BUSINESS LITIGATION: 2023 IN REVIEW

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In 2023 Connecticut's appellate courts decided numerous cases of interest to business litigators. Following is a summary of the year's most noteworthy decisions.

I. Contracts

A. *Continued employment may provide sufficient consideration to support a non-compete*

In *Schimenti Construction Co., LLC v. Schimenti*,[2] a non-compete case, the Appellate Court reversed the trial court's grant of summary judgment in favor of the defendant ex-employee. That ruling had been based on the premise that, when an established employee-at-will is required to sign a non-compete, the employer must provide consideration above and beyond continuation of the employment relationship. The Appellate Court disagreed.

The court noted a split among Superior Court decisions on the issue of whether continued employment may suffice as consideration for a non-compete. As for those decisions holding that additional consideration is required as a matter of law, the court held that they could not be reconciled with the Connecticut Supreme Court's decision in the 1934 case *Roessler v. Burwell*.[3] The court in *Roessler* had observed:

> The underlying purpose of the defendant in entering into the agreement was to continue thereafter in the employment of the plaintiff at a mutually agreeable salary; the benefit offered him was such a continuance, in return for which the plaintiff was to receive his services and the benefit of the restrictive covenant in the agreement. The defendant received the benefit he sought in that he was continued in the employment more than four years after the agreement was made, until he voluntarily left it. In such a

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[1] Of the Hartford Bar.
[2] 217 Conn. App. 224, 288 A.3d 1038 (2023).
[3] 119 Conn. 289, 176 A. 126 (1934).

> situation … *there is consideration for the agreement, and it can be enforced*.[4]

But the Appellate Court did not go so far as to hold that continued employment *necessarily* constitutes sufficient consideration for a non-compete; the court found only that there was at least a genuine issue of material fact in this regard. "Because he was an at-will employee, the defendant's employment could have been terminated by the plaintiff at any time, and, thus, the defendant's continued employment could constitute sufficient consideration to support the nondisclosure agreement."[5] The court's observation that continued employment "could" support the non-compete underscores the need for factfinding.

The court also pointedly noted that – like the defendant in *Roessler* – the defendant "voluntarily resigned from his employment with the plaintiff four years after executing the nondisclosure agreement."[6] The court added that the defendant "may present evidence that there was no connection between the nondisclosure agreement [which included the covenant not to compete] and his continued employment; but, if connected, continued employment can be sufficient consideration for a restrictive covenant."[7]

Because a factbound inquiry was required, the Appellate Court determined that the trial court erred in granting summary judgment, reversed the judgment below, and remanded the case for further proceedings.

This decision is notable for the fact that in many of the Superior Court cases on this issue, the court's approach to consideration seems binary: either it exists or it does not. In *Schimenti*, the court frames the issue as the sufficiency, not mere existence, of consideration.

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[4] 217 Conn. App. at 238, quoting *Roessler*, 119 Conn. at 290, 291. (Emphasis added by the Appellate Court.)

[5] *Id*. at 250, 251.

[6] *Id*. at 251.

[7] *Id*. at 251.

B. *With no evidence of parties' intent concerning ambiguous contract term, court applies its own judgment on the most logical interpretation.*

In *Cody Real Estate, LLC v. G & H Catering, Inc.*,[8] the Appellate Court was tasked with interpreting ambiguous contract terms – which ordinarily requires a factual determination of the parties' intent – in a case that had a trial record bereft of evidence on that very issue.

The plaintiff, a commercial landlord, sued its tenant and certain guarantors for nonpayment of a lease. The original lease had an initial term of ten years, running from 1998 to 2008, followed by "one (1) single option to renew the term" for a period of five years.[9] The guarantee agreement provided, in relevant part, "[t]he obligations, covenants, agreement and duties of [g]uarantors under this [g]uarant[ee] are unconditional and shall in no way be affected or impaired by reason of … the renewal of the [l]ease…"[10]

The tenant exercised its contractual right to renew, and subsequently entered into two further lease modification and extension agreements with the landlord. During the term of the second extension, the tenant began to fall behind in its rent, prompting the landlord to sue the tenant and the guarantors.

The guarantors argued that their guarantee did not survive beyond the initial renewal term contemplated by the original lease. "Relying on the provision of the initial lease that the tenant had 'one (1) single option to renew,' as well as the language of the guarantee agreement providing that it would not be affected or impaired by the occurrence of certain events, including '*the* renewal of the [l]ease,' the corporate guarantors argue that the renewal language of that agreement applies only to the single renewal of the initial lease…"[11]

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[8] 219 Conn. App. 773, 296 A.3d 214, *cert. denied* 348 Conn. 910, 303 A.3d 11 (2023).

[9] *Id.* at 776.

[10] *Id.* at 778, 779.

[11] *Id.* at 782.

The landlord countered, "the guarantee agreement contains no language that limits its duration and, therefore, it is continuing in nature. Under this view, the agreement remained in full force and effect at the time of the second lease extension and, as a consequence, the corporate guarantors are liable for the tenant's obligations under the initial lease *and* both lease extensions."[12] The trial court agreed with the landlord, and entered judgment in its favor against the tenant and the guarantors.

The Appellate Court found "an arguable ambiguity in the guarantee agreement," but noted that the parties "presented no extrinsic evidence at trial to clarify that ambiguity,"[13] such as evidence about which party had drafted the guarantee agreement.[14] Consequently, "the trial court's interpretation of the guarantee agreement was based solely on the language of that agreement and the lease and did not involve the resolution of any evidentiary issues of credibility."[15] Because the trial court's decision was "predicated entirely on the four corners of those agreements,"[16] the Appellate Court's task involved a question of law, and thus the exercise of plenary review.

On that sparse record, the court's approach was simply to apply its own judgment as to "the more reasonable interpretation of [the contract] language."[17] In so doing, the court applied the "bedrock rule of construction" that contract language should be accorded "a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract."[18] Under that approach, the court concluded that "the trial court adopted the better and more reasonable construction of the language at issue in concluding that renewals of the lease were expressly 'anticipated and proactively acknowledged as possible by the

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[12] *Id*. at 783.
[13] *Id*. at 784, 785.
[14] *Id*. at 785, fn. 9.
[15] *Id*. at 785.
[16] *Id*.
[17] *Id*. at 786.
[18] *Id*. at 787. (Citation and internal punctuation omitted.)

guarantee' agreement."[19]

C. *Insurance policy did not cover COVID-related loss of business income.*

In *Connecticut Dermatology Group, PC v. Twin City Fire Insurance Company*,[20] three healthcare facilities sought to recover COVID-19-related losses from their insurance companies, under policies requiring the insurers to "pay for direct physical loss of or physical damage to" covered property.[21] The plaintiffs claimed that as a result of the pandemic, they had suffered a loss of business income, and had incurred the expense of daily sanitation and the construction of physical barriers within the workspace. The Connecticut Supreme Court disagreed that losses of this type were covered, and affirmed the trial court's entry of summary judgment for the defendant insurance companies.

The plaintiffs argued that they were "seeking coverage for a 'direct physical loss' of their properties because the COVID-19 pandemic physically transformed their 'ordinary business properties' into 'potential viral incubators that were imminently dangerous to human beings.'"[22] The court credited "the ingenuity of this argument," but rejected the notion that there had been a "physical transformation" of the properties; "[r]ather, the COVID-19 pandemic caused a transformation in governmental and societal expectations and behavior that had a seriously negative impact on the plaintiffs' businesses."[23]

The plaintiffs also argued that the loss of productive use of their properties was equivalent to physical loss. The court rejected that proposition, instead "agree[ing] with the multiplicity of courts that have concluded that 'use of property' and 'property' are not the same thing, and the loss of the former does not necessarily imply the loss of the latter."[24]

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[19] *Id.*
[20] 346 Conn. 33, 288 A.3d 187 (2023).
[21] *Id.* at 36.
[22] *Id.* at 52.
[23] *Id.*
[24] *Id.* at 53.

