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BUSINESS LITIGATION: 2020 IN REVIEW

By William J. O'Sullivan*

In 2020, Connecticut's appellate courts decided numerous cases of interest to business litigators. Following is a summary of the year's most noteworthy decisions.

I. Closely Held Businesses

A. *Oppression of Minority Member of Limited Liability Company*

In *Manere v. Collins*,[1] the Appellate Court provided Connecticut's first appellate guidance on the meaning of "oppression" as cause to dissolve a limited liability company under the Connecticut Uniform Limited Liability Company Act, General Statutes Section 34-243 *et seq*. The act provides, under Section 34-267(a)(5)(B), that a member of a limited liability company may seek judicial dissolution of the company on the grounds that the managers or members in control "have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant ...."

The plaintiff was a forty-percent member of a limited liability company, called BAHR, LLC, which owned a bar in Fairfield. The first named defendant, Collins, owned the remaining sixty percent membership interest. Collins determined that the plaintiff had misappropriated company funds, in an amount determined by the trial court to exceed $190,000.[2] Collins responded by taking a number of measures, including terminating the employment of the plaintiff and his son, and changing the locks on the building.[3]

The plaintiff sued Collins and the company under a number of theories, and sought, among other remedies, dissolution of the company on the grounds of oppression. The allegedly oppressive conduct included claims that Collins "(1) stopped payment on nine $1000 [payroll] checks, (2) filed an interim

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[1] 200 Conn. App. 356, ___ A.3d ___ (2020).

[2] 200 Conn. App. at 364.

[3] *Id*. at 363.

report with the Connecticut Secretary of the State that failed to list the plaintiff as a member of BAHR, (3) terminated the plaintiff's son from employment by the cafe, (4) refused to provide the plaintiff with distributions, and (5) refused to provide the plaintiff with BAHR's financial documents."[4] After a bench trial, the court entered judgment for the defendants on all counts of the plaintiff's complaint, and also in favor of BAHR on its counterclaim against the plaintiff.[5]

The Appellate Court observed that the touchstone for member oppression is conduct that "substantially defeats the minority member's expectations which, objectively viewed, were both reasonable under the circumstances and were central to his or her decision to join the venture or developed over time…[T]he key is *reasonable*."[6] In evaluating the allegedly oppressed member's "expectations," the court should consider "with regard to each reasonable expectation invoked by the plaintiff, whether the expectation: (i) contradicts any term of the operating agreement or any reasonable implication of any term of that agreement; (ii) was central to the plaintiff's decision to become a member of the limited liability company or for a substantial time has been centrally important in the member's continuing membership; (iii) was known to other members, who expressly or impliedly acquiesced in it; (iv) is consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff's conduct; and (v) is otherwise reasonable under the circumstances."[7]

A limited liability company member's typical "expectations" include employment, a share of the company's earnings and dividends, meaningful participation in the company's operations, voting rights, and access to the company's books and records.[8] The court borrowed from established law on closely

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[4] *Id*. at 376, fn. 17.

[5] *Id*. at 364.

[6] *Id*. at 389. (Emphasis in original; citation and internal punctuation otherwise omitted.)

[7] *Id*. at 385, 386, quoting Rev. Unif. Limited Liability Company Act of 2006 (2013), § 701, comment.

[8] *Id*. at 387, 390.

held corporations. "It is widely understood that, in addition to supplying capital to a contemplated or ongoing enterprise and expecting a fair and equal return, parties comprising the ownership of a close corporation may expect to be actively involved in its management and operation .... [E]mployment is often a vital component of a [close corporation] [member's] return on investment and a principal source of income."[9]

As a corollary to this principle, an adverse change in compensation policy may constitute oppression. "Because employment by an LLC is typically the main source of income to members in an LLC – and due to the inherently reasonable expectation that a minority member is to receive a return on his or her investment – a change in distribution policy could, for instance, constitute oppression depending on the factual circumstances."[10]

Reasonable expectations may evolve over time. "The reasonableness of a member's expectation at the inception of an LLC may prove unreasonable over time and under particular circumstances … For example, a minority member may reasonably expect to be employed by the LLC when entering into the venture with other members. That expectation, however, becomes patently unreasonable when, in light of the minority member's own misconduct, he or she is terminated from that employment with the LLC… This also extends to a member's expectation that a relative will be employed."[11] In sum, "whether a minority member's expectation is both reasonable and was defeated will depend on the circumstances in the individual case…[M]aking that determination requires the court to engage in a fact intensive inquiry."[12]

An allegedly oppressed member must establish "a causal connection between the oppressive conduct and the harm sustained by the plaintiff-member."[13] The plaintiff need not prove that the oppressive conduct is ongoing; any such re-

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[9] *Id*. at 390.
[10] *Id*. at 390, 391.
[11] *Id*. at 391.
[12] *Id*. at 392.
[13] *Id*. at 393.

quirement would have the perverse effect of "allow[ing] the majority to abuse the minority so long as the abuse ceases prior to the date a decision is rendered."[14]

