard of Review**

Although Rule 12(f) of the Federal Rules of Civil Procedure provides that "the court may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter," these motions to strike are not favored by the federal courts. See Urashka v. Griffin Hospital, 841 F.Supp. 468, 476 (D. Conn. 1993) (citing Charles A. Wright, Arthur H. Miller & Edward H. Cooper, Federal Practice & Procedure, § 1380 (1988 & Supp. 1993)). Such motions "have been described aptly as disfavored and 'time wasters'." Nat'l Council of Young Israel v. Wolf, 963 F.Supp. 276, 282 (S.D.N.Y. 1997).

"In deciding whether to [grant] a Rule 26(f) motion on the ground that the matter is impertinent and immaterial, it is settled that the motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible." Johnson v. M&M Communications, Inc., 242 F.R.D. 187, 189 (D. Conn. 2007) [**54] (Thompson, J.) (citing Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976)). "Usually the questions of relevancy and admissibility in general require the context of an ongoing and unfolding trial in which to be properly decided." Id. "And ordinarily neither a district court nor an appellate court should decide to strike a portion of the complaint - on the grounds that the material could not possibly be relevant - on the sterile field of the pleadings alone." Id. "Moreover, because a complaint is not submitted to the jury, the danger of unfair prejudice is minimal." Id. The extraordinary remedy sought by defendants, which is to strike a pleaded fact injurious to its case at the pleadings stage, is unwarranted and should be denied.

[*31] **B. As The Purpose For Referencing The Consent Decree Is For Reasons Other Than To Prove Liability Or Damages By Way Of Collateral Estoppel, It Should Not Be Stricken From the Complaint.**

Defendants' broad statement that a consent decree cannot be used as evidence is patently misleading and simply incorrect. Although such a statement may prove true where that decree is offered to prove liability [**55] by way of collateral estoppel based on the underlying facts of the consent decree, parties may plead, and courts may certainly admit, such decrees for other purposes.

Defendants rely primarily on the holding in Lipsky v. Commonwealth United Corp., supra, 551 F.2d at 893, that a consent decree between a federal agency and a private corporation cannot be used in subsequent litigation. See Def. Memo at 16. The Lipsky court held that the plaintiff could not include references to an SEC complaint alleging violations of securities laws to prove that the defendants breached their contract by failing to properly register plaintiff's stock with the SEC. Lipsky, 551 F.2d at 894. Since the SEC complaint resulted in a consent decree that was analogous to a plea of *nolo contendre*, and therefore inadmissible as evidence, the complaint could not be referenced, as its purpose was to prove that defendants violated the securities laws. Id. at 893-94.

Yet, the rule of Lipsky is far from absolute. Lipsky applies in those instances where a plaintiff references the consent decree for the purpose of treating the decree as an admission [**56] to be used to prove liability in a subsequent proceeding. Accordingly, the Second Circuit has subsequently distinguished Lipsky in cases that are more closely analogous to the case at bar. For instance, in United States v. Gilbert, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982), the Second Circuit affirmed the trial court's decision to admit into evidence, under Rule 408 of the Federal Rules of Evidence, an earlier SEC civil consent decree that was signed [*32] by defendant, holding that it was material to show that the defendant knew of the SEC reporting requirements involved in the decree. Id. Rule 408 provides that although evidence of a compromise may not be admitted in a subsequent claim, such evidence may be used for other purposes. n5 Id. In subsequent decisions, the courts of the Second Circuit have cited to Gilbert when denying motions to strike references to consent decrees. See Johnson v. M&M Communications, Inc., 242 F.R.D. 187,

189 (D.Conn. 2007) (Thompson, J.) (admitting a prior judgment to permit plaintiff to show that defendant acted willfully [**57] and in bad faith); Brotman v. Nat'l Life Ins. Co., 1999 WL 33109, at *2 (E.D.N.Y., Jan. 22, 1999) (admitting consent decree not to prove the truth of the facts contained in the consent decree, but demonstrate plaintiff's ulterior motive in filing a lawsuit) (Exhibit O).

n5 Federal Rule of Evidence 408 provides as follows:

> (a) Prohibited uses.-Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish-or accepting or offering or promising to accept-a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
>
> (b) Permitted uses.-This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

[**58]

Lipsky was similarly distinguished in the case of ClearOne Communications, Inc. v. Lumbermans Mutual Casualty Co., 2005 WL 2716297 (D. Utah, Oct. 21, 2005). ClearOne resolved an SEC proceeding by consent decree, and sought to defend a private shareholders class action. Id., at *8. The Lumbermans action was then commenced by ClearOne to enforce terms of insurance policies against their insurance carrier, following Lumbermans' denial of coverage [*33] based on defendant's alleged fraud. Id. Relying on Lipsky, plaintiffs objected to the court's consideration of the consent decree on the parties' cross-motions for summary judgment. Id. The court, however, rejected that argument:

> [Plaintiffs'] reliance on Lipsky is misplaced. In that case, the court explained that consent decrees, like pleas of nolo contendere, may not be used for purposes of collateral estoppel because the issues in the underlying action were not fully litigated. Here, the court considers the consent decree[] only as part of the factual background of this case.

Id. (emphasis added). Thus, so long as the consent decree was not invoked for collateral [**59] estoppel purposes, it was perfectly appropriate to consider it as a fact in the case.

Here, plaintiffs cite the Consent Decree as support for the fact that for over forty years, public policy has prohibited insurance companies from engaging in, among other things, illegal steering and suppression of labor rates. See Compl. P 17, 21. Therefore, the offer of the Consent Decree in this action is not analogous to Lipsky, 551 F.2d at 892-93, where it was offered for purposes of collateral estoppel, or Gotlin v. Lederman, 367 F.Supp.2d 349, 363-64 (E.D.N.Y. 2005), where the court found the consent decree to be wholly unrelated to the issues in that case. Id. (in case alleging, *inter alia*, fraudulent inducement to undergo radiation treatment for cancer, court struck references to consent decree pertaining to medicare fraud and other immaterial issues).

Accordingly, the plaintiffs' reference to the Consent Decree in their complaint is perfectly appropriate, is well within the bounds of Fed. R. Evid. 408, and requires denial of defendants' motion to strike.

**C. Defendants' Remaining Contentions That References** [**60] **To The Consent Decree Would Be "Particularly Prejudicial" Are Without Merit.**

In an effort to further confuse the issue, defendants concoct additional arguments suggesting that the Consent Decree is "particularly immaterial and prejudicial" See Def. Memo [*34] at 17. These claims center around the contentions that (1) defendants were not signatories to the Consent Decree, (2) said Consent Decree is a private agreement incapable of expressing any "public policy," and (3) it involves different conduct than that alleged in the complaint. These claims are largely irrelevant, particularly in light of defendants' incorrect claim that consent decrees cannot be pleaded or admitted into evidence.

First, there is no real prejudice to defendants by inclusion of the Consent Decree in the complaint, as the complaint will not be shown to the jury. Thus, the entire premise for striking the Consent Decree from the complaint is misplaced and is simply an improper effort to eliminate from plaintiffs' case a fact that defendants do not like.

Second, this Court should not be making evidentiary determinations at this early stage of the case. Defendants ask this Court to accept their characterization [**61] of the Consent Decree as a document unconnected to them or the facts of this case. While under any interpretation this fundamentally misrepresents the nature of the Consent Decree, this Court cannot, and should not, be making factual determinations about the Consent Decree on the "sterile field of the pleadings alone." Johnson, 242 F.R.D. at 189. Moreover, these factual arguments amount to strawmen. The Consent Decree was an agreement by the major insurance trade associations at that time - the Association of Casualty and Surety Companies, the American Mutual Insurance Alliance, and the National Association of Mutual Casualty Companies - that the industry would operate under certain parameters and restrictions. The standards adopted by these associations are not unlike a position that might be taken by the American Bar Association proscribing certain attorney conduct. Certainly, a statement of conduct by the ABA would inform public policy on the matter. Thus, defendants' arguments about the factual predicates of the Consent Decree are [*35] largely irrelevant and, even if they were somehow germane, they cannot be resolved at this stage of the litigation.

Third, [**62] without citing any authority, defendants argue that the Consent Decree is "incapable" of expressing public policy under CUTPA, claiming that it has not been enacted or adopted by policymakers and that the Connecticut Supreme Court has never held that a consent decree satisfies a showing of public policy. This argument is also both immaterial and incorrect. By its very nature, defendants' position is dependent on determining a host of factual issues that cannot be decided at the pleading stage, such as the context in which the Consent Decree was executed, the nature of the industry, the purpose of adopting it, the role of the trade associations, and the extent to which members of the insurance industry were notified about the decree and warned about their conduct. Surely agreements by the principal trade associations in an industry as to the standard of conduct for that industry can inform public policy. Plaintiffs are merely saying that the Consent Decree is one of a number of facts that may be considered in determining the public policy governing this dispute. Moreover, it is equally true that because the Connecticut Supreme Court has not ruled against the offer of the Consent Decree [**63] proposed here, and in light of the case law discussed herein, pleading of the Consent Decree is perfectly appropriate and should be sustained in this case.

[*36] **Conclusion**

Based on the foregoing, plaintiffs respectfully request that the court deny defendants' motion to certify, motion to dismiss Count II of the complaint and motion to strike reference to the Consent Decree.

THE PLAINTIFFS

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CERTIFICATE OF SERVICE

This is to certify that on November 16, 2007, a copy of the foregoing was filed electronically and served by mail on anyone [**64] unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to all parties that are unable to accept electronic filing. Parties may access this filing through the Court's electronic system.

/s/ David A. Slossberg

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[SEE EXHIBIT A IN ORIGINAL]

5 of 8 DOCUMENTS

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A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of themselves and all Others Similarly Situated, Plaintiffs, v. PROGRESSIVE INSURANCE GROUP COMPANY, PROGRESSIVE NORTHEAST INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No. 3:07-CV-929 (WWE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Motions 929; 2007 U.S. Dist. Ct. Motions LEXIS 66323

September 28, 2007

Motion to Strike

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s); Pleading(s)

**COUNSEL:** [**1] Shaun S. Sullivan (ct04883), Robert M. Langer (ct06305), Seth L. Huttner (ct27197), Wiggin and Dana LLP, One Century Tower, 265 Church Street, New Haven, Connecticut 06510, Phone: (203) 498-4400, Fax: (203) 782-2889, Email: ssullivan@wiggin.com, rlanger@wiggin.com, shuttner@wiggin.com, Their Attorneys.

**TITLE: Defendants' Request for Certification, Motion to Dismiss the Second Cause of Action for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Motion To Strike Certain Portions of the Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

**TEXT:** Defendants Progressive Casualty Insurance Company and Progressive Direct Insurance Company, * as more fully set forth in the accompanying memorandum of law and proposed Certification Request, hereby respectfully request this Court to certify the following question to the Connecticut Supreme Court pursuant to Connecticut General Statutes § 51-199b and Connecticut Practice Book Chapter 82:

> [*2] What is the legal standard for determining "unfair acts or practices" under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b(a) [**2] ?

* There is no entity named "Progressive Insurance Group Company," and plaintiffs have agreed to withdraw their claims against Progressive Northeastern Insurance Company, as it is not subject to personal jurisdiction in Connecticut.

Defendants also move, as more fully set forth in the accompanying memorandum of law and proposed Order, to dismiss plaintiffs' second cause of action, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the complaint does not allege any deceptive business practices and therefore fails to state a claim upon which relief may be granted.

Finally, as more fully set forth in the accompanying memorandum of law and proposed Order, defendants move to strike all references to the 1963 consent decree alleged in PP 17-20, 25 & 32 of the complaint pursuant to Federal Rule of Civil Procedure 12(f).

DEFENDANTS
PROGRESSIVE CASUALTY INSURANCE COMPANY
PROGRESSIVE DIRECT INSURANCE COMPANY

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**Memorandum of Law in Support of Defendants' Request for Certification, Motion to Dismiss the Second Cause of Action for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Motion To Strike Certain Portions of the Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

This action arises out of the inability of certain auto body repair shops in Connecticut - namely, plaintiffs A&R Body Specialty, Skrip's Auto Body, and Family Garage - to charge individual consumers in Connecticut ***higher*** labor rates for auto body repairs. Specifically, plaintiffs allege that defendants Progressive Casualty Insurance Company and Progressive Direct Insurance Company (collectively "Progressive" or "defendants") n1 have engaged in unfair and [*2] [**4] deceptive business practices, in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), by suppressing labor rates and steering defendants' insureds away from the plaintiffs and to less expensive repair shops.

n1 There is no entity named "Progressive Insurance Group Company," and plaintiffs have agreed to withdraw their claims against Progressive Northeastern Insurance Company, as it is not subject to personal jurisdiction in Connecticut.

As will be seen, this action squarely presents a fundamental and important question of state law - i.e., whether the so-called "cigarette rule" will continue to serve as the appropriate legal standard for determining "unfair acts or practices" under CUTPA - a standard that the Connecticut Supreme Court has cast into doubt. Therefore, defendants request that this Court certify that question to the Connecticut Supreme Court, as the answer may be dispositive of plaintiffs' first cause of action (alleging that defendants engaged in unfair acts or practices), and will [**5] significantly affect the course of discovery, class certification, dispositive motions, and a trial in this matter.

In addition, plaintiffs' second cause of action alleges that defendants have violated CUPTA by engaging in "deceptive" acts or practices, yet the complaint contains no factual allegations to support this legal conclusion. Thus, this Court should dismiss this count for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

Finally, plaintiffs' complaint refers to a 1963 consent decree between the Department of Justice and various defendants, none of whom is a party to this suit. These references are both immaterial and prejudicial and should therefore be struck from the complaint pursuant to Federal Rule of Civil Procedure 12(f).

[*3] **I. This Court Should Certify to The Connecticut Supreme Court The State Law Question of What Legal Standard Applies for Determining "Unfair Acts or Practices" Under The Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b(a).**

The Connecticut Unfair Trade Practices Act ("CUTPA"), [**6] Conn. Gen. Stat. § 42-110a, *et seq.*, provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Id.* at § 42-110b(a). The statute was modeled after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and, indeed, Conn. Gen. Stat. § 42-110b(b) provides that "[i]t is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended." Thus, in construing the arguably subjective categories of "unfair methods of competition" and "unfair or deceptive acts or practices," Connecticut courts have looked to federal law for guidance.

