So, What Do You Do Again: Why the Primary Line of Business Test under the Connecticut Unfair Trade Practices Act Is Unfair

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Note

“So, What Do You Do Again?”: Why the Primary Line of Business Test Under the Connecticut Unfair Trade Practices Act is “Unfair”

CASEY OLDEN

The Connecticut Unfair Trade Practices Act (CUTPA) is a valuable tool for the commercial litigator. However, because of the statute’s vast potential applicability, courts have historically imposed limitations on the definition of “trade or commerce.” One of these judicially created restrictions is the primary line of business test, which requires a plaintiff to demonstrate that the complained of conduct occurred in the defendant’s primary line of business and not within an incidental transaction. This enhanced standard serves a gatekeeping function, striking CUTPA claims before they are considered on the merits.

This Note argues that the Connecticut Supreme Court should finally address the primary line of business issue directly because the test has no basis in the statutory text or legislative history. In the course of evaluating this assertion, the primary line of business precedents are examined critically in a way that no reported decision has yet undertaken. The Note concludes by suggesting a strategy for ending the primary line of business inquiry while still honoring its policy goal to preclude the statute from becoming overly expansive.
NOTE CONTENTS

INTRODUCTION ............................................................................................................. 1331

I. THE PRIMARY LINE OF BUSINESS TEST & CUTPA’S STATUTORY SCHEME .................................................................................. 1332

II. COMMON-LAW DEVELOPMENT ............................................................................. 1334
   A. FEDERAL UNDERPINNINGS .............................................................................. 1334
   B. STATE PRECEDENT ......................................................................................... 1336
   C. McCANN’S FLAWS ......................................................................................... 1343

III. CUTPA & BREACH OF CONTRACT ..................................................................... 1352
   A. MERGING DOCTRINES ................................................................................. 1353
   B. CONSISTENCY WITH PRIOR CASES ............................................................. 1354
   C. PREVENTING UNFAIR RESULTS ................................................................. 1355

CONCLUSION ................................................................................................................. 1356
"So, What Do You Do Again?: Why the Primary Line of Business Test Under the Connecticut Unfair Trade Practices Act is "Unfair"

CASEY OLDEN*

INTRODUCTION

The Connecticut Unfair Trade Practices Act (CUTPA) was enacted in 1973 as the State's primary consumer protection law.1 The statute was modeled after the Federal Trade Commission Act (FTC Act); but unlike the FTC Act, CUTPA provides for both government enforcement and private rights of action.2 CUTPA is also unique in that it does not require evidence that the public at large suffered harm.3 The statute was designed to protect businesses as well as consumers, and thus it is often used as a weapon in purely private litigation.4 If individual litigants can demonstrate that they suffered an ascertainable loss of money or property,5 a wide array of

* University of Connecticut School of Law, J.D. Candidate 2017; University of South Carolina, B.S. 2014. I would like to thank Mr. Robert M. Langer, partner at Wiggin and Dana, for teaching an insightful course on state unfair trade practice laws. The topics explored in his class inspired this Note and provided necessary background knowledge. I would also like to thank the Honorable A. Susan Peck for exposing me to a variety of cases at Hartford Superior Court, as my experience as a legal intern motivated me to learn more about CUTPA. Finally, I would like to thank my family for their years of support. The views expressed in this Note are solely mine and should not be imputed to any other party.


2 Id.

3 See, e.g., Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1019 (Conn. 1995) ("We previously have stated in no uncertain terms that CUTPA imposes no requirement of a consumer relationship. . . . [W]e [have] concluded that 'CUTPA is not limited to conduct involving consumer injury' and that 'a competitor or other business person can maintain a CUTPA cause of action without showing consumer injury.'" (quoting McLaughlin Ford, Inc. v. Ford Motor Co., 473 A.2d 1185, 1190 (Conn. 1984))).

4 See LANGER ET AL., supra note 1, § 1.1, at 11, 11 n.75 (explaining how "CUTPA has become a staple of business litigation in Connecticut").

5 CONN. GEN. STAT. § 42-110g(a) (2016); see Serv. Rd. Corp. v. Quinn, 698 A.2d 258, 264–65 (Conn. 1997) ("We have never addressed the meaning of the phrase 'ascertainable loss' in a similar context, in which one business owner claims that another has engaged in an intentional unfair trade practice that has caused the first business to lose potential customers. Nevertheless, we conclude that, in the business context, a plaintiff asserting a CUTPA claim may satisfy the ascertainable loss requirement of § 42-110g by establishing, through a reasonable inference, or otherwise, that the defendant's unfair trade practice has caused the plaintiff to lose potential customers."); Hinchcliffe v. Am. Motors Corp., 440 A.2d 810, 814–15 (Conn. 1981) ("Under CUTPA, there is no need to allege or prove the amount of the ascertainable loss. . . . To satisfy the 'ascertainable loss' requirement, a plaintiff need prove only that he has purchased an item partially as a result of an unfair or deceptive practice or act and that the item is
damages become potentially available, including punitive damages, costs and reasonable attorneys' fees, and injunctive or other equitable relief.

Connecticut has the largest body of case law interpreting a state consumer protection statute in the country. CUTPA was intentionally written broadly to foster application of the statute to different categories of commercial transactions slowly over time. To accomplish this goal, courts have consistently recognized that CUTPA is "remedial" in nature and "must be liberally construed." Despite this sentiment, many courts have struggled with the potential sweeping coverage of the statute. As an example of this apprehension, the Connecticut Appellate Court adopted a "primary line of business" test as a prerequisite to maintaining a CUTPA action. This test requires the proponent of an action to prove that some alleged misconduct occurred within the suspected wrongdoer's primary trade or business, as opposed to within an incidental transaction.

Section I of this Note will demonstrate that the primary line of business test has no basis in CUTPA's statutory text or legislative history. Section II will trace the development of the primary line doctrine and argue that it is flawed. Section III will offer a suggestion for replacing the primary line of business test with a better standard. The suggested approach, if followed, will reduce ambiguity while remaining relatively consistent with precedent.

I. THE PRIMARY LINE OF BUSINESS TEST & CUTPA'S STATUTORY SCHEME

CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any

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6 Conn. Gen. Stat. § 42-110g(a), (d).
8 See Sportsmen's Boating Corp. v. Hensley, 474 A.2d 780, 786 (Conn. 1984) ("The Connecticut General Assembly deliberately chose not to define the scope of unfair or deceptive acts proscribed by CUTPA so that courts might develop a body of law responsive to the marketplace practices that actually generate such complaints.").
10 See, e.g., Nat'l Waste Assocs., LLC v. TD Bank, N.A., No. HHDX07CV106007649S, 2015 WL 7421335, at *9 (Conn. Super. Ct. Oct. 22, 2015) ("If the court were to credit the plaintiff's argument that a CUTPA claim could be brought against TD Bank simply because it produces garbage that has to be removed, then this plaintiff could bring a CUTPA cause of action against nearly any entity or person in the world because almost everybody produces some type of refuse.").
11 See McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc., 890 A.2d 140, 164 (Conn. App. Ct. 2006) ("We accordingly conclude that a CUTPA violation may not be alleged for activities that are incidental to an entity's primary trade or commerce.").
12 Id.
trade or commerce.”

A person is defined as any “natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, and any other legal entity,” while trade or commerce “means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.”

Connecticut courts use a three-prong test called the cigarette rule—a name taken from the FTC’s early attempt to regulate cigarettes—to determine if an act or practice is unfair, considering:

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—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 businesspersons].

The test is disjunctive, meaning unfairness can be established by proving one of the criteria conclusively or through the presence, to a lesser extent, of multiple factors.

It would seem apparent from the text of the statute that an action alleging an unfair act or practice can be brought against a “person” who is engaged in “any trade or commerce.” The statute does not qualify trade or commerce as “primary trade or commerce.” Rather, the statute expressly says “any” trade or commerce and the definition of trade or commerce is particularly broad. Additionally, CUTPA contains an express exemption
section, which noticeably fails to mention that the scope of the statute should be restricted to only conduct within a primary line of business. Nevertheless, the primary line of business test is firmly established as the law under CUTPA, despite the absence of statutory language or legislative history supporting the principle.

II. COMMON-LAW DEVELOPMENT

A. Federal Underpinnings

Having no basis in the statutory text, the primary line of business test is entirely a common-law creation. The origins of this judicially created limitation on the scope of CUTPA actually arise from three federal district court cases. The first, Colonial Motors, Inc. v. New York Design Group, Inc., is an unreported decision granting the defendant’s motion to dismiss a CUTPA claim brought against it by the plaintiff. The defendant had leased a 1985 Audi from the plaintiff, but was accused of defaulting on the lease agreement by failing to make payments, converting the automobile after failing to return it upon demand, and an unfair trade practice under CUTPA. The court assumed for the purposes of the motion that the alleged conversion of the vehicle was an unfair trade practice under CUTPA, yet nevertheless concluded that the plaintiff failed to establish that the challenged unfair act “occurred in the conduct of defendant’s ‘trade or commerce.’”