Applying these principles to *Collins*, the Appellate Court found the trial court had not applied the correct legal standard – understandably, given that our appellate courts had not yet articulated one – and that the matter needed to be remanded for a new trial on all the plaintiff's claims of oppression except the termination of his employment. As a matter of law, given the circumstances, termination of the plaintiff's employment did not constitute oppression; "the plaintiff's misappropriation of BAHR's funds would render any expectation of continuing employment by BAHR or the cafe unreasonable."[15]

But the plaintiff's own misconduct

> does not obviate the need for the court to consider whether he continued to have reasonable expectations as a minority member… While the plaintiff cannot establish oppression based on his termination of employment – or based on his being prevented from unfettered access to the cafe or BAHR's bank accounts – we emphasize that the plaintiff cannot be marginalized to the extent that he would be precluded from realizing what reasonable expectation he still maintains as a minority member… Should the court find that the other acts taken by Collins were oppressive, the plaintiff's prior malfeasance should not bar his pursuit of an appropriate remedy under § 34-267(a)(5). This is so because, so long as the plaintiff retains an investment in BAHR, his reasonable expectations include being entitled to certain minimum rights as a minority member. An infringement of these rights and a bar to any remedy leaves the plaintiff with a worthless asset.[16]

This does not mean a wrongdoing limited liability company member can necessarily force dissolution of the entity if the other members overreact to the point of oppressing him. The uniform act provides, at General Statutes Section 34-267(b),

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[14] *Id.* at 394. (Citation and internal punctuation omitted.)
[15] *Id.* at 397.
[16] *Id.* at 398, 399, 400. (Citations omitted.)

that in a proceeding for dissolution based on oppression (or certain other grounds), “the court may order a remedy other than dissolution.” So, although an “oppressed bad guy” may be entitled to some form of relief, that relief does not necessarily include dissolution of the company. One possible option is a buyout in lieu of dissolution; although the uniform act does not specifically prescribe that procedure, as the corporate statutes do, the flexible language of Section 34-267(b) would appear to leave that as an option.

The act also authorizes the court-ordered expulsion of a limited liability company member who engages in serious misconduct. General Statutes Section 34-263a(5) provides that remedy against a member who “(A) Has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the company’s activities and affairs; (B) has committed wilfully or persistently, or is committing wilfully or persistently, a material breach of the operating agreement or a duty or obligation under section 34-255h; or (C) has engaged or is engaging in conduct relating to the company’s activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with the person as a member.”

It is thus foreseeable that, on facts similar to those in *Manere*, a court could face (i) an application by the company to expel the member for wrongdoing and (ii) a counterclaim by the member alleging that the company and its majority members had oppressed him in the aftermath of his own wrongdoing, and seeking dissolution of the entity or other relief.

Finally, on a side note concerning pleading practice, the court observed the split of authority among our trial courts as to whether it is proper to challenge the legal sufficiency of a pleading by way of a special defense rather than a motion to strike. Without expressly deciding that issue, the Appellate Court stated it was “doubtful that such a practice conforms with our rules that govern an attack on a pleading for a failure to state a claim.”[17]

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[17] *Id*. at 364, fn. 11.

B. *Fiduciary Duty Owed by Majority Member of Limited Liability Company When Purchasing Interest of Minority Member*

The Appellate Court's decision in *Falcigno v. Falcigno*[18] implicated the fiduciary duty that the majority owner of a closely held business owes when purchasing the interest of a minority owner. The case involved a family business, a distributorship called Statewide Meats and Poultry, Inc. In 2009, the plaintiff sold his twenty percent shareholder interest in the company to his brother, the defendant, for $200,000. At the time of the transaction, the defendant already held sixty percent of the stock in the company; a third brother, a non-party to the lawsuit, held the remaining twenty percent.

A year later, a representative of Sysco Corporation approached the defendant to broach the idea of buying the company. In 2011, the company was sold to Sysco for $6 million, with an additional $2 million earnout to be paid if the company maintained a certain level of sales.[19] In 2012, the plaintiff sued the defendant, claiming the defendant had misled him in connection with his buyout.

Following a courtside trial, the court entered judgment for the defendant on all counts of the plaintiff's complaint. The Appellate Court affirmed. Although the appeal was largely an attack on the trial court's findings of fact, the Appellate Court decision is noteworthy for its articulation of the relevant legal standard:

> 'Majority or controlling stockholders have a duty not to take advantage of the minority in purchasing the latter's shares. Accordingly, majority stockholders, when purchasing the stock of minority stockholders, are under a duty to disclose to them all material facts known to the majority stockholders by virtue of their position. … [T]he correct standard requires disclosure of all germane facts rather than mere disclosure of adequate facts.

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[18] 199 Conn. App. 663, 238 A.3d 60 (2020).
[19] *Id*. at 669.

> 'Absent nondisclosure, fraud, or oppression, a majority shareholder has no duty to pay a 'fair' price for shares. A shareholder in a closely held corporation does not breach the shareholder's fiduciary duties to the second shareholder by failing to disclose the true value of the corporation when the second shareholder sold their interest to the first shareholder, where there is no evidence that the first shareholder knew the true value of the corporation, and the second shareholder was advised, but refused, to obtain an appraisal....'[20]

II. Remedies and Defenses

A. *Limits on Applicability of Civil Theft*

In *Hamann v. Carl*,[21] the Appellate Court reversed a judgment for the plaintiff on a claim of civil theft, even as the plaintiff's judgment for unjust enrichment on another count of the complaint remained unchallenged.