Plaintiffs' complaint relies solely on this statute. The first cause of action alleges a CUTPA violation based on "unfair" acts or practices. Specifically, plaintiffs' complaint alleges that defendants [**7] violated CUTPA by engaging in unfair business practices that contravene public policy as expressed in both federal and state law. *See* Compl. PP 32-35.

Since 1983, when the Connecticut Supreme Court ruled on two seminal CUTPA unfairness cases, *see Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc.*, 190 Conn. 528 (1983); *Conaway v. Prestia*, 191 Conn. 484 (1983), these claims have been analyzed under the so-called "cigarette rule." The cigarette rule was part of the FTC's public statement issued in connection with a tobacco industry trade regulation. *See* Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964) (hereinafter "1964 FTC [*4] Statement"). The 1964 FTC Statement was thereafter adopted by the United States Supreme Court in *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244 n.5 (1972), and subsequently by the Connecticut Supreme Court in *Ivey, Barnum & O'Mara*. Thus, in *Ivey, Barnum & O'Mara*, the Connecticut Supreme Court explained the test as follows:

> The [**8] Commission has described the factors it considers in determining whether a practice that is neither in violation of the anti-trust laws nor deceptive is nevertheless unfair: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."

*Ivey, Barnum & O'Mara*, 190 Conn. 528, 539 n.13 (quoting *Sperry & Hutchinson*, 405 U.S. at 244 n.5 (quoting FTC 1964 Statement)). *See also Conaway*, 191 Conn. at 492-93.

Over the last twenty-four years, the cigarette rule has been cited in countless Connecticut state and federal cases. But, while Connecticut has almost uniformly applied the cigarette rule to analyze commercial unfairness claims, the legal underpinnings supporting this test have eroded. Specifically, in 1980, in response [**9] to Congressional inquiry, the FTC issued a Policy Statement on Unfairness which significantly modified the cigarette rule in favor of what has become known as the "substantial injury test." *See* FTC Policy Statement On Unfairness, Federal Trade Commission, Dec. 17, 1980, *available at* www.ftc.gov/bcp/policystmt/ad-unfair.htm (hereinafter "1980 FTC Policy Statement"). The 1980 FTC Policy Statement declared that "[u]njustified consumer injury is the primary focus of the FTC Act, and the most important part of the [cigarette rule]." *Id.* Consumer injury alone, therefore, can "be sufficient to warrant a finding of unfairness." *Id.*

[*5] The 1980 FTC Policy Statement further declared that in order for consumer injury to rise to the level of unfairness, it must satisfy a three-pronged test: (1) the injury must be substantial, (2) the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces, ***and*** (3) the injury must be one which consumers could not reasonably have avoided. *Id.* Finally, the 1980 Policy Statement explicitly disclaimed the second part of the cigarette rule - whether the conduct is [**10] immoral, unethical, oppressive, or unscrupulous - and de-emphasized and narrowed the public policy prong of the cigarette rule, permitting the consideration of only established public policy, and even then only to be considered along with all other evidence, ***not as an independent basis*** upon which to find a business practice unfair. *Id.* Thus, the new test significantly altered the standard of liability for "unfairness" by mandating a showing of substantial injury. n2

> n2 In 1994, Congress amended the FTC Act expressly to codify the substantial injury test as stated in the 1980 FTC Policy Statement. The amendment was codified at 15 U.S.C. § 45(n), which provides that "[t]he Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination."

[**11]

Although the FTC long ago abandoned the cigarette rule in favor of the substantial injury test, the Connecticut Supreme Court has continued to apply the cigarette rule to determine whether a business practice is "unfair" under CUTPA. However, both the Connecticut Supreme Court and this Court have recently questioned whether the cigarette rule should remain the appropriate test. Recognizing that "it is the intent of the legislature that in construing [CUTPA's unfairness provision], the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) [*6] of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended," Conn. Gen. Stat. § 42-110b(b), the Connecticut Supreme Court has suggested that the cigarette rule might be outdated.

For example, in *American Car Rental, Inc. v. Commissioner of Consumer Protection*, 273 Conn. 296, 305 n.6 (2005), the Connecticut Supreme Court, after quoting § 42-110b's "guided by" language, noted that "a serious question exists concerning whether the cigarette rule remains [**12] the guiding rule utilized by the federal trade commission." But, notwithstanding its concerns about applying a test subsequently disclaimed by federal authorities, the Connecticut Supreme Court was reluctant to consider the issue because it was not raised or briefed by either party. *See id.*

("[B]ecause neither party in the present case has raised or briefed this issue or asked us to reconsider our law in this area, it is appropriate that we wait until the issue has been squarely presented to us for determination.").

Twice more during that same term the Connecticut Supreme Court commented on the questionable vitality of the cigarette rule in adjudicating unfairness claims, but on both occasions refrained from deciding the issue because "neither party has raised or briefed this issue or asked [the Court] to reconsider [its] law in this area." *Votto v. Am. Car Rental*, 273 Conn. 478, 484 n.3 (2005). *See also Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 82 n.34 (2005) ("Because, in the present case, neither party has raised or briefed this issue, and both have briefed the issue applying the cigarette rule, we decline to address the issue of the [**13] viability of the cigarette rule until it squarely has been presented to us."). A year later, the Connecticut Supreme Court cited to *Glazer* for this same proposition, *Edmands v. Cuno, Inc.*, 277 Conn. 425, 450 n.16 (2006), and a few months later the District of Connecticut "follow[ed] the traditional cigarette rule," but only because the Connecticut Supreme Court refused to decide this pressing issue without the benefit [*7] of briefing and argument. *IndyMac Bank F.S.B. v. Reyad*, 2006 WL 2092621, at *5 n.8 (D. Conn. July 26, 2006).

Unlike in *American Car Rental, Votto, Glazer, Edmands and IndyMac*, the question whether the substantial injury test should replace the cigarette rule is squarely presented in the instant case, where plaintiffs' unfairness claim is premised exclusively on the first - and now deemphasized and narrowed - prong of the cigarette rule (a violation of public policy), and adopting the substantial injury test ***would likely prove dispositive***.

Plaintiffs' complaint alleges a CUTPA violation based exclusively on the first prong of the cigarette rule: a violation of public policy. Under the cigarette rule, a sufficiently [**14] strong showing of a violation of public policy could be sufficient to prove liability. *See e.g., Jacobs v. Healey Ford-Subaru, Inc.*, 231 Conn. 707, 725 (1995) ("All three criteria [of the cigarette rule] do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (citations omitted)). Thus, were the Connecticut Supreme Court to decide that Connecticut should not follow the FTC's lead and disclaim the cigarette rule in favor of the substantial injury test, plaintiffs would not be required to prove that defendants' actions caused a substantial injury.

Under the substantial injury test, however, plaintiffs would be required to prove (1) that they were substantially injured, (2) that such injury was not outweighed by the countervailing benefits to consumers or competition, ***and*** (3) that such injury could not have been reasonably avoided. Proof of a violation of public policy may be tangentially relevant, but certainly not dispositive. Thus, while plaintiffs might be able to establish liability under the cigarette rule solely [**15] by proving a violation of the steering statute and code of ethics regulation (as expressions [*8] of public policy), such proof would be insufficient to establish liability - and thus subject plaintiffs' theory to a dispositive motion - under the substantial injury test. n3

> n3 Indeed, were the Supreme Court to adopt the substantial injury test, plaintiffs' complaint would fail to state a claim upon which relief may be granted. Therefore, defendants reserve their right to move to dismiss the complaint for failure to state a claim upon which relief may be granted pending certification to the Connecticut Supreme Court.

Moreover, as a practical matter, the question whether the substantial injury test is the proper standard for unfairness claims will also affect class and merits discovery, class certification briefing, and, of course, any trial on the merits in this action. For example, under the substantial injury test, the extent of each class member's injury is relevant not only to calculate damages, [**16] but to determine defendants' liability in the first instance, and, therefore, becomes crucial to the analysis of whether individual issues predominate. In addition, much of the merits discovery under the cigarette rule would likely focus on the question whether defendants violated the expressions of public policy cited in the complaint. *See* Compl. PP 17-22. As explained above, under the substantial injury test, the focus of discovery would necessarily

shift away from the policy implications of Progressive's practices, and towards an examination of the extent of plaintiffs' injuries, the extent of the countervailing benefits to consumers or competition resulting from Progressive's insurance practices, and whether the alleged injuries could have been reasonably avoided.

For these reasons, and because the Connecticut Supreme Court has repeatedly hinted at the cigarette rule's demise, certification is appropriate. Indeed, the United States Supreme Court has encouraged federal courts to certify such issues of state law because the procedure "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); [**17] *see also Cweklinsky v. Mobil Chem. Co.*, 297 F.3d 154, 160 (2d Cir. 2002) ("[T]he principles of federalism and comity demand that federal [*9] courts give a state's highest court the opportunity to determine state law authoritatively, if it wishes to do so."). Thus, courts in the Second Circuit have "long recognized that state courts should be accorded the first opportunity to decide significant issues of state law through the certification process." *Caruso v. Siemens Bus. Communications Sys. Inc.*, 392 F.3d 66, 71 (2d Cir. 2004) (per curiam) (citing *Parrot v. Guardian Life Ins. Co.*, 338 F.3d 140, 144 (2d Cir. 2003)); *accord Cweklinsky*, 297 F.3d at 160 (same) (citing *Great Northern Ins. Co. v. Mt. Vernon Fire Ins. Co.*, 143 F.3d 659, 662 (2d Cir. 1998)).

For the same reasons, Connecticut has adopted the Uniform Certification of Questions of Law Act ("Uniform Act"), which permits the Connecticut Supreme Court to answer a question of law certified to it by a court of the United States "if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no [**18] controlling appellate decision, constitutional provision or statute of this state." Conn. Gen. Stat. § 51-199b(d); *accord* Practice Book § 82-1 (same). Indeed, the very purpose of the Uniform Act was to "encourag[e] courts to certify questions of law in appropriate cases" and, thus, facilitate "the greater use of certification." UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 70 (1996).

Whether a question will be certified is committed to the sound discretion of the court, *see Lehman Bros.*, 416 U.S. at 391, and, in exercising such discretion, courts have considered several factors, including: (1) whether there is a definitive appellate decision on point; (2) whether the issue is one of importance to the state; (3) whether the issue implicates state policy concerns; and (4) whether the issue is likely to recur. *See, e.g.*, *Caruso*, 392 F.3d at 68, 71-72 (certifying proper interpretation of "physically disabled" requirement under the Connecticut Fair Employment Practices Act because its proper construction was "unsettled, important, . . . likely [*10] to recur, and . . . implicate[d] significant [**19] public policy considerations for Connecticut"); *Cweklinsky*, 297 F.3d at 156, 160-61 (certifying issue of whether compelled self-publication of defamation is a viable cause of action because Connecticut law did not provide sufficient guidance, the issue involved important policy considerations for the state, and the issue was likely to recur); *Old Republic Nat'l Title Ins. Co. v. Bank of East Asia Ltd*, 247 F. Supp. 2d 197, 199-200 (D. Conn. 2003) (certifying question of whether an insurer, acting as subrogee, can bring a legal malpractice claim against the insured's counsel because of the absence of clear precedent, the serious policy implications, and the profound impact the issue could have on countless real estate closings in Connecticut).

Here, each of those factors weighs heavily in favor of certifying the proposed question. First, given that the Connecticut Supreme Court itself has repeatedly questioned the continued validity of the cigarette rule, and has expressed a willingness to re-examine the standard for unfairness under CUTPA, n4 certification is "***particularly appropriate***" because "***the state's highest court has cast doubt*** [**20] ***on the scope or continued validity of one of its earlier holdings***." *Liriano v. Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998) (emphases added). n5

n4 As previously stated, the Connecticut Supreme Court has questioned whether the cigarette rule is still the governing standards on four occasions. *Edmands*, 277 Conn. at 450 n.16; *Glazer*, 274 Conn. at 82 n.34; *Votto*, 273 Conn. at 484 n.3; *Am. Car Rental, Inc.*, 273 Conn. at 305 n.6; *see also* ROBERT M. LANGER, JOHN T. MORGAN & DAVID L. BELT, 12 CONN. PRACTICE SERIES: CONNECTICUT UNFAIR TRADE PRACTICES § 2.2 n.66 & accompanying text (Supp. 2006) [attached as Ex. 1; hereinafter "LANGER,

MORGAN & BELT"].

n5 In *Liriano*, Judge Calabresi expressed the court's fear that, absent certification under such circumstances, "the danger . . . is that a party favored . . . by the weakened high court holding will seek federal jurisdiction with the knowledge that the federal courts, unlike the state's highest court, will feel virtually bound to follow these decisions." 132 F.3d at 132. The very same concern underlies Connecticut's adoption of the Uniform Act: "[F]aced with the difficult problem of ascertaining state law when there is no . . . definitive state appellate judicial decision on the matter, . . . federal courts have been forced to guess what the state court might rule if the precise issue of law were presented it," and such speculation has "worked to undermine the two major purposes of the *Erie* doctrine: that is, the 'discouragement of forum-shopping and the avoidance of inequitable administration of the laws.'" UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 68 (1996) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

[**21]

[*11] Second, it is also indisputable that the standard for unfairness is an issue of particular importance to Connecticut, and one likely to recur, because "Connecticut is 'the state with the most litigation-by far-concerning unfairness.'" David L. Belt, *The Standard For Determining "Unfair Acts Or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. BAR. J. 247, 250 (2006) (quoting Michael M. Greenfield, *Unfairness Under Section 5 Of The FTC Act And Its Impact On State Law*, 46 WAYNE L. REV. 1869, 1929 (2000)) [attached as Ex. 2; hereinafter "Belt"].

