# STANDARDS FOR PLEADING A CLAIM UNDER CUIPA: NO EXCEPTIONS TO THE CONNECTICUT FACT PLEADING REQUIREMENT

BETHANY L. DIMARZIO*

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## I. INTRODUCTION

In her complaint, a plaintiff alleges that her insurer failed to settle her claim in a timely fashion when her house burned down. In order to prevail on her claim, she must allege that other people insured by the same company experienced the same misconduct. It seems likely that she is not the only one who has experienced a delay in settling a claim with this insurer, so in her complaint, she claims that, "upon information and belief", other insureds have suffered the same misconduct. If her complaint is deemed factually insufficient upon a motion to strike, she has no opportunity to conduct discovery to prove that she is not the only one who suffered, and no opportunity to pursue her claim. If her complaint is found

* J.D. Candidate, University of Connecticut School of Law, 2012; B.S., University of Connecticut, 2009. I would like to thank Attorney Crystal Fraser, Attorney Mark Seiger, and Professor Alexandra Lahav for their invaluable assistance in writing this note, as well as my family and friends for their constant support and encouragement.

to be sufficient, however, the insurer will be subjected to a time-consuming, expensive, and exhaustive discovery procedure, based on the plaintiff's unsubstantiated allegations that other insureds suffered similar misconduct.

Pleading standards serve a critical function in our judicial system in that they set a threshold by which frivolous claims are stricken or dismissed, leaving room for meritorious claims to be tried in court.[1] Compliance with pleading standards is essential to prevail on a claim; without adequate pleadings, a claim essentially fails before the case ever begins. Inadequate pleadings are targets waiting to be stricken, and result in loss of opportunity to conduct discovery, the inability to present a case, and ultimately, no possibility of obtaining relief.[2]

The standards for pleading a claim in federal and Connecticut state courts are set forth in the Federal Rules of Civil Procedure[3] and in Connecticut's Trial Rules.[4] In Connecticut, the courts require the plaintiff to set forth a concise statement of material facts in support of their allegations.[5] However, the standards for pleading a claim of unfair settlement practices against an insurer have recently become a subject for debate, causing a split amongst Connecticut trial courts. Some courts believe that pleadings should be construed liberally, giving the plaintiff the benefit of doubt over the insurer.[6] Others adhere to strict construction of pleading standards, suggesting that there should not be an exception to the state's fact pleading rule for insurance claims.[7] This note analyzes the standards for pleading a claim under the Connecticut Unfair Insurance

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[1] Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 48-49 (2010) (discussing the district court judge's role in filtering cases based on pleadings and motions to dismiss and the uncertainty of separating frivolous and meritorious claims).

[2] Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1294-95 (2010).

[3] FED. R. CIV. P. 8(a).

[4] CONN. PRAC. BOOK § 10-1.

[5] *Id.*

[6] *See, e.g.*, Blakeslee Arpaia Chapman, Inc. v. U.S. Fid. & Guar. Co., No. 520348, 1994 WL 76383, at *10 (Conn. Super. Ct. Mar. 4, 1994) (interpreting a CUIPA claim liberally under CUTPA because the statutes are remedial in nature).

[7] *See, e.g.*, Tomonto v. Progressive N. Ins. Co., No. CV044001543, 2006 WL 2053723, at *2 (Conn. Super. Ct. July 7, 2006) ("This is a fact pleading jurisdiction. Practice Book § 10-1 states, in part: 'Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies . . . .'") (citing CONN. PRAC. BOOK § 10-1).

Practices Act, and will suggest that there is no adequate reason to suspend Connecticut's fact pleading standard for this singular area of law.

## II. PLEADING STANDARDS IN FEDERAL AND STATE COURTS

Until recently, claims for relief in federal court were governed by the notice pleading approach, wherein the claimant is only required to provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[8] The goal of notice pleading is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[9] Under a notice pleading standard, if a claim for relief is sufficient to put the defendant on notice of the claim against him, it will survive a motion to strike, with factual discovery occurring later in the pretrial process.[10]

Notice pleading was adopted because, in many cases, the defendant is in control of information that is relevant to the plaintiff's claim, as they have the knowledge and evidence the plaintiff is seeking to prove their case.[11] Notice pleading balances out this advantage by giving the plaintiff the benefit of the doubt that they have a legitimate claim, and by not requiring the plaintiff to cite facts that they cannot be expected to know at an early stage of litigation.[12] However, the lower the pleading standard, the higher the economic cost, as vague and unsubstantiated pleadings may permit plaintiffs to conduct extensive and costly discovery inquiries into the defendant's affairs.[13]

In 2007, the United States Supreme Court reconsidered the federal notice pleading standard in *Bell Atlantic Corp. v. Twombly*, a consumer antitrust action against telephone and telecommunications providers alleging a conspiracy in violation of the Sherman Act.[14] The *Twombly*

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[8] FED. R. CIV. P. 8(a)(2). The United States Supreme Court adopted the notice pleading standard in *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

[9] *Conley*, 355 U.S. at 47.

[10] Miller, *supra* note 1, at 4.

[11] Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 114-15 (2009).

[12] *Id.*

[13] *Id.* at 116 ("In particular, the lower the pleading standard, the greater the potential disparity between defendant's and plaintiff's costs for several claim types . . . because the range of permissible inquiry into defendant's affairs increases as pleading specificity requirements decrease, especially for claims in which the plaintiff's own conduct is of little moment.").

[14] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550, 553 (2007).

Court adopted a slightly higher standard than notice pleading, holding that enough facts must be stated to make a claim for relief "plausible" on its face.[15] In 2009, the Supreme Court again leaned away from the notice pleading standard in *Ashcroft v. Iqbal*, which relied on and enforced the plausibility pleading requirement set forth in *Twombly*.[16] The *Iqbal* Court dismissed a civil rights complaint filed by a Pakistani man who was detained after the September 11 attacks.[17] Mirroring the language in *Twombly*, the *Iqbal* Court stated that discriminatory animus on the part of the federal officials was "not a plausible conclusion" based on the facts pled.[18] This newly-formed federal pleading standard has become known as "plausibility pleading"; a standard that imposes a higher burden on plaintiffs, requiring just slightly more facts be pled in comparison to the notice pleading standard.[19] The holdings in *Twombly* and *Iqbal* regarding pleading standards are significant in that they indicate a moving away from the explicit focus on giving notice.[20] However, this movement is modest, as the Court has stated that "plausibility" should not be interpreted as a demanding standard.[21]

In contrast to the standards for pleading a claim in federal court, Connecticut takes a fact pleading approach, requiring that "[e]ach pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved . . . ."[22] By focusing on a plain statement of specific facts, courts avoid subjecting defendants to frivolous litigation and the overall cost of operating the judicial system is reduced, as fewer claims survive this strict pleading standard.[23] However, some claims that appear frivolous due to lack of factual pleading might be dismissed, despite the potentially valid claims they assert.[24]

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[15] *Id.* at 570.