The court also distinguished the plaintiffs' case from various decisions in which "contamination of a property by harmful substances or bacteria was deemed to be a direct physical loss."[25] The court noted that in those cases, "it was the physical presence of the contaminants at the properties that caused the loss," whereas the threat posed by COVID-19 was "the potential for person to person transmission of the virus within the building."[26] On this issue, the court was persuaded by "the cases that have held that the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants."[27]

In sum, "the plain meaning of the term 'direct physical loss of ... [p]roperty' does not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus. Rather, in ordinary usage, the phrase 'direct physical loss of ... [p]roperty' clearly and unambiguously means that there must be some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible."[28]

D. *Municipal building codes and associated statutes implicitly incorporated into contract.*

The Appellate Court's decision in *Ah Min Holding, LLC v. Hartford*[29] provides a useful example of statutory provisions being implicitly incorporated into a contract. The plaintiff, owner of numerous residential properties in Hartford occupied by low- and moderate-income tenants, entered into a tax abatement agreement with the defendant City of Hartford. The agreement required the plaintiff to "maintain" the dwelling units in the properties, and authorized the city to terminate the agreement if the plaintiff ceased to do so.

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[25] *Id.* at 58.
[26] *Id.* at 59.
[27] *Id.*
[28] *Id.* at 51.
[29] 217 Conn.App. 574, 289 A.3d 598 (2023).

The city terminated the agreement, based on the plaintiff's noncompliance with the city's building code. The plaintiff sued, pointing out that the agreement did not expressly require compliance with the code, and alleging that the termination was improper. The trial court disagreed, finding that compliance with the code, and with General Statutes Section 47a-7, which requires residential landlords to comply with municipal housing codes, must be read into the contract.

The Appellate Court agreed with the city that the relevant statutes and code provisions in effect at the time of the agreement "provide necessary guidance for the required maintenance of low and moderate income dwelling units" and therefore "must be read into the agreement."[30]

The court noted existing precedent from the Connecticut Supreme Court holding that "'statutes existing at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention.'"[31] The court does so in order to "'construe the scope or validity of an obligation already embraced within the terms of the contract,'" but "'do[es] not incorporate the law to create a substantive obligation where none previously had existed.'"[32]

II. Creditors' Rights

A. *Public Act that increased homestead exemption held applicable to pre-existing debts.*

In *In re Cole*,[33] the Connecticut Supreme Court examined Connecticut Public Acts 21-161 (act), which amended Connecticut's exemption statute, General Statutes Section 52-352b(21), to increase the homestead exemption from $75,000 to $250,000. The court considered the following certified question from the United Stated District Court in connection with

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[30] *Id.* at 584, 585.

[31] *Id.* at 585, quoting Deming v. Nationwide Mutual Ins. Co., 279 Conn. 745, 780, A.2d 623 (2006).

[32] *Id.*, quoting Deming at 781.

[33] 347 Conn. 284, 297 A.3d 151 (2023).

a bankruptcy appeal: "does the expanded homestead exemption contained in P.A. 21-161, § 1, apply in bankruptcy proceedings filed on or after the effective date of the act to debts that accrued prior to that date?"[34] The court answered yes.

The bankruptcy trustee, who sought to apply the older, lower homestead exemption in Ms. Cole's bankruptcy case, argued that giving her the benefit of the act "would give the act retroactive effect without the express authorization of the legislature."[35] But the court did not see a retroactivity issue "when applied to postenactment [bankruptcy] petitions,"[36] which was the situation here, as Ms. Cole filed for bankruptcy protection shortly after the October 1, 2021, effective date of the act. "[A]pplying the expanded homestead exemption to a bankruptcy proceeding that was initiated on or after the effective date of the act does not constitute a retroactive application, any more than a new law governing divorces would be retroactive with respect to already married couples."[37]

Nor did the court credit the notion that allowing Ms. Cole to avail herself of the higher exemption would "impair established rights of the creditors or the trustee," or "disturb other reasonable, settled expectations."[38] In this regard, the court drew a clear line between secured creditors and unsecured creditors. Quoting from a decision of the United States Bankruptcy Court for the District of Minnesota, the court noted that unlike a secured creditor, which "reasonably expects specific property to be available to satisfy an obligation," an unsecured creditor's "expectation of later realization of payment from unsecured property in existence at the time of contract" is generally "pure speculation … dependent [on] continued retention of ownership and equity in the property by a debtor as well as the subsequent creation of a lien by judgment and/or levy."[39]

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[34] *Id*. at 290.
[35] *Id*. at 298.
[36] *Id*.
[37] *Id*. at 309.
[38] *Id*. at 306.
[39] *Id*. at 306, 307, quoting In re Johnson, 69 B.R. 988, 993 (Bankr. D. Minn. 1987).

The court elaborated:

> [When] an unsecured claim has not been reduced to judgment prior to such legislation, the abstract right of potential enforcement out of specific unsecured property, standing alone, ordinarily has no substantial value to the contractual relationship .... This is particularly so [when] the legislation compromising or eliminating the right is in an area of established, long-standing legislative control and regulation, such as homestead exemption laws. The abstract right is simply one without reasonable expectation of fulfillment.[40]

The Connecticut Supreme Court therefore

> reject[ed] the trustee's argument that applying the increased homestead exemption to preexisting debts would be fundamentally unfair because it would frustrate the settled expectations of unsecured lenders who extended credit while the lower, $75,000 exemption was in place. There is no evidence in the record that the debtor's creditors ever considered the equity in her house, much less that they relied to their detriment on the size of the Connecticut homestead exemption when they decided to extend her credit. Rather, the unsecured creditors are presumed to have been aware that the legislature could increase the size of the homestead exemption at any time and that their rights might otherwise be adversely impacted by changes in federal or state law.[41]

B. *Foreclosure defendant lacked standing to assert defense that was personal to another defendant*

In *Bayview Loan Servicing, LLC v. Ishikawa*,[42] the Appellate Court reinforced that the concept of standing applies not only to claims but also to defenses. The plaintiff brought a residential foreclosure action against a divorced couple, who had been co-obligors on the note and mortgage. In connection with the divorce, the husband, defendant Robert Hackett,

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[40] *Id*.
[41] 347 Conn. at 307, 308.
[42] 220 Conn.App. 625, 298 A.3d 1276 (2023).

quitclaimed his interest in the house to the wife, defendant Yoko Ishikawa. The bank sent notices of default and acceleration to both of them at the marital residence, but Hackett had already vacated the house and did not receive the notice.

Ishikawa asserted, by way of special defense, that HUD regulations required default notices to be delivered to both obligors as a condition precedent to commencing foreclosure. She claimed that, due to failure of notice to Hackett, the bank was barred from foreclosing.

The Appellate Court held that Ishikawa lacked standing to assert this defense. The court found no "authority demonstrating that she is the proper party to assert a special defense, even if viable, that is personal to Hackett."[43] The court noted that by operation of the quitclaim, Hackett "had no legal interest in the property securing the note and no equitable or statutory right of redemption in the property," and thus "it would strain logic to permit [Ishikawa] to rely on Hackett's alleged failure to receive the notice to defend against the plaintiff's foreclosure action against her."[44]

C. *Borrower's objection to affidavit of debt triggered obligation by bank to prove the debt by live testimony.*

In *JPMorgan Chase Bank v. Malick*,[45] a foreclosure case, the Connecticut Supreme Court clarified what a defendant is and is not required to do to force the lender to prove the amount of the debt by way of live testimony rather than affidavit.

Section 23-18(a) of the Practice Book provides that, in a foreclosure action, "where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that

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[43] *Id*. at 633.
[44] *Id*. at 634.
[45] 347 Conn. 155, 296 A.3d 157 (2023).

there is no setoff or counterclaim thereto." The rule does not explain what steps a defendant must take to "interpose" a defense and thereby thwart the affidavit procedure.