Third, because CUTPA itself does not set forth a standard for "unfair acts or practices," but, rather, directs Connecticut courts to be "guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), as from time to time amended," Conn. Gen. Stat. § 42-110b(b), the issue presented in this case is not one strictly of statutory construction, but involves the fundamental choice of whether Connecticut should follow the federal construction [**22] of unfairness or forge its own path-a choice that involves the resolution of a number of competing policy considerations. *See, e.g.*, LANGER, MORGAN & BELT at 9-10 (discussing competing policy concerns); Belt at 316-30 (same). As recently stated:

> Resolution of the questions concerning whether the Connecticut courts should abandon the Cigarette Rule standard, modify that standard or apply the current FTC standard for determining whether an act or practice is unfair fundamentally involves weighing the strength of the legislative directive to be guided by federal precedent interpreting the FTC Act against other considerations which indicate that the Cigarette Rule or some modification of it may be more appropriate for application to a state statute that places primary reliance on private litigation for its enforcement.

[*12] *Id.* at 329-30. Clearly, principles of federalism and comity demand that the Connecticut Supreme Court have the opportunity to consider and resolve these issues.

Finally, as discussed above, *see supra* at 7-8 & n.3, obtaining definitive guidance on the standard for unfairness is crucial at this juncture in this action because it will [**23] affect the scope of both class and merits discovery, dispositive motions, class certification, and, of course, any trial on the merits in this action. Proceeding without an understanding of something as fundamental as the standard for liability for the claims pursued by the plaintiffs would clearly result in an inefficient waste of time and resources for all parties and the Court. *See, e.g., Lehman Bros.*, 416 U.S. at 390-91 (noting that certification "in the long run save[s] time, energy, and resources").

For the foregoing reasons, defendants respectfully request that the Court certify the following question to the Connecticut Supreme Court:

> What is the legal standard for determining "unfair acts or practices" under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b(a)?

**II Plaintiffs' Second Cause of Action Should be Dismissed Because There is No Allegation that Defendants' Business Practices Are Deceptive**

The certified question will resolve the open issue of which test governs whether a business practice is unfair. Plaintiffs' complaint, however, alleges both that defendants' business practices [**24] are unfair, Compl. PP 31-36 (First Cause of Action), and that defendants' acts or practices are deceptive, Compl. PP 37-40 (Second Cause of Action). While a determination of the proper unfairness test is invaluable prior to continued litigation of plaintiffs' first cause of action, this Court need not await any guidance from the Connecticut Supreme Court prior to dismissing plaintiffs' second cause of action. This cause of action - asserting that defendants' acts "constitute deceptive acts or practice under CUTPA," Compl. P 38 - must be dismissed because the complaint contains no allegations capable of supporting the settled deception test.

[*13] **A. Standard of Review**

A Rule 12(b)(6) motion is properly granted where, viewing the allegations in the light most favorable to the plaintiffs, the complaint fails to state a claim upon which relief may be granted. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). [**25]

When ruling on a 12(b)(6) motion, the court must consider all well-pled allegations as true, *Albright v. Oliver*, 510 U.S. 266, 268 (1994), and "draw all inferences from those allegations in the light most favorable to the plaintiff," *United States v. Baylor Univ. Medical Center*, 469 F.3d 263, 267 (2d Cir. 2006) (citation omitted). However, "bald assertions and conclusions of law will not suffice," *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 344 (2d Cir. 2006) (citations omitted), and the Court need not accept legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

**B. The Complaint Does Not Allege That Defendants Engaged in Deceptive Business Practices**

The Connecticut Unfair Trade Practices Act prohibits both unfair and deceptive business practices. Conn. Gen. Stat. § 42-110b(a). There is a significant difference, however, between an "unfair" business practice, and a "deceptive" business practice. As this Court explained:

> A practice is ***unfair*** (1) if it offends public policy as it has been established by statues, [**26] the common law or otherwise, (2) if it is immoral, unethical, oppressive or unscrupulous, or (3) if it causes substantial injury to consumers. A practice is ***deceptive*** if it is a materially misleading representation, omission, or other practice that a consumer reasonably interpreted under the circumstances.

*Walsh v. Seaboard Surety Co.*, 94 F. Supp. 2d 205, 213 (D. Conn. 2000) (emphasis added) (internal citations omitted) (Eginton, J.). The seminal Connecticut Supreme Court case [*14] construing deceptive business practices set forth the following three-pronged test: "'First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material - that is, likely to affect consumer decisions or conduct.'" *Caldor, Inc. v. Heslin*, 215 Conn. 590, 597 (1990) (quoting *Matter of Figgie International, Inc.*, 107 F.T.C. 313, 374 (1986)).

Plaintiffs' second cause of action merely realleges the allegations in paragraphs 1 through 30 of the complaint, [**27] Compl. P 37, asserts that defendants' acts are deceptive, *id.* at P 38, and alleges damages, *id.* at PP 39, 40. Given these conclusory allegations, plaintiffs' second cause of action fails to state a claim upon which relief may be granted.

The allegations in paragraphs 1 through 30 of the complaint, realleged in the deception count, allege ***no*** facts capable of meeting the test set forth in *Caldor*. Specifically, the complaint contains no allegation that defendants made any false or misleading representation to either consumers or to plaintiffs themselves, nor does the complaint allege that there was an omission or any other practice likely to mislead any relevant economic actor. There is likewise no allegation that consumers or the plaintiffs themselves have interpreted any unspecified representation or omission reasonably. And, finally, there is no allegation that any unspecified representation or omission affected the decisions or conduct of either consumers or the plaintiffs. Thus, other than the bald-faced legal conclusion that "[t]he foregoing acts of Progressive constitute deceptive acts or practices under CUTPA," Compl. P 38 - which, of course, is insufficient [**28] to defeat a motion to dismiss, *see, e.g., Amron*, 464 F.3d at 344 - the complaint is devoid of any facts suggesting that consumers or plaintiffs were deceived.

[*15] In these situations, where a CUTPA count is alleged solely in conclusory terms, this Court has not hesitated to grant a motion to dismiss for failure to state a claim upon which relief may be granted. *See Omni Corp. v. Sonitrol Corp.*, 476 F. Supp. 2d 125, 129 (D. Conn. 2007); *Bepko v. St. Paul Fire & Marine Ins. Co.*, 2005 WL 3619253, at *5 (D. Conn. Nov. 10, 2005); *Keaney v. E. Computer Exch., Inc.*, 2004 WL 885100, at *1-*2 (D. Conn. April 21, 2004); *Martin v. Am. Equity Ins. Co.*, 185 F. Supp. 2d 162, 167-68 (D. Conn. 2002); *Pers. Fin. Servs., Inc. v. General Motors Acceptance Corp.*, 169 F. Supp. 2d 49, 54-56 (D. Conn. 2001); *Loda Agency, Inc. v. Nationwide Ins. Co.*, 2000 WL 1849865, at *3-*4 (D. Conn. Oct. 10, 2000). The same conclusion is compelled here, where plaintiffs' sole reference to deception is the factually unsupported assertion in P 38 that defendants' business practices constitute deceptive [**29] acts or practices. *See cf. Martin*, 185 F. Supp. 2d at 168 (dismissing a CUTPA count where plaintiff's allegation that defendant's actions were part of a general business practice was "set forth . . . in the most conclusory fashion, without any factual allegations" to support it); *Loda Agency*, 2000 WL 1849865 at *4 n.4 ("The CUTPA counts merely call the alleged breaches of contract 'immoral, oppressive and unscrupulous' without ever explaining how they can be so characterized."). Because plaintiffs alleged entitlement to the relief sought in the second cause of action is limited to "labels and conclusions," *Twombly*, 127 S. Ct. at 1965, dismissal is appropriate.

**III. All References to the Consent Decree Should Be Stricken From the Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

Federal Rule of Civil Procedure 12(f) provides that "[u]pon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. [**30] " Plaintiffs' [*16] complaint contains numerous references to an immaterial and prejudicial consent decree, and defendants respectfully request that the Court strike these references from the complaint.

This Court has often held that "motions to strike are disfavored and will not be granted routinely." *SEC v. Packetport.com, Inc.*, 2006 WL 2349452, at *5 (D. Conn. July 28, 2006). However, it is equally settled that "[i]n spite of this reluctance, allegations may be stricken if they have no real bearing on the case, will likely prejudice the movant, or where they have criminal overtones." *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 555 (S.D.N.Y. 2002). Allegations in a complaint are also properly struck where "no evidence in support of the allegation would be admissible." *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976).

One oft-cited allegation that cannot be used as evidence - and should therefore be stricken from a complaint - is any reference to a consent decree between a federal agency and a private corporation. *See id.* at 893-94. As the Second Circuit explained, "a consent [**31] judgment between a federal agency and a private corporation . . . is not the result of an actual adjudication of any of the issues. Consequently, it can not [sic] be used as evidence in subsequent litigation between that corporation and another party." *Id.* at 893. The Court further explained that consent decrees are immaterial because they are "the result of private bargaining, and there was no hearing or rulings or any form of decision on the merits by the district court." *Id.* at 894. *See also Gotlin v. Lederman*, 367 F. Supp. 2d 349, 363 (E.D.N.Y. 2005) ("[C]ourts hold that references in pleadings to agreements with state or federal agencies may properly be stricken on a Rule 12(f) motion."); *In Re Merrill Lynch & Co., Inc.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003) ("Second Circuit case law

makes it clear that references to preliminary steps in litigation and administrative proceedings that did not result in an adjudication on the merits or legal or [*17] permissible findings of fact are, as a matter of law, immaterial under Rule 12(f) of the Federal Rules of Civil Procedure. [**32] "). *Lipsky* and its progeny could not be clearer: a consent decree between a private party and the government, as alleged in plaintiffs' complaint, should be struck under Rule 12(f).

Furthermore, the consent decree is particularly immaterial and prejudicial in this case because (1) defendants were not signatories, (2) the consent decree is a private agreement, incapable of expressing any "public policy" under CUTPA, and (3) the consent decree involved fundamentally different conduct than alleged in the complaint.

First, the Department of Justice's case was brought only against the trade associations, not the insurance companies. *See United States v. Ass'n of Cas. and Surety Cos., Am. Mut. Ins. Alliance & the Nat'l Ass'n of Mut Cas. Cos.*, 1963 U.S. Dist. Lexis 9949 (S.D.N.Y. Nov. 27, 1963) [attached as Ex. 3]. Plaintiffs' complaint, however, ignores the actual parties named in the Department of Justice's complaint, and misleadingly suggests that defendants signed the consent decree. n6 *Lipsky* stated that a consent decree between the government and ***the defendant*** is properly struck pursuant to Fed. R. Civ. P. 12(f) [**33] . 551 F.2d at 894. Therefore, a consent decree between the government and ***a non-party*** should, *a fortiori*, be struck as well.

> n6 For example, P 18 alleges that the Department of Justice brought an action against 265 insurance companies, and that the Department of Justice sought to enjoin the "named insurance companies" from engaging in certain acts. These statements are incorrect. The action was brought against three trade associations, not 265 insurance companies. Moreover, there were no "named" insurance companies, just the three named trade associations. Similarly, P 19 of the complaint incorrectly states that the suit was resolved by a consent decree "agreed to by the 265 insurance companies that were parties to the lawsuit." These patently inaccurate descriptions of the consent decree should be stricken from the complaint.

Second, plaintiffs cite to the consent decree as an expression of public policy in order to meet the first prong of the cigarette rule. However, unlike the [**34] Connecticut statute and regulation, *see* Compl. PP 20-22, the consent decree is not enacted or adopted by policymakers. Rather, as [*18] *Lipsky* notes, consent decrees between the government and private corporations are the "result of private bargaining," 551 F.2d at 894, rendering them more analogous to contracts than statutes or regulations. Indeed, the Connecticut Supreme Court has never held that such a consent decree constitutes the requisite expression of public policy capable of satisfying the first prong of the cigarette rule. Therefore, because the consent decree cannot state an expression of public policy, it has no relevance to this case and should be struck from the complaint.

Finally, the consent decree, signed by the Association of Casualty and Surety Companies, American Mutual Insurance Alliance, and the National Association of Mutual Casualty Companies, governed agreements amongst these three trade associations, whose membership comprised 265 competitors in the insurance industry. Plaintiffs' complaint, by contrast, asserts allegations against ***one*** insurance company's agreements with appraisers and repair shops. Stated in antitrust [**35] terms, the Department of Justice's suit against three trade associations was concerned with horizontal agreements amongst competitor insurance companies, while the instant complaint is concerned with vertical relationships between one insurance company and appraisers and repair shops.

Plaintiffs' reliance on the consent decree blurs the fundamental distinction between these two types of agreements. *See e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement firms at different levels of distribution as vertical restraints."). Yet, this distinction is critical, and is one of the most basic precepts of antitrust law because, "[u]nlike agreements among rivals, vertical agreements are a customary and even indispensable part of the market system. They are not [*19] even presumptively 'suspect.'" AREEDA &

HOVENKAMP, ANTITRUST LAW P 1902d at 217 (2005).

In fact, the Supreme Court has gone to great lengths, on numerous occasions, to highlight the differing analyses governing vertical and horizontal [**36] agreements. Specifically, the Court has explained that while a particular agreement amongst competitors may constitute a *per se* violation of the antitrust laws, that same agreement between vertical firms would not be *per se* unlawful. *See e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-39 (1998). The varied analysis for vertical and horizontal restraints is grounded in the realization that vertical restrictions have the "potential for a simultaneous reduction of ***intrabrand*** competition and stimulation of ***intrabrand*** competition." *Continental T. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 (1977) (emphasis added). Because "[i]nterbrand competition . . . is the primary concern of antitrust law," *id.* at 52 n.19, the Court has been more lenient when considering vertical restraints, even recently ruling that vertical price fixing is no longer *per se* unlawful, *see Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

Thus, plaintiffs' contention that a consent decree condemning horizontal behavior amongst insurers is at all relevant to a single insurance company's [**37] agreements with preferred repair shops and in-house appraisers flies in the face of years of antitrust jurisprudence. Because the allegations in the complaint involve vertical agreements, plaintiffs cannot allege that such allegations violate public policy as expressed by a consent decree enjoining the continuation of horizontal agreements. Stated simply, the consent decree has no bearing on an individual [*20] insurance company's agreement with downstream entities (*i.e.*, appraisers and auto body repair shops). n7

> n7 The consent decree's limitation to horizontal agreements makes economic sense: if one insurance company's agreements with appraisers and auto body shops raised prices, consumers would simply switch to another insurance company. It is only when multiple insurance companies agree with each other - the conduct outlined in the 1963 consent decree - that consumer harm rears its head and public policy is offended.