In reaching this result, the court framed the issue as “whether CUTPA encompasses a lessee-customer who leases one automobile for use in its office design business and then converts the automobile to its own use.” Despite quoting the exceptionally broad definition of “trade or commerce”

conduct related to any transaction in goods, services, or real property in the state,” if courts had not limited its application in certain situations).

20 CONN. GEN. STAT. § 42-110c.
21 See infra Section II.B (tracing the case law).
23 See Feen, 2000 WL 1398898, at *3 (reviewing the legislative history). In fact, the limitation on trade or commerce seems contrary to the legislature’s intention of CUTPA “be[ing] remedial and be[ing] so construed.” CONN. GEN. STAT. § 42-110b(d).
25 Id. slip op. at 6.
26 Id. at 1.
27 Id. at 3.
28 Id. at 3–4 (emphasis added).
found in Connecticut General Statutes Section 42-110a(4) and acknowledging that the defendant leased the vehicle for use in its business, the court found the fact that the defendant was not in the trade or business of leasing automobiles dispositive. The legal justification for this conclusion appears to derive from the lack of any Connecticut state court case at the time permitting a retailer to sue a customer for a violation of CUTPA.

The court in the second case, Arawana Mills Co. v. United Technologies Corp., relied exclusively on the holding in Colonial Motors to dismiss a CUTPA claim brought by a plaintiff-lessee against a defendant-lessee. In Arawana Mills, the defendant corporation overhauled and serviced jet engines on property it leased from the plaintiff. The plaintiff alleged that during this time the defendant significantly contaminated the soil and groundwater on the property by discharging hazardous chemicals. The plaintiff brought numerous environmental and common-law causes of action, including a CUTPA claim.

The defendant moved to dismiss the CUTPA count, arguing that it was only in the business of repairing aircraft engines and not in the trade of leasing property. Therefore, the defendant’s act of leasing property from the plaintiff was not conduct within their “trade or commerce.” The court, relying on Colonial Motors, agreed by stating: “Certainly, defendant’s act of leasing property from plaintiff is incidental to the conduct of its true business on the [p]roperty, the repair and servicing of aircraft engines.” Neither Colonial Motors nor Arawana Mills expressly uses the phrase “primary line of business,” but Arawana Mills is the first case to use the now-common word “incidental” when examining conduct that is not actionable under CUTPA.

Arawana Mills was later discussed and applied favorably in a third case.

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29 Id. at 3–5. The court clarified in a footnote that even if the plaintiff amended the complaint to add “that [the] defendant entered into the lease agreement in the course of its trade or business,” the decision would not turn out differently “because [the] defendant is not in the business of leasing automobiles.” Id. at 5.
30 Id. at 5–6. This fear of applying CUTPA in the reverse to a non-traditional situation makes a more influential appearance—albeit surreptitiously placed in a footnote—in the next case that further developed the primary line of commerce test. See Arawana Mills Co. v. United Techs. Corp., 795 F. Supp. 1238, 1252–53 n.14 (D. Conn. 1992) (emphasis in original) ("CUTPA is more likely aimed at the activities of lessors, since . . . . [i]t is fair to say that lessees are usually members of the ‘public’ and ‘consumers’ that CUTPA is meant to protect, rather than to regulate.").
32 Id. at 1252–53.
33 Id. at 1240.
34 Id. at 1240–41.
35 Id. at 1241–42.
36 Id. at 1252.
37 Id.
38 Id. at 1253 (emphasis added).
Cornerstone Realty, Inc. v. Dresser Rand Co. In Cornerstone Realty, the intended buyer of commercial property sued the prospective seller following a failed real estate transaction. The plaintiff alleged that the defendant violated CUTPA by engaging in a pattern of bad faith conduct in an "attempt to transfer environmentally contaminated properties to unsuspecting purchasers." After reviewing the facts in Arawana Mills, the court held that "[t]he CUTPA claim should be dismissed because the allegations cannot support a finding that [the defendant's] attempt to sell the Windsor property occurred in the conduct of its primary trade or commerce." The plaintiff advanced three arguments in an attempt to distinguish Arawana Mills. First, they argued that the defendant’s trade or commerce in Connecticut was only the sale of real estate, as the commercial property in question was no longer in operation. The court dismissed this argument by finding that the defendant had substantial manufacturing and industrial activities elsewhere, thus "[t]he sale of a manufacturing facility that is no longer in operation would therefore be incidental to [the defendant’s] business of manufacturing." The second argument related to this jurisdictional question, as the plaintiff tried to argue that the court should only consider activities taking place within Connecticut for purposes of evaluating a company’s primary trade or commerce—an argument that did not persuade the court. Finally, the plaintiff attempted to argue that limiting CUTPA to one’s primary trade or commerce was contrary to the legislative intent of liberally construing the statute in a remedial way. The court did acknowledge that it must predict how the Connecticut Supreme Court would rule on this issue. However, after citing a few Superior Court decisions, the court "agree[d] with the principle that a CUTPA violation may not arise out of conduct that is merely incidental to the performance of one’s trade or commerce." "

B. State Precedent

After the federal precedent developed sequentially in Colonial Motors, Arawana Mills, and Cornerstone Realty, Connecticut state courts struggled

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40 Id. at 109–10.
41 Id. at 111 (citation omitted).
42 Id. (emphasis added).
43 Id. at 111–12.
44 Id. at 112.
45 Id.
46 Id.
47 Id.
48 Id. at 112–13.
with whether to apply the emerging primary line of business doctrine.\textsuperscript{49} A split of authority developed, with some Superior Courts adopting the principle\textsuperscript{50} while others applied a broader "business context" test instead.\textsuperscript{51}

Perhaps in recognition of the growing divide, the Connecticut Appellate Court addressed the issue in \textit{McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc.}\textsuperscript{52}

In \textit{McCann}, the plaintiffs contracted to purchase four acres of real estate from the defendants with the intent to construct a supermarket on the property.\textsuperscript{53} The defendants used the space as part of their car sales and service business, which included oil changes.\textsuperscript{54} The plaintiffs conducted environmental testing on the property prior to the closing, which highlighted some environmental concerns but otherwise showed no "significant contamination."\textsuperscript{55} However, approximately two and a half years after the closing, the Department of Environmental Protection informed the plaintiffs that the soil on the property was contaminated and ordered remediation measures to take place.\textsuperscript{56} The plaintiffs brought many causes of action against the defendants in order to help finance the remediation costs, including a CUTPA claim.\textsuperscript{57} At trial, after the plaintiffs' presentation of


\textsuperscript{50} See, e.g., Advest, Inc. v. Carvel Corp., No. CV 98-0585401S, 1999 WL 786357, at *4 (Conn. Super. Ct. Sept. 21, 1999) ("The court finds that the line of state and federal cases which focuses on whether the alleged acts occurred as a part of a defendant's primary business is most applicable to the present action.").

\textsuperscript{51} See, e.g., Duncan v. PEH I, No. CV020817088S, 2003 WL 1962789, at *2-3 (Conn. Super. Ct. Apr. 1, 2003) ("The Connecticut Supreme Court has not yet interpreted the 'trade or commerce' provision of CUTPA, and Superior Court cases addressing the issue have reached two diverging views in determining the definition of 'trade' or 'commerce.' Some cases have applied the analysis used by the United States District Court for the District of Massachusetts, which held that where the actions of the defendant are incidental to its primary business, it cannot be liable under CUTPA. . . . Conversely, other Superior Court cases have followed the conclusion reached by the Supreme Court of Massachusetts in interpreting the Massachusetts Unfair Trade Practices Act. These cases found that under a CUTPA claim, a transaction need not take place in the defendant's ordinary course of business so long as it takes place in a 'business context.' . . . The court . . . finds that, unless otherwise determined by the legislature or appellate authority, the 'business context' test is the applicable standard to apply to CUTPA claims.").