[16] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952 (2009).

[17] *Id.* at 1950-51.

[18] *Id.* at 1952.

[19] Steinman, *supra* note 2, at 1310.

[20] Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 883 (2009); *Iqbal*, 129 S. Ct. at 1949.

[21] Bone, *supra* note 20, at 883-84 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

[22] CONN. PRAC. BOOK § 10-1.

[23] Stancil, *supra* note 11, at 148-49.

[24] *Id.* at 149.

The main purpose of more lenient pleading standards is simply to make a party aware of the claims against them.[25] The requirements set forth by notice and plausibility pleading standards are easy enough to satisfy, which helps to ensure that a litigant gets his or her day in court.[26] Despite the long-standing history of lenient pleading standards in federal courts, many state courts find it preferable to take a fact pleading approach, including Connecticut.[27] Attorneys handling full workloads of civil litigation cases find that fact pleading standards make their cases "more focused, and ultimately less expensive and less time-consuming" than if a more lenient pleading approach was followed.[28] The adoption and practice of fact pleading in Connecticut is therefore not arbitrary or accidental, but serves to benefit the judicial system by conserving resources and expediting meritorious cases.

## III. PLEADING A CUIPA CLAIM

The Connecticut Unfair Insurance Practices Act (CUIPA) was derived from the National Association of Insurance Commissioner's Model Act, which has been adopted by most states.[29] CUIPA was adopted to prohibit persons from engaging in unfair or deceptive behavior in the practice of insurance within the state of Connecticut.[30] The statute specifically lists sixteen prohibited practices, including misrepresenting the benefits of a policy, disseminating false information to the public, and engaging in unfair claim settlement practices,[31] the last of which is the

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[25] Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003).

[26] *Id.*

[27] U. OF DENV. INST. FOR THE ADVANCEMENT OF THE LEGAL SYS., *Fact-Based Pleading: A Solution Hidden in Plain Sight*, 1 (May 2010), http://iaals.du.edu/news-room/fact-based-pleading-a-solution-hidden-in-plain-sight (follow "Read More" link) ("While fact-based pleading has not been a part of the federal civil process since the 1930s, it remains alive and well in many of the country's biggest and busiest state courts, including California, New York, Pennsylvania, Florida, Texas, Missouri, Virginia, Illinois, New Jersey, Connecticut and Louisiana. These are courts that collectively handle millions of civil cases every year.").

[28] *Id.*

[29] Chapell v. LaRosa, No. CV990552801, 2001 WL 58057, at *5 (Conn. Super. Ct. Jan. 5, 2001).

[30] CONN. GEN. STAT. § 38a-815 (2012).

[31] *Id.* § 38a-816.

violation this paper will focus on. The list of prohibited acts is followed by a blanket prohibition on any unlisted, unfair insurance practices.[32]

CUIPA claims are handled by the Connecticut Insurance Department, and the Act gives the Commissioner of Insurance broad discretion to investigate potential unfair practices and enforce its provisions.[33] Once a CUIPA claim is properly pled, therefore, it is at the discretion of the Commissioner to determine whether the alleged practice should be investigated, and to request and view any pertinent information. The Act also established an administrative procedure through which the Commissioner of Insurance can take action and impose sanctions against an insurer found to be in violation of its provisions.[34]

If a plaintiff has experienced unfair insurance claim settlement practices, bringing a claim under CUIPA is not the only opportunity for redress. Every contract is accompanied by an implied covenant of good faith and fair dealing.[35] When an insurer withholds payment of a valid insurance claim in bad faith, in violation of an insurance contract, they subject themselves to liability in tort.[36] A plaintiff can bring a claim of common law bad faith sounding in tort, and will succeed if they can prove that the insurer committed an unfair practice with a dishonest purpose or ill will.[37] The payoff to the plaintiff who succeeds in their common law bad faith claim will not be substantial, however, as punitive damages under

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[32] *Id.* § 38a-818 (permitting charges "[w]henever the commissioner has reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in section 38a-816 . . . .").

[33] Martin v. Am. Equity Ins. Co., 185 F. Supp. 2d 162, 166 (D. Conn. 2002).

[34] Elizabeth J. Stewart, *Environmental Insurance Coverage Disputes in Connecticut*, 70 CONN. B.J. 280, 306 (1996).

[35] Hoskins v. Titan Value Equities Grp. Inc., 749 A.2d 1144, 1146-47 (Conn. 2000).

[36] Wiacek v. Safeco Ins. Co. of Am., Inc., No. 329601, 1998 WL 161378, at *2 (Conn. Super. Ct. Mar. 31, 1998).

[37] Buckman v. People Exp., Inc., 530 A.2d 596, 599 (Conn. 1987); *see also* Chapman v. Norfolk & Dedham Mut. Fire Ins. Co., 665 A.2d 112, 120 (Conn. 1995) ("[I]n order to receive punitive damages under CUTPA, the plaintiffs were required to produce evidence that the defendants' actions had a reckless indifference to the rights of others or that the defendants had engaged in an intentional and wanton violation of those rights.") (internal quotation marks omitted).

Connecticut common law are limited to the amount of attorney's fees.[38] Bringing an action under CUIPA is therefore significantly more attractive to those who have been subjected to unfair settlement practices than a claim sounding in tort, as a successful CUIPA claim could potentially award the plaintiff actual damages, attorney's fees, and punitive damages.[39]

### A. DOES CUIPA PROVIDE A PRIVATE CAUSE OF ACTION?

Since its inception, individuals have turned to CUIPA to seek redress from insurers for treating claimants unfairly during the claim settlement process. However, individuals cannot succeed on such claims, as the Second Circuit has held that there is no such private cause of action under CUIPA.[40] The Connecticut Supreme Court has not addressed this issue, and the lower courts are split as to whether CUIPA provides a private cause of action.[41] A minority of courts rule that a private right of action does exist,[42] but the majority opinion is that there is no private right of action under CUIPA.[43] For the purposes of this paper, the majority position will be adopted, and it will be assumed that there is no private right of action under CUIPA.

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[38] Charles T. Lee, *Insurance Coverage Litigation in Connecticut: Is There a Level Playing Field in the "Insurance State"?*, 74 CONN. B.J. 362, 379 (2000).

[39] CONN. GEN. STAT. § 42-110g (2012). "[U]nder a combination of the Connecticut Unfair Insurance Practices Act . . . and the Connecticut Unfair Trade Practices Act, . . . insureds may recover substantial punitive damages, if they can show a defendant engaged in a general business practice of unfair or deceptive settlement conduct." Lee, *supra* note 38, at 379.

[40] Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 118 (2d Cir. 2001).

[41] W. World Ins. Co. v. Architectural Builders of Westport, LLC, 520 F. Supp. 2d 408, 411 (D. Conn. 2007).