Because the consent decree relates only to specific horizontal agreements in [**38] the insurance industry, it is irrelevant and immaterial to the instant complaint. In such situations, courts within this circuit properly strike such sections of the complaint pursuant to Rule 12(f). For example, in *Gotlin*, plaintiffs alleged that physicians and a hospital misleadingly marketed a cancer treatment program. 367 F. Supp. 2d at 352-53. In the complaint, plaintiffs included (1) the defendant-hospital's agreement to pay $ 45 million dollars (plus an additional $ 39 million in free services) to the New York Attorney General's Office to settle a prior Medicaid fraud case, and (2) that the Office of Inspector General of HHS had been investigating the defendant-hospital since 1996 for overstating the number of residents on staff. *Id.* 363. Because both the "[a]llegations about a Medicaid fraud case," and the "[a]llegations about investigations of misrepresentations regarding the number of [hospital] medical residents," were irrelevant to the action, they were properly struck under Rule 12(f). *Id. Gotlin* is directly on point here, where the prior government action dealt with horizontal agreements amongst competitors, which has no bearing [**39] on defendants' unilateral behavior in the instant action. As such, any reference to the Consent Decree in the Complaint should be struck under the same rationale as in *Gotlin*.

**IV. Conclusion**

For the foregoing reasons, defendants respectfully request that the Court certify the question regarding the proper unfairness test to the Connecticut Supreme Court. Defendants also [*21] respectfully request that the Court dismiss plaintiffs' second cause of action on the ground that the complaint asserts no allegations of deceptive conduct, and strike all references to the immaterial and prejudicial 1963 Department of Justice consent decree.

DEFENDANTS
PROGRESSIVE CASUALTY INSURANCE COMPANY

PROGRESSIVE DIRECT INSURANCE COMPANY

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[SEE CERTIFICATION REQUEST IN ORIGINAL]

[SEE ORDER IN ORIGINAL]

**Certificate of Service** [**40]

I hereby certify that, on September 28, 2007, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Seth L. Huttner

6 of 8 DOCUMENTS

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A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of themselves and all Others Similarly Situated, Plaintiffs, v. PROGRESSIVE INSURANCE GROUP COMPANY, PROGRESSIVE NORTHEAST INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No. 3:07-CV-929 (WWE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Motions 929; 2007 U.S. Dist. Ct. Motions LEXIS 66325

September 25, 2007

Motion to Dismiss

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s); Pleading(s)

**COUNSEL:** [**1] Shaun S. Sullivan (ct04883), Robert M. Langer (ct06305), Seth L. Huttner (ct27197), Wiggin and Dana LLP, One Century Tower, 265 Church Street, New Haven, Connecticut 06510, Phone: (203) 498-4400, Fax: (203) 782-2889, Email: ssullivan@wiggin.com, rlanger@wiggin.com, shuttner@wiggin.com, Their Attorneys.

**TITLE: Defendants' Request for Certification, Motion to Dismiss the Second Cause of Action for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Motion To Strike Certain Portions of the Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

**TEXT:** Defendants Progressive Casualty Insurance Company and Progressive Direct Insurance Company, * as more fully set forth in the accompanying memorandum of law and proposed Certification Request, hereby respectfully request this Court to certify the following question to the Connecticut Supreme Court pursuant to Connecticut General Statutes § 51-199b and Connecticut Practice Book Chapter 82:

> [*2] What is the legal standard for determining "unfair acts or practices" under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b(a) [**2] ?

* There is no entity named "Progressive Insurance Group Company," and plaintiffs have agreed to withdraw their claims against Progressive Northeastern Insurance Company, as it is not subject to personal jurisdiction in Connecticut.

Defendants also move, as more fully set forth in the accompanying memorandum of law and proposed Order, to dismiss plaintiffs' second cause of action, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the complaint does not allege any deceptive business practices and therefore fails to state a claim upon which relief may be granted.

Finally, as more fully set forth in the accompanying memorandum of law and proposed Order, defendants move to strike all references to the 1963 consent decree alleged in PP 17-20, 25 & 32 of the complaint pursuant to Federal Rule of Civil Procedure 12(f).

DEFENDANTS
PROGRESSIVE CASUALTY INSURANCE COMPANY
PROGRESSIVE DIRECT INSURANCE COMPANY

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**Memorandum of Law in Support of Defendants' Request for Certification, Motion to Dismiss the Second Cause of Action for Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Motion To Strike Certain Portions of the Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

This action arises out of the inability of certain auto body repair shops in Connecticut - namely, plaintiffs A&R Body Specialty, Skrip's Auto Body, and Family Garage - to charge individual consumers in Connecticut ***higher*** labor rates for auto body repairs. Specifically, plaintiffs allege that defendants Progressive Casualty Insurance Company and Progressive Direct Insurance Company (collectively "Progressive" or "defendants") n1 have engaged in unfair and [*2] [**4] deceptive business practices, in violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), by suppressing labor rates and steering defendants' insureds away from the plaintiffs and to less expensive repair shops.

n1 There is no entity named "Progressive Insurance Group Company," and plaintiffs have agreed to withdraw their claims against Progressive Northeastern Insurance Company, as it is not subject to personal jurisdiction in Connecticut.

As will be seen, this action squarely presents a fundamental and important question of state law - i.e., whether the so-called "cigarette rule" will continue to serve as the appropriate legal standard for determining "unfair acts or practices" under CUTPA - a standard that the Connecticut Supreme Court has cast into doubt. Therefore, defendants request that this Court certify that question to the Connecticut Supreme Court, as the answer may be dispositive of plaintiffs' first cause of action (alleging that defendants engaged in unfair acts or practices), and will [**5] significantly affect the course of discovery, class certification, dispositive motions, and a trial in this matter.

In addition, plaintiffs' second cause of action alleges that defendants have violated CUPTA by engaging in "deceptive" acts or practices, yet the complaint contains no factual allegations to support this legal conclusion. Thus, this Court should dismiss this count for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

Finally, plaintiffs' complaint refers to a 1963 consent decree between the Department of Justice and various defendants, none of whom is a party to this suit. These references are both immaterial and prejudicial and should therefore be struck from the complaint pursuant to Federal Rule of Civil Procedure 12(f).

[*3] **I. This Court Should Certify to The Connecticut Supreme Court The State Law Question of What Legal Standard Applies for Determining "Unfair Acts or Practices" Under The Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b(a).**

The Connecticut Unfair Trade Practices Act ("CUTPA"), [**6] Conn. Gen. Stat. § 42-110a, *et seq.*, provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Id.* at § 42-110b(a). The statute was modeled after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and, indeed, Conn. Gen. Stat. § 42-110b(b) provides that "[i]t is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended." Thus, in construing the arguably subjective categories of "unfair methods of competition" and "unfair or deceptive acts or practices," Connecticut courts have looked to federal law for guidance.

Plaintiffs' complaint relies solely on this statute. The first cause of action alleges a CUTPA violation based on "unfair" acts or practices. Specifically, plaintiffs' complaint alleges that defendants [**7] violated CUTPA by engaging in unfair business practices that contravene public policy as expressed in both federal and state law. *See* Compl. PP 32-35.

Since 1983, when the Connecticut Supreme Court ruled on two seminal CUTPA unfairness cases, *see Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc.*, 190 Conn. 528 (1983); *Conaway v. Prestia*, 191 Conn. 484 (1983), these claims have been analyzed under the so-called "cigarette rule." The cigarette rule was part of the FTC's public statement issued in connection with a tobacco industry trade regulation. *See* Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964) (hereinafter "1964 FTC [*4] Statement"). The 1964 FTC Statement was thereafter adopted by the United States Supreme Court in *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244 n.5 (1972), and subsequently by the Connecticut Supreme Court in *Ivey, Barnum & O'Mara. Thus, in Ivey, Barnum & O'Mara*, the Connecticut Supreme Court explained the test as follows:

> The [**8] Commission has described the factors it considers in determining whether a practice that is neither in violation of the anti-trust laws nor deceptive is nevertheless unfair: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."

*Ivey, Barnum & O'Mara*, 190 Conn. 528, 539 n.13 (quoting *Sperry & Hutchinson*, 405 U.S. at 244 n.5 (quoting FTC 1964 Statement)). *See also Conaway*, 191 Conn. at 492-93.

Over the last twenty-four years, the cigarette rule has been cited in countless Connecticut state and federal cases. But, while Connecticut has almost uniformly applied the cigarette rule to analyze commercial unfairness claims, the legal underpinnings supporting this test have eroded. Specifically, in 1980, in response [**9] to Congressional inquiry, the FTC issued a Policy Statement on Unfairness which significantly modified the cigarette rule in favor of what has become known as the "substantial injury test." *See* FTC Policy Statement On Unfairness, Federal Trade Commission, Dec. 17, 1980, *available at* www.ftc.gov/bcp/policystmt/ad-unfair.htm (hereinafter "1980 FTC Policy Statement"). The 1980 FTC Policy Statement declared that "[u]njustified consumer injury is the primary focus of the FTC Act, and the most important part of the [cigarette rule]." *Id.* Consumer injury alone, therefore, can "be sufficient to warrant a finding of unfairness." *Id.*

[*5] The 1980 FTC Policy Statement further declared that in order for consumer injury to rise to the level of unfairness, it must satisfy a three-pronged test: (1) the injury must be substantial, (2) the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces, ***and*** (3) the injury must be one which consumers could not reasonably have avoided. *Id.* Finally, the 1980 Policy Statement explicitly disclaimed the second part of the cigarette rule - whether the conduct is [**10] immoral, unethical, oppressive, or unscrupulous - and de-emphasized and narrowed the public policy prong of the cigarette rule, permitting the consideration of only established public policy, and even then only to be considered along with all other evidence, ***not as an independent basis*** upon which to find a business practice unfair. *Id.* Thus, the new test significantly altered the standard of liability for "unfairness" by mandating a showing of substantial injury. n2

> n2 In 1994, Congress amended the FTC Act expressly to codify the substantial injury test as stated in the 1980 FTC Policy Statement. The amendment was codified at 15 U.S.C. § 45(n), which provides that "[t]he Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination."

[**11]

Although the FTC long ago abandoned the cigarette rule in favor of the substantial injury test, the Connecticut Supreme Court has continued to apply the cigarette rule to determine whether a business practice is "unfair" under CUTPA. However, both the Connecticut Supreme Court and this Court have recently questioned whether the cigarette rule should remain the appropriate test. Recognizing that "it is the intent of the legislature that in construing [CUTPA's unfairness provision], the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) [*6] of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended," Conn. Gen. Stat. § 42-110b(b), the Connecticut Supreme Court has suggested that the cigarette rule might be outdated.

For example, in *American Car Rental, Inc. v. Commissioner of Consumer Protection*, 273 Conn. 296, 305 n.6 (2005), the Connecticut Supreme Court, after quoting § 42-110b's "guided by" language, noted that "a serious question exists concerning whether the cigarette rule remains [**12] the guiding rule utilized by the federal trade commission." But, notwithstanding its concerns about applying a test subsequently disclaimed by federal authorities, the Connecticut Supreme Court was reluctant to consider the issue because it was not raised or briefed by either party. *See id.*

("[B]ecause neither party in the present case has raised or briefed this issue or asked us to reconsider our law in this area, it is appropriate that we wait until the issue has been squarely presented to us for determination.").

Twice more during that same term the Connecticut Supreme Court commented on the questionable vitality of the cigarette rule in adjudicating unfairness claims, but on both occasions refrained from deciding the issue because "neither party has raised or briefed this issue or asked [the Court] to reconsider [its] law in this area." *Votto v. Am. Car Rental,* 273 Conn. 478, 484 n.3 (2005). *See also Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 82 n.34 (2005) ("Because, in the present case, neither party has raised or briefed this issue, and both have briefed the issue applying the cigarette rule, we decline to address the issue of the [**13] viability of the cigarette rule until it squarely has been presented to us."). A year later, the Connecticut Supreme Court cited to *Glazer* for this same proposition, *Edmands v. Cuno, Inc.*, 277 Conn. 425, 450 n.16 (2006), and a few months later the District of Connecticut "follow[ed] the traditional cigarette rule," but only because the Connecticut Supreme Court refused to decide this pressing issue without the benefit [*7] of briefing and argument. *IndyMac Bank F.S.B. v. Reyad,* 2006 WL 2092621, at *5 n.8 (D. Conn. July 26, 2006).

Unlike in *American Car Rental, Votto, Glazer, Edmands* and *IndyMac*, the question whether the substantial injury test should replace the cigarette rule is squarely presented in the instant case, where plaintiffs' unfairness claim is premised exclusively on the first - and now deemphasized and narrowed - prong of the cigarette rule (a violation of public policy), and adopting the substantial injury test ***would likely prove dispositive.***

Plaintiffs' complaint alleges a CUTPA violation based exclusively on the first prong of the cigarette rule: a violation of public policy. Under the cigarette rule, [**14] a sufficiently strong showing of a violation of public policy could be sufficient to prove liability. *See e.g., Jacobs v. Healey Ford-Subaru, Inc.*, 231 Conn. 707, 725 (1995) ("All three criteria [of the cigarette rule] do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (citations omitted)). Thus, were the Connecticut Supreme Court to decide that Connecticut should not follow the FTC's lead and disclaim the cigarette rule in favor of the substantial injury test, plaintiffs would not be required to prove that defendants' actions caused a substantial injury.