In *Malick*, after the bank had e-filed its affidavit of debt, foreclosure worksheet and other documents in support of its motion for judgment of strict foreclosure, the defendant filed a written objection to the affidavit of debt. In the objection, he asserted that the affidavit "contained hearsay and inaccurate calculations as to the defendant's municipal tax liability and the interest owed on his loan."[46] More particularly, he "specifically objected that the plaintiff's failure to include property tax abatements the municipality had allegedly provided him for at least three years. Additionally, the defendant objected to the plaintiff's calculation of interest and requested that the court require the plaintiff to provide a breakdown of his variable interest rate for the years that he was not paying his mortgage."[47] He did not offer any evidence in support of his challenge to the bank's debt calculation.

The trial court accepted the bank's affidavit of debt, and entered a judgment of strict foreclosure. The Appellate Court reversed and remanded the case for further proceedings,[48] holding that "because the defendant had objected to the amount of the mortgage debt, § 23-18(a) did not apply as a matter of law in the present case."[49] The bank appealed to the Supreme Court.

The Supreme Court affirmed the Appellate Court's judgment for the defendant, and added clarity to the meaning of Section 23-18(a). A successful challenge to the rule "requires a supporting legal or factual argument, i.e., a specific argument about why the debt amount is incorrect."[50] It is not sufficient to "merely plead[] insufficient knowledge as to the amount of the debt";[51] the defendant must "provide argument as to

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[46] *Id*. at 160.
[47] *Id*. at 171.
[48] The Appellate Court decision is reported at 208 Conn. App. 38, 263 A.3d 920 (2021).
[49] 347 Conn. at 159.
[50] *Id*. at 171.
[51] *Id*. at 173.

why he or she is objecting to the amount of the debt, based on some articulated legal reason or fact."[52]

But the defendant is not required to offer evidence in support of such arguments. "Although it is the defendant's burden to sufficiently interpose a defense to the claimed amount of the debt, once a defense is interposed, the burden remains on the plaintiff to prove the amount of the debt. At no point does the burden shift to the defendant to prove that the plaintiff's affidavit is incorrect. In other words, once the defendant has sufficiently interposed a defense as to the amount of the debt, the plaintiff is required to satisfy its burden under the Connecticut Code of Evidence, without the benefit of § 23-18(a)."[53]

Here, "[t]he defendant sufficiently objected to the amount of interest and municipal taxes, and it was not his burden to provide further evidence to prove his objection. By placing the burden on the defendant to establish that the affidavit of debt was inaccurate, the trial court prevented the defendant from having an opportunity to cross-examine the plaintiff's witnesses, including the affiant."[54] Accordingly, the Appellate Court properly reversed the trial court's judgment of strict foreclosure.

D. *In foreclosure case, trial court's protective order unduly limited borrower's access to bank's file.*

In *JPMorgan Chase Bank, National Association v. Lakner*,[55] the Connecticut Supreme Court reversed the trial court's judgment of foreclosure by sale, on the grounds that the borrower had been unfairly prejudiced by an overly broad protective order.

In his answer to the complaint, the defendant raised a special defense of payment, claiming he had "submitted all payments due and owing on the subject mortgage note."[56] He

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[52] *Id*. at 174.
[53] *Id*. at 168, 169.
[54] *Id*. at 178.
[55] 347 Conn. 476, 298 A.3d 249 (2023).
[56] *Id*. at 481.

later issued a document production request to the plaintiff, seeking the bank's "complete mortgage file," including but not limited to "[a]ll records of mortgage payments, including payments for property taxes and/or property insurance, related to the subject [m]ortgage [n]ote, from the inception of the [m]ortgage [n]ote to the present, including records pertaining to returning payments to the [d]efendant."[57]

The bank moved for a protective order, characterizing the document request as "not reasonably calculated to lead to the discovery of admissible evidence," "a fishing expedition," and "simply too vague and broad to be answered."[58] The trial court granted the motion.

At trial, the bank offered into evidence its exhibit number twelve, a 28-page document from its mortgage file, consisting of "the 'Transaction Detail,' 'Payments Due Detail,' and 'Loan History Summary' of the defendant's account in order to prove its debt."[59] Counsel for the defendant objected, arguing that the document had never been produced in discovery, and renewed his demand for access to the bank's loan file. The court overruled his objection, denied his request and entered a judgment of foreclosure by sale.

The Supreme Court reversed, agreeing that the borrower had been unfairly prejudiced by being denied access to the bank's mortgage file. The court noted, "[s]ome of the very documents that the defendant was blocked from obtaining in discovery—those pertaining to the defendant's payment history—were ultimately entered into evidence by [the plaintiff] at trial without the defendant ever having seen them. … As illustrated by the records submitted into evidence by [the plaintiff] at trial, [the plaintiff's] mortgage file contained, among other things, the account's payment history, correspondence between the lender and borrower, and other important account information. These records make up the source material that gives rise to [the plaintiff's] foreclosure

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[57] *Id*. at 482.
[58] *Id*.
[59] *Id*. at 485.

action."[60]

The court rejected the bank's contention that the defendant should have made a more narrowly tailored discovery request. The court noted that under Connecticut's rules of practice, the bank had been required to "engage in a good faith effort to reach agreement with the defendant on any discovery related objections,"[61] but the record did not indicate that this had ever been done. Instead, the defendant had suffered a complete denial of document discovery, which is "seldom within the [trial] court's discretion."[62] As a result, "the defendant had no meaningful access to those very documents that would have allowed him to challenge the accuracy of [the bank witness's] testimony or the information contained in exhibit 12, which [the plaintiff] used to prove the amount of the debt."[63]

The court reversed the judgment below, with instructions that the motion for protective order be denied and the case set for a new trial.

E. *Bank's issuance of an Emergency Mortgage Assistance Act notice before commencement of a foreclosure action that was dismissed held insufficient to support a second foreclosure action.*

In *KeyBank, N.A. v. Yazar*,[64] the Connecticut Supreme Court reviewed the Appellate Court's holding[65] that, in a residential foreclosure action, (i) the bank's delivery of a pre-foreclosure notice under the Emergency Mortgage Assistance Program (EMAP)[66] to the borrowers is a jurisdictional prerequisite to foreclosure, and (ii) an EMAP notice sent before the commencement of a prior foreclosure action cannot be relied upon for the purposes of a subsequent foreclosure action.

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[60] *Id*. at 493, 494.

[61] *Id*. at 495.

[62] *Id*. at 495, quoting Standard Tallow Corp. v. Jowdy, 190 Conn. 48, 60, 459 A.2d 503 (1983).

[63] *Id*. at 498.

[64] 347 Conn. 381, 297 A.3d 968 (2023)

[65] The Appellate Court's decision is reported at 206 Conn. App. 625, 261 A.3d 9 (2021).

[66] Conn. Gen. Stat. §§ 8-265cc through 8-265kk.

As to the first issue, the court disagreed that compliance with EMAP is a matter of jurisdiction, but further concluded that such compliance is "a mandatory condition precedent," and "[a] foreclosure action may not proceed unless the EMAP notice requirement is carried out."[67] As to whether a statutory condition imposes a jurisdictional prerequisite or "merely" a condition precedent, that depends on whether the underlying right of action modified by the statute is itself statutory or one that exists under the common law. "[O]ur case law has distinguished between conditions imposed on the commencement of a statutorily created right of action and statutory conditions imposed on an action existing under the common law. The former generally is deemed to be jurisdictional, whereas the latter is not."[68] Because foreclosure is an action arising under the common law, the statutory requirements imposed by EMAP are not jurisdictional.

As to the second issue, the Supreme Court agreed with the Appellate Court that a fresh EMAP notice was required when the lender commenced a second foreclosure action. In *Yazar*, the original mortgagee, First Niagara Bank, N.A. had sent an EMAP notice before commencing foreclosure, but that action was dismissed due to the bank's failure to provide certain documents and information required by the foreclosure mediator. After First Niagara Bank merged into KeyBank, the latter commenced a new foreclosure action, without first issuing a new EMAP notice. This was improper, and according to the Supreme Court, would have been equally improper if the identity of the mortgagee had remained unchanged. "Our analysis does not turn on the particular entity that sent the EMAP notice; rather, what is of consequence is ensuring that an EMAP notice is sent prior to the initiation of any subsequent foreclosure action, as each foreclosure action must stand on its own EMAP notice."[69]

The decision is puzzling procedurally. The court's holding

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[67] 347 Conn. at 398.