[42] *See, e.g.*, George's Auto Parts, Inc. v. Providence Wash. Ins. Co., No. CV000439407, 2001 WL 206081 (Conn. Super. Ct. Feb. 8, 2001); Edelman v. Pac. Emp'r Ins. Co., No. CV 93 0533463, 1994 WL 590632 (Conn. Super. Ct. Oct. 20, 1994).

[43] *See, e.g.*, Am. Progressive Life & Health Ins. Co. of N.Y. v. Better Benefits, LLC, 7591S, 2001 WL 1178596, at *2 (Conn. Super. Ct. Aug. 30, 2001); Chieffo v. Yannielli, No. CV000159940, 2001 WL 950286, at *4 (Conn. Super. Ct. July 10, 2001); Joseph v. Hannan Agency Inc., No. 323310, 1997 WL 15424, at *1 (Conn. Super. Ct. Jan. 9, 1997); Stabile v. S. Conn. Hosp. Sys., Inc., No. 326120, 1996 WL 651633, at *3 n.6 (Conn. Super. Ct. Oct. 31, 1996).

Although the Connecticut Supreme Court has expressly declined to rule on this issue,[44] the lack of definite authority doesn't serve to restrict private claims. Even if no private right of action exists under CUIPA, the plaintiff is not left without redress; a claim for relief can be made under the Connecticut Unfair Trade Practices Act (CUTPA) alleging a breach of CUIPA.[45] The CUTPA, which prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce, does create a private right of action.[46] For the purposes of this paper, pleadings alleging unfair settlement practices will be referred to as claims under CUIPA, regardless of whether they are being brought in conjunction with a CUTPA claim.

Although a plaintiff is entitled to bring a claim under CUTPA alleging a violation of CUIPA, the claim is not proper unless the alleged unfair practice actually violates CUIPA.[47] As a Connecticut statute, CUIPA is subject to governance by Connecticut's Trial Rules. Such a claim therefore must contain a statement of the material facts forming the basis of the allegation, and meet the criteria set forth in both CUTPA and CUIPA.

### B. REQUIREMENTS FOR PLEADING A CUIPA CLAIM

Of the sixteen causes of action contained in CUIPA, the unfair settlement practices cause of action is unique in that it requires a showing of multiple instances of misconduct by the same insurer.[48] When asserting a claim of unfair settlement practices under CUIPA, the claimant must plead that the insurer performed certain actions constituting misconduct in conjunction with the settlement of their insurance claim.[49] Such misconduct encompasses misrepresenting the insurance policy provisions at issue, attempting to settle a claim for less than a reasonable person would have expected, or refusing to pay claims without reasonable investigation.[50] These actions must not have been committed only as to the plaintiff; they

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[44] Lees v. Middlesex Ins. Co., 643 A.2d 1282, 1285 n.4 (Conn. 1994) ("With respect to the CUIPA count, the defendant contends that CUIPA does not create a private cause of action. We decline to consider that claim because it is unnecessary for us to do so.").

[45] Mead v. Burns, 509 A.2d 11, 18 (Conn. 1986).

[46] 16 Conn. Prac. Series, Elements of an Action § 11:2 ("A statutory cause of action is created by C.G.S.A. § 42-110g for any person who suffers a loss of money or property as the result of an unfair trade practice.").

[47] Martin v. Am. Equity Ins. Co., 185 F. Supp. 2d 162, 168 (D. Conn. 2002).

[48] CONN. GEN. STAT. § 38a-815 (2012).

[49] *Id.* § 38a-816(6).

[50] *Id.*

must have been committed "with such frequency as to indicate a general business practice."[51] This clause has led Connecticut courts to conclude that pleading a claim of unfair settlement practices under CUIPA requires the claimant to show more than one instance of misconduct on the part of the insurer.[52]

The language in the unfair settlement practices cause of action therefore requires a showing of multiple prohibited acts, whereas the other causes of action under CUIPA require that only one prohibited act be asserted.[53] By including this language in the statute, the legislature clearly intended that insurers only be punished for unfair settlement practices occurring with some frequency, rather than for isolated incidences of misconduct.[54] This indicates that isolated incidences of misconduct, although unfortunate, are not so seriously in violation of state public policy as to mandate statutory intervention.[55]

Furthermore, CUIPA's protection is not meant to extend to a plaintiff who claims that multiple unfair settlement practices occurred in relation to just one insurance claim.[56] This point was emphasized in *Lees v. Middlesex Insurance Company*, where the plaintiff alleged that the insurer failed to acknowledge inquiries regarding her claim, failed to affirm or deny coverage, failed to make a good faith effort to settle the claim promptly, and failed to properly explain her insurance policy.[57] The court in *Lees* held that multiple instances of alleged misconduct in relation to one insurance claim does not rise to the level of a general business practice.[58]

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[51] *Id.*

[52] Mead v. Burns, 509 A.2d 11, 19 (Conn. 1986) (recognizing "the legislative determination that isolated instances of unfair insurance settlement practices are not so violative of the public policy of this state as to warrant statutory intervention").

[53] Ferreira v. Safeco Ins. Co. of Am., No. 323152, 1996 WL 411999, at *1 (Conn. Super. Ct. July 5, 1996)*; see also* Lees v. Middlesex Ins. Co., 229 Conn. 842, 848 n.5 (1994) ("We note that of the sixteen categories of unfair insurance practices proscribed by General Statutes § 38a-816, only subsection (6) expressly requires proof that the unfair claim settlement practices enumerated therein were committed or performed 'with such frequency as to indicate a general business practice.'").

[54] *Lees*, 229 Conn. at 849.

[55] Martin v. Am. Equity Ins. Co., 185 F. Supp. 2d 162, 166 (D. Conn. 2002).

[56] *Lees*, 229 Conn. at 848.

[57] *Id.* at 848 n.7.

[58] *Id.* at 849.

## IV. DEFENDING AGAINST CUIPA CLAIMS

The main strategy for defending against CUIPA claims in state court is by filing a motion to strike.[59] A motion to strike is used to contest the legal sufficiency of the allegations of a complaint.[60] In evaluating a motion to strike, the court considers the facts set forth in the complaint and construes them in the light most favorable to the plaintiff, admitting all well-pleaded facts.[61] Only the facts alleged in the complaint can be considered; legal conclusions or opinions will not be admitted.[62] If the facts set forth would support the cause of action asserted, the motion to strike will be denied.[63] A motion to strike a claim of unfair settlement practices under CUIPA is often based on the grounds that the pleading violates Connecticut Trial Rules by stating insufficient specific facts.

CUIPA claims can also be litigated in federal court if there is diversity jurisdiction.[64] In federal court, the proper motion to defend against a pleading that fails to state a claim upon which relief can be granted is a motion to dismiss.[65] A motion to dismiss is evaluated in largely the same way as a motion to strike; the court accepts as true all the factual allegations in the complaint, and draws inferences in the light most favorable to the movant.[66] The action will be dismissed only if it is clear that no relief can be granted based on the facts and allegations contained in the complaint.[67] It is important to note that, because the standard for

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[59] Robert B. Yules & Cynthia W. S. Rowen, *Insurance Bad Faith Litigation, A Primer*, 67 CONN. B.J. 380, 393 (1993).