\textsuperscript{52} 890 A.2d 140 (Conn. App. Ct. 2006).
\textsuperscript{53} Id. at 144-45, 150.
\textsuperscript{54} Id. at 150.
\textsuperscript{55} Id. at 150-52.
\textsuperscript{56} Id. at 145.
\textsuperscript{57} Id. at 146-47.
evidence, the court granted defendants’ motion for a directed verdict.\textsuperscript{58}

On the CUTPA issue, the trial court based its decision on a causation problem; it held that the plaintiffs failed to show how alleged misrepresentations made by the defendants were the proximate cause of the loss.\textsuperscript{59} Curiously, the Appellate Court did not review the CUTPA issue on the same ground. Instead, the court appears to have picked up one sentence from the defendants’ appellate brief that said:

In this case, the Plaintiffs failed to establish that the Defendants’ actions were carried out in the course of their primary trade or business, and not merely incidental to the Defendants’ trade or business. \textit{Cornerstone Realty, Inc. v. Dresser Rand Co.}, 993 F. Supp. 107 (D. Conn. 1998) (where a sale of contaminated property was not defendant’s primary business).\textsuperscript{60}

The defendants’ brief then went on to discuss other topics.\textsuperscript{61} It did not cite \textit{Cornerstone Realty} again, and only cited \textit{Arawana Mills} once as part of a long string citation standing for a different, general proposition.\textsuperscript{62} Also of note, the plaintiffs’ reply brief did not mention either of these cases once, or even acknowledge the primary line of business test.\textsuperscript{63} Despite the trial court not addressing the question and neither party adequately briefing the issue, the Appellate Court decided to consider the viability of the primary line of

\textsuperscript{58} Id. at 145.

\textsuperscript{59} Id. at 162. The first misrepresentation that the plaintiffs claimed they relied on was that when asked about a large amount of liquid in a basement area on the property, the defendant allegedly stated that it was “only rainwater” and that the two aboveground storage tanks had never been used.” Id. at 151. Even assuming these representations were made, the Appellate Court agreed with the trial court in concluding that the plaintiffs could not establish that these statements caused their loss because they already knew from their own experts’ reports that the representations were false. \textit{See id.} at 158–59 (emphasis in original) (“It was not the fact that the soil was contaminated that was a problem, but the \textit{amount of contamination}. There is no evidence that the defendants were in a position to know the extent of contamination, had made any representation as to that fact or prevented the plaintiffs from conducting the appropriate tests.”). The second alleged misrepresentation involved the defendants’ failure to disclose letters they received from the Department of Environmental Protection between the years of 1994 and 1997. \textit{Id.} at 154. The Appellate Court again agreed with the trial court in finding that the letters were “wholly unrelated” to the plaintiffs’ claims; thus, failing to disclose the letters could not have been a proximate cause of the plaintiffs’ damages. \textit{Id.} at 155–56.

\textsuperscript{60} Brief of the Defendant-Appellee at 24, McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc., 890 A.2d 140 (Conn. App. Ct. 2006) (No. 26347), 2005 WL 5808552, at *24; \textit{see also McCann}, 890 A.2d at 163 (“[T]he defendants argue that to constitute a violation of CUTPA, the alleged offense must arise out of the offenders’ primary trade or business, not out of an incidental matter.”).

\textsuperscript{61} Brief of the Defendant-Appellee, \textit{supra} note 60, at 23–26 (raising issues such as simple breach of contract, lack of an unfair or deceptive practice, and causation problems).

\textsuperscript{62} Id. at 24.

business test “pursuant to the supervisory powers granted . . . by our rules of practice in order that justice may be done.”

The McCann court first provided a brief overview of both Arawana Mills and Cornerstone Realty. Then, without a mention of CUTPA’s statutory text or any underlying policy concerns, the court adopted the same primary line of business test found in the federal case law. The court justified its decision with a conclusory statement that the “legislature is presumed to be aware of judgments that construe our statutes. In the absence of any legislation to reverse the [Arawana Mills and Cornerstone Realty] decisions, we may assume that the General Assembly is in agreement with them.” Lastly, the court easily upheld the directed verdict as to the CUTPA count “because the defendants in this case were not in the business of selling real property, and the purchase and sale agreement at issue was merely incidental to the defendants’ sale and servicing of automobiles.”

A few years later, the McCann holding was used by the Appellate Court in Sovereign Bank v. Licata to further expand the influence of the primary line of business test. In Sovereign Bank, the substitute plaintiff Seven Oaks entered into a forbearance arrangement with the defendant, agreeing not to continue with a foreclosure action against the defendant’s property provided that the balance due on a mortgage was settled within a year. This condition was ultimately not met, and Seven Oaks renewed the foreclosure action. One of the defendant’s three counterclaims alleged that certain conduct of Seven Oaks constituted a violation of CUTPA. A jury found in favor of the defendant on the CUTPA count, awarding $300,000 in damages plus the trial court’s imposition of $90,130.75 in attorneys’ fees.

On appeal, Seven Oaks argued that the relevant transaction involved conduct that was “incidental to its primary business.” The Sovereign Bank court found no controversy with the applicable law, citing McCann and Cornerstone Realty. Applying the primary line of business test to the facts of the case, the court reasoned that:

The subject transaction involved the Seven Oaks’ acquisition

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64 McCann, 890 A.2d at 163 n.30.
65 Id.
66 See id. at 164 (“We accordingly conclude that a CUTPA violation may not be alleged for activities that are incidental to an entity’s primary trade or commerce.”).
67 Id.
68 Id.
69 977 A.2d 228 (Conn. App. Ct. 2009).
70 Id. at 235.
71 Id.
72 Id. at 236.
73 Id. at 237.
74 Id.
75 Id. at 238.
of the defendant's mortgage loan and note from Sovereign Bank, the forbearance agreement that Seven Oaks entered into with the defendant and conduct between the parties during the period of forbearance. There was no evidence presented at trial that Seven Oaks ever had, prior to the transaction or thereafter, engaged in the mortgage business, nor did the defendant allege as much. The defendant's allegations solely related to an ancillary transaction that was incidental to the Seven Oaks' primary real estate business and thus fell outside the CUTPA penumbra.\textsuperscript{76}

The court then reversed the CUTPA judgement and vacated the damages award.\textsuperscript{77} Some view this case as a potential limitation on the utility of CUTPA.\textsuperscript{78}

However, soon after Sovereign Bank, for the first time the Appellate Court applied CUTPA's primary line of business test favorably to a plaintiff in Landmark Investment Group, LLC v. Chung Family Realty Partnership, LLC.\textsuperscript{79} In Landmark, a defendant purchased commercial property with the intent to develop the area into a restaurant, but environmental cleanup proved to be too costly.\textsuperscript{80} The plaintiff entered into an agreement to buy the property, with the deal contingent on either the defendant securing brownfields funding from the town or providing the funds to remediate the environmental issues on its own.\textsuperscript{81} A new environmental assessment revealed that the initial appraisal overestimated the cleanup costs by approximately one million dollars, prompting the town to deny brownfields funding.\textsuperscript{82} A third party soon after made a more favorable offer to buy the property.\textsuperscript{83} The defendant, citing the lack of brownfields funding, attempted to cancel its deal with the plaintiff, and entered into a contract to sell the property to the third party instead.\textsuperscript{84} The trial court ordered specific performance of the defendant's contract with the plaintiff and granted

\textsuperscript{76} Id.
\textsuperscript{77} Id. at 238–39.
\textsuperscript{78} See LANGER ET AL., supra note 1, § 3.2, at 115 (“This decision is significant for establishing an even narrower definition for ‘trade or commerce’ than did McCann. In McCann, the conduct at issue related to sale of real property, a transaction that had only an incidental connection to the regular business of selling and servicing automobiles. In Sovereign Bank, although the conduct appeared to be of a form that was new to Seven Oaks, it occurred in a transaction involving real property, which was closely related to business of a type in which the party had previously engaged. Further, the relevant conduct was seemingly for the purpose of profit as an ongoing aspect of that business.”).
\textsuperscript{79} 10 A.3d 61 (Conn. App. Ct. 2010); see also LANGER ET AL., supra note 1, § 3.2, at 116 (explaining how the Landmark decision “could be an important basis for an expanded application of CUTPA”).
\textsuperscript{80} Landmark, 10 A.3d at 68.
\textsuperscript{81} Id. at 68–69.
\textsuperscript{82} Id. at 69.
\textsuperscript{83} Id. at 70.
\textsuperscript{84} Id. at 70–71.
attorneys' fees on a CUTPA claim.\textsuperscript{85} On appeal, the defendant relied on \textit{McCann} to argue that the sale of the real estate was incidental to the primary business because its owner was a "lifelong restaurateur."\textsuperscript{86} The Appellate Court, in an emerging trend, took no issue with the primary line of business test, summarily citing \textit{McCann} and \textit{Sovereign Bank}.\textsuperscript{87} The court did not agree with the defendant's factual application of the standard however, noting that "[w]e find no support in \textit{McCann} . . . for the proposition that the sale of assets of an unprofitable business is incidental to that business."\textsuperscript{88} The court went on to find that, although Chung himself was a restaurateur, the defendant-entity's articles of organization provided that "its purposes [were] 'to acquire, manage, lease, and develop real property and related assets.'"\textsuperscript{89} From these facts, the court was easily able to conclude "that real estate development was the defendant's main commercial endeavor," and upheld the plaintiff's CUTPA verdict.\textsuperscript{90}