[68] *Id*. at 394, 395, quoting Neighborhood Assn., Inc. v. Limberger, 321 Conn. 29, 46, 136 A.3d 581 (2016).

[69] *Id*. at 404.

that EMAP compliance is non-jurisdictional would appear to suggest that it would be improper to raise the issue by way of motion to dismiss. Rather, the issue would appear to be appropriately raised by a motion to strike, given the court's holding that "[u]ntil the condition is satisfied, the plaintiff has not alleged a cause of action on which relief can be granted."[70] But in its rescript, the Supreme Court directed the Appellate Court to "remand the case to the trial court with direction to render judgment *dismissing* the action for failure to comply with a mandatory condition precedent."[71] (Emphasis added.)

Finally, in footnote five to the opinion, the court pointedly noted – but did not rule upon – another defense that had been pled by the pro se defendant but not decided by the trial court, or pursued on appeal. The defendant Ozlem Yazar, ex-wife of the borrower Emre Yazar, jointly owned the house with him, and both of them signed the mortgage deed, but the defendant was not an obligor on the note. The court observed, "[i]t is unclear on this record how the plaintiff can maintain a foreclosure action against the defendant when the defendant was not a borrower on the note that gave rise to the loan default. … The defendant asserted a special defense in the trial court regarding her lack of obligation under the note, but the trial court did not specifically address that defense in its decision … Should that special defense be raised in any subsequent foreclosure action, we would expect it to be specifically addressed by the trial court."[72]

F. *Foreclosure auction found to be conducted in violation of appellate stay.*

In *Finance of America Reverse, LLC v. Henry*,[73] the Appellate Court examined the scope of Practice Book Section 61-11(h),[74] a rule of appellate procedure adopted to curtail use of

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[70] *Id*.
[71] *Id*. at 405.
[72] *Id*. at 387, fn. 5.
[73] 222 Conn.App. 810, ___ A.3d ___ (2023).
[74] The rule provides: "In any action for foreclosure in which the owner of the equity has filed a motion to open or other similar motion, which motion was denied fewer than twenty days prior to the scheduled auction date, the auction shall proceed as scheduled notwithstanding the court's denial of the motion, but

the "perpetual motion machine"[75] by foreclosure defendants. Before the rule was adopted, "a party could indefinitely delay conclusion of the foreclosure proceedings by filing repeated dilatory motions to open the foreclosure judgment,"[76] each of which, once ruled upon by the court, would trigger a new appellate stay.

The rule provides that if the property owner files a motion to open or "other similar motion" that is denied within twenty days of an auction date, the auction can still proceed even though it is within the appeal period. But the rule adds a safeguard: no motion to approve the sale can be filed until after the appeal period has run after denial of the motion to open.

In *Henry*, the plaintiff obtained a judgment of foreclosure by sale, and the court set an auction date that was repeatedly postponed, ultimately to June 25, 2022. On May 10, 2022, the defendant moved to extend the auction date once again, and that motion was denied (first denial order), twenty-five days before the auction date. On June 7, 2022, the defendant moved for reargument and reconsideration of the denial. The court denied that motion (second denial order), three days before the auction date, and the auction went forward, with the plaintiff as the highest bidder. On September 19, 2022, the court entered orders approving the sale, from which the defendant appealed.

The Appellate Court reversed, holding that the auction sale had been conducted in violation of an automatic stay. The first denial order had been issued more than twenty days before the auction date, and thus "did not directly implicate Practice Book § 61-11 (h)."[77] (Indeed, if the defendant had taken no further action after the first denial order, "the appellate stay would have expired prior to the sale date and the fore-

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no motion for approval of the sale shall be filed until the expiration of the appeal period following the denial of the motion without an appeal having been filed. The trial court shall not vacate the automatic stay following its denial of the motion during such appeal period."

[75] 222 Conn.App. at 821.

[76] *Id.*

[77] *Id.* at 825.

closure auction could have proceeded as scheduled."[78]) The second denial order, as to the motion to reargue, triggered its own appeal period. "The existence of the appellate stay and the inapplicability of Practice Book § 61-11 (h) should have precluded the committee from conducting the foreclosure sale on June 25, 2022."[79]

G. *Business records rule allows successor mortgagee to introduce evidence acquired from its predecessors in interest.*

In *GMAT Legal Title Trust 2014-1, U.S. Bank, National Association, Legal Title Trustee v. Catale*,[80] the Appellate Court revisited the issue of how the "business records" hearsay exception applies to documents offered by a foreclosing lender that incorporate data obtained from previous owners of the loan.

The plaintiff purchased the subject note and mortgage deed after they had been assigned repeatedly. At trial, the plaintiff offered testimony from an officer of its loan servicer, Rushmore Loan Management Services, LLC. Through that witness, the plaintiff introduced exhibits about the loan history that incorporated data obtained by Rushmore from the predecessor loan servicer. The witness also testified about the "boarding process" implemented when Rushmore acquires loan files from another servicer. That process involves close review and audits of the information received. He also testified that "'prior servicers have an obligation to transfer … accurate information from their system to [Rushmore] so [it] can input that information in our system,'" and that Rushmore relies on that information when creating its own records.[81]

The defendant challenged the admissibility of the plaintiff's evidence, contending that the plaintiff was required to

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[78] *Id.*

[79] *Id.*

[80] 221 Conn. App. 90, 300 A.3d 1218, *cert. denied* 348 Conn. 928, 305 A.3d 265 (2023).

[81] *Id.* at 103.

"present evidence from each and every prior owner or servicer of the note in order to demonstrate that each had a duty to transmit accurate information regarding the records to the next holder."[82] The plaintiff countered that it "satisfied its burden under the business records exception to the rule against hearsay because it sufficiently demonstrated that the relevant data became part of its own business records through its transaction with the previous servicer, which had a business duty to transmit accurate information."[83] The trial court overruled the defendants' objection to this evidence, and entered judgment of strict foreclosure.

The Appellate Court agreed with the plaintiff that the trial court had properly admitted the challenged evidence. The court relied heavily on the Connecticut Supreme Court's decision in *Jenzack Partners, LLC v. Stoneridge Associates, LLC*,[84] in which the court held, "[i]f part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." The Appellate Court found that the plaintiff had met this burden.

H. *Statutory procedure for challenging invalid liens held inapplicable to property owner's attack on mortgage.*

In *Fiorita, Kornhaas & Company, P.C. v. Vilela*,[85] the Appellate Court addressed whether a foreclosure defendant wishing to challenge the enforceability of the mortgage is required to follow the procedure of General Statutes Section 49-51, "Discharge of invalid lien." Under that statute, a person owning an interest in property "described in any certificate of lien, which lien is invalid but not discharged of record" should

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[82] *Id*. at 97.
[83] *Id*. at 98.
[84] 334 Conn. 374, 390, 391, 222 A.3d 950 (2020).
[85] 219 Conn. App. 881, 297 A.3d 236 (2023).

first make written demand for the lien's release, and then wait thirty days before applying to the court for an order discharging the lien.

The plaintiff, an accounting firm, had taken a mortgage on property owned by a client. The client quitclaimed the property to the defendant, whom the plaintiff understood to be the client's nephew. When the plaintiff brought an action to foreclose, the defendant counterclaimed, alleging that the mortgage had been procured by fraud, had been procured in violation of the plaintiff's code of professional conduct, and had been paid. The defendant sought a declaratory judgment voiding the mortgage.

The plaintiff moved to dismiss the counterclaim, alleging that the court lacked subject matter jurisdiction due to the defendant's failure to follow the statutory procedure. The trial court agreed, and granted the plaintiff's motion.