The defendant and nonparty Richard Edwards were involved in the purchase and sale of classic automobiles. The defendant faced a deadline to pay $150,000 to Ferrari Motor Services, on the defendant's line of credit with that company. Edwards, on behalf of the defendant, asked the plaintiff's then-husband, Thomas Hamann, to provide a short-term loan for the benefit of the defendant. Thomas prevailed upon the plaintiff to provide the funds, which she arranged to have wired to Ferrari, credited toward the defendant's account.[22] Not until after the payment was made did the defendant learn that the plaintiff had been the source of the payment.[23]

Several months later, Thomas, on behalf of the plaintiff, contacted the defendant to seek repayment. The defendant refused, claiming, as later set forth in his special defenses, that Edwards owed him $150,000, and that the money wired into the defendant's Ferrari account was in satisfaction of that obligation.[24]

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[20] *Id.* at 674, 675, quoting 18A Am. Jur. 2d 529–30, Corporations § 662 (2015).
[21] 196 Conn. App. 583, 230 A.3d 803 (2020).
[22] 196 Conn. App. at 587.
[23] *Id.*
[24] *Id.* at 588, fn. 4.

The plaintiff brought suit in four counts, but withdrew two of them, going to trial only on claims of unjust enrichment and civil theft. Following a courtside trial, the court rejected the defendant's special defenses, and entered judgment for the plaintiff for $150,000 on the unjust enrichment claim, and treble damages of $450,000 on the civil theft claim, pursuant to General Statutes Section 52-564. The latter ruling was founded on subsection (4) of General Statutes Section 53a-119, the larceny statute, which provides that a person who "comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of larceny if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to it."

On appeal, the defendant did not contest the court's judgment of unjust enrichment, but challenged the court's finding of civil theft. The Appellate Court agreed that the trial court had erred in imposing liability under that theory. A claim for civil theft may not rest on a "mere obligation to pay money."[25] Rather, to establish a claim for civil theft of money, a party must prove "ownership or the right to possess specific, identifiable money, rather than the right to the payment of money generally."[26] The money in question must be identifiable "as a specific chattel,"[27] requiring such evidence as "intent to form [a] trust, requirement of segregation of funds, or other means of establishing identifiable funds."[28]

Here, the record lacked any such evidence. The Appellate Court concluded that the trial court "erred in finding that the defendant committed civil theft because the plaintiff's tort claim cannot arise from an implied contract of unjust enrichment and because the plaintiff had no right to specific identifiable money once it was paid to Ferrari."[29]

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[25] *Id*. at 598.
[26] *Id*. at 598 (citations and internal punctuation omitted).
[27] *Id*.
[28] *Id*. at 599.
[29] *Id*. at 600.

B. *Statements of Opinion Could Not Support Defamation Claim*

In *NetScout Systems, Inc. v. Gartner, Inc.*,[30] the Connecticut Supreme Court discussed the distinction between actionable misstatements of fact and non-actionable expressions of opinion, as applied to a publication that rates technology products and services.

The defendant publishes a research report that assigns ratings to certain information technology companies. The centerpiece of each report is a graphic, called the "Magic Quadrant," presented as a square divided into quadrants, with the horizontal axis denoting "Completeness of Vision" and the vertical axis denoting "Ability to Execute." The quadrants are labelled "Leaders," "Challengers," "Visionaries" and "Niche Players."

In its 2014 report, the defendant characterized the plaintiff, a provider of products and services for the monitoring of computer network performance, as a "Challenger."[31] The defendant added various comments about the plaintiff, including that it "has a limited ability to expand beyond its network management heritage" and "is perceived as a conservative stalwart … and lacks the reach and mind share that many smaller competitors have."[32]

The plaintiff sued the defendant for defamation. Also, noting that the defendant offers consulting services to information technology vendors, including vendors that the defendant rates in its reports, the plaintiff asserted a claim under the Connecticut Unfair Trade Practices Act,[33] alleging that that combination of services amounts to a "pay to play" scheme, by which vendors purchase consulting services from the defendant in exchange for favorable ratings.[34]

The Supreme Court affirmed the trial court's entry of summary judgment for the defendant. The court found the de-

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[30] 334 Conn. 396, 223 A.3d 37 (2020).
[31] 334 Conn. at 404.
[32] *Id*. at 405.
[33] Conn. Gen. Stat. §42-110a et seq.
[34] 334 Conn. at 405.

fendant's statements about the plaintiff were expressions of opinion, and thus could not support a claim for defamation.