The latest Appellate Court case to address this doctrine—\textit{DiNardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corp.}\textsuperscript{91}—contained the most detailed look into the legal justification for the primary line of business test so far. In \textit{DiNardo}, the plaintiff leased industrial property to the defendant for use in manufacturing H-66 Comanche helicopters for the United States Army.\textsuperscript{92} After the plaintiff inspected the property following the conclusion of the lease, it thought that several improper modifications were made and that the property had not been properly maintained.\textsuperscript{93} These allegations led the landlord to commence an action against the former tenant for breach of the lease agreement.\textsuperscript{94}

In the second count of the complaint, the plaintiff alleged a violation of CUTPA, claiming "that employees of the defendant had vandalized the

\textsuperscript{85} \textit{Id.} at 71.  
\textsuperscript{86} \textit{Id.} at 79.  
\textsuperscript{87} \textit{Id.}  
\textsuperscript{88} \textit{Id.}  
\textsuperscript{89} \textit{Id.}  
\textsuperscript{90} \textit{Id.}  
\textsuperscript{91} 100 A.3d 413 (Conn. App. Ct. 2014).  
\textsuperscript{92} \textit{Id.} at 418–19.  
\textsuperscript{93} See \textit{id.} at 420 ("Specifically, the plaintiff alleged that the defendant improperly had removed telecommunications, data and electrical power wiring, had cut wires, had disabled the telephone system to the point that a replacement was necessary, had disabled the energy management, security and fire alarm systems that had been connected to an off-site property owned by the defendant, had disabled the card access aspect of the security system, had removed security cameras and had cut various pipes throughout the building. The plaintiff further alleged that, in breach of the lease agreement, the defendant had failed to maintain the property, including failing to clean and caulk thermal windows, which allowed water to damage the building and caused the DryVit stucco exterior to fail, and failing to maintain the parking lot and sidewalks.").  
\textsuperscript{94} \textit{Id.}
interior of the buildings and removed property belonging to the plaintiff. The plaintiff believed that the defendant intentionally committed these acts to make the property uninhabitable until a significant number of repairs could be made. At the conclusion of the plaintiff’s case, the trial court granted the defendant’s motion for a directed verdict as to the CUTPA count, ruling that the defendant was not “in the trade or commerce of renting or leasing properties and its ‘true business’ was the manufacture and servicing of aviation equipment.”

The plaintiff first argued that the trial court erred in applying McCann instead of considering the plain language of CUTPA. It attempted to characterize McCann’s adoption of the primary line of business test from Arawana Mills and Cornerstone Realty as dicta. The Appellate Court traced the history of the case law in reviewing this assertion, analyzing Arawana Mills, McCann, and Sovereign Bank. After some discussion regarding the factual background of all three cases, the Appellate Court rejected the plaintiff’s contention. They swiftly reaffirmed McCann, stating that it was “controlling and applicable precedent.” Interestingly, the court expressed an unwillingness to revisit the McCann decision unless an appeal is heard en banc. The plaintiff’s other two arguments for reversing the CUTPA directed verdict were also unsuccessful.

To date, the Connecticut Supreme Court has been largely silent on the primary line of business issue. The court denied certification in McCann, Sovereign Bank, Landmark, and DiNardo. The one potential exception occurred in Tzovolos v. Wiseman. In Tzovolos, the defendants appealed from a number of trial court findings, including that they violated

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95 Id.
96 Id. at 420, 423.
97 Id. at 421; see id. at 423 (relying on McCann to reach its determination).
98 Id. at 424, 426 n.5.
99 Id. at 426.
100 Id. at 424–26.
101 See id. at 426 (“Simply put, [the primary line of business analysis] was the express holding of the case, and not dicta as claimed by the plaintiff.”).
102 Id.
103 Id. at 426 n.5.
104 See id. at 427–28 (declining to review the merits of the plaintiff’s claim that the court improperly raised the primary line of business issue sua sponte and upholding the trial court’s determination that renting or leasing property was not in the defendant’s primary line of business, despite the defendant’s worldwide real estate activities).
109 12 A.3d 563 (Conn. 2011) (per curiam).
CUTPA. The Connecticut Supreme Court took the case on direct appeal. The court went on to simply affirm all of the prior judgments by fully adopting "the trial court's well reasoned decision as a statement of the facts and the applicable law on those issues."

The trial court's opinion did cite to McCann yet found the conduct complained of as being within the defendants' primary line of business. Some believe that the blanket affirmation in Tzovolos signals the Supreme Court's approval of McCann, and therefore approval of the primary line of business limitation on trade or commerce under CUTPA. However, the door is likely still open for a legal challenge to McCann and its progeny because the Supreme Court's opinion does not expressly mention the primary line of business test at all and other courts have largely ignored the decision. Additionally, the Superior Court issued its decision before Sovereign Bank, Landmark, and DiNardo further developed the law. It is more likely that because of the variety of issues presented in the complex underlying cases, the Supreme Court at the time only assumed that the primary line of business doctrine existed and agreed with the trial court's reasoning.

C. McCann's Flaws

Since its humble beginnings in Colonial Motors, the primary line of

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110 Id. at 565–66.
111 Id. at 565 n.11.
112 Id. at 566.
114 See LANGER ET AL., supra note 1, § 3.2, at 108, 118 (arguing that "Tzovolos seems to be an important and controlling decision").
115 Tzovolos, 12 A.3d at 563–66; LANGER ET AL., supra note 1, § 3.2, at 118 n.36.
116 As explained supra, Sovereign Bank appears to have broadened the limitation on the definition of trade or commerce. See Sovereign Bank v. Licata, 977 A.2d 228, 238 (Conn. App. Ct. 2009) (contending that just because a business is primarily involved in real estate does not mean that it is primarily involved with purchasing mortgages and loaning money for the purposes of CUTPA). This highly formalistic analysis, which looks at each business activity narrowly, appears contrary to a conclusion partially relied upon by the Tzovolos lower court that "a part of most businesses' commerce is the borrowing or providing of capital, the giving or taking of security interests and dealing honestly and in a nonpreferential manner to creditors of an insolvent entity. These acts are within the primary scope of business and, therefore, are subject to CUTPA." Tzovolos, 16 A.3d at 850. The Tzovolos lower court opinion was issued in 2007. Sovereign Bank came out in 2009, and the Connecticut Supreme Court did not affirm Tzovolos until 2011. The Landmark decision was also announced during this period in 2010. While application of the Sovereign Bank standard would likely hurt the Tzovolos plaintiffs, Landmark would likely be helpful because the case also contained a defendant found to have acted in bad faith. See infra Section III (arguing that past precedent can alternatively be analyzed by the scope of the conduct). One could reasonably wonder how the Supreme Court failed to identify any of the apparent inconsistencies or similarities between Tzovolos and the new appellate authority.
117 See Tzovolos, 12 A.3d at 566 ("It would serve no useful purpose for us to repeat [the trial court's] discussion here.").
business test has grown into a practical obstacle that many litigants must undertake. A plaintiff bringing a CUTPA lawsuit in state or federal court should be prepared for a primary line of business challenge. This reality is justified considering the number of Appellate Court decisions issued on the subject. However, while the common law system is based on the principle of stare decisis in order to ensure slow development of the law and promote the value of predictability, the downside to such a structure is that it can become difficult to challenge a past erroneous decision that is subsequently relied on repeatedly.

The primary line of business test is an example of this phenomenon. McCann is the fundamental case that first confirmed that the primary line of business test applies to CUTPA, resolving the split at the Superior Court level. Every Appellate Court decision that followed relied on the holding from McCann. The problem, as referred to above, is that each of these cases blindly accepted the legal conclusion from McCann without question. Some of the blame for this oversight is fairly attributable to the litigants for not raising the issue—although the motivation for challenging McCann understandably grows weaker as more cases supporting it are released—but the Appellate Court should be held at least equally responsible for failing to address the issue when it is raised, as it was in DiNardo.