[60] Fort Trumbull Conservancy, LLC v. Alves, 815 A.2d 1188, 1200-01 (Conn. 2003).

[61] Colon v. Geico Cas. Co., No. CV 980419197, 1999 WL 596245, at *1-2 (Conn. Super. Ct. July 28, 1999) (quoting Waters v. Autuori, 676 A.2d 357, 359-60 (Conn. 1996)).

[62] Wiacek v. Safeco Ins. Co. of Am., Inc., No. 329601, 1998 WL 161378, at *1 (Conn. Super. Ct. Mar. 31, 1998).

[63] *Id.*

[64] 28 U.S.C. § 1332 (2006). The District Court has jurisdiction over civil actions where the amount in controversy exceeds $75,000 and is between citizens of different states. When considering diversity of incorporated insurers, a corporation is deemed to be a citizen of both the state it is incorporated in and the state where it has its principal place of business.

[65] FED. R. CIV. P. 12(b)(6).

[66] W. World Ins. Co. v. Architectural Builders of Westport, LLC, 520 F. Supp. 2d 408, 410 (D. Conn. 2007).

[67] Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

pleading in federal courts is plausibility pleading, the complaint does not have to contain specific facts; the plaintiff must simply plead sufficient facts to "nudge[] their claims across the line from conceivable to plausible."[68]

A strong motion to dismiss or strike comes with the potential benefit to insurers that the complaint will be immediately disposed of, and will not survive to be litigated in court.[69] Alternatively, upon realizing the strong legal arguments contained in the motion, the plaintiff might be more willing to engage in settlement discussions, or settle at a lower price.[70] On the other hand, if the motion is granted, the plaintiff might come back with stronger legal arguments that are more difficult to defeat at trial.[71] Because of this delicate balancing act, it is critical for an insurer to evaluate the pros and cons of moving to strike or dismiss a CUIPA action before any such motion is filed.

## V. LEVEL OF SPECIFIC FACTUAL DETAIL REQUIRED

At the trial level, Connecticut courts are split as to the minimum facts that must be pled to support a claim under CUTPA and CUIPA.[72] "The point of contention among these decisions centers on the requirement that 'a CUPTA claim based on an alleged unfair claim settlement practice . . . require[s] proof, as under CUIPA, that the unfair claim settlement practice had been committed or performed by the defendant with such frequency as to indicate a general business practice.'"[73] The problem therefore often lies in the ability of an individual plaintiff to state sufficient facts indicating that not only did the insurer perpetrate misconduct against

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[68] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007).

[69] Mark Thomas Smith, *Strategic Motions to Dismiss (Or Lack Thereof)*, AMERICAN BAR ASSOCIATION, http://www.abanet.org/litigation/litigationnews/trial_skills/pretrial-motion-dismiss.html (last visited Mar. 28, 2012).

[70] *Id.*

[71] *Id.* "Practice Book § 10-44 permits a party to file a new pleading within fifteen days after a motion to strike has been granted . . . ." Crespan v. State Farm Mut. Auto. Ins. Co., No. LLICV054002121S, 2006 WL 280009, at *2 (Conn. Super. Ct. Jan. 13, 2006) (quoting Johnson v. Mazza, 834 A.2d 725, 729 (Conn. 2003)).

[72] Mark B. Seiger & Elizabeth F. Ahlstrand, *When Pleadings Lack Specific Facts*, CONN. L. TRIB., Feb. 8, 2010, at 14-15 (quoting Lees v. Middlesex Ins. Co., 643 A.2d 1282, 1286 (Conn. 1994)).

[73] *Id.*

the plaintiff, but also that this misconduct is repeated with frequency sufficient to render it a general business practice.

Pleadings alleging a violation of CUIPA often state facts asserting that the claimant experienced unfair settlement practices, and that "upon information and belief" the defendant has regularly engaged in such practices with other insureds.[74] Some courts have taken a lenient approach when factually sparse pleadings are set forth, and have permitted pleadings that contain either a factual allegation of a specific violation combined with an assertion that this is a regular business practice, or pleadings containing several claims based on the same incident.[75] However, the majority of courts have held that general allegations of unfair business practices are insufficient, without giving any indication as to the precise level of fact required to state a sufficient claim.[76]

The subsections of CUIPA describing the acts prohibited in settling insurance claims are both broad and vague, and the pleadings filed by plaintiffs vary widely depending on the nature of each insurance claim.[77] The issue of how much factual detail is required is significant, because the facts set forth in the pleadings often control the scope of discovery.[78] If a complaint that alleges unfair settlement practices "on information and belief" survives an insurer's motion to strike, the claimant may then have the opportunity to conduct prolonged, intrusive, and expensive discovery, inconveniencing both the claimant and the insurer.[79]

To date, the Connecticut Supreme Court has not had the opportunity to consider the level of factual detail required to adequately plead a CUIPA claim. The defensive motion to strike removes some CUIPA claims from court before a decision is reached. Insurers often settle CUIPA claims that survive a motion to strike; they would rather pay the plaintiff a settlement than subject themselves to the broad discovery

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[74] *Id.*

[75] Lee, *supra* note 38, at 380; Lees v. Middlesex Ins. Co., 643 A.2d 1282 (Conn. 1994); Quimby v. Kimberly Clark Corp., 613 A.2d 838 (Conn. App. 1992).

[76] Lee, *supra* note 38, at 380.

[77] Chapell v. Larosa, No. CV990552801, 2001 WL 58057, at *8 (Conn. Super. Ct. Jan. 5, 2001) (questioning how inappropriate behavior by insurers can be ascertained, given the vague and broad language of the CUIPA statute).

[78] Seiger & Ahlstrand, *supra* note 72, at 14-15 (quoting Lees v. Middlesex Ins. Co., 643 A.2d 1282, 1286 (Conn. 1994)).

[79] *Id.*

discretion of the Commissioner of Insurance permitted under CUIPA.[80] Particularly for a large insurer, the costs associated with such discovery, such as time spent sorting documents, copying and shipping fees, and storage fees, serve as an incentive to settle the case rather than try it in court.[81]

In the trial courts, there are two conflicting lines of cases outlining the level of fact necessary to state a claim that meets the general business practice requirement of CUIPA. These cases differ not only in the facts set forth in the various pleadings, but also in the legal analyses the courts apply. The first line of cases requires that the plaintiff state facts demonstrating a general business practice that go beyond the unfairness immediately suffered by the plaintiff personally.[82] The second line of cases takes precisely the opposite position, holding that as long as the plaintiff alleges that other insureds have been subjected to the same unfair settlement practices, specific factual descriptions of these alleged instances are not required.[83]

### A. LINE 1: SPECIFIC FACTS REQUIRED TO ILLUSTRATE GENERAL BUSINESS PRACTICE

The first line of cases reviewing the standards for pleading a CUIPA claim concludes that pleadings must conform to Connecticut's Trial Rules, and as such, must contain a plain and concise statement of the material facts. Such cases state that, despite the rule that pleadings must be read in the light most favorable to the plaintiff, "an allegation based upon 'reasonable information and belief' is properly viewed as a legal conclusion, particularly when the plaintiff has made no attempt to plead facts establishing any other instance or instances to demonstrate the

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[80] *See, e.g.*, Stancil, *supra* note 11, at 116 ("Fishing expeditions are sometimes so expensive that the defendant will pay the plaintiff to leave even a lake the defendant knows to be empty.").