The court acknowledged "the distinction between actionable statements of fact and nonactionable statements of opinion is not always easily articulated or discerned," given that "the expression of an opinion may, under certain circumstances, reasonably be understood to imply the existence of an underlying basis in an unstated fact or set of facts."[35] Liability for defamation may attach "'when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, [firsthand] knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact.'"[36] In such instances, "a reasonable fact finder could conclude that an expression of opinion implies an actionable assertion of fact."[37]

To distinguish between fact and opinion in this context, the court applied "three basic, overlapping considerations: (1) whether the circumstances in which the statement is made should cause the audience to expect an evaluative or objective meaning; (2) whether the nature and tenor of the actual language used by the declarant suggests a statement of evaluative opinion or objective fact; and (3) whether the statement is subject to objective verification."[38]

Applying these factors to the statements at issue, the court concluded that the defendant's speech "was not factual and did not imply defamatory facts."[39] This conclusion, coupled with the absence of evidence to support the plaintiff's "pay to play" theory, also disposed of the CUTPA claim.[40]

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[35] *Id*. at 411, 412.

[36] *Id*. at 416, 417, quoting Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 225 (2d Cir. 1985).

[37] *Id*. at 413.

[38] *Id*. at 414.

[39] *Id*. at 418.

[40] *Id*. at 430.

C. *Supreme Court Clarifies Elements of Claim for Constructive Discharge*

In *Karagozian v. USV Optical, Inc.*,[41] the Connecticut Supreme Court clarified the required elements for a claim of constructive discharge. The plaintiff must allege "that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned."[42]

The court noted that in some decisions, the Appellate Court had construed the "intent" requirement as including specific intent, on the part of the employer, that the employee resign. But the Supreme Court disagreed. "This standard does not require that the plaintiff allege facts to show that the employer intended to force the employee to resign, only that a reasonable employee would feel compelled to resign."[43]

D. *Alleged Tying Arrangement Did Not Violate Antitrust Law*

In *Reserve Realty, LLC v. Windemere Reserve, LLC*,[44] the Connecticut Supreme Court reversed the Appellate Court, which had struck down a real estate brokerage agreement that a real estate developer had been required to accept as a condition of its land purchase. The Appellate Court had found the agreement constituted an illegal tying arrangement in violation of antitrust law, but the Supreme Court disagreed.

In 2002, in connection with the purchase of 546 acres of land in Danbury called "the Reserve," a group of developers known as Woodland Group II, LLC (Woodland) entered into a brokerage agreement (Woodland agreement) with the plaintiff real estate brokers, by which the brokers would assist with the subsequent sale or lease of the property. The Woodland agreement provided it shall be binding upon a sub-

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[41] 335 Conn. 426, 238 A.3d 716 (2020).

[42] *Id.* at 440.

[43] *Id.*

[44] 335 Conn. 174, 229 A.3d 708 (2020). The Appellate Court decision is reported at 174 Conn. App. 130, 165 A.3d 162 (2017).

sequent purchaser of the property.

Woodland subsequently sold two parcels of the property to the defendants, who intended to develop the parcels. Consistent with the Woodland agreement, Woodland required the defendants, as a condition of the purchase and sale, to retain the plaintiffs as their real estate brokers. The defendants did so, but the relationship soured, and the defendants terminated the listing agreement, prompting the plaintiffs to sue.

The defendants asserted various special defenses, including that the agreement constituted a tying arrangement, in violation of the Sherman Act, 15 U.S.C. § 1 et seq., and its analogue under the Connecticut Antitrust Act, Connecticut General Statutes Section 35-26. A tying arrangement is "an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchase a different (tied) product, or at least agree that he will not purchase that product from any other supplier."[45]

The U.S. Supreme Court traditionally viewed such agreements as per se anticompetitive and unlawful, reasoning that tying "confers little, if any, economic benefit or value" and "allows a monopolist in the tying product to improperly extend or leverage its monopoly position so as to monopolize or obtain an unfair advantage in the market for the complementary, tied product."[46] In a 1980 case called *State v. Hossan-Maxwell, Inc.*,[47] the Connecticut Supreme Court, mindful of that jurisprudence, voided a restrictive covenant in a 64-lot subdivision that required all purchasers to use the services of a designated broker.

After a courtside trial, the trial court in *Reserve Realty* found the defendants had proven three special defenses, including the defense of illegal tying arrangement, and entered judgment for the defendants.[48] The Appellate Court affirmed,

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[45] 335 Conn. at 186, quoting *State v. Hossan-Maxwell, Inc.*, 181 Conn. 655, 659, 436 A.2d 284 (1980).

[46] *Id.* at 186.

[47] 181 Conn. 655, 436 A.2d 284 (1980).