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118 For a non-exhaustive list of some of the cases that raise the primary line of business issue, see LANGER ET AL., supra note 1, § 3.2, at 112–14 n.18.
119 The primary line of business defense is an issue of law to be decided by the court. E.g., Biro v. Matz, 33 A.3d 742, 754 (Conn. App. Ct. 2011).
120 See supra Section II.B (discussing the development of state precedent).
121 See, e.g., State v. Peeler, 140 A.3d 811, 852–57 (Conn. 2016) (Zarella, J., dissenting) (explaining why the different forms of reliance play a significant role in the stare decisis calculus). Compare id. at 814 (Rogers, C.J., concurring) (arguing that the court cannot overrule past precedent, regardless of how erroneous it is, if doing so "would inflict far greater damage on the public perception of the rule of law and the stability and predictability" of the court as an institution), with id. at 890 (Espinosa, J., dissenting) (emphasis in original) (criticizing the outcome of the case because "a fundamental principle underlying the doctrine of stare decisis [is] that the doctrine, although grounded in stability and consistency, cannot be rigid. Otherwise, consistency and stability would require the court to follow precedent regardless of how wrong it may be").
123 See supra Section II.B (discussing the appellate cases following McCann).
124 See supra Section II.B.
125 See Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn., Inc., 84 A.3d 840, 869 (Conn. 2014) ("[O]ur system is an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived.").
126 This might be a case of "post hoc, ergo propter hoc" reasoning. See POST HOC ERGO PROPTER HOC, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining this phrase as "[T]he logical fallacy of assuming that a causal relationship exists when acts or events are merely sequential").
127 See DiNardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corp., 100 A.3d 413, 426 n.5 (Conn. App. Ct. 2014) (declining to revisit the McCann holding).
McCann violated many well-settled judicial philosophies. The Appellate Court adopted the primary line of business test as the law in Connecticut, despite neither party first being asked to brief the issue. In contrast, the Supreme Court has repeatedly refused to take up perhaps the most evident and controversial issue under CUTPA—whether the appropriate standard for unfairness should remain the three-prong cigarette rule or switch to the narrower substantial injury test used under federal law—because parties fail to adequately present the matter. Even when the defendant in Artie's Auto Body, Inc. v. Hartford Fire Insurance Co. properly preserved this important issue on appeal, the Supreme Court still declined to reach the question, acknowledging that it would eventually have to address the conflict unless the legislature takes action. The McCann court should have used this conservative approach—refraining from deciding a matter of first impression under CUTPA until the opposing theories can be effectively balanced against each other—to defer the primary line of business issue.

The plaintiffs in McCann, if given the chance, could have cited the various precedents in existence at the time (cases that the McCann court somehow disregarded) that found fault with the primary line of business test. The adversarial design of the judicial system helps protect the court from deciding cases that are not ready for resolution.

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129 See Ulbrich v. Groth, 78 A.3d 76, 108–09, 112 (Conn. 2013) (emphasis in original) (“[T]he defendants argue[] that the trial court improperly instructed the jury that the cigarette rule applied to the plaintiffs’ CUTPA claim, and it should have instructed the jury in accordance with the standard applied by the federal courts. . . . [However], the defendants neither requested that the trial court instruct the jury in accordance with current federal law applicable to unfair trade practices instead of the cigarette rule, nor excepted to the instruction given by the trial court on that ground. . . . In the present case, we see no exceptional circumstances that would militate in favor of reviewing the defendants’ unpreserved claim that the cigarette rule should be abandoned in favor of the substantial unjustified injury test. Accordingly, we conclude that the claim is not reviewable.”); Glazer v. Dress Barn, Inc., 873 A.2d 929, 959 n.34 (Conn. 2005) (“Although we consistently have followed the cigarette rule in CUTPA cases, we also note that, when interpreting ‘unfairness’ under CUTPA, our decisions are to be guided by the interpretations of the Federal Trade Act by the Federal Trade Commission and the federal courts. . . . Review of those authorities indicates that a serious question exists as to whether the cigarette rule remains the guiding rule utilized under federal law. . . . 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 viability of the cigarette rule until it squarely has been presented to us.”); see also Naples v. Keystone Bldg. & Dev. Corp., 990 A.2d 326, 343 (Conn. 2010) (Zarella, J., concurring) (explaining that although there appears to be tension between the Connecticut and federal standards on unfairness, “it is also my view that the case presently before us would not be the appropriate case to take on such a review of our precedent, and, therefore, any such review must be left to a future case”).

130 Id. at 1149–50 n.13.

from making mistakes of law. Unfortunately, this significant check was not available in McCann, and the resulting opinion is deficient. The court based its holding on the same one reached in Arawana Mills and Cornerstone Realty, yet failed to trace where that holding originated from. Cornerstone Realty relied on Arawana Mills, but Arawana Mills relied solely on Colonial Motors.

If the McCann court cited Colonial Motors, it would have noticed that the foundation of what would come to be known as the “primary line of business” doctrine was initially used as a means of dismissing a CUTPA action by a retailer against a consumer. The federal court was concerned about the lack of state court guidance at the time regarding this issue. Contrary to what Arawana Mills and Cornerstone Realty extrapolated from the case, Colonial Motors did not adopt a “primary line of business” test. Rather, properly placed in context, the case stands as an example of the early reservations regarding the breadth of CUTPA and judiciary’s attempt to limit the class of cases brought under it to avoid overreach. Thus, adopting the ‘business context’ test is the applicable standard to apply to CUTPA claims.

133 See Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn., Inc., 84 A.3d 840, 858 (Conn. 2014) (“The justifications for the adversarial system are ‘that self-interested adversaries will uncover and present more useful information and arguments to the decision maker than would be developed by the judicial officer in an inquisitorial system . . . .’” (quoting Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 TENN. L. REV. 245, 282 (2002))).


135 See supra Section II.A (discussing the court’s reasoning in Cornerstone Realty and Arawana Mills).

136 See Colonial Motors, Inc. v. N.Y. Design Grp., Inc., Civil No. H—86–206 (AHN), slip op. at 5 (D. Conn. June 20, 1986) (“Here, the complaint alleges that defendant leased one automobile from plaintiff, but does not allege defendant was in the trade or commerce involving the leasing of automobiles. Further, despite CUTPA’s broad coverage, plaintiff’s counsel conceded at oral argument that she knew of no case where a retailer has sued a customer for a violation of CUTPA. The court’s research confirms counsel’s concession. This court is persuaded that the leasing of one automobile by a consumer who is not involved in the trade or business of leasing automobiles, does not constitute ‘conduct of any trade or commerce.’”).

137 See id. at 6 (“Of the numerous Connecticut state court decisions dealing with CUTPA claims, no case involved a retailer suing its customer for a violation of CUTPA. Therefore, this court is disinclined to permit plaintiff to proceed with its CUTPA claim.”).

138 In the twenty years between Colonial Motors and McCann, state Superior Courts came out differently on the issue of whether CUTPA can apply in the reverse. Compare D’Alberio v. Vailette, No.
the broader holding that Arawana Mills and Cornerstone Realty derived from Colonial Motors was misplaced. It defies logical reasoning for a federal court to dismiss an action because there are no state court interpretations on the matter, and then later have the state appellate court indirectly adopt the federal court’s decision without a discussion as to the underlying reasons why, because both the language and the intent of the statute are ignored in both instances.  

Instead of using the traditional tools of statutory analysis, the McCann court defended its conclusion by citing to the legislature’s inaction in amending CUTPA since Arawana Mills and Cornerstone Realty. This faulty approach relates to the court’s violation of a second fundamental

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CV NH-9112-4940, 1992 WL 389824, at *1 (Conn. Super. Ct. Nov. 25, 1992) ("Allowing CUTPA actions by retailers and manufacturers against their customers, or by lending institutions against their borrowers, or by landlords against their tenants would be to stand CUTPA on its head. Statutory protections intended to place customers on more equal commercial footing with the business community would grossly be transmuted into a weapon of industry, to be used at will against the consuming public.").

with Conning Corp. v. Davenport Grp., No. CV91 0115140 S, 1992 WL 98135, at *4 (Conn. Super. Ct. Apr. 30, 1992) ("The restrictive application urged by the defendants would have disastrous practical consequences. For instance, it would prevent a merchandise seller who has been cheated through the deceptive acts of a purchaser from utilizing the full arsenal of remedies afforded by CUTPA. Such a result would be inconsistent with the remedial purpose of the statute."). This question still appears to be unresolved. See Petra Constr. Co. v. Sacred Heart Univ., No. X03HHDCV096013738S, 2011 WL 2536196, at *3 (Conn. Super. Ct. May 26, 2011) ("There is a split of authority among trial courts as to whether a seller of goods or services may assert a CUTPA claim against a purchaser or consumer of those goods and services. . . . This court . . . agrees with those courts which have held that a seller of goods or services like the plaintiff here may assert a CUTPA claim against a purchaser or consumer of those goods and services.").

LANGER ET AL., supra note 1, §§ 3.1, 3.6, at 105, 198–201 (referencing the split of authority). Perhaps this omission is because the primary line of business doctrine has become the predominant concern litigants raise after McCann. Compare DiNardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corp., 100 A.3d 413, 421 (Conn. App. Ct. 2014) (addressing the plaintiff’s primary line of business arguments, but failing to consider that the case involved a landlord suing a former commercial tenant), with Trigo Family, LLC v. Avery, No. CV044000712S, 2005 WL 1273922, at *1–2 (Conn. Super. Ct. May 3, 2005) ("The fundamental argument is that although CUTPA may be applied to landlord-tenant situations, it has never been permitted in an action by a landlord against a tenant. . . . All that is alleged here is that the defendants rented the premises from the plaintiffs, that they failed to pay the rent due, and that they caused certain enumerated items of damage to the premises. If such allegations could turn an action by a landlord against a commercial tenant into a CUTPA claim, virtually all landlord-tenant actions against commercial tenants would become CUTPA cases."). Either way, the fear of CUTPA applying in “reverse” scenarios and thus being used too broadly is the foundation of the primary line of business test. However, this fear can best be mitigated by looking at the scope of the alleged conduct, not at who the parties are. See infra Section III (analyzing the relationship between the primary line of business test, a CUTPA claim, and a breach of contract claim).