[81] *See, e.g.*, Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in A Digital Age*, 58 Duke L.J. 889, 945 (2009) (stating that increased discovery costs have the effect of "increasing parties' incentives to settle early, before much discovery . . . but also increasing the incentive to file frivolous lawsuits that defendants would settle to avoid discovery costs.").

[82] Wirth v. Progressive Cas. Ins. Co., No. CV095012844S, 2010 WL 654392, at *2 (Conn. Super. Ct. Feb. 14, 2010).

[83] *Id.* at *3.

frequency of the alleged CUIPA violation."[84] This line of cases suggests that, in order to properly plead unfair settlement practices as a general business practice, the plaintiff must allege specific facts indicating that the insurer's misconduct has occurred with such frequency as to go beyond the immediate claims of the plaintiff.[85]

One such case is *Quimby v. Kimberly Clark Corporation*, where the plaintiff sought damages and injunctive relief from her employer, based on alleged wrongful conduct in the treatment of the plaintiff's workers' compensation claims.[86] All eight counts of the complaint were stricken by the trial court, among which two were stricken because the plaintiff failed to allege sufficient facts indicating that the defendant's misconduct constituted a general business practice in violation of CUIPA.[87] In *Quimby*, not only did the plaintiff fail to state sufficient facts indicating a general business practice, she did not even allege that other claimants had been treated in a similar manner.[88] Without such an allegation, the facts stated did not meet the well-settled requirement that a single act of misconduct is insufficient to plead a claim under CUIPA.[89] Therefore, the court affirmed the trial court's decision to strike the plaintiff's complaint.[90] The *Quimby* case is one of few cases concerning the standards of pleading a CUIPA claim to have been considered on the appellate level, and as the complaint in question did not suggest that the unfair settlement practices occurred with frequency, the precise amount of fact required to plead a CUIPA claim was not addressed.

In some cases, the plaintiff will allege, without factual substantiation, that other insureds have experienced the same unfair settlement practices, in an attempt to fulfill the general business practice element of CUIPA. This was the case in *Ciarleglio v. Fireman's Fund Ins. Co.*, where the plaintiff was denied workers' compensation benefits after suffering job-related injuries.[91] In considering the insurer's motion to strike plaintiff's CUIPA claim, the court noted that, "[i]n what may be an attempt

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[84] Wiacek v. Safeco Ins. Co. of Am., Inc., No. 329601, 1998 WL 161378, at *3 (Conn. Super. Ct. March 31, 1998).

[85] *Wirth*, 2010 WL 654392 at *3.

[86] Quimby v. Kimberly Clark Corp., 613 A.2d 838, 840-41 (Conn. App. 1992).

[87] *Id.*

[88] *Id.* at 845.

[89] *Id.*

[90] *Id.*

[91] Ciarleglio v. Fireman's Fund Ins. Co., No. CV90 0276028 S, 1993 WL 541609, at *1 (Conn. Super. Ct. Dec. 16, 1993).

to avoid prompt demise of the fourth count, the plaintiff has inserted the magic words of other acts of insurance misconduct by the defendant, although not stating the factual basis for that claim."[92]

The *Ciarleglio* court viewed this strategy as problematic, in that the language in the pleadings constituted a legal conclusion due to the fact that the plaintiff did not name any other claimants whose workers' compensation claims were handled inappropriately, and legal conclusions are not properly admitted on a motion to strike.[93] Furthermore, the court acknowledged that the plaintiff had filed discovery to find other claimants in a similar position in order to bolster his CUIPA claim, but held that merely filing such a discovery request to give the appearance of fulfilling the requirements of a CUIPA claim is insufficient.[94] Because the complaint failed to allege sufficient facts to support a claim of unfair settlement as a general business practice, the court granted the insurer's motion to strike.[95]

The plaintiff's complaint in *Hellberg v. Travelers Home & Marine Insurance Co.* exhibited elements of the complaints in both *Quimby* and *Ciarleglio*. There, the plaintiff asserted seven violations of CUTPA/CUIPA with respect to one insurance claim that the insurer allegedly refused to pay.[96] The plaintiff further stated that "these violations are part of a 'pattern or frequency of similar unfair trade practices engaged in by the defendant.'"[97] In determining whether the complaint would survive the insurer's motion to strike, the court cited the holdings in *Lees* and *Mead*, noting that more than one instance of misconduct must be demonstrated.[98] The court not only relied on these key cases, but also quoted a similar Connecticut Superior Court case, *Finocchio v. Atlantic Mutual Insurance Co.*, in granting the insurer's motion to strike:

> A recent Superior Court decision examined the level of detail required in § 38a-816(6) claims holding that: "[a] close examination of the plaintiff's allegations . . . reveals that there are no specific factual references to the defendant's action towards other insureds . . . . As all of the

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[92] *Id.* at *3.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Hellberg v. Travelers Home & Marine Ins. Co., No. HHDCV095030438S, 2010 WL 3584551, at *1 (Conn. Super. Ct. Aug. 13, 2010).
[97] *Id.*
[98] *Id.* at *3.

> factual allegations in [the count at issue] involve only the settlement negotiations between the plaintiff and the defendant and fail to reference other insureds, the plaintiff has not alleged a general business practice." In that case, the court held that allegations that the defendant "has in the past engaged, and continues to engage in unfair and deceptive acts and/or practices" were insufficient for the purpose of § 38a-816(6).[99]

In some cases, the court explicitly analyzes how the Connecticut fact pleading standard should be applied to CUIPA claims. One such case is *Currie v. Aetna Casualty & Surety Co.*, where there was disagreement amongst the parties as to the limits of the plaintiffs' insurance policy when the plaintiffs' store and warehouse burned down.[100] Aetna moved to strike the plaintiffs' CUIPA claims, as the plaintiffs had made the broad allegation that they and "other insureds and policy holders of the defendants" had suffered misconduct.[101] In granting defendant's motion to strike, the court held that:

> [s]uch bald allegations are properly seen as legal conclusions, particularly since the plaintiffs make no attempt to plead any facts identifying these "other occasions." It is recognized that while Connecticut is a fact pleading jurisdiction, requiring that "[e]ach pleading shall contain a plain and concise statement of the material facts on which the pleader relies," the pleader, nevertheless, is not required to plead "the evidence by which [material facts] are to be proved." But here, no facts are alleged essential to establishing an unfair pattern of general business practice by Aetna, as required by Section 38a-816(6). As Aetna contends, the plaintiffs "have inserted the magic words of other acts of insurance misconduct by the defendant, although not stating the factual basis for that claim."[102]

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[99] *Id.* (quoting Finocchio v. Atl. Mut. Ins. Co., No. FSTCV095009607S, 2009 WL 1335073, at *4 (Conn. Super. Ct. Apr. 22, 2009)).

