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Connecticut Trial Court Addresses Administrative Agency's Targeting of Law Firms Under the State Unfair Trade Practices Act

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In a December 5, 2016 decision a Connecticut trial court (Huddleston, J.) addressed the limitations on the Connecticut Department of Consumer Protection (DCP) in enforcing a so-called "investigative demand" served under the authority of the Connecticut Unfair Trade Practices Act (CUTPA). The somewhat novel twist in the case was the identity of the subject of the investigation: a law firm. *Harris v. Kimmel & Silverman, PC*, No. HHD-CV-15-6064617-S (Conn. Super. Ct., Hartford Judicial District).

Here's the background. In 2013 the DCP received two complaints against the law firm. The court described the firm as providing "services to consumers with claims of automobiles and motorcycle defects that are covered under the Connecticut Lemon Law other state and federal automobile warranty or unfair trade practice laws." One complainant alleged that the law firm had misled him in an (unsuccessful) attempt to get him to engage the firm. A second complainant, who actually had engaged the firm, alleged the firm had mishandled his Lemon Law claim.

In response to the two complaints the Department focused on, among other things, whether the law firm had ever represented Connecticut clients in the Lemon Law Arbitration Program the Department itself administers. Accordingly, in its demand the Department asked the law firm to "[i]dentify each Connecticut consumer since January 2012 who retained [the law firm's] services regarding the Connecticut Lemon Law issue but did not proceed through a state of Connecticut [DCP] Lemon Law arbitration hearing." In objecting to the Department's investigative demand the law firm asserted two basic claims. First, that by demanding information about the nature of the firm's engagement

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agreements with clients, the Department exceeded the well-established limitation on CUTPA exposure for professionals including lawyers; namely, that CUTPA extends to only the "entrepreneurial aspects" of services provided by a professional. Second, the law firm argued that certain of the Department's inquiries would require the firm to disclose information protected by the attorney-client privilege.

With respect to the Commissioner's authority under CUTPA to investigate and demand information from law firms, the court sided with the Commissioner. The court acknowledged CUTPA does not extend to lawyer conduct amounting to professional negligence (legal malpractice), nor to a lawyer's "consultations with clients . . . regarding the clients' objectives," "negotiating strategies" or "specific settlements obtained by" identifiable clients. However the court held the Act does authorize the Commissioner to investigate a law firm's "business practices." Even though the challenged portion of the Commissioner's demand expressly required the law firm to identify law firm clients and those clients whose claims were handled or resolved in a forum other than the Department's Lemon Law arbitration program, the court was satisfied that the information demanded properly fell into the category of the law firm's business practices or entrepreneurial activities, rather than of its legal services or advice to clients.

With respect to the law firm's privilege objections, the court concluded that the privilege did not extend to the identity of a client, a client's address and telephone number (except in cases in which ". . . the client communicated the address [to the law firm] confidentially, and the legal advice sought involves the address."), or whether or not the law firm had charged fees to the clients in the Lemon Law cases at issue. In the court's view, the attorney-client privilege does not extend to *all* communications between an attorney and a client but only those communications shown to be "inextricably linked to the giving or receiving of legal advice."

The court did, however, reject the Commissioner's demand for one category of information sought from the law firm: the nature and adequacy of settlement agreements the law firm obtained for identifiable clients. And for that category the court rejected the Commissioner's argument that the adequacy of the settlement terms obtained for the firm's clients fell within the "entrepreneurial" exception to CUTPA based regulation of law firms. "Scrutiny of the terms of the settlement agreements . . . appears to the court to intrude into the Respondent attorneys' performance of their professional responsibilities" and is therefore beyond the "proper" authority of the Commissioner. Thus, although CUTPA authorizes the state DCP to investigate, demand information, and potentially to take enforcement action against law firms relating to "advertising, client solicitation, and fees," the Act "does not extend to discussions . . . between" a law firm and its clients "during the course of representation or settlement negotiations" as such "communications are at the heart of the lawyer's professional responsibilities."

What Does the Decision Mean?

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In its decision in the *Harris v. Kimmel & Silverman* case the court held the Connecticut DCP has authority under CUTPA to target a law firm as long as the investigation is limited to the firm's advertising, promotional and business activities. The court also concluded that the attorney-client privilege did not preclude an administrative agency's demand that a law firm provide the identity of clients, the addresses of clients, or the amount of fees paid by identifiable clients.

However it did not directly address whether such investigative demands by an administrative agency might be limited or barred for a different reason: the constitutional separation of powers arising from the Connecticut Judicial Branch's inherent power to regulate lawyer conduct. See *Persels & Associates, LLC v. Banking Commissioner*, 318 Conn 652 (2015) (statute authorizing the Connecticut Department of Banking to determine whether attorneys engaged in debt negotiation are doing so "as an ancillary matter to" the representation of a client in another matter interferes with the Judicial Branch's regulation of the practice of law and therefore violates the separation of powers provision of the State Constitution).

For additional information about the decision, or to discuss your firm's obligations to maintain client confidentiality and to preserve the attorney-client privilege, please contact [David P. Atkins \(datkins@pullcom.com\)](mailto:datkins@pullcom.com) or [Marcy Tench Stovall \(mstovall@pullcom.com\)](mailto:mstovall@pullcom.com).

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