[48] Reserve Realty, LLC v. Windemere Reserve, LLC, 174 Conn. App. 130, 138, 165 A.3d 162 (2017).

relying on the Connecticut Supreme Court's decision in *Hossan-Maxwell*. Finding that claim dispositive, the Appellate Court did not address the other special defenses.[49] The Connecticut Supreme Court certified the question of whether the Appellate Court had properly relied on the *Hossan-Maxwell* decision.[50]

The court considered the continued vitality of the *Hossan-Maxwell* decision in light of more recent federal jurisprudence concerning this issue. The court noted that the U.S. Supreme Court had abandoned the view that tying arrangements are "per se" unlawful, in favor of a rule of reason. This more nuanced approach is rooted in a concurring opinion, authored by Justice O'Connor, in a 1984 case in which the tying arrangement required patients who were having surgery at a particular hospital to use the services of a designated anesthesiology practice.[51] By 2006, the U.S. Supreme Court had come to recognize that "'tying arrangements may well be procompetitive.'"[52]

In light of these more recent legal developments, the Connecticut Supreme Court in *Reserve Realty* overruled *Hossan-Maxwell* "to the extent that it held that real estate list-back agreements affecting a not insubstantial volume of commerce are per se illegal," instead adopting a five-part reasonableness test that the United States Court of Appeals for the Second Circuit adopted in 2016.[53] Applying that test to the record, the court determined as a matter of law that the defendants had failed to prove their antitrust special defense.[54] The court reversed the judgment of the Appellate Court, and remanded the case for further proceedings.

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[49] *Id.*

[50] 327 Conn. 910, 170 A.3d 679 (2017).

[51] 335 Conn. at 192, referring to Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

[52] 335 Conn. at 193, quoting Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 36 (2006).

[53] *Id.* at 204, citing Kaufman v. Time Warner, 836 F.3d 137, 141 (2nd Cir. 2016).

[54] *Id.* at 211.

E. *Litigation Privilege Barred Civil Theft Claim Against Attorney*

In *Scholz v. Epstein*,[55] the Appellate Court ruled that an attorney had absolute immunity, under the litigation privilege, for a claim of civil theft[56] arising from the attorney's work in a previous proceeding.

The defendant, a Connecticut attorney (attorney), represented the assignee of a tax lien on property owned by the plaintiff, Scholz. In that capacity, the attorney had brought an action to foreclose the lien (underlying action). As alleged in the subsequent theft action, the writ and summons in the underlying action bore an incorrect home address for Scholz, even though the attorney had ample notice of his correct address, and Scholz was never properly served in the underlying action.[57] As also alleged, the attorney filed a motion in the underlying action that contained various misrepresentations about purported difficulties in effectuating service upon Scholz.[58]

Scholz was defaulted in the underlying action for failure to appear, and the attorney followed up with a motion for judgment of strict foreclosure, rather than a motion for judgment of foreclosure by sale, supported by an appraisal of the property that, as alleged by Scholz in the theft action, was "flawed on its face."[59] The court in the underlying action entered a judgment of strict foreclosure, and title passed to the attorney's client, which in turn sold the property to a third party for a "windfall profit."[60] On those facts, Scholz alleged that the attorney had acted "with the intent to deprive [Scholz] of his property and/or to appropriate the property to [the attorney's client], thereby committing [statutory] theft…"[61]

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[55] 198 Conn. App. 197, 232 A.3d 1155 (2020).

[56] General Statutes Section 52-564 provides "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

[57] 198 Conn. App. at 200, 201.

[58] *Id.* at 201, 202.

[59] *Id.* at 202.

[60] *Id.* at 203.

[61] *Id.*

The attorney moved to dismiss the theft action for lack of subject matter jurisdiction, based on the litigation privilege. The trial court noted that the issue at hand – whether or not the litigation privilege applies to claims of statutory theft – had never been addressed by Connecticut's appellate courts, and proceeded to grant the motion.

The Appellate Court affirmed, holding that the attorney's conduct was protected by absolute immunity. The court noted the doctrine's origins as a shield against defamation claims,[62] protecting clients by sparing their attorneys from "the constant fear of lawsuits arising out of their conduct in the course of legal representation."[63] In *Simms v. Seaman*,[64] the Connecticut Supreme Court expanded the doctrine to bar a claim against an attorney for fraud. The court analogized Scholz's theft claim to claims of those types. "Like fraud and defamation claims in the context of a judicial proceeding, a statutory theft action focuses on the allegedly improper conduct of an attorney in the role of advocacy for a client."[65]

The court also cited public policy concerns:

> We conclude that public policy does not support permitting claims of statutory theft against attorneys, as it would inhibit participation and candor in judicial proceedings, as well as having a chilling effect on the attorney-client relationship and on an attorney's zealous representation of his or her client…. In the context of foreclosure proceedings, where emotions run high because parties stand to lose property on which a home or business may be located, if counsel are not protected by absolute immunity, such a result could open the floodgates to a rash of claims against opposing counsel for fraud or statutory theft where a disgruntled party is dissatisfied with the loss of the foreclosed property.[66]

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[62] *Id*. at 206.
[63] *Id*.
[64] 308 Conn. 523, 69 A.3d 880 (2013).
[65] *Id*. at 215.
[66] *Id*. at 223.

F. *Appellate Court approves attachment of fraudulently transferred equipment without finding its value*

In *Featherston v. Katchko & Son Construction Services, Inc.*,[67] the plaintiff, a judgment creditor of a construction company, proved at trial that the company had fraudulently transferred two excavators to a second company. The trial court ordered, among other things, that the plaintiff could attach the excavators, up to the amount of the judgment debt plus six percent interest.