The Appellate Court reversed. The court noted that the statute neither uses the word "mortgage" nor defines "certificate of lien" or "lien," and therefore "look[ed] to the commonly approved usage of the relevant terms."[86] Citing previous caselaw, the court noted that a mortgage is "a form of contract" that "immediately vests legal title in the mortgagee and equitable title in the mortgagor," the foreclosure of which is "'an equitable action that precludes further proceedings on the underlying debt and requires an unsatisfied mortgagee to pursue his rights through a deficiency judgment.'"[87] A judgment lien, by contrast, "'results from the unilateral act of a creditor and does not vest him with legal title to the subject property. ... Foreclosure of a judgment lien is an action at law that does not extinguish the underlying debt.'"[88]

Based on these distinctions, and absent any indication that the legislature had intended the statute to apply to both liens and mortgages, the court concluded that mortgages are outside the ambit of the statute.

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[86] *Id*. at 893.

[87] *Id*. at 896, 897, quoting Stein v. Hillebrand, 240 Conn. 35, 43, n. 7, 688 A.2d 1317 (1997).

[88] *Id*. at 897.

III. Remedies and Defenses

A. State Supreme Court rejects veil-piercing claim.

In *Deutsche Bank AG v. Sebastian Holdings, Inc.*,[89] the Connecticut Supreme Court rejected the plaintiff's attempt to hold the defendant Alexander Vik personally liable, under the theory of piercing the corporate veil, for a $243 million judgment rendered against his company in the courts of England.

Vik, a citizen of Norway and Monaco who maintained a residence in Greenwich, Connecticut,[90] owned a trading company called Sebastian Holdings, Inc. (SHI), which was organized under the laws of Turks and Caicos Islands. SHI was engaged in the trading of foreign currencies. Its trades "often involved options or bets on the forward movement of the currencies involved," which, as found by the trial court, "could be highly lucrative," but were "extremely risky."[91]

In 2006, SHI entered into an agreement with the plaintiff, Deutsche Bank, by which the bank provided such services as "(1) credit intermediation, [which] permit[s] the client to trade with many banks through the prime broker, who serves as the counterparty, (2) back-office functions [such as] processing and confirming trades, and (3) risk control and management functions, including calculating limits, calculating margin requirements, [and] calculating exposures."[92] To provide collateral for its trading, SHI pledged $35 million that was held in an account at the bank.

Initially, SHI was "extraordinarily successful," but the atmosphere darkened as the markets melted down in September and October of 2008.[93] At a meeting on October 7, 2008,

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[89] 346 Conn. 564, 294 A.3d 1 (2023).

[90] Notwithstanding claims to the contrary asserted in certain beer commercials, Forbes Magazine characterized Mr. Vik, in a 2014 article, as "The Most Interesting Man in the World." Vardi, N., Forbes Magazine (online edition), "Alexander Vik Is The Most Interesting Man In The World (As Long As He Doesn't Owe You Money)," March 5, 2014, https://www.forbes.com/sites/nathanvardi/2014/03/05/the-riddle-of-alexander-vik/?sh=568e1a696460.

[91] 346 Conn. at 570.

[92] *Id.*

[93] *Id.* at 571.

representatives of the bank's London office congratulated Vik on "how well SHI was doing in such 'difficult and negative' financial markets."[94] That same day, an internal bank email asserted that the SHI trading account was "in good order from a margin viewpoint,"[95] and the bank provided Vik with a report showing that SHI's holdings at Deutsche Bank totaled almost a billion dollars.[96] SHI also had an additional $635 million in assets held in other financial institutions.[97]

In a series of transactions starting on October 8, 2008, and concluding by the end of the month, Vik transferred almost $900 million of SHI assets to various entities, including $160 million to a company owned by his father, and hundreds of millions of dollars to another company owned by Vik, the stock of which was in turn placed in trust for his children.[98] But he also left hundreds of millions of dollars with Deutsche Bank, and between October 13th and October 17th, SHI met capital calls issued by the bank that aggregated more than $500 million.[99]

At that point, the bank briefly paused its demands, but then in an internal meeting on October 22nd, the bank realized that due to a "failure to properly evaluate and enter ... [SHI's] trades, SHI's account balances had been overstated by at least ... $320 million, leaving SHI 'under water' by hundreds of millions of dollars."[100] Shortly thereafter, the bank issued another margin call, this time in the amount of $309 million, which SHI did not honor.[101]

In 2009, Deutsche Bank sued SHI, in the Queen's Bench Division of the High Court of Justice of England and Wales, to collect the amounts owed pursuant to the unpaid margin call. In November of 2013, that court issued a judgment in favor of Deutsche Bank, in the amount of $243,023,089.[102] A

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94 *Id*. at 572.
95 *Id*. at 573.
96 *Id*.
97 *Id*.
98 *Id*. at 575, fn. 3.
99 *Id*. at 577.
100 *Id*. at 578.
101 *Id*. at 579, 580.
102 *Id*. at 580.

month later, the bank sued Vik in the Connecticut Superior Court, seeking to pierce SHI's corporate veil and hold Vik personally liable for the judgment rendered in England.

The trial court determined that the veil-piercing claim should be evaluated under the law of the jurisdiction where SHI is incorporated, Turks and Caicos Islands, and that under the operative law, the plaintiff was tasked with proving "(1) domination and control of the corporation by the alleged wrongdoer, (2) commingling of the corporation's assets with those of the wrongdoer or with entities controlled by him, and (3) specific intent by the wrongdoer to leave the corporation unable to pay its debts."[103]

Following a courtside trial, the court found that the bank had proven the first two of these prongs, but not the third. As to that third element, "the court found that Vik had every intention of paying the October margin calls and credibly believed that SHI had sufficient funds in its Deutsche Bank account to do so up until the moment that Deutsche Bank informed Vik of its failure to accurately value [SHI's] trades."[104] The court noted, as a "salient fact [that] stands out," that Vik "left more than $500 million in SHI's accounts at [Deutsche Bank]."[105] When Vik "distribut[ed] approximately $900 million of SHI's assets, " he "credibly believed [that] they totaled at least $1.65 billion and had no reason to believe [that] the remainder of approximately $750 million would be inadequate to cover any debt to [Deutsche Bank]."[106]

The court also noted that the bank's harm had been caused in part by its "extraordinary … negligence and incompetence in calculating and reporting the status of" SEI's trades.[107] Emphasizing the equitable nature of a claim for veil-piercing, the court found that the equities favored Vik. The trial court noted that the bank had inexplicably failed to procure Vik's guaranty of SHI's obligations, and characterized its pursuit

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[103] *Id.* at 584.
[104] *Id.*
[105] *Id.* at 586.
[106] *Id.* at 587.
[107] *Id.*

of veil-piercing as "an attempt to circumvent the lack of a [personal] guarantee."[108] The court entered judgment for Vik.

On appeal, the bank claimed the trial court had erred in applying the law of Turks and Caicos Islands, and should have applied the law of either Connecticut[109] or New York, under which the bank allegedly would have prevailed. The Supreme Court found significant overlap in those bodies of law. "[I]n all three jurisdictions, [veil-piercing] is an extraordinary remedy that requires, at a minimum, a determination by the court that the corporate form was used to promote a wrong or injustice, and that a fundamental unfairness would result from a failure to disregard the corporate form.…The party seeking to pierce the corporate veil must also show that the corporate form was a mere shell used primarily as an intermediary to perpetrate fraud or to promote injustice."[110]

The court deemed it unnecessary to resolve the choice of law issue, on the grounds that "the trial court's factual findings foreclose Deutsche Bank's claim under New York, Connecticut, and TCI law, and, therefore, any error in the trial court's choice of law analysis or application of TCI law was harmless."[111] The court elaborated:

> In the present case, the trial court unequivocally absolved Vik of any wrongdoing vis-à-vis SHI's business dealings with Deutsche Bank and rejected Deutsche Bank's assertion that there was anything fundamentally unfair about leaving SHI's corporate veil intact. Indeed, the trial court found that 'the balance of equities' favored Vik and that Deutsche Bank's effort to pierce SHI's veil was simply an

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[108] *Id*.