Under the substantial injury test, however, plaintiffs would be required to prove (1) that they were substantially injured, (2) that such injury was not outweighed by the countervailing benefits to consumers or competition, ***and*** (3) that such injury could not have been reasonably avoided. Proof of a violation of public policy may be tangentially relevant, but certainly not dispositive. Thus, while plaintiffs might be able to establish liability under the cigarette [**15] rule solely by proving a violation of the steering statute and code of ethics regulation (as expressions [*8] of public policy), such proof would be insufficient to establish liability - and thus subject plaintiffs' theory to a dispositive motion - under the substantial injury test. n3

n3 Indeed, were the Supreme Court to adopt the substantial injury test, plaintiffs' complaint would fail to state a claim upon which relief may be granted. Therefore, defendants reserve their right to move to dismiss the complaint for failure to state a claim upon which relief may be granted pending certification to the Connecticut Supreme Court.

Moreover, as a practical matter, the question whether the substantial injury test is the proper standard for unfairness claims will also affect class and merits discovery, class certification briefing, and, of course, any trial on the merits in this action. For example, under the substantial injury test, the extent of each class member's injury is relevant not only to calculate [**16] damages, but to determine defendants' liability in the first instance, and, therefore, becomes crucial to the analysis of whether individual issues predominate. In addition, much of the merits discovery under the cigarette rule would likely focus on the question whether defendants violated the expressions of public policy cited in the complaint. *See* Compl. PP 17-22. As explained above, under the substantial injury test, the focus of discovery would necessarily

shift away from the policy implications of Progressive's practices, and towards an examination of the extent of plaintiffs' injuries, the extent of the countervailing benefits to consumers or competition resulting from Progressive's insurance practices, and whether the alleged injuries could have been reasonably avoided.

For these reasons, and because the Connecticut Supreme Court has repeatedly hinted at the cigarette rule's demise, certification is appropriate. Indeed, the United States Supreme Court has encouraged federal courts to certify such issues of state law because the procedure "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); [**17] *see also Cweklinsky v. Mobil Chem. Co.*, 297 F.3d 154, 160 (2d Cir. 2002) ("[T]he principles of federalism and comity demand that federal [*9] courts give a state's highest court the opportunity to determine state law authoritatively, if it wishes to do so."). Thus, courts in the Second Circuit have "long recognized that state courts should be accorded the first opportunity to decide significant issues of state law through the certification process." *Caruso v. Siemens Bus. Communications Sys. Inc.*, 392 F.3d 66, 71 (2d Cir. 2004) (per curiam) (citing *Parrot v. Guardian Life Ins. Co.*, 338 F.3d 140, 144 (2d Cir. 2003)); *accord Cweklinsky*, 297 F.3d at 160 (same) (citing *Great Northern Ins. Co. v. Mt. Vernon Fire Ins. Co.*, 143 F.3d 659, 662 (2d Cir. 1998)).

For the same reasons, Connecticut has adopted the Uniform Certification of Questions of Law Act ("Uniform Act"), which permits the Connecticut Supreme Court to answer a question of law certified to it by a court of the United States "if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no [**18] controlling appellate decision, constitutional provision or statute of this state." Conn. Gen. Stat. § 51-199b(d); *accord* Practice Book § 82-1 (same). Indeed, the very purpose of the Uniform Act was to "encourag[e] courts to certify questions of law in appropriate cases" and, thus, facilitate "the greater use of certification." UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 70 (1996).

Whether a question will be certified is committed to the sound discretion of the court, *see Lehman Bros.*, 416 U.S. at 391, and, in exercising such discretion, courts have considered several factors, including: (1) whether there is a definitive appellate decision on point; (2) whether the issue is one of importance to the state; (3) whether the issue implicates state policy concerns; and (4) whether the issue is likely to recur. *See, e.g.*, *Caruso*, 392 F.3d at 68, 71-72 (certifying proper interpretation of "physically disabled" requirement under the Connecticut Fair Employment Practices Act because its proper construction was "unsettled, important, . . . likely [*10] to recur, and . . . implicate[d] significant [**19] public policy considerations for Connecticut"); *Cweklinsky*, 297 F.3d at 156, 160-61 (certifying issue of whether compelled self-publication of defamation is a viable cause of action because Connecticut law did not provide sufficient guidance, the issue involved important policy considerations for the state, and the issue was likely to recur); *Old Republic Nat'l Title Ins. Co. v. Bank of East Asia Ltd*, 247 F. Supp. 2d 197, 199-200 (D. Conn. 2003) (certifying question of whether an insurer, acting as subrogee, can bring a legal malpractice claim against the insured's counsel because of the absence of clear precedent, the serious policy implications, and the profound impact the issue could have on countless real estate closings in Connecticut).

Here, each of those factors weighs heavily in favor of certifying the proposed question. First, given that the Connecticut Supreme Court itself has repeatedly questioned the continued validity of the cigarette rule, and has expressed a willingness to re-examine the standard for unfairness under CUTPA, n4 certification is "***particularly appropriate***" because "***the state's highest court has cast doubt*** [**20] ***on the scope or continued validity of one of its earlier holdings."*** Liriano v. Hobart Corp., 132 F.3d 124, 132 (2d Cir. 1998) (emphases added). n5

n4 As previously stated, the Connecticut Supreme Court has questioned whether the cigarette rule is still the governing standards on four occasions. *Edmands*, 277 Conn. at 450 n.16; *Glazer*, 274 Conn. at 82 n.34; *Votto*, 273 Conn. at 484 n.3; *Am. Car Rental, Inc.*, 273 Conn. at 305 n.6; *see also* ROBERT M. LANGER, JOHN T. MORGAN & DAVID L. BELT, 12 CONN. PRACTICE SERIES: CONNECTICUT UNFAIR TRADE PRACTICES § 2.2 n.66 & accompanying text (Supp. 2006) [attached as Ex. 1; hereinafter "LANGER,

> MORGAN & BELT"].
> n5 In *Liriano*, Judge Calabresi expressed the court's fear that, absent certification under such circumstances, "the danger . . . is that a party favored . . . by the weakened high court holding will seek federal jurisdiction with the knowledge that the federal courts, unlike the state's highest court, will feel virtually bound to follow these decisions." 132 F.3d at 132. The very same concern underlies Connecticut's adoption of the Uniform Act: "[F]aced with the difficult problem of ascertaining state law when there is no . . . definitive state appellate judicial decision on the matter, . . . federal courts have been forced to guess what the state court might rule if the precise issue of law were presented it," and such speculation has "worked to undermine the two major purposes of the *Erie* doctrine: that is, the 'discouragement of forum-shopping and the avoidance of inequitable administration of the laws.'" UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 68 (1996) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

[**21]

[*11] Second, it is also indisputable that the standard for unfairness is an issue of particular importance to Connecticut, and one likely to recur, because "Connecticut is 'the state with the most litigation-by far-concerning unfairness.'" David L. Belt, *The Standard For Determining "Unfair Acts Or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. BAR. J. 247, 250 (2006) (quoting Michael M. Greenfield, *Unfairness Under Section 5 Of The FTC Act And Its Impact On State Law*, 46 WAYNE L. REV. 1869, 1929 (2000)) [attached as Ex. 2; hereinafter "Belt"].

Third, because CUTPA itself does not set forth a standard for "unfair acts or practices," but, rather, directs Connecticut courts to be "guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), as from time to time amended," Conn. Gen. Stat. § 42-110b(b), the issue presented in this case is not one strictly of statutory construction, but involves the fundamental choice of whether Connecticut should follow the federal construction [**22] of unfairness or forge its own path-a choice that involves the resolution of a number of competing policy considerations. *See, e.g.*, LANGER, MORGAN & BELT at 9-10 (discussing competing policy concerns); Belt at 316-30 (same). As recently stated:

> Resolution of the questions concerning whether the Connecticut courts should abandon the Cigarette Rule standard, modify that standard or apply the current FTC standard for determining whether an act or practice is unfair fundamentally involves weighing the strength of the legislative directive to be guided by federal precedent interpreting the FTC Act against other considerations which indicate that the Cigarette Rule or some modification of it may be more appropriate for application to a state statute that places primary reliance on private litigation for its enforcement.

[*12] *Id.* at 329-30. Clearly, principles of federalism and comity demand that the Connecticut Supreme Court have the opportunity to consider and resolve these issues.

Finally, as discussed above, *see supra* at 7-8 & n.3, obtaining definitive guidance on the standard for unfairness is crucial at this juncture in this action because it will [**23] affect the scope of both class and merits discovery, dispositive motions, class certification, and, of course, any trial on the merits in this action. Proceeding without an understanding of something as fundamental as the standard for liability for the claims pursued by the plaintiffs would clearly result in an inefficient waste of time and resources for all parties and the Court. *See, e.g., Lehman Bros.*, 416 U.S. at 390-91 (noting that certification "in the long run save[s] time, energy, and resources").

For the foregoing reasons, defendants respectfully request that the Court certify the following question to the Connecticut Supreme Court:

> What is the legal standard for determining "unfair acts or practices" under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110b(a)?

**II. Plaintiffs' Second Cause of Action Should be Dismissed Because There is No Allegation that Defendants' Business Practices Are Deceptive**

The certified question will resolve the open issue of which test governs whether a business practice is unfair. Plaintiffs' complaint, however, alleges both that defendants' business practices [**24] are unfair, Compl. PP 31-36 (First Cause of Action), and that defendants' acts or practices are deceptive, Compl. PP 37-40 (Second Cause of Action). While a determination of the proper unfairness test is invaluable prior to continued litigation of plaintiffs' first cause of action, this Court need not await any guidance from the Connecticut Supreme Court prior to dismissing plaintiffs' second cause of action. This cause of action - asserting that defendants' acts "constitute deceptive acts or practice under CUTPA," Compl. P 38 - must be dismissed because the complaint contains no allegations capable of supporting the settled deception test.

[*13] **A. Standard of Review**

A Rule 12(b)(6) motion is properly granted where, viewing the allegations in the light most favorable to the plaintiffs, the complaint fails to state a claim upon which relief may be granted. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). [**25]

When ruling on a 12(b)(6) motion, the court must consider all well-pled allegations as true, *Albright v. Oliver*, 510 U.S. 266, 268 (1994), and "draw all inferences from those allegations in the light most favorable to the plaintiff," *United States v. Baylor Univ. Medical Center*, 469 F.3d 263, 267 (2d Cir. 2006) (citation omitted). However, "bald assertions and conclusions of law will not suffice," *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 344 (2d Cir. 2006) (citations omitted), and the Court need not accept legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

**B. The Complaint Does Not Allege That Defendants Engaged in Deceptive Business Practices**

The Connecticut Unfair Trade Practices Act prohibits both unfair and deceptive business practices. Conn. Gen. Stat. § 42-110b(a). There is a significant difference, however, between an "unfair" business practice, and a "deceptive" business practice. As this Court explained:

> A practice is ***unfair*** (1) if it offends public policy as it has been established by statues, [**26] the common law or otherwise, (2) if it is immoral, unethical, oppressive or unscrupulous, or (3) if it causes substantial injury to consumers. A practice is ***deceptive*** if it is a materially misleading representation, omission, or other practice that a consumer reasonably interpreted under the circumstances.

*Walsh v. Seaboard Surety Co.*, 94 F. Supp. 2d 205, 213 (D. Conn. 2000) (emphasis added) (internal citations omitted) (Eginton, J.). The seminal Connecticut Supreme Court case [*14] construing deceptive business practices set forth the following three-pronged test: "'First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material - that is, likely to affect consumer decisions or conduct.'" *Caldor, Inc. v. Heslin*, 215 Conn. 590, 597 (1990) (quoting *Matter of Figgie International, Inc.*, 107 F.T.C. 313, 374 (1986)).

Plaintiffs' second cause of action merely realleges the allegations in paragraphs 1 through 30 of the complaint, [**27] Compl. P 37, asserts that defendants' acts are deceptive, *id.* at P 38, and alleges damages, *id.* at PP 39, 40. Given these conclusory allegations, plaintiffs' second cause of action fails to state a claim upon which relief may be granted.

The allegations in paragraphs 1 through 30 of the complaint, realleged in the deception count, allege ***no*** facts capable of meeting the test set forth in *Caldor*. Specifically, the complaint contains no allegation that defendants made any false or misleading representation to either consumers or to plaintiffs themselves, nor does the complaint allege that there was an omission or any other practice likely to mislead any relevant economic actor. There is likewise no allegation that consumers or the plaintiffs themselves have interpreted any unspecified representation or omission reasonably. And, finally, there is no allegation that any unspecified representation or omission affected the decisions or conduct of either consumers or the plaintiffs. Thus, other than the bald-faced legal conclusion that "[t]he foregoing acts of Progressive constitute deceptive acts or practices under CUTPA," Compl. P 38 - which, of course, is insufficient [**28] to defeat a motion to dismiss, *see, e.g., Amron*, 464 F.3d at 344 - the complaint is devoid of any facts suggesting that consumers or plaintiffs were deceived.

[*15] In these situations, where a CUTPA count is alleged solely in conclusory terms, this Court has not hesitated to grant a motion to dismiss for failure to state a claim upon which relief may be granted. *See Omni Corp. v. Sonitrol Corp.*, 476 F. Supp. 2d 125, 129 (D. Conn. 2007); *Bepko v. St. Paul Fire & Marine Ins. Co.*, 2005 WL 3619253, at *5 (D. Conn. Nov. 10, 2005); *Keaney v. E. Computer Exch., Inc.*, 2004 WL 885100, at *1-*2 (D. Conn. April 21, 2004); *Martin v. Am. Equity Ins. Co.*, 185 F. Supp. 2d 162, 167-68 (D. Conn. 2002); *Pers. Fin. Servs., Inc. v. General Motors Acceptance Corp.*, 169 F. Supp. 2d 49, 54-56 (D. Conn. 2001); *Loda Agency, Inc. v. Nationwide Ins. Co.*, 2000 WL 1849865, at *3-*4 (D. Conn. Oct. 10, 2000). The same conclusion is compelled here, where plaintiffs' sole reference to deception is the factually unsupported assertion in P 38 that defendants' business practices constitute deceptive [**29] acts or practices. *See cf. Martin*, 185 F. Supp. 2d at 168 (dismissing a CUTPA count where plaintiff's allegation that defendant's actions were part of a general business practice was "set forth . . . in the most conclusory fashion, without any factual allegations" to support it); *Loda Agency*, 2000 WL 1849865 at *4 n.4 ("The CUTPA counts merely call the alleged breaches of contract 'immoral, oppressive and unscrupulous' without ever explaining how they can be so characterized."). Because plaintiffs alleged entitlement to the relief sought in the second cause of action is limited to "labels and conclusions," *Twombly*, 127 S. Ct. at 1965, dismissal is appropriate.