On appeal, the defendants complained that in effect, the trial court had rendered a monetary judgment, but without making any finding as to the value of the transferred assets.[68] This, they argued, was improper, given that pursuant to General Statutes Section 52-552i(b), a creditor in a fraudulent transfer case may obtain a judgment in an amount equal to the lesser of the value of the asset transferred or the amount required to satisfy the claim.

The Appellate Court disagreed. The court noted the Uniform Fraudulent Transfer Act (act) separately provides, at General Statutes Section 52-552h, that a creditor may obtain "an attachment or other provisional remedy against the asset transferred," and that a judgment creditor may further seek an order allowing it to "levy execution on the asset transferred or its proceeds." The trial court's order was consistent with these provisions, and did not constitute an award of damages.[69]

The Appellate Court's opinion contains some stray language that is likely to cause confusion until it is clarified in a future case. The court said that to establish liability under the act, the plaintiff had the burden of proving that the asset transfers had been made after the underlying judgment had been rendered against the transferor company.[70] This suggests that only judgment creditors, but not creditors holding

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[67] 201 Conn. App. 774, ___ A.3d. ___ (2020).
[68] *Id.* at 803-805.
[69] *Id.* at 805.
[70] *Id.* at 798.

claims yet to be reduced to judgment, have standing to sue for fraudulent transfer. But that is not what the act provides: the act confers standing upon "creditors"; defines "creditor" as a "person who has a claim"[71]; and broadly defines "claim" as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."[72]

G. *Declaratory Judgment Action Following Arbitration Creates Procedural Thicket*

The Appellate Court's decision in *Starboard Resources, Inc. v. Henry*[73] lay at the intersection of an arbitration proceeding and an interpleader action. The plaintiff, a corporation, commenced an interpleader action against various parties who had competing claims to stock in the plaintiff (shares), alleging in its complaint that it was willing to disburse the shares to whomever was lawfully entitled to them. That action was stayed while the parties arbitrated a variety of securities claims involving various entities, including the plaintiff. The arbitrator issued an award, granting damages and various other forms of relief to a group of litigants denominated the Henry parties. The award did not expressly mention ownership of the shares.[74]

The Henry parties filed a motion for an interlocutory judgment of interpleader, claiming the arbitration award had the effect of granting ownership of the shares to them. At the same time, they filed a motion asking the trial court, in the event it discerned an ambiguity in the arbitrator's award, to remand the matter to the arbitrator to clarify ownership of the shares.

Another party, Giddings Investments, LLC, construed the arbitrator's award as having the opposite effect with respect to the shares, namely that the Henry parties' claim to owner-

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[71] Conn. Gen. Stat. §52-552b(4).
[72] Conn. Gen. Stat. §52-552b(3).
[73] 196 Conn. App. 80, 228 A.3d 1042 (2020).
[74] *Id.* at 93.

ship had been denied. That party moved to dismiss the interpleader action, claiming it had been mooted by the arbitrator's denial of the Henry parties' claim to the shares.[75] The trial court denied the motion to dismiss, granted the Henry parties' motion for an interlocutory judgment of interpleader, and granted their motion for remand. Giddings Investments, LLC and other parties, collectively denominated the Imbruce parties, appealed.

The Appellate Court held that the trial court had ruled properly on the intertwined motion to dismiss and motion for interlocutory judgment of interpleader. The Imbruce parties' challenge to the interpleader was based on the merits of the parties' competing claims to the shares. This argument, however, was premature. Interpleader actions "involve two distinct parts .... In the first part, the court must determine whether the interpleader plaintiff has alleged facts sufficient to establish that there are adverse claims to the fund or property at issue.... Only once an interlocutory judgment of interpleader has been rendered may the court hold a trial on the merits, compelling the parties to litigate their respective claims to the disputed property."[76]

Here, the Imbruce parties were not questioning the sufficiency of the pleading, but rather were challenging the viability of one of the competing claims. But it was improper to assert such an argument at this point in the case. Before rendition of an interlocutory judgment of interpleader, "it is premature to consider the merits of the parties' purportedly adverse claims to the shares."[77] Accordingly, the trial court acted correctly when it denied the motion to dismiss and entered an interlocutory judgment of interpleader. Following the rendition of that judgment, but not until then, there would be "no bar to a party moving to dispose of the action on the ground that no viable adverse claims to the property at issue exist."[78]

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[75] *Id.* at 86.
[76] *Id.* at 90, 91 (citation and internal punctuation omitted).
[77] *Id.* at 91.
[78] *Id.* at 91, fn. 15.

The Appellate Court also addressed the appellants' challenge to the trial court's order remanding the matter to the arbitrator. The appellants argued that this order violated the doctrine of functus officio, which is defined as "having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force of authority.'[79] This doctrine is founded on "an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he or she has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion."[80]

The Appellate Court disagreed that the remand order violated this principle. The court noted that there are three general exceptions to the rule of functus officio: correction of an obvious error, such as a clerical mistake or mathematical miscalculation; failure of the neutral to adjudicate an issue that was submitted; and "where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify."[81] The court observed "an award is ambiguous if it is susceptible to more than one interpretation … When faced with an ambiguous award, a court usually will remand to the arbitrator for clarification."[82] The Appellate Court agreed that the subject award was "susceptible to more than one reasonable interpretation,"[83] and accordingly that the remand order was proper.