[109] In its choice of law analysis, the Supreme Court observed, "[i]n Connecticut, courts recognize two theories under which the corporate veil may be pierced, namely, the instrumentality rule and the identity rule," and went on to discuss both approaches. 346 Conn. at 590, 591. The court's use of the present tense is surprising, given that in 2019, the Connecticut legislature enacted P.A. 19-181, later codified at General Statutes Section 33-673b, which effectively abolished the "identity rule" while codifying the "instrumentality rule." However, the statute's effective date was July 9, 2019, long after the relevant events and commencement of the suit, and so the court's statement of the law was accurate for the purposes of the case.

[110] *Id*. at 592, 593 (citation and internal punctuation omitted).

[111] 346 Conn. at 592.

> attempt to 'circumvent' the 'extraordinary' 'negligence and incompetence' Deutsche Bank exhibited in not obtaining a personal guarantee from Vik and in failing to accurately record and value [SHI's] trades.[112]

Applying the "clearly erroneous" standard of review, the court "conclude[d] that Deutsche Bank has not met its heavy burden,"[113] and affirmed the judgment below.

B. *Evidentiary rule barred evidence of settlement offer in support of defense of failure to mitigate damage.*

In *CCI Computerworks, LLC v. Evernet Consulting, LLC*,[114] the Appellate Court considered the issue of whether evidence of a late payment tendered by the defendant, but rejected by the plaintiff, was properly admissible in support of the defendant's special defense of failure to mitigate damages.

The plaintiff sued the defendant for failure to pay certain installment payments owing under an asset purchase agreement. The contract included a provision for interest on late payments.

Shortly after the commencement of suit, the defendant tendered two checks to the plaintiff: one in the amount of $30,937.97, representing the defendant's calculation of the missed payments and interest, and one in the amount of $4,000, which stated in the memo line that it was to compensate the plaintiff for its legal fees. The checks were accompanied by a letter from the defendant advising, "[i]f [the plaintiff] has incurred more than $4000 in legal fees, please provide me with that figure along with documentation supporting the reasonableness of the legal fees incurred."[115] The plaintiff refused the offer, and returned the checks. Citing this offer and rejection, the defendant asserted a special defense of failure to mitigate damages.

Over the plaintiff's objection, the trial court admitted evi-

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[112] *Id.* at 593.
[113] *Id.* at 594.
[114] 221 Conn. App. 491, 302 A.3d 297 (2023).
[115] *Id.* at 515.

dence of the defendant's tender of payments, and the plaintiff's rejection of the same. The court entered judgment for the plaintiff on its principal claim, together with interest up until the date that the payment was tendered, but denied interest after that date, finding the plaintiff's rejection of the payment constituted a failure to mitigate damages.[116]

The Appellate Court ruled that this was error. The court noted that pursuant to section 4-8 of the Connecticut Code of Evidence, "[e]vidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim." The defendant pointed to separate language in the rule that such evidence may be admissible if it is "offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution," and argued that its proffer had been for "another purpose," proving its special defense of failure to mitigate.[117] But the court disagreed, reasoning that "evidence of a settlement offer proffered to support a mitigation of damages defense speaks to the 'amount of the claim.'"[118]

C. *Appellate Court broadly construes petitioner's entitlement to a bill of discovery.*

In *Nowak v. Environmental Energy Services, Inc.*,[119] the Appellate Court threaded a fine needle in affirming the trial court's judgment granting a petition for a bill of discovery.

The plaintiff, Anna Nowak, executrix of the estate of Kenneth Nowak, controlled shares in the defendant Environmental Energy Services, Inc. (company). Her brother-in-law, the defendant Richard Nowak, also owned shares in the company, which he had co-founded with Kenneth. The plaintiff characterized Richard as the company's "controlling shareholder."

The plaintiff requested certain information from the company, but she received only partial compliance. She brought a

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[116] *Id*. at 517.
[117] *Id*. at 520.
[118] *Id*. at 522.
[119] 218 Conn. App. 516, 292 A.3d 4 (2023).

petition against Richard and the company for a bill of discovery, alleging probable cause to support claims for breach of fiduciary duty, an accounting, and shareholder oppression.[120] She claimed Richard had "caus[ed] the board to authorize excessive salaries and/or bonuses for himself and other executives; that she has been improperly excluded from company meetings; and that EES and/or Richard Nowak mismanaged the corporation by submitting for reimbursement as corporate expenses certain expenses for personal travel, meals and entertainment, by failing to investigate the reasonableness of certain corporate tax deductions, and by refusing to pay dividends to all shareholders."[121]

In her petition, the plaintiff sought seventeen different categories of records, claiming they were material and necessary for her to bring an action on her substantive claims. She asserted that there was no other adequate means to obtain the records. After a three-day hearing, the court granted her petition as to eleven of the seventeen categories of documents.

Before the court issued its judgment, the company had brought a separate action (civil action) against the plaintiff, alleging breach of contract, fraud and unfair trade practice, in connection with an agreement for the company to purchase some of the estate's shares. After judgment had been rendered in the bill of discovery case, she filed an answer, special defenses and counterclaim in the civil action, and also cited Richard into that case. Then she added claims for shareholder oppression, an accounting, and breach of fiduciary duty.

On appeal in the bill of discovery action, the defendants argued that by filing those pleadings in the civil action, the plaintiff had "in effect, admitted that she could have proceeded in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery."[122] The plaintiff countered, "[s]hould the bill of discovery be upheld, the breach of fiduciary

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[120] "The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action." *Id*. at 530.

[121] *Id*. at 520.

[122] *Id*. at 523.

duty, shareholder oppression and accounting claims may be amplified or even refiled as derivative rather than individual actions," and "[t]he bill of discovery could provide information that would lead to [an] extension or otherwise revised pleading in [the civil] action or even the commencement of another action."[123]

The Appellate Court noted that under previous caselaw, a bill of discovery can co-exist with a separate action concerning the same subject matter. "[A]n action in equity seeking a bill of discovery is separate from a civil action and may be maintained seeking information relating to a civil action that already has been, or has yet to be, brought."[124] The court elaborated:

> The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. ... The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery.[125]

The court went on to state two governing principles that, if not directly contradictory, are quite challenging to reconcile. On the one hand, a petitioner seeking a bill of discovery "must … show that [it] has no other adequate means of enforcing discovery of the desired material."[126] But on the other hand, the "availability of other remedies for obtaining information does not require the denial of the equitable relief sought."[127]

To harmonize "no other adequate means" with "availability of other remedies," the court noted that "other remedies" are "adequate" if they are "specific and adapted to securing the relief sought conveniently, effectively and completely."[128]

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[123] *Id*. at 525.
[124] *Id*. at 527.
[125] *Id*. at 528, 529, quoting H & L Chevrolet, Inc. v. Berkley Ins. Co., 110 Conn.App., 428, 955 A.2d 565 (2008).
[126] *Id*. at 529.
[127] *Id*. (citation and internal punctuation omitted).
[128] *Id*.

The defendants argued that the plaintiff had adequate remedies at law that obviated the need for a bill of discovery: General Statutes Section 33-948, by which a shareholder can obtain a court order enforcing the shareholder's right to inspect corporate records, and the discovery process in the separate civil action. But the court rejected this argument, noting "the availability of a remedy at law does not necessarily preclude a party from obtaining a bill of discovery."[129]

With respect to the plaintiff's ability to obtain the material in question via the discovery process in the civil action, the court observed that in that case, the defendant "objected to the very same requests by the plaintiff that were made in the present action in equity, withheld the requested documents for months and, when a disclosure was finally made, it allegedly was incomplete and did not include all of the documents sought."[130] The court further noted that the discovery deadline in the civil action had passed with various objections unadjudicated, apparently limiting the plaintiff's options in that forum.

The court cited the principle that "a pure bill of discovery is favored in equity, [and] it should be granted unless there is some well founded objection against the exercise of the court's discretion,"[131] and affirmed the judgment below.