**III. All References to the Consent Decree Should Be Stricken From the Complaint Pursuant to Federal Rule of Civil Procedure 12(f)**

Federal Rule of Civil Procedure 12(f) provides that "[u]pon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. [**30] " Plaintiffs' [*16] complaint contains numerous references to an immaterial and prejudicial consent decree, and defendants respectfully request that the Court strike these references from the complaint.

This Court has often held that "motions to strike are disfavored and will not be granted routinely." *SEC v. Packetport.com, Inc.*, 2006 WL 2349452, at *5 (D. Conn. July 28, 2006). However, it is equally settled that "[i]n spite of this reluctance, allegations may be stricken if they have no real bearing on the case, will likely prejudice the movant, or where they have criminal overtones." *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 555 (S.D.N.Y. 2002). Allegations in a complaint are also properly struck where "no evidence in support of the allegation would be admissible." *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976).

One oft-cited allegation that cannot be used as evidence - and should therefore be stricken from a complaint - is any reference to a consent decree between a federal agency and a private corporation. *See id.* at 893-94. As the Second Circuit explained, "a consent [**31] judgment between a federal agency and a private corporation . . . is not the result of an actual adjudication of any of the issues. Consequently, it can not [sic] be used as evidence in subsequent litigation between that corporation and another party." *Id.* at 893. The Court further explained that consent decrees are immaterial because they are "the result of private bargaining, and there was no hearing or rulings or any form of decision on the merits by the district court." *Id.* at 894. *See also Gotlin v. Lederman*, 367 F. Supp. 2d 349, 363 (E.D.N.Y. 2005) ("[C]ourts hold that references in pleadings to agreements with state or federal agencies may properly be stricken on a Rule 12(f) motion."); *In Re Merrill Lynch & Co., Inc.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003) ("Second Circuit case law

makes it clear that references to preliminary steps in litigation and administrative proceedings that did not result in an adjudication on the merits or legal or [*17] permissible findings of fact are, as a matter of law, immaterial under Rule 12(f) of the Federal Rules of Civil Procedure. [**32] "). *Lipsky* and its progeny could not be clearer: a consent decree between a private party and the government, as alleged in plaintiffs' complaint, should be struck under Rule 12(f).

Furthermore, the consent decree is particularly immaterial and prejudicial in this case because (1) defendants were not signatories, (2) the consent decree is a private agreement, incapable of expressing any "public policy" under CUTPA, and (3) the consent decree involved fundamentally different conduct than alleged in the complaint.

First, the Department of Justice's case was brought only against the trade associations, not the insurance companies. *See United States v. Ass'n of Cas. and Surety Cos., Am. Mut. Ins. Alliance & the Nat'l Ass'n of Mut Cas. Cos.*, 1963 U.S. Dist. Lexis 9949 (S.D.N.Y. Nov. 27, 1963) [attached as Ex. 3]. Plaintiffs' complaint, however, ignores the actual parties named in the Department of Justice's complaint, and misleadingly suggests that defendants signed the consent decree. n6 *Lipsky* stated that a consent decree between the government and ***the defendant*** is properly struck pursuant to Fed. R. Civ. P. 12(f) [**33] . 551 F.2d at 894. Therefore, a consent decree between the government and a ***non-party*** should, *a fortiori*, be struck as well.

n6 For example, P 18 alleges that the Department of Justice brought an action against 265 insurance companies, and that the Department of Justice sought to enjoin the "named insurance companies" from engaging in certain acts. These statements are incorrect. The action was brought against three trade associations, not 265 insurance companies. Moreover, there were no "named" insurance companies, just the three named trade associations. Similarly, P 19 of the complaint incorrectly states that the suit was resolved by a consent decree "agreed to by the 265 insurance companies that were parties to the lawsuit." These patently inaccurate descriptions of the consent decree should be stricken from the complaint.

Second, plaintiffs cite to the consent decree as an expression of public policy in order to meet the first prong of the cigarette rule. However, unlike the [**34] Connecticut statute and regulation, *see* Compl. PP 20-22, the consent decree is not enacted or adopted by policymakers. Rather, as [*18] *Lipsky* notes, consent decrees between the government and private corporations are the "result of private bargaining," 551 F.2d at 894, rendering them more analogous to contracts than statutes or regulations. Indeed, the Connecticut Supreme Court has never held that such a consent decree constitutes the requisite expression of public policy capable of satisfying the first prong of the cigarette rule. Therefore, because the consent decree cannot state an expression of public policy, it has no relevance to this case and should be struck from the complaint.

Finally, the consent decree, signed by the Association of Casualty and Surety Companies, American Mutual Insurance Alliance, and the National Association of Mutual Casualty Companies, governed agreements amongst these three trade associations, whose membership comprised 265 competitors in the insurance industry. Plaintiffs' complaint, by contrast, asserts allegations against ***one*** insurance company's agreements with appraisers and repair shops. Stated in antitrust [**35] terms, the Department of Justice's suit against three trade associations was concerned with horizontal agreements amongst competitor insurance companies, while the instant complaint is concerned with vertical relationships between one insurance company and appraisers and repair shops.

Plaintiffs' reliance on the consent decree blurs the fundamental distinction between these two types of agreements. *See e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement firms at different levels of distribution as vertical restraints."). Yet, this distinction is critical, and is one of the most basic precepts of antitrust law because, [u]nlike agreements among rivals, vertical agreements are a customary and even indispensable part of the market system. They are not [*19] even presumptively 'suspect.'" AREEDA &

HOVENKAMP, ANTITRUST LAW P 1902d at 217 (2005).

In fact, the Supreme Court has gone to great lengths, on numerous occasions, to highlight the differing analyses governing vertical and horizontal [**36] agreements. Specifically, the Court has explained that while a particular agreement amongst competitors may constitute a *per se* violation of the antitrust laws, that same agreement between vertical firms would not be *per se* unlawful. *See e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-39 (1998). The varied analysis for vertical and horizontal restraints is grounded in the realization that vertical restrictions have the "potential for a simultaneous reduction of ***intrabrand*** competition and stimulation of ***intrabrand*** competition." *Continental T. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 (1977) (emphasis added). Because "[i]nterbrand competition . . . is the primary concern of antitrust law," *id.* at 52 n.19, the Court has been more lenient when considering vertical restraints, even recently ruling that vertical price fixing is no longer *per se* unlawful, *see Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

Thus, plaintiffs' contention that a consent decree condemning horizontal behavior amongst insurers is at all relevant to a single insurance company's [**37] agreements with preferred repair shops and in-house appraisers flies in the face of years of antitrust jurisprudence. Because the allegations in the complaint involve vertical agreements, plaintiffs cannot allege that such allegations violate public policy as expressed by a consent decree enjoining the continuation of horizontal agreements. Stated simply, the consent decree has no bearing on an individual [*20] insurance company's agreement with downstream entities (*i.e.*, appraisers and auto body repair shops). n7

> n7 The consent decree's limitation to horizontal agreements makes economic sense: if one insurance company's agreements with appraisers and auto body shops raised prices, consumers would simply switch to another insurance company. It is only when multiple insurance companies agree with each other - the conduct outlined in the 1963 consent decree - that consumer harm rears its head and public policy is offended.

Because the consent decree relates only to specific horizontal agreements in [**38] the insurance industry, it is irrelevant and immaterial to the instant complaint. In such situations, courts within this circuit properly strike such sections of the complaint pursuant to Rule 12(f). For example, in *Gotlin*, plaintiffs alleged that physicians and a hospital misleadingly marketed a cancer treatment program. 367 F. Supp. 2d at 352-53. In the complaint, plaintiffs included (1) the defendant-hospital's agreement to pay $ 45 million dollars (plus an additional $ 39 million in free services) to the New York Attorney General's Office to settle a prior Medicaid fraud case, and (2) that the Office of Inspector General of HHS had been investigating the defendant-hospital since 1996 for overstating the number of residents on staff. *Id.* 363. Because both the "[a]llegations about a Medicaid fraud case," and the "[a]llegations about investigations of misrepresentations regarding the number of [hospital] medical residents," were irrelevant to the action, they were properly struck under Rule 12(f). *Id. Gotlin* is directly on point here, where the prior government action dealt with horizontal agreements amongst competitors, which has no bearing [**39] on defendants' unilateral behavior in the instant action. As such, any reference to the Consent Decree in the Complaint should be struck under the same rationale as in *Gotlin*.

**IV. Conclusion**

For the foregoing reasons, defendants respectfully request that the Court certify the question regarding the proper unfairness test to the Connecticut Supreme Court. Defendants also [*21] respectfully request that the Court dismiss plaintiffs' second cause of action on the ground that the complaint asserts no allegations of deceptive conduct, and strike all references to the immaterial and prejudicial 1963 Department of Justice consent decree.

DEFENDANTS
PROGRESSIVE CASUALTY INSURANCE COMPANY

PROGRESSIVE DIRECT INSURANCE COMPANY

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[SEE CERTIFICATION REQUEST IN ORIGINAL]

[SEE ORDER IN ORIGINAL]

**Certificate of Service** [**40]

I hereby certify that, on September 28, 2007, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Seth L. Huttner

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A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of Themselves and all Others Similarly Situated, Plaintiffs, - against - PROGRESSIVE CASUALTY INSURANCE COMPANY and PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No. 3:07 cv 0929 (WWE)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Pleadings 929; 2007 U.S. Dist. Ct. Pleadings LEXIS 7347

November 16, 2007

Amendment to Pleadings

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s)

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**TITLE: AMENDED COMPLAINT**

**TEXT: I. INTRODUCTION**

1. This class action is brought by plaintiffs A&R Body Specialty, Skrip's Auto Body, Family Garage and the Auto Body Association of Connecticut ("ABAC"), by their attorneys, on behalf of themselves and all other licensed auto body repairers in the State of Connecticut who have performed repairs during the class period for any person with automobile insurance underwritten and/or administered by Progressive Casualty Insurance Company and Progressive Direct Insurance Company (collectively "Progressive" or the "Company"). Plaintiffs seek to recover for the harm caused by Progressive in its consistent pattern of [*2] unfair and deceptive acts and practices in commerce within the State of

Connecticut.

2. Progressive is a major nationwide insurer selling automobile insurance to thousands of Connecticut residents. In order to extract enormous profits from the automobile insurance programs in the State of Connecticut, Progressive has instituted and managed a program of direct repair shops and in-house, non-independent appraisers, in order to illegally suppress labor rates paid to auto body repair shops and to illegally steer its insureds to a network of preferred body shops that it controls. This conduct has caused very substantial damages to the class of hardworking, highly skilled, auto body repair shops that are trying to earn an honest living in their industry. Plaintiffs seek recovery under the Connecticut Unfair Trade Practices Act ("CUTPA") (Counts I and II) and for Unjust Enrichment (Count III). Plaintiffs also seek injunctive relief (Count IV).

**II. JURISDICTION AND VENUE**

3. This Court has jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). Jurisdiction is proper because (1) the claims of all Plaintiffs, aggregated together, exceed [*3] $ 5,000,000 and (2) the Plaintiffs and the Defendants are citizens of different states. 28 U.S.C. § 1332(d)(2).

4. Venue is proper in this Court under 28 U.S.C. § 1391(a) because the Plaintiffs and the members of the putative class reside in the District of Connecticut and a substantial part of the events or omissions giving rise to the claims occurred in this District.

**III. THE PARTIES**

5. Plaintiff A&R Body Specialty ("A&R") is a Connecticut corporation with its principal place of business at 151 North Plains Industrial Road, Wallingford, Connecticut 06420. A&R is licensed to perform automobile physical damage repairs in the State of Connecticut. A&R has performed automobile physical damage repairs on damaged automobiles insured under Progressive policies and has been paid unreasonably low labor rates by Progressive. In addition, Progressive has improperly steered business away from A&R.

6. Plaintiff Skrip's Auto Body ("Skrip's") is a Connecticut corporation with its principal place of business at 104 Cheshire Road, Prospect, Connecticut 06712. Skrip's is licensed to perform automobile physical damage repairs in the State [*4] of Connecticut. Skrip's has performed automobile physical damage repairs on damaged automobiles insured under Progressive policies and has been paid unreasonably low labor rates by Progressive. In addition, Progressive has improperly steered business away from Skrip's.

7. Plaintiff Family Garage ("FG") is a Connecticut corporation with its principal place of business at 88 North Avenue, Bridgeport, Connecticut, 06606. FG is licensed to perform automobile physical damage repair in the State of Connecticut. Family Garage has performed automobile physical damage repairs on damaged automobiles insured under Progressive policies and has been paid unreasonably low labor rates by Progressive. In addition, Progressive has improperly steered business away from Family Garage.

8. Plaintiff Auto Body Association of Connecticut ("ABAC") is a not-for-profit association of auto body shops, located at 2111 Dixwell Avenue, Hamden, Connecticut 06514. It is comprised of over one hundred automobile physical damage repair shops in the State of Connecticut. The ABAC is a statewide trade association of professionals dedicated to the advancement of the collision repair industry. The ABAC limits its claim [*5] to the injunctive relief requested in Count IV below.

9. Defendant Progressive is a Connecticut licensed insurer with corporate offices in Mayfield Heights, Ohio. Progressive is in the business of, among other things, underwriting and issuing automobile insurance policies in the state of Connecticut to Connecticut residents.

**IV. The Nature Of Progressive's Unlawful Conduct**

**A. Steering And Setting Of Unfair Labor Rates**

10. Through a consistent and continuous course of conduct for more than a decade, Progressive has instituted and utilized a program of direct repair program shops ("DRPs"), in-house appraisers and claims handlers to suppress the labor rates paid for auto body repair in the State of Connecticut and to steer its insureds to its DRPs where it exerts greater control over the entire repair process.