III. Creditors' Rights

A. *Bank's Witness Lacked Personal Knowledge of Default Notice*

In *Bank of New York Mellon v. Mazzeo*,[84] the Appellate Court reversed the trial court's judgment of foreclosure by

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[79] *Id*. at 92, fn. 16 (citation and internal punctuation omitted).
[80] *Id*.
[81] *Id*. at 94 (citation and internal punctuation omitted).
[82] *Id*. at 95 (citations and internal punctuation omitted).
[83] *Id*. at 96.
[84] 195 Conn. App. 357, 225 A.3d 290 (2020).

sale, finding that the plaintiff bank had failed to prove it had mailed the pre-foreclosure default notice required by the subject promissory note.

At trial, the bank's witness authenticated a copy of the default notice. She acknowledged, however, that she "did not have direct knowledge of whether the notice was properly stamped and placed in a mailbox or handed over to the postal service, but, rather, that she based her assertion that the notice was mailed on the existence of the notice itself and the accompanying screenshot."[85]

The Appellate Court found, as a matter of law, that this was insufficient to establish an essential element of the plaintiff's case, that it had satisfied the condition precedent of mailing a default notice to the defendants. The bank's witness "was not able to testify as to the particular practices used by Bank of America to generate default notices, or to mail default notices. Although she testified that she was 'familiar with industry standards,' she admitted that she was not familiar with the default notice practices used by Bank of America. …[She] was not able to testify that it was 'customary' or the 'course of habit' for Bank of America to mail default notices following the generation of such notices because she had no personal knowledge of Bank of America's specific procedures or policies."[86]

B. *Judgment Creditor Lacked Standing to Enforce Promissory Note Payable to Her Debtor*

In *Castle v. DiMugno*,[87] a judgment creditor of a debtor who held a promissory note tried to step into his shoes and enforce the note, but was thwarted by the law of standing.

The defendant, Katherine DiMugno, was the ex-wife of Donald DiMugno. As part of their divorce, which went to judgment in 2005, Katherine was awarded the family home, and for the apparent purpose of sharing the equity, she

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[85] *Id*. at 373.
[86] *Id*. at 377.
[87] 199 Conn. App. 734, 237 A.3d 731 (2020).

signed a $160,000 note to Donald, secured by a mortgage on the house.[88] That note would come due when Katherine died, or if she sold the property.

Years later, the plaintiff sued Donald and obtained a judgment against him. In later proceedings in that case concerning prejudgment remedies that had entered earlier, the plaintiff sought possession of the note "[s]o when the trigger of the contingency occurs, the money gets paid and we hold onto it."[89] The court agreed, and ordered Donald to turn over the original note to the plaintiff. But counsel expressed doubt that the original could be found, and it never was.[90]

In 2014, Katherine quitclaimed the house to her daughter for no consideration, retaining a life estate. The plaintiff deemed that transaction a sale of the house, a triggering event under the note, and brought suit against Katherine to collect the note and foreclose the mortgage.[91] In her complaint, the plaintiff alleged that the court in the case against Donald had "assigned the [note] to the [plaintiff] for payment," and characterized herself as the "court-ordered holder of the [note]."[92] The trial court entered summary judgment for the defendant, finding as a matter of law that her quitclaim of the house to her daughter did not trigger payment under the note.[93]

On appeal, the Appellate Court focused on the threshold issue of whether the plaintiff in fact had the status of either a holder of the note or a nonholder with the right to enforce it. The court concluded that, under the relevant provisions of Article 3 of the Uniform Commercial Code, she did not. Under General Statutes Section 42a-301, a promissory note may be enforced by a holder of the note – which pursuant to General Statutes Section 42a-1-201(b)(21) requires possession – or by a nonholder in possession who has acquired the rights of a holder. But it was undisputed that the plaintiff lacked possession of the note. "[S]omeone who is not in possession of the

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[88] *Id*. at 737.
[89] *Id*. at 738, 739.
[90] *Id*. at 739.
[91] *Id*. at 739, 740.
[92] *Id*. at 740.
[93] *Id*. at 745.

original note can be neither a holder nor a nonholder in possession."[94] General Statutes Section 42a-3-309 allows a note to be enforced by a person who previously had possession of the note and lost it, but the plaintiff lacked that status as well.

The court noted that the plaintiff could have availed herself of various statutory post-judgment remedies, but had not done so. For example, General Statutes Section 52-356a "sets forth in great detail the steps a judgment creditor must take to execute on the assets of a judgment debtor, including levying any debt owed to the judgment debtor by a third party."[95] The court also noted General Statutes Section 52-329, which provides for "garnishment of a debt as a type of prejudgment remedy," and 52-381, which "sets forth the statutory procedure for executing on such a garnishment."[96]

The Appellate Court held that the plaintiff lacked standing to pursue the action, and accordingly the trial court lacked subject-matter jurisdiction over the case. The court found the form of judgment to be improper, reversed the summary judgment, and remanded the case with instructions to the trial court to render a judgment of dismissal.[97]

C. *Trial Court Erred in Granting Default Based on Apparent Lack of Merit of Disclosed Defense*

In *Compass Bank v. Dunn*,[98] the Appellate Court reversed a judgment of foreclosure that had been rendered after an improperly granted motion for default for failure to disclose a defense.