D. *"Grossly careless" commercial landlord allowed to reform lease under doctrine of mutual mistake.*

In *Stamford Property Holdings, LLC v. Jashari*,[132] the Appellate Court affirmed the trial court's judgment reforming a commercial lease, on the alternate grounds of mutual mistake and unilateral mistake coupled with inequitable conduct. In so doing, the court affirmed the continued vitality of an 1885 Connecticut Supreme Court case allowing reformation at the behest of even a very careless party.

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[129] *Id*. at 540.
[130] *Id*.
[131] *Id*. at 542.
[132] 218 Conn. App. 179, 291 A.3d 117, *cert. denied* 347 Conn. 901, 296 A.3d 840 (2023).

The parties negotiated a lease of the plaintiff's car-wash business from the plaintiff to the defendant. Their negotiations provided for a lease that would be triple net to the plaintiff landlord – the tenant bearing responsibility for insurance, maintenance, and real estate taxes – and executed a letter of intent with that provision.[133] But the actual lease, as drafted and signed, lacked a triple-net provision, due to a drafting error by the plaintiff's attorney.[134]

Shortly after the defendant took occupancy of the property, the plaintiff billed the defendant for reimbursement of real estate taxes. The defendant refused to pay, citing the absence of any such obligation in the lease. The plaintiff promptly brought suit to reform the lease.

Following a courtside trial, the court entered judgment for the plaintiff, "'primarily' determin[ing] that there was a mutual mistake but, alternatively, [holding] that the unilateral mistake ground was satisfied as well."[135] On appeal, the defendant argued that the plaintiff's claim should have been barred, asserting that the plaintiff's conduct in failing to notice the omission of the triple-net provision from the lease rose to the level of recklessness.

The Appellate Court disagreed. The court noted the 19th-century decision of the Connecticut Supreme Court in *Essex v. Day*,[136] which concerned the issuance of municipal bonds that should have been callable in ten years at the town's option, but lacked such a provision due to a printing error. In that case, the court determined that a party in the plaintiff's position may prevail even if it is guilty of "gross carelessness," which does not rise to the level of recklessness. The Appellate Court noted the following:

> The court [in *Essex v. Day*] recognized that there was 'unquestionably a reprehensible carelessness; a lack of intelligent attention to the matter that must be regarded as not

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[133] *Id*. at 183.
[134] *Id*.
[135] *Id*. at 187, 188.
[136] 52 Conn. 483, 1 A.620 (1885).

> only unreasonable but culpable.' [Citation.] Nonetheless, the court noted that '[t]he question however, as we conceive, is not so much whether a culpable negligence existed, as it is, whether such negligence should operate to bar the plaintiffs from relief against this defendant. This negligence is not of the extremist kind which the courts sometimes characterize as the equivalent of fraud. It was not recklessness; it was mere want of care. There was no indifference to the effect; it was simply an honest assumption that all was right. It is to be classed only with those incautious and unbusiness-like acts which are constantly presenting themselves and would not have been noticed but for some mischief that they have wrought.'[137]

The Appellate Court agreed with the trial court that the *Day* decision was indistinguishable from the case before it, and affirmed the judgment below.

E. *State supreme court clarifies "reasonable certainty" standard for proving damages.*

In *Roach v. Transwaste, Inc.*,[138] the Connecticut Supreme Court clarified that the often-cited "reasonable certainty" standard for proving damages may be less daunting than it sounds: the plaintiff may meet the standard by providing the factfinder with a "reasonable estimate" of the plaintiff's loss. "The term 'reasonable certainty' in this context … requires only evidence that is sufficient to enable the fact finder to arrive at a reasonable estimate and thereby remove the award from the realm of speculation."[139]

The plaintiff in *Roach* was a truck driver who sued his former employer for wrongful termination. He testified that as a result of his termination, he had been unemployed for about six months; that his compensation had been 46 cents per mile driven, and that he had driven approximately 230,000 miles during his two years as the defendant's employee. He provided no other evidence of damages, and based solely on his

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[137] 218 Conn. App. at 200, quoting *Essex v. Day*, 52 Conn. 483, 492, 493, 1 A.620 (1885).

[138] 347 Conn. 405, 297 A.3d 1004 (2023).

[139] *Id*. at 413.

testimony, the jury awarded him a sum that closely tracked these figures.

The Supreme Court deemed this evidence sufficient to provide a reasonable estimate of the plaintiff's damage. "The jury … based its award on figures drawn directly from uncontroverted testimony, and the method it employed for its calculations is set forth in the jury interrogatories form. Consequently, the damages award was not based on speculation or guesswork. …Rather, the plaintiff proved his damages to a reasonable certainty by providing nonspeculative evidence from which the jury derived a fair and reasonable estimate."[140]

F. *Probate decree has mixed res judicata effect on subsequent tortious interference action in Superior Court.*

In *Solon v. Slater*,[141] the Connecticut Supreme Court resuscitated a widow's claim that her late husband's son and attorney had tortiously interfered with the amendment of the couple's prenuptial agreement. The trial court and Appellate Court had ruled that her claim was barred, under the doctrine of collateral estoppel, due to an earlier ruling in the Probate Court.

The plaintiff was the second wife of Michael Solon (decedent), who died in 2014, less than a year after their marriage. On the eve of their wedding, in May of 2013, they had signed a prenuptial agreement granting her a life estate in the decedent's house in Stamford.

Shortly thereafter, the decedent was diagnosed with inoperable cancer. Several months later, in February of 2014, he executed a new will. At about that time, he and the plaintiff discussed the possibility of an amended prenuptial agreement, on terms that would have been more generous to her, but no such amendment was ever finalized.

In March of 2014, the decedent moved out of the marital home, and into his former wife's home on Long Island – an arrangement that the plaintiff would later characterize as a

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[140] *Id.* at 415, 416.
[141] 345 Conn. 794, 345 Conn. 794 (2023).

"kidnapping" orchestrated by the defendants. A month later, still residing in Long Island, the decedent died. In probate proceedings, the plaintiff objected to the admission of the decedent's 2014 will, claiming it was the product of the defendants' undue influence, and that the decedent had lacked testamentary capacity.

While the probate matter was pending, she sued the defendants in Superior Court, claiming, among other things, tortious interference with contractual relations (the proposed amendment of the prenuptial agreement) and tortious interference with right of inheritance (a possible amendment of the will). The trial court dismissed those claims due to lack of jurisdiction, because the decedent's assets were under the jurisdiction of the Probate Court.

In 2015, the Probate Court admitted the 2014 will, over the plaintiff's objections. The court found insufficient evidence of undue influence or lack of capacity. The plaintiff did not appeal from that decision.

The plaintiff then filed a second suit in the Superior Court, presenting claims that were substantially the same as those asserted in the dismissed first action. The trial court granted the defendants' motion for summary judgment as to both tortious interference claims, based on collateral estoppel. The court noted the "interrelationship between the [antenuptial] agreement and the [2014] will with respect to the ultimate disposition of the decedent's estate."[142] The Appellate Court affirmed.

The Supreme Court agreed with the judgment below with respect to the plaintiff's claim based on the proposed amendment of the will. "Because the Probate Court determined that the defendants' conduct regarding the testamentary disposition of the Solon assets was not tortious, we conclude that the plaintiff's tortious interference with the right of inheritance claim is barred by the doctrine of collateral estoppel."[143]

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[142] *Id*. at 806.
[143] *Id*. at 822.