See supra Section I; see also Feen v. Benefit Plan Adm’rs, Inc., No. 406726, 2000 WL 1398898, at *4 (Conn. Super. Ct. Sept. 7, 2000) ("Neither Colonial Motors, Inc. v. New York Design Group, Inc. . . . nor the subsequent cases following it, cited any independent support or rationale for the proposition that an unfair or deceptive act or practice is not actionable if it relates only to an incidental business activity rather than to the defendant’s primary business activity.").

judicial tenet: “Connecticut is the final arbiter of its own laws.”141 The McCann court could have chosen to consider the federal precedent, but was under no obligation to accept those holdings as binding.142 The legislature could have reasonably not taken action because they were waiting for a Connecticut appellate-level court to determine if the primary line of business test even existed under CUTPA.143 The court undermined its legislative acquiescence argument by observing that “[t]he question of whether a CUTPA claim may arise out of a transaction that is not the alleged offender’s primary trade or business has not been addressed by Connecticut’s appellate courts.”144 If Connecticut state courts are the “final arbiters” of Connecticut law, and there was no state appellate authority at the time on the matter, it reasonably follows that the legislature should not have been “presumed to be aware of judgments that construe [the] statute[.]”145

It has been ten years since McCann, and the primary line of business test has been reaffirmed several times by the Appellate Court,146 perhaps signaling the legislature’s eventual acceptance of the policy. However, this subsequent observation ignores the fact that it was improper for the McCann court to rely on legislative indifference in the first place. Additionally, the legislature might still be waiting for a statement on the issue from the Connecticut Supreme Court, notwithstanding Tzovolos.147 The holes in the court’s legislative theory, taken together with a comprehensive evaluation of the prior case law, strip McCann of any other substantive reason supporting the primary line of business test.

Finally, the McCann court disrupted one of the most widely recognized rules on judicial scrutiny: courts should issue decisions on the narrowest

141 See Vollemans v. Town of Wallingford, 928 A.2d 586, 588-89, 594 (Conn. App. Ct. 2007), aff’d, 956 A.2d 579 (Conn. 2008) (quoting Johnson v. Manson, 493 A.2d 846, 852 (Conn. 1985)) (failing to apply the United States Supreme Court’s interpretation of the federal antidiscrimination statute to a portion of the Connecticut Fair Employment Practices Act as a matter of state law); id. at 594 n.10 (“In interpreting our statutes and deciding this question of first impression as a matter of Connecticut law, we are free to depart from that federal statutory interpretation upon concluding that it fails to effectuate both the legislative policy underlying the statute at issue and the remedial nature thereof . . . ”). It is true that CUTPA requires Connecticut courts to look at federal decisions for guidance, but only to the extent that those decisions interpret the FTC Act, CONN. GEN. STAT. § 42-110b(b) (2016). In contrast, the McCann court relied on federal precedent that interpreted the state statute, even though it had no duty to consider those interpretations.

142 Vollemans, 928 A.2d at 594. This argument is strengthened when considering that the reasoning rejected in Vollemans came from the United States Supreme Court, while the opinions that the McCann court relied on came from the lower, district court level.

143 Both state and federal trial courts were applying two different standards in the post-Arawana Mills but pre-McCann era, and the legislature likely wanted some firm authority on the state of the law before acting. See supra notes 49–51 and accompanying text (discussing the standards).

144 McCann, 890 A.2d at 163.

145 Id. at 164.

146 See supra Section II.B (highlighting the Appellate Court cases following McCann).

147 See supra Section II.B (discussing the relevance of Tzovolos).
ground possible. The plaintiff in DiNardo unsuccessfully argued that the primary line of business discussion in McCann was dicta because the trial court never considered the issue. To get around this problem, the McCann court referenced its "supervisory powers," declaring that a review of the applicable law was required "in order that justice may be done." This argument has no merit.

An appellate-level court may decide an unpreserved issue if it involves subject matter jurisdiction, the plain-error doctrine, or a constitutional claim if certain conditions are met. Appellate tribunals may also consider unpreserved claims raised by a party for the first time on appeal pursuant to their supervisory powers if: 1) the record is adequate for review and there is

148 See, e.g., Artie’s Auto Body, Inc. v. Hartford Fire Ins. Co., 119 A.3d 1139, 1149–50 n.13 (Conn. 2015) (deciding the CUTPA issue on the narrower ground); Amanda Frost, The Limits of Advocacy, 59 DUKE L.J. 447, 509 (2009) ("[A] court has no reason to raise issues that are tangential to or distinct from the claims that the parties have asked the court to decide, because in these cases its opinion will not mislead others or create flawed precedent.").


150 See Lapointe v. Comm’r of Corr., 112 A.3d 1, 134 (Conn. 2015) (Espinosa, J., dissenting) ("On the one hand, our supervisory powers serve an essential purpose, reflecting our recognition that, although the rule of law ensures justice within the legal system, there are some instances when justice is more properly aligned with principles of equity. In those rare instances, the uniformity of legal rules must yield to equity, thereby achieving justice. On the other hand, our extraordinary authority to act outside the limits of the rule of law is unquestionably a ‘great power,’ one that carries with it both great risk and attendant responsibility. Our supervisory authority allows us to reach down and announce a rule or result from on high. As the highest court in the state, once we have invoked that authority, our use of it is virtually unreviewable—with few exceptions, we are answerable only to ourselves. Accordingly, because of the lack of outside checks on that power, we have a duty to resort to that authority only when we must—disciplining ourselves to rely on it rarely. Otherwise, we risk injecting arbitrariness and capriciousness into the rule of law.").


152 See Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn., Inc., 84 A.3d 840, 867 (Conn. 2014) ("[W]e emphasize that a general statement by a reviewing court that the review of an unpreserved claim is warranted in the interests of justice between the parties or because no party will be prejudiced is not alone sufficient."); see also id. at n.32 ("Courts have decided cases sua sponte to avoid a miscarriage of justice or to prevent a result inconsistent with substantial justice. Unfortunately, these phrases are almost meaningless, because any time the new issue would affect the result, it could be a miscarriage of justice for the party that lost below not to be permitted to raise the issue.").

153 Id. at 859–60. Subject matter jurisdiction and constitutional concerns were not at issue in McCann. The plain-error doctrine requires a reviewing court to make an express finding that either the error [was] so obvious that it affect[ed] the fairness and integrity of and public confidence in the judicial proceedings or that the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable," combined with a demonstration "that the failure to grant relief will result in manifest injustice." Id. at 861–63 (alterations in original) (citations omitted) (internal quotation marks omitted). The McCann court could not justify a plain error review and had to rely on its supervisory powers instead because the case was not one that had significant public attention or one in which the trial court made a facially-obvious error.
no need for further trial court proceedings; 2) all parties have an opportunity to be heard on the issue; and 3) no party suffers unfair prejudice.\footnote{Id. at 863–64.} Additionally, supervisory powers require a showing that: 1) the opposing party does not contest the decision to review the issue; 2) the party who raises the unpreserved claim cannot prevail; or 3) “the exceptional circumstances of the case . . . justify a deviation from the general rule that unpreserved claims will not be reviewed.”\footnote{Id. at 865, 867.} A court’s decision to raise an unpreserved issue sua sponte demands the same analysis.\footnote{Id. at 867–69.}

In *McCann*, the primary line of business issue was unpreserved, as the trial court did not consider it.\footnote{McCann Real Equities Series XXI, LLC v. David McDermott Chevrolet, Inc., 890 A.2d 140, 163 n.30 (Conn. 2006).} Whether one sentence in the defendant’s appellate brief is enough evidence to support the notion that the defendant actually intended to raise the primary line of business issue on appeal is irrelevant because the same prerequisites apply to unpreserved claims raised by parties and unpreserved claims raised sua sponte by the court.\footnote{See Matos v. Ortiz, 144 A.3d 425, 435 n.8 (Conn. App. Ct. 2016) (citing Blumberg, 84 A.3d at 867–68) (“Our Supreme Court has held that the standard for reviewing an unpreserved issue that was raised on appeal is identical to the standard for reviewing an unpreserved issue that was not raised on appeal.”).} Regardless of which standard ultimately applies, the *McCann* court abused its power.