11. DRPs have a direct, contractual relationship with Progressive to perform automobile damage repair by referral from Progressive under strict conditions set by Progressive. One of the principal conditions is that DRPs agree to work at labor rates set by Progressive which are well below the reasonable labor rates posted by auto repair shops in the State of [*6] Connecticut.

12. When Progressive's insureds require automobile damage repair, Progressive engages in a pervasive and strictly enforced policy and practice of steering these insureds to Progressive's direct repair shops and appraisers it favors and/or controls. Its employees field calls from Progressive insureds and direct them to a DRP through Progressive's "Concierge" Program. Progressive uses its position of power over its insureds, in the form of incentives and requirements, to carry out its program of steering.

13. Progressive employees tell insureds, among other things, that Progressive does not do business with a non-DRP shop, that a claim may not get paid if done at another shop, that it is "easier" to have the car repaired at one of its shops, that the insured can receive free towing if the vehicle is brought to a DRP shop, that the insured can receive a discount off of his or her deductible by using a DRP shop, and that it will not guarantee work done at a non-DRP shop, but will guarantee the work at its DRP shops for the life of the vehicle.

14. Progressive requires its insureds to have all damage inspected and assessed by appraisers employed by Progressive. These appraisers [*7] are not independent; their appraisal content and practices are monitored and controlled by Progressive.

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16. The appraisers employed by Progressive are prohibited by Progressive from approving labor rates for auto repairs that are above the artificially low rates imposed by Progressive. The labor rate cap illegally imposed by Progressive for auto body repair is presently approximately $ 44-46 per hour. By contrast, the average posted labor rates for auto body repair work not covered by insurance is in excess of $ 70 an hour, which represents the fair market value of the services performed by auto body repair shops in the State of Connecticut.

17. Defendants represented to plaintiffs and members of the putative class that they pay labor rates constituting fair market rates, while at all times knowing that [*8] said rates result from insurer pressure, are well below posted labor rates for work not covered by insurance, and are not reasonable rates for the State of Connecticut.

18. Defendants represented to plaintiffs and members of the putative class that their appraisers produce fair and unbiased appraisals, when in fact defendants prohibit the use of independent appraisers, set strict parameters for their appraisers to follow, and dictate the labor rates to be used by their appraisers, even where the appraisers do not consider said rates to be fair and reasonable for the State of Connecticut.

19. While defendants contend that there are supposedly legitimate reasons for requiring their insureds to have their automobiles appraised and repaired at Progressive selected shops, the principal reason is corporate greed, and

Progressive's overriding objective to enhance corporate profit.

**B. The Federal Consent Decree and State Laws and Regulations**

20. For more than forty years public policy, as expressed in the form of state statute and regulations, and federal consent decree, have prohibited attempts by the insurance industry to illegally fix and control the content of appraisals for [*9] damage to automobiles, as well as the costs for repairs to those vehicles, through such illegal practices as steering and suppression of labor rates.

21. In 1963, the United States Justice Department brought an action seeking to enjoin insurance companies from fixing, establishing, maintaining or otherwise controlling the prices to be paid for the appraisal of damage, or to be charged by shops for repair.

22. The suit was resolved prior to trial through entry of a Consent Decree by the major insurance industry trade associations, whose members included approximately 265 insurance companies, that extended to "all other persons in active concert or participation with any defendant. *See United States v. Association of Casualty and Surety Companies, American Mutual Insurance Alliance and the National Association of Mutual Casualty Companies,* 1963 U.S. Dist. LEXIS 9949 (SDNY) ("Consent Decree"). The Consent Decree provided as follows:

> (A) Each defendant is enjoined from placing into effect any plan, program, or practice which has the purpose or effect of
>
> > (1) sponsoring, endorsing or otherwise recommending any appraiser of damage to automobile vehicles; [*10]
> >
> > (2) directing, advising or otherwise suggesting that any person or firm do business or refuse to do business with (a) any appraiser of damage to automotive vehicles with respect to the appraisal of such damage, or (b) any independent or dealer franchised repair shop with respect to the repair of damage to automotive vehicles;
> >
> > (3) exercising any control over the activities of any appraiser of damage to automotive vehicles;
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> > (4) allocating or dividing customers, territories, markets or business among any appraisers of damage to automotive vehicles;
> >
> > (5) fixing, establishing, maintaining or otherwise controlling the prices to be paid for the appraisal of damage to automotive vehicles, or to be charged by independent or dealer franchised automotive repair shops for the repair of damage to automotive vehicles or for replacement parts or labor in connection therewith, whether by coercion, boycott, or intimidation or by the use of flat rate or parts manuals or otherwise.

23. Statute and regulations of the State of Connecticut are consistent with the Consent Decree, and are designed to prevent insurance companies from forcing their policy holders to use specific appraisers [*11] or auto body repair shops to repair damage to automobiles within the State of Connecticut. The purpose of these laws is to (a) allow insureds the opportunity to select auto repair facilities and appraisers without being pressured by insurance carriers which have a conflict between their interests in paying as little as possible for repairs and those of their policy holders to obtain reasonable, appropriate, quality repairs, and (b) to provide a level playing field for auto body repairers to compete for business without unfair interference by insurance carriers.

24. Connecticut General Statute §§ 38a-354, originally enacted in 1958 as C.G.S. §38-175u, specifically prohibits

automobile appraisers and insurers from steering policy holders to specific auto body repair shops when there is damage to their vehicles, as follows:

> (a) No automobile physical damage appraiser shall require that appraisals or repairs should or should not be made in a specified facility or repair shops or shop.
>
> (b) No insurance company doing business in this state, or agent or adjuster for such company shall require any insured to use a specific person for the provision of [*12] automobile physical damage repairs, automobile glass replacement, glass repair services or glass products unless otherwise agreed to in writing by the insured.

25. Connecticut State Regulations on the Conduct of Motor Vehicle Physical Damage Appraisers, specifically, § 38a-790-8, "Code of Ethics," further requires that appraisers be independent and free of interference and influence of insurance companies, stating, in relevant part that every appraiser shall "...(2) approach the appraisal of damaged property without...favoritism toward any party involved in order to make fair and impartial appraisals," that he/she must "(3) disregard any efforts on the part of others to influence his judgment in the interest of the parties involved," and that he/she shall "(4) prepare an independent appraisal of damage." (emphasis added)

**V. Class Action Allegations**

26. Pursuant to Federal Rule of Civil Procedure 23 and Conn. Gen. Stat. §42-110g, plaintiffs bring this action on behalf of themselves and all other persons and/or entities licensed to perform automobile physical damage repairs in the State of Connecticut [*13] who have performed at least one auto body repair for a Progressive insured from inception of its direct repair program to present.

27. The Class is so numerous that joinder of all members is impracticable. There are approximately 750 persons and/or entities licensed to perform automobile physical damage repairs in the State of Connecticut.

28. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether Progressive's conduct improperly suppressed hourly labor rates for reimbursement to non-DRPs, including plaintiffs and members of plaintiffs' class;

b. whether Progressive improperly steered its policy holders to repair shops and appraisers favored and/or controlled by Progressive, including Direct Repair Providers and in-house appraisers;

c. whether Progressive violated C.G.S. §§ 38a-354;

d. whether Progressive violated the public policy set forth in the Consent Decree;

e. whether Progressive violated the Connecticut Unfair Trade Practices Act, C.G.S. §42-110b *et seq.* ("CUTPA");

f. whether the members of the [*14] class were harmed as a result of Progressive's improper conduct; and

g. whether Progressive has been unjustly enriched by its actions as alleged herein.

29. Plaintiffs are members of the Class. They are auto body repair shops that are licensed to perform automobile physical damage repairs in the State of Connecticut who have been damaged by Progressive's steering of its insureds and through Progressive's suppression of labor rates it will pay to non-DRPs below reasonable market rates.

30. Plaintiffs' claims are typical of the claims of the Class, and plaintiffs have the same interests as the other Class

members.

31. Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have retained qualified counsel with extensive experience in class action litigation. The interests of the plaintiffs are coincident with, and not antagonistic to, the interests of the other Class members.

32. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

33. A class action is superior to other available methods for [*15] the fair and efficient adjudication of this controversy because joinder of all Class members is impracticable. Moreover, since the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it impossible for the members of the Class individually to redress the wrongs done to them. The Class is readily definable, and prosecution of this action as a class action will eliminate the possibility of repetitious litigation. There will be no difficulty in the management of this action as a class action.

**FIRST CAUSE OF ACTION**

**(Violation Of The Connecticut Unfair Trade Practices Act - Unfair Practices)**

34. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 33 of the complaint as if fully set forth herein.

35. Progressive has for many years continuously and systematically violated the public policy set forth in the Consent Decree and Connecticut State law by:

a. artificially suppressing labor rates paid to non-DRP shops, including plaintiffs and members of plaintiffs' class, below reasonable market rates;

b. facilitating the suppression of labor rates by prohibiting the use of independent [*16] appraisers;

c. requiring its appraisers to write appraisals at labor rates set by Progressive; and

d. improperly steering its policy holders to repair shops and appraisers favored and/or controlled by Progressive, including DRPs and in-house appraisers that utilize labor and other rates well below reasonable market rates.

36. Said practices are immoral, unethical, oppressive and/or unscrupulous.

37. By virtue of the foregoing unfair methods of competition in the conduct of trade or commerce, plaintiffs and the members of the Class have been substantially injured. In particular, plaintiffs and members of the Class have lost considerable business and income because they have been paid labor rates for repair work for Progressive insureds well below reasonable market rates, and large numbers of Progressive's policy holders have been improperly steered by Progressive's practices to repair shops and appraisers approved and controlled by Progressive.

38. The substantial injury to plaintiffs arises from the inherent conflict of interest between defendants' obligation to its insureds to pay for quality auto body repairs, and its overriding interest in managing its repair program to earn [*17] the largest possible profit. In placing disproportionate emphasis on corporate profit through it's unlawful practices, defendant improperly injured the ability of insureds to obtain quality repairs at the repair shop of their choice, and the ability of the plaintiffs and members of the class to earn a reasonable hourly labor rate. The substantial injury to plaintiffs and members of the putative class outweigh any conceivable benefit to the public from defendants' unfair practices and could not reasonably have been avoided.

39. The foregoing acts of Progressive constitute unfair business practices under CUTPA, C.G.S. § 42-110b(a).

40. Defendants' conduct as alleged in this cause of action was an intentional and wanton violation of plaintiffs' rights and the rights of the members of the Class, or was done with a reckless indifference to those rights.

41. As a result of defendants' unfair business practices, plaintiffs and the members of the Class have suffered ascertainable loss and substantial money damages.

**SECOND CAUSE OF ACTION**

**(Violation Of The Connecticut Unfair Trade Practices Act - Deceptive Practices)**

42. Plaintiffs repeat and reallege the allegations [*18] in paragraphs 1 through 41 of the complaint as if fully set forth herein.

43. Defendants represented to plaintiffs and members of the putative class that they pay labor rates constituting fair market rates, while at all times knowing that said rates result from insurer pressure, are well below posted labor rates for work not covered by insurance, and are not reasonable rates for the State of Connecticut.

44. Defendants represented to plaintiffs and members of the putative class that their appraisers produce fair and unbiased appraisals, when in fact defendants prohibit the use of independent appraisers, set strict parameters for their appraisers to follow, and dictate the labor rates to be used by its appraisers, even where the appraisers do not consider said rates to be fair and reasonable for the State of Connecticut.

45. Defendants' conduct and statements were designed to mislead and manipulate both plaintiffs and members of the putative class for the principal purpose of increasing corporate profit.

46. Defendants' misrepresentations, omissions and other acts were material to defendants' conduct of business with plaintiffs and members of the putative class, who interpreted [*19] said statements, omissions and acts reasonably.

47. The foregoing acts of Progressive constitute deceptive acts or practices under CUTPA, C.G.S. § 42-110b(a).

48. Defendants' conduct as alleged in this cause of action was an intentional and wanton violation of plaintiffs' rights and the rights of members of the Class, or was done with reckless indifference to those rights.

49. As a result of defendants' conduct, plaintiffs and the members of the Class have suffered ascertainable loss and substantial money damages.

**THIRD CAUSE OF ACTION**

**(Unjust Enrichment)**

50. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 49 of the complaint as if fully set forth herein.

51. As a result of Progressive's unfair, deceptive and unlawful conduct, as described herein, Progressive has been unjustly enriched by retaining monies it improperly failed to pay to plaintiffs and members of the putative class for auto body repairs.

52. Progressive is not entitled to keep the monies improperly retained through its practice of suppressing labor rates and steering its insureds to DRP shops.

53. Plaintiffs and the Class seek an order of restitution from Progressive [*20] and request an order of this Court to Progressive requiring it to disgorge all profits and other compensation retained by Progressive as a result of its wrongful conduct, plus attorney's fees, expert's fees, interest, expenses, disbursements and costs.

**FOURTH CAUSE OF ACTION**

**(Injunctive Relief)**

54. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 53 of the complaint as if fully set forth herein.

55. The aforesaid acts of Progressive violate public policy as expressed in the Consent Decree, the laws of the State of Connecticut, the Connecticut Unfair Trade Practices Act, and the Connecticut Unfair Insurance Practices Act. These unlawful acts will continue unless this Court orders that such acts be enjoined.

56. Accordingly, plaintiffs and the Class seek an Order from this Court that all acts committed by Progressive which may be found in violation of Connecticut law, the Consent Decree, CUTPA and the common law be temporarily and permanently enjoined.

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury on behalf of themselves and the members of the class as defined herein on all claims so triable.

**PRAYER FOR RELIEF** [*21]

WHEREFORE, plaintiffs, on behalf of themselves and on behalf of the members of the putative class, pray for judgment and relief as follows:

A. As soon as practicable, an order certifying that the action may be maintained as a class action, pursuant to Federal Rules Of Civil Procedure 23 and C.G.S. § 42-110g(b);

B. Compensatory damages pursuant to C.G.S. §§ 42-110g(a);

C. Disgorgement of all profits, benefits, and other compensation received or obtained by Progressive as a result of its wrongful conduct;

D. Punitive damages pursuant to C.G.S. § 42-110g(a), 52-240(b), and common law;

E. An award of plaintiffs reasonable attorney's fees, expert's fees, costs and expenses incurred in connection with this suit pursuant to C.G.S. §§ 42-110g(d) and/or 52-240(a) and/or common law; and

F. The granting under Count IV of a temporary and permanent injunction pursuant to C.G.S. § 42-110g(d) against Progressive's continued violation of the Consent Decree, Connecticut Anti-Steering Law, C.G.S. § 38a-354, Connecticut State Regulations on the Conduct of Motor Vehicle Physical Damage Appraisers § 38a-790-8, the Connecticut Unfair Trade Practices [*22] Act and the Connecticut Unfair Insurance Practices Act.