But that did not hold true with respect to the plaintiff's claim of tortious interference with amendment of the prenuptial agreement. In the court's view, "the plaintiff's claim of tortious interference with the amendment of the antenuptial agreement is predicated on different (albeit partly overlapping) conduct relating to a different legal instrument, not the 2014 will. The sole issue in the Probate Court was whether to admit the decedent's 2014 will to probate. Notably, the plaintiff did not challenge the validity of the preexisting antenuptial agreement …"[144] Although the Probate Court did consider and reject the plaintiff's claim of undue influence and capacity concerning the will, that court "made no factual findings regarding the defendants' conduct pertaining to the proposed amendment of the antenuptial agreement."[145]

The court recognized "there is some overlap between the facts underlying the plaintiff's undue influence claim in the Probate Court and her tortious interference with contractual relations claim in the present case, because both claims are predicated on the defendants' allegedly wrongful conduct during the same general time period regarding the Solon assets."[146] But, "[a]n overlap in issues is not enough to trigger application of the doctrine of collateral estoppel; the doctrine becomes operative only if the issue decided in the prior proceeding and the issue presented in the subsequent proceeding are *identical*."[147]

IV. Business Torts

A. *Company that pretended to join with competitors in suit against the State found liable for tortious interference and unfair trade practice.*

In *Companions & Homemakers, Inc. v. A&B Homecare Solutions, LLC*,[148] the Connecticut Supreme Court affirmed the trial court's finding that a company committed tortious

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144 *Id.* at 814.
145 *Id.*
146 *Id.* at 815, 816.
147 *Id.* at 816.
148 348 Conn. 132, 302 A.3d 283 (2023).

interference and unfair trade practices when it misleadingly pretended to join its competitors in litigation against their common client, the State of Connecticut.

The plaintiff and defendant were providers of homemaking and companion care to the elderly, and both companies had contracts with the Connecticut Department of Social Services (DSS). In 2016, DSS implemented a new billing and timekeeping system, the Electronic Visit Verification system (EVV), for contractors of this type. The plaintiff was dissatisfied with this new requirement, and rallied various of its competitors, including the defendant, to join a legal challenge to EVV, under the Uniform Administrative Procedure Act.

The defendant joined with the plaintiff and three other home-care companies in a complaint alleging that the home care providers were "unable to implement EVV" and would be irreparably harmed if it became mandatory.[149] But unbeknownst to its competitors and fellow litigants, the defendant successfully implemented the system, billing more than $715,000 through EVV by December of 2016, while the plaintiff and other providers had billed nothing at all.[150] As found by the trial court, the defendant's CEO "'played both sides of the litigation' because doing so 'enabled him to continue to receive strategic information from the [other providers] and to plan to benefit at their expense from their nonuse of EVV.'"[151]

In early 2017, DSS terminated its provider agreement with the plaintiff, "based, in part, on its knowledge that [the defendant] had successfully implemented EVV and that it could rely on [the defendant] to take on [the plaintiff's] clients."[152] The defendant then began doing precisely that, via referrals from DSS, and hiring the plaintiff's employees, with full knowledge that they were bound by noncompete agreements.[153]

In a two-count complaint, the plaintiff alleged that this

[149] *Id*. at 137, 138.
[150] *Id*. at 139.
[151] *Id*. at 139.
[152] *Id*. at 140.
[153] *Id*.

conduct constituted tortious interference with its agreements with DSS and its employees, as well as a violation of the Connecticut Unfair Trade Practice Act, General Statutes Section 42-110a et seq. (CUTPA). Following a lengthy bench trial, the trial court agreed.

On appeal, the defendant challenged the trial court's finding of tortious interference with the plaintiff's relationship with DSS, asserting that that conclusion was based on findings of multiple fraudulent misrepresentations even though the defendant owed the plaintiff no duty of disclosure. The Supreme Court rejected this argument, noting the established principle that "a duty to disclose will be imposed on a party insofar as he voluntarily makes disclosure. A party who assumes to speak must make a full and fair disclosure as to the matters about which he assumes to speak."[154] Concluding that the claim of tortious interference was well supported, the Supreme Court summarily affirmed the trial court's judgment on the CUTPA claim as well, citing an earlier decision for the proposition that "it is difficult to conceive of a situation [in which] tortious interference would be found but a CUTPA violation would not."[155]

V. Closely Held Businesses

A. *Saving statute rescues LLC claim initially, and incorrectly, brought in the name of the LLC's member.*

In *AAA Advantage Carting & Demolition Service, LLC v. Capone*,[156] the Appellate Court weighed the applicability of General Statutes Section 52-591 (savings statute) to a situation where an LLC member pursued a company claim in his own name, obtained a judgment that was reversed by the Appellate Court, then brought suit in the name of the company after the limitations period had expired. The Appellate Court

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[154] *Id*. at 145, quoting Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 636, 804 A.2d 180 (2002).

[155] *Id*. at 151, quoting Sportsmen's Boating Club v. Hensley, 192 Conn. 747, 757, 474 A.2d 780 (1984).

[156] 221 Conn. App. 256, 301 A.3d 1111, *cert. denied* 348 Conn. 924, 304 A.3d 443 (2023).

agreed that the second action was saved by the savings statute.

The savings statute provides, "[w]hen a judgment in favor of a plaintiff suing in a representative character, or for the benefit of third persons, has been reversed, on the ground of a mistake in the complaint or in the proper parties thereto, and, while the action was pending, the time for bringing a new action has expired, the parties for whose special benefit the action was brought may commence a new action in their individual names at any time within one year after the reversal of the judgment, if the original action could have been so brought."

In *Capone*, the plaintiff limited liability company sued a former 50% member, Joseph Capone, for statutory theft of company funds committed on the eve of Capone's sale of his membership interest to the other member, Frank Bongiorno. In a previous action commenced in 2012, Bongiorno had brought the same claim in his own name, and prevailed at trial, but the Appellate Court reversed, holding that he lacked individual standing to prosecute the claim.[157] Bongiorno then caused the company to bring a second action in the company's name. Capone asserted that the claim was time-barred, but the plaintiff countered by citing the savings statute.

Capone contended that the savings statute did not apply "because Bongiorno brought the 2012 action in his individual capacity only and did not assert a derivative claim on the plaintiff's behalf."[158] Thus, he argued, the situation did not meet the requirement of the savings statute that the earlier case be one that was brought "in a representative character, or for the benefit of third persons." The trial court disagreed, holding that "[a]lthough [Bongiorno] commenced suit [in the 2012 action] individually and not derivatively, the object of the [2012 action] was to recover the [$17,000 in] funds withdrawn without authorization from the [plaintiff's checking]

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[157] Bongiorno v. Capone, 185 Conn. App. 176, 196 A.3d 1212, *cert. denied* 330 Conn. 943, 195 A.3d 1134 (2018).

[158] 221 Conn. App. at 272.

account …. For this reason, [the 2012 action] can be viewed as brought 'for the benefit of' a third person, [the plaintiff]…"[159]

The Appellate court agreed, echoing the trial court's observation that in the 2012 suit, "Bongiorno sought the recovery of the $17,000 withdrawn by the defendant from the *plaintiff's* checking account."[160] The court also pointed out that Bongiorno was the plaintiff LLC's sole member, and under the authority of the Connecticut Supreme Court's 2019 decision Saunders v. Briner (which had not yet been released at the time of the Appellate Court's decision in the 2012 case),[161] it is possible that Bongiorno as sole member may have had standing to prosecute the claim individually.

The Appellate Court concluded that "[u]nder these unique circumstances, we conclude that the claims of statutory theft and conversion in the 2012 action in their essence were asserted 'for the benefit of' the plaintiff notwithstanding that Bongiorno brought the 2012 action in his individual capacity only,"[162] and accordingly the savings statute applied to the second action.

One of the "unique circumstances" apparently relied upon by the Appellate Court was the plaintiff company's status as a single-member LLC. It is therefore less than 100% clear that the court would have reached the same conclusion as applied to a multi-member LLC.

The plaintiff argued, and the trial court agreed, that the second suit was saved by not only the savings statute but also by the accidental failure of suit statute, General Statutes Section 52-592.[163] The Appellate Court decided the issue based solely on the former, and expressly declined to address the latter.

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[159] *Id*. at 271, 272. (Brackets inserted by the Appellate Court.)

[160] *Id*. at 273. (Emphasis by the court.)

[161] 334 Conn. 135, 221 A.3d 1 (2019).

[162] *Id*. at 274.

[163] The statute provides, in relevant part, "(a) If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits … because the action has been dismissed for want of jurisdiction, … the plaintiff … may commence a new action … for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."