[100] Currie v. Aetna Cas. & Sur. Co., No. CV 960558900, 1999 WL 682041, at *1 (Conn. Super. Ct. Aug. 12, 1999).

[101] *Id.* at *4.

[102] *Id.* (internal citations omitted).

This line of cases clearly indicates that a plaintiff cannot merely insert key phrases and plural terms into their complaint to make it appear as though other claimants have suffered the same unfair settlement practices. For a complaint to be factually sufficient to survive a motion to strike under Connecticut's fact pleading standard, the plaintiff must provide information as to the identities of other insureds that have suffered misconduct, and must demonstrate that they have suffered the same type of misconduct alleged in their complaint.

For example, in *National Publishing Co., Inc. v. Hartford Fire Insurance Co., Inc.*, the plaintiff sought insurance coverage following a series of thefts, but had difficulty collecting covered costs from the insurer.[103] The plaintiff attempted to illustrate the frequency of misconduct by listing eight other parties who had allegedly filed complaints against the insurer with the Connecticut Insurance Department.[104] In granting the insurer's motion to strike, the court recognized that "the plaintiff fails to establish what facts, if any, support those entities' complaints. The only misconduct pleaded, therefore, is the 'isolated instance' of wrongdoing that occurred against the plaintiff."[105] Because the complaint failed to establish these facts, the court held that the plaintiff's CUIPA claim was not sufficiently pled, and granted the insurer's motion to strike.[106]

This first line of cases sheds light on the level of fact required to state a CUIPA claim in accordance with Connecticut fact pleading standards. From these cases, we can derive a general rule that plaintiffs must do more than allege that the insurer's misconduct has occurred with frequency;[107] they must plead sufficient supporting facts, rather than merely using plural terms alleging that "others" have suffered the same misconduct.[108] The judges considering these cases have analyzed not only the purpose of the CUIPA statute itself, but have taken it into consideration in conjunction with the legislative intent of the statute and the Connecticut

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[103] Nat. Publ'g Co. v. Hartford Fire Ins. Co., No. CV 970156478S, 1998 WL 166169, at *1 (Conn. Super. Ct. Mar. 25, 1998).

[104] *Id.* at *2.

[105] *Id.*

[106] *Id.*

[107] Quimby v. Kimberly Clark Corp., 613 A.2d 838, 845 (Conn. App. Ct. 1992).

[108] Ciarleglio v. Fireman's Fund Ins. Co., No. CV90 0276028 S, 1993 WL 541609, at *3 (Conn. Super. Ct. Dec. 16, 1993); Currie v. Aetna Cas. & Sur. Co., No. CV 960558900, 1999 WL 682041, at *4 (Conn. Super. Ct. Aug. 12, 1999); National Pub. Co. v. Hartford Fire Ins. Co., No. CV 970156478S, 1998 WL 166169, at *2 (Conn. Super. Ct. Mar. 25, 1998).

standards for pleading a claim. The strength of this line of cases, therefore, is that it takes into consideration Connecticut law as a whole, and does not merely pick and choose certain rules to follow in certain circumstances.

### B. LINE 2: LIBERAL CONSTRUCTION OF THE PLEADINGS

The second line of cases reviewing the standards for pleading a CUIPA claim concludes that claims alleging limited material facts may survive a motion to strike. The rationale for these holdings is that CUTPA and CUIPA are remedial in nature, and as such, should be construed liberally to benefit claimants.[109] Given that there is no appellate authority governing how much factual detail is required to allege a general business practice, and the district courts are split on this issue, courts that follow this second line of reasoning apply liberal construction in holding that such pleadings are sufficient to survive a motion to strike.[110]

The clear deficiency with these cases is that they fail to apply the Connecticut standard of fact pleading in evaluating the motion to strike. In *Wirth v. Progressive Casualty Insurance Company*, for example, the plaintiff brought a claim of unfair settlement practices under CUTPA/CUIPA against her insurer, in addition to claims of breach of contract and bad faith.[111] The insurer moved to strike the count under CUTPA/CUIPA, arguing that the complaint was factually insufficient and failed to set forth facts indicating unfair claim settlement as a general business practice.[112] In denying the insurer's motion to strike, the court noted that Connecticut courts are split as to the specificity of pleadings required, but gave deference to the fact that other trial courts had held that pleading specific instances of misconduct involving other insureds is not

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[109] Nation v. Allstate Ins. Co., No. CV040093456S, 2005 WL 2364932, at *2 (Conn. Super. Ct. Sept. 7, 2005) ("The court is aware that there is no appellate authority as to whether a plaintiff must plead other specific instances of unfair settlement practices on the part of an insurer in order to satisfy the allegation of a general business practice and that superior court decisions are split on this issue. Given the remedial nature of CUIPA and given that it is to be liberally construed to give effect to the legislature's intent, the court holds that the allegation of a general business practice in the plaintiff's complaint is sufficient to withstand a motion to strike.").

[110] *Id.*

[111] Wirth v. Progressive Cas. Ins. Co., No. CV095012844S, 2010 WL 654392, at *1 (Conn. Super. Ct. Feb. 14, 2010).

[112] *Id.*

required.[113] There was no reasoning or discussion as to why these cases should be followed over those requiring specific instances of misconduct, and no rationale was given as to why notice-style pleadings are sufficient. The court in *Wirth* further stated that "[t]he plaintiff's allegations of insurer misconduct reach beyond the plaintiff's individual claim, as evidenced by her use of the plural 'claims' and 'insureds.' The plaintiff's choice of words demonstrates that the acts are not confined to the plaintiff herself."[114] However, the court never questioned how the plaintiff knew that other "insureds" had been similarly affected, or what the factual basis for these claims was. Because the court in *Wirth* did not evaluate or discuss the merits of the pleadings under Connecticut's fact pleading rule, it is difficult to say whether merely pluralizing words in a complaint causes the pleading to contain facts sufficient to allege a general business practice.