G. Such other and further legal and equitable relief as the Court deems just and proper.

THE PLAINTIFFS

By: /s/ [Signature]
David A. Slossberg [ct13116]
Allison M. Murray [ct27241]
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CERTIFICATE OF SERVICE

This is to certify that on November 16, 2007, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to all parties that are unable to accept electronic filing. Parties may access this filing through the Court's electronic system.

Copies to:

Kevin [*23] M. Smith, Esq.
Shaun Sullivan, Esq.
Seth Huttner, Esq.
Robert Langer, Esq.
Wiggin & Dana LLP
265 Church Street
New Haven, CT 06510

/s/ [Signature]
David A. Slossberg

8 of 8 DOCUMENTS

View Original Source Image of This Document

A&R BODY SPECIALTY, SKRIP'S AUTO BODY, FAMILY GARAGE and THE AUTO BODY ASSOCIATION OF CONNECTICUT on Behalf of Themselves and all Others Similarly Situated, Plaintiffs, - against - PROGRESSIVE INSURANCE GROUP COMPANY, PROGRESSIVE NORTHEAST INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY, Defendants.

Civil Action No .3:07CV929 WWE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2007 U.S. Dist. Ct. Pleadings 866810; 2007 U.S. Dist. Ct. Pleadings LEXIS 22857

June 13, 2007

Complaint

**COUNSEL:** [*1] David A. Slossberg [ct13116], Allison M. Murray [ct27241], HURWITZ, SAGARIN, SLOSSBERG & KNUFF, LLC Milford, CT, Juris No. 26616, Alan Neigher [ct00134], Sheryle Levine [ct04388], BYELAS & NEIGHER, Westport, CT, Robert J. Berg, Ronald J. Aranoff, BERNSTEIN LIEBHARD & LIFSHITZ, LLP, New York, NY.

**TITLE: COMPLAINT**

**TEXT: I. INTRODUCTION**

1. This class action is brought by plaintiffs A&R Body Specialty, Skrip's Auto Body, Family Garage and the Auto Body Association of Connecticut ("ABAC"), by their attorneys, on behalf of themselves and all other licensed auto body repairers in the State of Connecticut who have performed repairs during the class period for any person with automobile insurance from Progressive Insurance Group, Progressive Northeast Insurance Company, Progressive Casualty Insurance Company, Progressive Direct Insurance Company (collectively "Progressive" or the "Company"). Plaintiffs seek to recover for the harm caused by Progressive in its consistent pattern of unfair and deceptive acts and practices in commerce within the State of Connecticut.

2. Progressive is a major nationwide insurer selling automobile insurance to thousands of Connecticut [*2] residents. In order to extract enormous profits from the automobile insurance programs in the State of Connecticut, Progressive has instituted and managed a program of direct repair shops and in-house, non-independent appraisers, in order to illegally suppress labor rates paid to auto body repair shops and to illegally steer its insureds to a network of preferred body shops that it controls. This conduct has caused very substantial damages to the class of hardworking, highly skilled, auto body repair shops that are trying to earn an honest living in their industry. Plaintiffs seek recovery

under the Connecticut Unfair Trade Practices Act ("CUTPA") (Counts I and II) and for Unjust Enrichment (Count III). Plaintiffs also seek injunctive relief (Count IV).

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4. Venue is proper in this Court under 28 U.S.C. § 1391(a) [*3] because the Plaintiffs and the members of the putative class reside in the District of Connecticut and a substantial part of the events or omissions giving rise to the claims occurred in this District.

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17. For more than forty years, both federal and state public policy, expressed in the form of consent decree, statute and regulations, have prohibited attempts by the insurance industry to illegally fix and control the costs of appraisals for damage to automobiles, as well as the costs for repairs to those vehicles, through such illegal practices [*8] as steering and suppression of labor rates.

18. In 1963, the United States Justice Department brought an action against 265 insurance companies, seeking to enjoin the named insurance companies from fixing, establishing, maintaining or otherwise controlling the prices to be paid for the appraisal of damage, or to be charged by shops for repair.

19. The suit was resolved prior to trial through entry of a Consent Decree, agreed to by the 265 insurance companies that were parties to the lawsuit. *See United States v. Association of Casualty and Surety Companies, American Mutual Insurance Alliance and the National Association of Mutual Casualty Companies*, 1963 U.S. Dist. Lexis 9949 (SDNY) ("Consent Decree"). The Consent Decree provided as follows:

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The Consent Decree became established public policy in Connecticut and throughout the United States

20. The State of Connecticut has enacted laws consistent with the Consent Decree designed to prevent insurance companies from forcing their policy holders to use specific appraisers or auto body repair shops to repair damage to automobiles within the State of Connecticut. The purpose of these [*10] laws is to (a) allow insureds the opportunity to select auto repair facilities without being pressured by insurance carriers which have a conflict between their interests in paying as little as possible for repairs and those of their policy holders to obtain reasonable, appropriate, quality repairs, and (b) to provide a level playing field for auto body repairers to compete for business without unfair interference by insurance carriers.

21. Connecticut General Statute §§ 38a-354, originally enacted in 1958 as C.G.S. § 38-175u, specifically prohibits automobile appraisers and insurers from steering policy holders to specific auto body repair shops when there is damage to their vehicles, as follows:

> (a) No automobile physical damage appraiser shall require that appraisals or repairs should or should not be made in a specified facility or repair shops or shop.
>
> (b) No insurance company doing business in this state, or agent or adjuster for such company shall require any insured to use a specific person for the provision of automobile physical damage repairs, automobile glass replacement, glass repair services or glass products unless otherwise agreed [*11] to in writing by the insured.

22. Connecticut State Regulations on the Conduct of Motor Vehicle Physical Damage Appraisers, specifically, § 38a-790-8, "Code of Ethics," further requires that appraisers be independent and free of interference and influence of insurance companies, stating, in relevant part that every appraiser shall "...(2) approach the appraisal of damaged property without...favoritism toward any party involved in order to make fair and impartial appraisals," that he/she must "(3) disregard any efforts on the part of others to influence his judgment in the interest of the parties involved," and that he/she shall "(4) prepare an independent appraisal of damage." (emphasis added)

**V. Class Action Allegations**

23. Pursuant to Federal Rule of Civil Procedure 23 and Conn. Gen. Stat. § 42-110g, plaintiffs bring this action on behalf of themselves and all other persons and/or entities licensed to perform automobile physical damage repairs in the

State of Connecticut who have performed at least one auto body repair for a Progressive insured from inception of its direct repair program to [*12] present.

24. The Class is so numerous that joinder of all members is impracticable. There are approximately 750 persons and/or entities licensed to perform automobile physical damage repairs in the State of Connecticut.

25. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether Progressive's conduct improperly suppressed hourly labor rates for reimbursement to non-DRPs, including plaintiffs and members of plaintiffs' class;

b. whether Progressive improperly steered its policy holders to repair shops favored by Progressive, including Direct Repair Providers;

c. whether Progressive violated C.G.S. §§ 38a-354;

d. whether Progressive violated the public policy set forth in the Consent Decree;

e. whether Progressive violated the Connecticut Unfair Insurance Practices Act, C.G.S. § 38a-815, *et seq.* ("CUIPA");

f. whether Progressive violated the Connecticut Unfair Trade Practices Act, C.G.S. § 42-110b *et seq.* ("CUTPA");

g. whether the members of the class were harmed as a result of Progressive's improper [*13] conduct; and

h. whether Progressive has been unjustly enriched by its actions as alleged herein.

26. Plaintiffs are members of the Class. They are auto body repair shops that are licensed to perform automobile physical damage repairs in the State of Connecticut who have been damaged by Progressive's steering of its insureds and through Progressive's suppression of labor rates it will pay to non-DRPs below reasonable market rates.

27. Plaintiffs' claims are typical of the claims of the Class, and plaintiffs have the same interests as the other Class members.

28. Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have retained qualified counsel with extensive experience in class action litigation. The interests of the plaintiffs are coincident with, and not antagonistic to, the interests of the other Class members.

29. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

30. A class action is superior to other available methods for the fair and efficient adjudication of this controversy [*14] because joinder of all Class members is impracticable. Moreover, since the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it impossible for the members of the Class individually to redress the wrongs done to them. The Class is readily definable, and prosecution of this action as a class action will eliminate the possibility of repetitious litigation. There will be no difficulty in the management of this action as a class action.

**FIRST CAUSE OF ACTION**

**(Violation Of The Connecticut Unfair Trade Practices Act - Unfair Practices)**

31. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 30 of the complaint as if fully set forth herein.

32. Progressive has for many years continuously and systematically violated the public policy set forth in the Consent Decree and Connecticut State law by:

a. artificially suppressing labor rates paid to non-DRP shops, including plaintiffs and members of plaintiffs' class, below reasonable market rates;

b. facilitating the suppression of labor rates by prohibiting the use of independent appraisers;

c. requiring its appraisers to write [*15] appraisals at labor rates set by Progressive; and

d. improperly steering its policy holders to repair shops favored by Progressive, including DRPs, that charge labor and other rates well below reasonable market rates.

33. Progressive, together with its adjusters, claims handlers and appraisers, have engaged in these acts with such frequency as to indicate a general business practice, and these acts constitute violations of the Connecticut Unfair Insurance Practices Act ("CUIPA"), C.G.S. § 38a-815 et seq.

34. The foregoing acts of Progressive constitute unfair business practices under CUTPA, C.G.S. § 42-110b(a).

35. By virtue of the foregoing unfair methods of competition in the conduct of trade or commerce, plaintiffs and the members of the Class have been substantially damaged. In particular, plaintiffs and members of the Class have lost considerable business and income because they have been paid labor rates for repair work for Progressive insureds well below reasonable market rates, and large numbers of Progressive's policy holders have been improperly steered by Progressive's practices to repair shops approved and controlled by Progressive.

36. As a result thereof, plaintiffs [*16] and the members of the Class have suffered ascertainable loss in the conduct of trade or business in Connecticut.

**SECOND CAUSE OF ACTION**

**(Violation Of The Connecticut Unfair Trade Practices Act - Deceptive Practices)**

37. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 30 of the complaint as if fully set forth herein.

38. The foregoing acts of Progressive constitute deceptive acts or practices under CUTPA, C.G.S. § 42-110b(a).

39. By virtue of the foregoing deceptive acts or practices in the conduct of trade or commerce, plaintiffs and the members of the Class have been substantially damaged. In particular, plaintiffs and members of the Class have lost considerable business and income because, (a) they have been paid labor rates for repair work for Progressive's insureds well below reasonable market rates, and (b) large numbers of Progressive's policy holders have been improperly steered by Progressive's practices to repair shops approved and controlled by Progressive.

40. As a result thereof, plaintiffs and the members of the Class have suffered ascertainable loss in the conduct of trade or business in Connecticut.

**THIRD CAUSE OF** [*17] **ACTION**

**(Unjust Enrichment)**

41. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 40 of the complaint as if fully set forth herein.

42. As a result of Progressive's unfair, deceptive and unlawful conduct, as described herein, Progressive has been unjustly enriched by retaining monies it improperly failed to pay to plaintiffs and members of the putative class for auto body repairs.

43. Progressive is not entitled to keep the monies improperly retained through its practice of suppressing labor rates and steering its insureds to DRP shops.

44. Plaintiffs and the Class seek an order of restitution from Progressive and request an order of this Court to Progressive requiring it to disgorge all profits and other compensation retained by Progressive as a result of its wrongful conduct, plus attorney's fees, expert's fees, interest, expenses, disbursements and costs.

**FOURTH CAUSE OF ACTION**

**(Injunctive Relief)**

45. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 44 of the complaint as if fully set forth herein.

46. The aforesaid acts of Progressive violate public policy as expressed in the Consent Decree, the laws [*18] of the State of Connecticut, the Connecticut Unfair Trade Practices Act, and the Connecticut Unfair Insurance Practices Act. These unlawful acts will continue unless this Court orders that such acts be enjoined.

47. Accordingly, plaintiffs and the Class seek an Order from this Court that all acts committed by Progressive which may be found in violation of Connecticut law, the Consent Decree, CUTPA and/or CUIPA, and the common law be temporarily and permanently enjoined.

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury on behalf of themselves and the members of the class as defined herein on all claims so triable.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiffs, on behalf of themselves and on behalf of the members of the putative class, pray for judgment and relief as follows:

A. As soon as practicable, an order certifying that the action may be maintained as a class action, pursuant to Federal Rules Of Civil Procedure 23 and C.G.S. § 42-110g(b);

B. Compensatory damages pursuant to C.G.S. §§ 42-110g(a);

C. Disgorgement of all profits, benefits, and other compensation received or obtained by Progressive as a result [*19] of its wrongful conduct;

D. Punitive damages pursuant to C.G.S. § 42-110g(a), 52-240(b), and common law;

E. An award of plaintiffs reasonable attorney's fees, expert's fees, costs and expenses incurred in connection with this suit pursuant to C.G.S. §§ 42-110g(d) and/or 52-240(a) and/or common law; and

F. The granting under Count IV of a temporary and permanent injunction pursuant to C.G.S. § 42-110g(d) against

Progressive's continued violation of the Consent Decree, Connecticut Anti-Steering Law, C.G.S. § 38a-354, Connecticut State Regulations on the Conduct of Motor Vehicle Physical Damage Appraisers § 38a-790-8, the Connecticut Unfair Trade Practices Act and the Connecticut Unfair Insurance Practices Act.

G. Such other and further legal and equitable relief as the Court deems just and proper.

THE PLAINTIFFS

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