First, the factual record was likely not complete because the plaintiffs did not get an opportunity to fully establish what the defendants’ primary business activities consisted of. Second, as stated above, the plaintiffs were not given an opportunity to adequately brief the primary line of business issue.\footnote{See Lapointe v. Comm’r of Corr., 112 A.3d 1, 112 (Conn. 2015) (Zarella, J., dissenting) (“Due process compels [appellate courts] to give the parties notice and an opportunity to be heard. . . . The significance of certain evidence may not be obvious to [the court] from [its] own, unguided review of such a voluminous record. The parties have greater knowledge of the evidence in the record and how it got there. They also have a more complete perspective of the context in which evidence was presented and its import. Facts viewed in isolation are not as powerful as facts woven into a coherent and compelling argument. That is the purpose of briefing. By denying the parties notice and a chance to brief the issue that the court decides, [the court] may be silencing valid arguments not obvious from [its] own review. Even if that briefing does not change the majority’s conclusions, the losing party deserves the solace of knowing that it has been fairly heard.”).} The Appellate Court should have ordered supplemental briefing from both parties or at least put them on notice that the topic might come up at oral argument.\footnote{See State v. Connor, 138 A.3d 265, 277 (Conn. 2016) (emphasizing the importance of supplemental briefing and “time to review the record . . . to conduct research, and to prepare a response”).} Third, the plaintiffs were prejudiced because they likely would have proceeded differently had the trial court raised the primary line

\footnote{\textsuperscript{154} Id. at 863–64.\textsuperscript{155} Id. at 865, 867.\textsuperscript{156} Id. at 867–69.\textsuperscript{157}McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc., 890 A.2d 140, 163 n.30 (Conn. 2006).\textsuperscript{158} See Matos v. Ortiz, 144 A.3d 425, 435 n.8 (Conn. App. Ct. 2016) (citing Blumberg, 84 A.3d at 867–68) (“Our Supreme Court has held that the standard for reviewing an unpreserved issue that was raised on appeal is identical to the standard for reviewing an unpreserved issue that was not raised on appeal.”).\textsuperscript{159} See Lapointe v. Comm’r of Corr., 112 A.3d 1, 112 (Conn. 2015) (Zarella, J., dissenting) (“Due process compels [appellate courts] to give the parties notice and an opportunity to be heard. . . . The significance of certain evidence may not be obvious to [the court] from [its] own, unguided review of such a voluminous record. The parties have greater knowledge of the evidence in the record and how it got there. They also have a more complete perspective of the context in which evidence was presented and its import. Facts viewed in isolation are not as powerful as facts woven into a coherent and compelling argument. That is the purpose of briefing. By denying the parties notice and a chance to brief the issue that the court decides, [the court] may be silencing valid arguments not obvious from [its] own review. Even if that briefing does not change the majority’s conclusions, the losing party deserves the solace of knowing that it has been fairly heard.”).\textsuperscript{160} See State v. Connor, 138 A.3d 265, 277 (Conn. 2016) (emphasizing the importance of supplemental briefing and “time to review the record . . . to conduct research, and to prepare a response”).}
issue. Fourth, although it can be argued that the plaintiffs did not object to the Appellate Court’s review because their reply brief ignored the primary line issue entirely, McCann was not an “exceptional case” that demanded review. While the final part of the supervisory powers framework is a disjunctive test, the first part is conjunctive, meaning that the McCann decision cannot be justified under modern jurisprudence.

Part of the basis for appeal in McCann was the grant of the defendants’ motion for a directed verdict as to the CUTPA claim. The Superior Court found that no reasonable jury could conclude that alleged misrepresentations made by the defendants were the proximate cause of the loss suffered by the plaintiffs. The Appellate Court, in other sections of its opinion, upheld the trial court’s findings regarding the causation problem as applied to different claims. Therefore, the McCann court should have simply affirmed the trial court’s CUTPA decision in a few sentences. “Justice” did not require a review of the primary line of business test; the defendant won under that theory but also would have won had the Appellate Court affirmed using the trial court’s causation-based reasoning—a task that the McCann court already demonstrated a willingness to accept. Instead, the McCann case has become a prime example of legislating from the bench. The Connecticut Supreme Court should recognize the faults in McCann and take action to remedy the situation.

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161 See Blumberg, 84 A.3d at 864 (“Prejudice may be found, for example, when a party demonstrates that it would have presented additional evidence or that it otherwise would have proceeded differently if the claim had been raised at trial.”).
162 See id. at 865–66 (citing a non-exhaustive list of factors that may make a case exceptional, including public character, intervening change in the law, newly-established undisputed facts, avoidance of a constitutional question, alternative basis for affirming an evidentiary ruling, and judicial bias).
163 A reviewing court can issue an unpreserved, alternative ground for affirming a lower court if the appellant’s claim would require a remand because judicial economy would be preserved. Id. at 870. This would be the case in McCann because if the directed verdict was reversed as appellant advocated, the CUTPA claim would need to be sent back down to a jury. Still, “the record must be adequate for review, and all parties must be provided with an opportunity to address the unpreserved issue.” Id. at n.38.
165 Id.
166 See id. at 155–57, 159 (regarding the breach of contract, negligent and reckless misrepresentation claims).
167 See Blumberg, 84 A.3d at 868 n.35 (“Unless . . . [a] new issue is so closely intertwined with the issue raised on appeal that the reviewing court cannot avoid addressing it . . . the reviewing court ordinarily can avoid creating bad precedent when the parties have failed to identify an issue or misconstrued the law by deciding the issue ‘in accordance with the parties’ view of the law, but . . . not[e] that the parties had failed to raise key issues that might have produced a different holding,’ thereby signaling ‘to future litigants to be sure to argue the point.’” (quoting Amanda Frost, The Limits of Advocacy, 59 DUKE L.J. 447, 473 (2009))).
168 See, e.g., Lapointe v. Comm’r of Corr., 112 A.3d 1, 132 (Conn. 2015) (Espinosa, J., dissenting) (arguing that sua sponte review of a claim not adequately addressed by the parties violates a “‘bedrock principle’ . . . and blur[s] the line between judging and advocacy”).
III. CUTPA & BREACH OF CONTRACT

One area where the Connecticut Supreme Court has provided more guidance than with the primary line of business test involves the relationship between a CUTPA claim and a simple breach of contract claim. For the first time in *Naples v. Keystone Building & Development Corp.*, the Supreme Court accepted a long-standing principle relied on by many lower courts that "not every contractual breach rises to the level of a CUTPA violation." The general philosophy supporting this pronouncement is that because the statutory tort contains an assortment of available damages that would not traditionally be available under a common law breach of contract claim, the legislature could not have meant to preempt such a large and historic body of law without expressly saying so. To help differentiate between the two causes of action, the *Naples* Court adopted the following standard: "In the absence of aggravating unscrupulous conduct, mere incompetence [in failing to perform a contract] does not by itself mandate a trial court to find a CUTPA violation." The Supreme Court expounded this rule in *Ulbrich v. Groth*, stating that the focus is on whether the defendant’s breach of contract [is] merely negligent or incompetent, in which case the CUTPA claim [is] barred, or whether the defendant’s actions would support a finding of intentional, reckless, unethical or unscrupulous conduct, in which case the contractual breach will support a CUTPA claim under the second prong of the cigarette rule.

Thus, plaintiffs should allege aggravating factors in their complaints with as much specificity as possible in order to elevate contractual actions into CUTPA territory and have the best chances of surviving preliminary motions. *Ulbrich* independently held that the economic loss doctrine, which ordinarily prevents a double recovery by barring the award of tort damages in contract actions that result only in economic loss, does not apply to certain CUTPA claims because the statute "was intended to provide a

169 990 A.2d 326 (Conn. 2010).
170 Id. at 337 (quoting Hudson United Bank v. Cinnamon Ridge Corp., 845 A.2d 417, 428 (Conn. App. Ct. 2004)); see id. (describing past cases that stand for the same proposition); LANGER ET AL., supra note 1, § 4.3, at 379–80 (explaining the development of the “aggravating circumstances” doctrine).
171 LANGER ET AL., supra note 1, § 4.3, at 369–70. The legislature has incorporated CUTPA by reference in over eighty statutes, thereby making CUTPA per se applicable to contracts falling under those sections. See id. at app. E (listing the statutes).
172 *Naples*, 990 A.2d at 337.
173 78 A.3d 76 (Conn. 2013).
174 Id. at 100–01.
175 See LANGER ET AL., supra note 1, § 4.3, at 385–91 (considering some practical pleading strategies).
remedy that is separate and distinct from the remedies provided by contract law when the defendant’s contractual breach [is] accompanied by aggravating circumstances.” This result is consistent with Naples because a plaintiff may simultaneously maintain both a breach of contract and CUTPA action so long as there are aggravating circumstances, and if successful on the merits of both claims the plaintiff may also recover separate damages available under each count.

A. Merging Doctrines

The primary line of business analysis and the aggravating factors analysis for breach of contract are similar in many ways. First, neither test is apparent from the text of the statute. Second, there is no bright line rule for helping courts determine when conduct is within the primary scope of business and when it is merely incidental; likewise, there is no conclusive rule for defining what unscrupulous conduct is or how many allegations are required to sustain a CUTPA action. Most importantly, both analyses function as a restriction on the definition of trade or commerce under CUTPA, thereby limiting the reach of the statute and the class of potential plaintiffs. However, while both doctrines carry out similar policy goals, the aggravating unscrupulous conduct standard is legally more justifiable than the primary line of business test.