The court in *Pettibone Tavern, LLC v. OneBeacon Midwest Ins. Co.* provided a more thorough analysis of its reasoning in denying an insurer's motion to strike, but still neglected to apply Connecticut's fact pleading standard in considering the merits of the complaint.[115] The insurer moved to strike the insured's complaint alleging CUIPA violations, asserting that "[t]he better approach . . . is to require the plaintiff to do more than merely parrot the language contained within the CUIPA count and allege facts that demonstrate that the defendant engaged in a pattern of misconduct."[116] The insured's response was that "the more persuasive line of cases does not require that it allege specific instances of insurer misconduct."[117]

In its reasoning, the *Pettibone Tavern* court considered the language of CUIPA, as well as the holding in *Lees* that the plaintiff must provide proof that the misconduct occurred with such frequency as to indicate a general business practice.[118] However, the court concluded that because the plaintiff included language that the misconduct occurred in "other claims", the complaint survived the insurer's motion to strike.[119] The court did not provide any reasoning as to why including this phrase in the

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[113] *Id.* at *2-3.

[114] *Id.* at *4.

[115] Pettibone Tavern, LLC v. OneBeacon Midwest Ins. Co., No. CV106006711S, 2010 WL 4723384 (Conn. Super. Ct. Oct. 28, 2010).

[116] *Id.* at *4.

[117] *Id.*

[118] *Id.* at *5 (citing Lees v. Middlesex Ins. Co., 643 A.2d 1282, 1283 (Conn. 1994)).

[119] *Id.* at *6.

complaint made it sufficient, nor did it mention how its conclusion fit in with the requirement of proving frequency as stated in *Lees*.

Some opinions stemming from cases in this line not only fail to consider the applicable state law, they provide no analysis whatsoever as to the level of fact must be pled in order to constitute a general business practice. In *Bates v. Utica Mutual Insurance Co.*, the plaintiff brought a CUIPA claim against her insurer, alleging that her workers' compensation claims were handled inappropriately during settlement.[120] In her complaint, she set forth six instances of alleged misconduct pertaining to her single workers' compensation claim.[121] Although the court acknowledged that a CUIPA claim must include a showing of more than a single act of misconduct under *Mead* and *Quimby*, the insurer's motion to strike was denied.[122] The court reasoned that "[t]he plaintiff has also alleged that the defendant has committed the same acts 'with such frequency as to indicate a general business practice.' . . . The allegation of a general business practice in the plaintiff's complaint is sufficient to withstand a motion to strike."[123] In doing so, the court in *Bates* not only failed to discuss the Connecticut fact pleading standard, they also ignored the reasoning in cases requiring more factual support to allege a general business practice. They provided no explanation as to why the plaintiff's allegations were sufficient. Finally, the court in *Bates* did not offer any discussion as to why an allegation of a general business practice is an appropriate factual component of a pleading, rather than a legal conclusion.

What is missing in these cases is an analysis of Connecticut law as a whole. Cases in this line do not take into consideration the level of facts required in a complaint under Connecticut fact pleading standards. While most of the cases in this line of reasoning acknowledge widely-followed cases such as *Mead*, *Quimby* and *Lees*, which require proof of frequent insurer misconduct, they merely cite these cases as a rule and then form their own, unrelated conclusions.[124] Many such cases hold that it is factually sufficient to assert that several other persons have suffered similar insurer misconduct, without naming those persons or stating any facts to demonstrate how the instances of misconduct were similar. Furthermore, it is difficult to tell how the courts reason through their decisions in this line

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[120] Bates v. Utica Mut. Ins. Co., No. CV020088925S, 2003 WL 21327656, at *1 (Conn. Super. Ct. May 29, 2003).

[121] *Id.* at *2.

[122] *Id.* at *3.

[123] *Id.*

[124] *See, e.g.*, *id.* at *3.

of cases, as there is rarely a thorough discussion or analysis of the relevant law. These courts often rely on other trial-level decisions stating that no facts concerning other instances of misconduct are required, without explaining their reliance or analyzing the justification for these holdings.

This line of cases is more favorable to insureds, who may have meritorious claims but lack the factual detail to properly articulate these claims at the pleading stage. However, denying a motion to strike does provide a plaintiff their day in court, but it does so at an enormous potential discovery cost to the insurer. Courts analyzing a complaint without the full force of Connecticut law in mind are exposing insurers to needless litigation that was not intended by the legislature in crafting the CUIPA statute.

### C. PLEADING STANDARDS APPLIED TO CUIPA CLAIMS IN FEDERAL COURTS

CUIPA claims heard in federal court by diversity jurisdiction are subject to federal pleading standards.[125] Because the federal plausibility pleading standard is less stringent than Connecticut's fact pleading standard, one might assume that more CUIPA claims survive dismissal in federal court. However, this is not the case; the Connecticut District Court has held that unsubstantiated allegations of unfair settlement as a general business practice are not compliant with the plausibility pleading standard.

In 2010, the Connecticut District Court applied the *Twombly* and *Iqbal* plausibility pleading standard to a CUIPA claim in *Ensign Yachts, Inc. v. Arrigoni*.[126] In *Ensign Yachts*, a yacht insured by Lloyd's of London was damaged during transportation for sale.[127] In its complaint, Ensign Yachts alleged that the insurer violated CUIPA's prohibition against unfair settlement practices by refusing to cooperate in the claims process and ultimately denying the claim without justification.[128] However, the complaint asserted facts describing the unfair settlement practices suffered by Ensign Yachts and alleged that this was a general business practice of Lloyd's, but did not identify any other specific instances of similar unfair claim settlement practices.[129]

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[125] *See* discussion of federal pleading standards *supra* Part II.

[126] Ensign Yachts, Inc. v. Arrigoni, No. 3:09-cv-209, 2010 WL 918107, at * 3 (D. Conn. Mar. 11, 2010).

[127] *Id.* at *1-2.

[128] *Id.* at *17.

[129] *Id.*

In its decision, the *Ensign Yachts* court commented on the split amongst Connecticut trial courts as to whether unsubstantiated allegations of unfair claims settlement as a "general business practice" are sufficient to plead a CUIPA claim. The court stated:

> Given the remedial nature of CUTPA and CUIPA, the Court would be inclined to agree with those courts which have held that the allegation of a general business practice, unsupported by specific instances of insurer misconduct in other cases, is sufficient to withstand a motion to dismiss. However, the applicable pleading standard for this forum requires a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Thus, under the *Iqbal* pleading standard, a mere assertion of a general business practice without anything more is insufficient to sustain Ensign's "CUIPA through CUTPA" claims against Lloyds . . . for violation of Conn. Gen. Stat. § 38a-816(6). Accordingly, the Court dismisses these claims.[130]

The Connecticut District Court has reached similar conclusions in other cases applying the *Twombly* and *Iqbal* plausibility standard. One such case is *O'Neill v. Riversource Life Ins. Co.*, where the plaintiff asserted that "upon information and belief" the defendant had evaded disability income claims "as a general business practice."[131] The court in *O'Neill* dismissed the plaintiff's CUIPA claim, stating that "[w]hile pleading 'upon information and belief' is permitted, O'Neill is obligated to do more than recite the elements of the cause of action."[132]

The District Court's application of the plausibility standard is notable for two reasons. First, cases such as *Ensign Yachts* and *O'Neill* illustrate that pleadings asserting unfair claims settlement as a general business practice "upon information and belief" do not pass the threshold

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[130] *Id.* (citations omitted).

[131] O'Neill v. Riversource Life Ins. Co., No. 3:10-CV-898 JCH, 2010 WL 3925988, at *3 (D. Conn. Sept. 29, 2010).

[132] *Id.* (citation omitted).

of the plausibility pleading standard. As such, similar unsubstantiated pleadings would not comply with Connecticut's more stringent fact pleading standard. Also, the fact that the federal courts apply federal pleading standards to CUIPA claims raises a potential *Erie* issue. The *Erie* doctrine discourages forum shopping between state and federal jurisdictions by binding the federal court to apply local substantive law and federal procedural law to matters sitting in diversity.[133] If the standards for pleading a CUIPA claim were found to be substantive law for *Erie* purposes,[134] the federal courts might be required to apply Connecticut pleading standards.[135] Although not the focus of this note, the treatment of CUIPA claims in federal courts would be a factor worth considering if this issue reaches the Connecticut Supreme Court.

## VI. ANALYSIS FOR FUTURE DEVELOPMENTS

Although a split opinion amongst courts as to the factual standards for pleading a CUIPA claim might be confusing, it is not unusual. Cases and motions are decided based on a judge's objective opinion, and each judge emphasizes different facts and arguments within a case.[136] As a result, the body of case law is not always perfectly consistent, but varies based on which judge was hearing a particular case and what facts and precedent they chose to emphasize. Our legal system is based on precedent, and in deciding which decisions to rely on, the judge must objectively analyze the facts at hand and identify similarities with past cases.[137] When opinions on a point of law appear to be split amongst the courts, as in this

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[133] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Id.* at 78.

[134] One might assume that pleading standards are procedural law; however, other seemingly procedural laws have been found substantive for purposes of Erie analysis. *See, e.g.*, Resolution Trust Corp. v. Deloitte & Touche, 818 F. Supp. 1406, 1407-08 (D. Colo. 1993) (finding state statute concerning notice of settlement to nonparty persons to be substantive law).

[135] *But see* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) (noting that where the matter in question is governed by the Federal Rules of Civil Procedure, "the Federal Rule applies regardless of contrary state law").

[136] David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 499 (1985).

[137] *Id.* at 501.

case, the judge must analyze how another court justified its decision in determining whether it is appropriate to join it.[138]

For some legal issues, splits amongst trial courts persist until legislation is drafted in an attempt to clarify the law and assist the courts in rendering consistent decisions amongst cases with similar facts and claims. Despite the conflicting trial court decisions stemming from the general business practice requirement to plead an unfair settlement practice under CUIPA, the legislature has yet to enact any law to correct this issue. In 2009, a bill was proposed in the Connecticut General Assembly that would eliminate the portion of CUIPA requiring that unfair settlement practices occur "with such frequency as to indicate a general business practice."[139] The stated purpose of the bill was "[t]o allow a private cause of action for unfair claim settlement practices without the necessity of showing a general business practice on the part of an insurer."[140] However, this bill was not enacted.

The fact that new legislation has not been enacted speaks to the importance of the legislature's intent in adopting the language of the statute. The role of the courts is to construe and apply the plain language of the statute, and the legislature is free to step in and provide instructions if the court misconstrues its intentions.[141] Inaction by the legislature is characterized as acquiescence in the court's construction of a statute.[142] The fact that the legislature has not acted to remove the "general business practice" language of CUIPA therefore indicates its acquiescence with this language, and with the courts' requirement of a showing of multiple unfair practices by an insurer to satisfy a CUIPA claim.

The treatment of CUIPA claims in federal court is also indicative of how the Connecticut Supreme Court might rule on this issue. As seen in cases such as *Ensign Yachts* and *O'Neill*, the Connecticut District Court has held that allegations of unfair claim settlement as a "general business practice" are insufficient to plead a CUIPA claim when applying a plausibility pleading standard.[143] The plausibility pleading standard is not as demanding as fact pleading, requiring just slightly more factual allegations than notice pleading.[144] If unsubstantiated allegations are

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[138] *Id.* at 502.
[139] S.B. 763, Gen. Assemb., Jan. Sess. (Ct. 2009).
[140] *Id.*
[141] Hall v. Gilbert & Bennett Mfg. Co., 695 A.2d 1051, 1060 (Conn. 1997).
[142] *Id.*
[143] *See supra* Part V.C.
[144] Steinman, *supra* note 2, at 1298.

insufficient to comply with plausibility pleading standards, it is likely that the Connecticut Supreme Court would find them similarly insufficient to meet the state's more stringent fact pleading standard.

Public policy rationale may also play a significant role in the future analysis of the standards for pleading a CUIPA claim. If pleading standards are too stringent, plaintiffs may be deterred from bringing valid CUIPA claims simply because they do not have specific facts illustrating the insurer's general business practice, and no access to discovery to ascertain such facts. Insurers should not be permitted to repeatedly commit unfair insurance practices purely because plaintiffs cannot meet Connecticut's stringent fact pleading standard.

If the Connecticut Supreme Court were to place high value on these public policy considerations, there may be ways to accommodate plaintiffs without circumventing the fact pleading standard. For example, plaintiffs could be granted a limited opportunity for discovery before a complaint is dismissed for lack of specific facts. Alternatively, the Connecticut Insurance Department or other regulatory entities could assist plaintiffs by keeping records of unfair settlement claims, which plaintiffs could use to identify other insureds who suffered similar wrongdoing. However, although these proposed solutions might address public policy concerns, they also have the potential to place undue strain on insurers; more insureds may take advantage of the limited opportunity for discovery, thus subjecting insurers to more frequent, costly and time-consuming discovery expeditions. Because public policy considerations have serious implications for both insureds and insurers, any proposed solutions should be considered carefully, noting that well-reasoned trial court cases, the lack of corrective legislation, and the treatment of CUIPA claims in federal courts all indicate that specific facts must be pled alleging a general business practice.

## VII. CONCLUSION

Based on the plain language of the statute, CUIPA was intended for use against insurers that commit more than a single and isolated act of misconduct.[145] However, trial court judges apply different standards in analyzing the level of facts necessary to plead a general business practice. As long as the general business practice requirement exists, and until the issue is decided at the appellate level, there will continue to be debate amongst judges over the level of fact required to plead a CUIPA claim.

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[145] Lees v. Middlesex Ins. Co., 643 A.2d 1282, 1285 (Conn. 1994).

When thoughtfully considered, it is clear that there is no compelling reason to excuse CUIPA claims from following Connecticut's fact pleading standard. It is true that it is difficult for individual plaintiffs to find factual evidence to support their allegations of general business practice without the benefit of full trial discovery, but it is by no means impossible. Therefore, plaintiffs should not be permitted to plead claims "based on information and belief," or with unsubstantiated conclusions that others have experienced the same misconduct, as such pleadings do not meet the Connecticut fact pleading standard.