First, the breach of contract approach actually has some support in the statutory language—unlike the primary line of business requirement, as demonstrated in Section I. CUTPA expressly requires Connecticut courts to look at federal courts’ interpretations of the FTC Act for guidance in construing CUTPA. Systemic breaches of contract or ones that cause substantial harm to consumers are cognizable under the FTC Act; however, there is no reciprocal primary line of business test under federal law. Second, while determining what conduct rises to the level of being “unscrupulous” can be an indefinite practice, it is less ambiguous than the primary line of business test. Bad faith conduct is easier to identify than the heavily fact-specific inquiry seeking to separate out those business activities which are “primary” from those which are merely “incidental,” and thus the aggravating conduct approach better serves to instill predictability in the

176 Ulbrich, 78 A.3d at 100–01; see id. at 101, 101 n.31 (reiterating that the exception to the economic loss doctrine under CUTPA is limited to cases that fall under the second prong of the cigarette rule).


178 See Orkin Exterminating Co. v. F.T.C., 849 F.2d 1354, 1366–68 (11th Cir. 1988) (upholding the FTC’s power to determine that a breach of over 200,000 contracts was an unfair practice).

179 See Ulbrich, 78 A.3d at 110–11 n.43 (considering the defendant’s argument that finding immoral, unethical, oppressive, or unscrupulous behavior is a vague and ambiguous process).
marketplace. Third, the Connecticut Supreme Court has already approved of the aggravating unscrupulous conduct standard in cases like Naples and Ulbrich, thus giving the concept stare decisis impact. In contrast, the highest court in the state has yet to give an official opinion on the primary line of business test, preserving an opportunity to acknowledge the Appellate Court’s errors without undermining the system’s legitimacy.

This Note has argued that the primary line of business test and the case that created it are flawed. In an effort to resolve this problem, the Connecticut Supreme Court should look to merge the primary line of business test into the already existing aggravating unscrupulous conduct standard. A merger of the two doctrines can be accomplished without upsetting much prior precedent, while also ensuring better conclusions in the future.

B. Consistency with Prior Cases

A review of the primary line of business cases demonstrates that the question comes up most frequently in situations involving either the purchase and sale or lease of real estate. A contract is almost always involved in these circumstances. Even though the holdings are based on the primary line of business test, most of the prior case law would turn out the same way if analyzed under the aggravating unscrupulous conduct standard instead. The Connecticut Supreme Court could justify abdicating the primary line of business doctrine without necessarily disrespecting the entire line of cases that came from it.

A comparison of McCann and Landmark is instructive. Both cases arose under similar factual scenarios, as both involved environmental issues disrupting a real estate purchase. However, in McCann the plaintiffs were foreclosed from maintaining a CUTPA claim, while the plaintiff in Landmark was permitted to proceed with such a claim. These outcomes

180 Compare Tzovolos v. Wiseman, 16 A.3d 819, 850 (Conn. Super. Ct. 2007), aff’d, 12 A.3d 563 (Conn. 2011) ("Furthermore, a part of most businesses’ commerce is the borrowing or providing of capital, the giving or taking of security interests and dealing honestly and in a nonpreferential manner to creditors of an insolvent entity. These acts are within the primary scope of business and, therefore, are subject to CUTPA."), with Sovereign Bank v. Licata, 977 A.2d 228, 238 (Conn. App. Ct. 2009) (emphasis added) ("Our careful review of the record reveals uncontroverted testimony that since 2000, Seven Oaks has been engaged in the business of real estate acquisition, including the purchase, sale and renovation of real property. . . . There was no evidence presented at trial that Seven Oaks ever had, prior to the transaction or thereafter, engaged in the mortgage business, nor did the defendant allege as much.").

181 See supra Section II.A-B.


183 Landmark, 10 A.3d at 79; McCann, 890 A.2d at 164.
are consistent with the aggravating factors standard, despite neither court addressing the subject. The complaint in McCann was largely filled with allegations regarding breach of contract, with a CUTPA claim haphazardly included. In contrast, the Landmark court upheld the trial court’s findings of nine specific examples of bad faith on the part of the defendant. Therefore, the conduct alleged in McCann could be reclassified as “merely negligent or incompetent,” while the conduct in Landmark ascended to the level of “unscrupulous.” Tzovolos is another example of a case that could be justified under the aggravating factors standard because bad faith conduct was specifically found, while the outcomes in Colonial Motors, Arawana Mills, Cornerstone Realty, and Sovereign Bank would likewise remain intact because each only contained allegations amounting to simple breach of contract.

C. Preventing Unfair Results

There is one case conclusion that appears to be inconsistent with the aggravating conduct standard and it is the most recent, DiNardo. In DiNardo, the plaintiff included many allegations in the complaint that the defendant engaged in bad faith conduct; specifically, [the plaintiff] claimed that the intentional destruction of the property constituted an unfair trade practice and was done with malice toward the plaintiff and/or to prevent another occupant from using the property.” If the DiNardo court had analyzed the CUTPA claim related to breach of the lease agreement under the aggravating unscrupulous conduct standard, it is likely that the defendant’s motion for directed verdict would have been vacated and the case remanded. However, the plaintiff never received the opportunity to have the CUTPA claim decided on the merits because the DiNardo court used the primary line of business test to prevent the issue from going to a jury.

The result in DiNardo is an example of the primary line of business test going too far. The behavior alleged in DiNardo seems to be the type of

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184 See McCann, 890 A.2d at 146–48 (describing the pleadings).
185 See Landmark, 10 A.3d at 82–83 (listing all the bad faith actions).
186 Ulbrich v. Groth, 78 A.3d 76, 100 (Conn. 2013).
187 See Tzovolos v. Wiseman, 16 A.3d 819, 850 (Conn. Super. Ct. 2007), aff’d, 12 A.3d 563 (Conn. 2011) (“Here, Hartmann, Sr., his sons, and the entities that he controlled, dealt with creditors of Seawind and persons holding security interest in equipment controlled by Seawind in an unscrupulous, oppressive and immoral manner.”).
188 See supra Section II.A–B.
190 Id.
191 Id. at 426.
conduct that CUTPA was enacted to protect against. Abandoning the primary line of business test in favor of the aggravating factors standard would give plaintiffs who allege a heightened degree of unfairness in contract actions a chance to get in front of a jury, instead of being shut down as a matter of law. This result will not prejudice defendants substantially, as plaintiffs would still have the ultimate burden of proving unfairness under the cigarette rule. The aggravating unscrupulous conduct test would better serve to prevent future injustices than the primary line of business test. This is especially true in a case like DiNardo, where the plaintiff lost on the other non-CUTPA count, and was thus left with no recovery.

CONCLUSION

CUTPA is a valuable tool, for those who can use it. The primary line of business test, which asks whether unfair conduct is incidental to an alleged violator’s trade or business, serves as an unjustifiable restriction on the definition of trade or commerce under CUTPA. The idea has no basis in the statutory text or legislative history and the case law supporting the doctrine suffers from numerous procedural and substantive fallacies. The Connecticut Supreme Court should recognize this problem and merge the primary line of business test into the aggravating unscrupulous conduct standard, which is used for differentiating between CUTPA claims and simple breach of contract. This outcome would reduce ambiguity by leaving trial courts with less discretion to dismiss CUTPA actions prematurely, while also remaining relatively consistent with precedent.

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192 See Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1020 (Conn. 1995) (reviewing the legislative history in light of the remedial nature of the statute).

193 See Feen v. Benefit Plan Adm’rs, Inc., No. 406726, 2000 WL 1398898, at *5 (Conn. Super. Ct. Sept. 7, 2000) (“[T]o limit actionable unfair acts or practices to those committed only in the course of a defendant’s principal trade could lead to irrational and bizarre results. . . . Suppose that a businessperson is seeking to branch out into one or more secondary businesses and acts in a patently unfair and deceptive manner in seeking this expansion. Is he or she to be given free reign to do so in pursuing these secondary businesses or business lines because they are merely, at present, incidental to the primary business?”); Kay v. Seiden, No. CV 940048587S, 1999 WL 596601, at *4 (Conn. Super. Ct. July 30, 1999) (“Or to look at it from another perspective, is the reluctance to apply the act based on the fact that a small business is involved with an individual business person selling to other business people? If that is so, how do we formulate a principle excluding applicability of the act to such factual circumstances and still apply it to sale of a business or a portion of a business involving big impersonal corporations affecting large numbers of competitors and a broad range of consumers? It cannot be done, and to say the act does not apply to the latter case is not supportable.”).

194 DiNardo, 100 A.3d at 421.