In response to a demand for disclosure of defense, counsel for the defendants had filed a disclosure of defense stating that the plaintiff had not shown it was the owner of the subject promissory note, with standing to foreclose. The plaintiff moved for a default for failure to disclose a defense, claiming

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[94] *Id.* at 748.
[95] *Id.* at 757.
[96] *Id.* at 759.
[97] *Id.* at 760, 761.
[98] 196 Conn. App. 43, 228 A.3d 663 (2020).

the defendants had failed to disclose a "proper defense." The trial court granted that default, notwithstanding the defendant's objection, and proceeded to render a judgment of strict foreclosure.

The Appellate Court ruled that it had been error for the trial court to "pass on the legal sufficiency of the proposed defense."[99] The defendants had satisfied their obligation under Rule 13-19 of the Practice Book by "timely disclosing their defense, stating their counsel's belief that the defense was a bona fide one and setting forth the 'nature or substance of the defense.'"[100] The court did take note of previous authority that if a disclosed defense is "clearly and palpably untruthful, or irrelevant, or utterly frivolous, it would indicate bad faith on the part of the counsel, and might warrant the court in holding that it was not satisfied either the attorney believed that a bona fide defense existed, or that he intended to make it ...."[101]

D. *Challenge to Priority of Mortgage Being Foreclosed Should Not Await Supplemental Judgment*

In *Saunders v. KDFBS, LLC*,[102] a foreclosure case involving a dispute about mortgage priorities, the Connecticut Supreme Court ruled that the priority issue was ripe for appellate review immediately following judgment of foreclosure by sale, and need not await approval of the sale or entry of a supplemental judgment.

The priority dispute was between the foreclosing plaintiff and defendants (the Davis defendants) who also held a mortgage on the property and were named as subsequent encumbrancers. The trial court rendered judgment for the plaintiff, and ordered a foreclosure by sale. The Davis defendants appealed from that judgment to the Appellate Court. The plaintiff moved to dismiss the appeal as premature, on the grounds that the priority of mortgages cannot be challenged until af-

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[99] *Id*. at 51, quoting Jennings v. Parsons, 71 Conn. 413, 416 (1899).
[100] *Id*. at 51.
[101] *Id*. at 49, quoting Jennings v. Parsons, 71 Conn. 413, 418, 42 A. 76 (1899).
[102] 335 Conn. 586, 239 A.3d 1162 (2020).

ter the foreclosure sale has taken place. The Appellate Court granted the motion to dismiss.

The Supreme Court reversed. The court noted that, in cases involving a judgment of foreclosure by sale, competing claims to any surplus proceeds are typically resolved by way of a supplemental judgment, after the sale has been approved. But the supplemental judgment procedure is intended to resolve disputes only among "interests held by encumbrancers holding interests admittedly subordinate to the plaintiff's interest, although in dispute as to that subordinate order."[103] That procedure does not apply to priority disputes involving the mortgage being foreclosed. "[T]he priority of the foreclosing plaintiff is a proper and indeed, essential aspect of the judgment of foreclosure by sale,"[104] and thus does not await a supplemental judgment.

Here, "the determination of priorities as between the plaintiff and the Davis defendants was an integral part of the judgment of foreclosure."[105] Accordingly, it was proper for the Davis defendants immediately to appeal from that judgment.

E. *Pre-Foreclosure Default Notice Sent by Certified Mail Requires Proof of Actual Delivery*

In *Hudson City Savings Bank v. Hellman*,[106] the Appellate Court reversed the trial court's judgment of foreclosure, finding the trial court had improperly granted an interlocutory motion for summary judgment on the issue of liability. The bank affidavit included the averment that the bank had provided its compulsory default notice to the defendants by way of certified mail, but failed to provide evidence of actual delivery. The mortgage provided that notice shall be deemed given "when mailed by first class mail or when actually delivered to [the borrower's] notice address if sent by other means."[107] Drawing on its recent decision in *Aurora Loan Services, LLC*

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[103] *Id.* at 601.
[104] *Id.* at 601, 602.
[105] *Id.* at 594.
[106] 196 Conn. App. 836, 231 A.3d 182 (2020).
[107] *Id.* at 859.

v. Condron,[108] the court found certified mail to be "other means," requiring proof of actual delivery. Absent such evidence, the trial court erred in granting summary judgment for the bank.

The court also took note of the principle that, if a business entity merges into another entity while a lawsuit is pending, the surviving entity may be substituted as plaintiff – but need not be. The court therefore rejected the defendants' argument that the trial court had improperly granted such a motion to substitute, finding no abuse of discretion, as well as an absence of prejudice.

F. *Supreme Court Finds Loan Guaranty Followed the Note; Payment Data Obtained from Original Lender Constituted Assignee's Business Record*

In *Jenzack Partners, LLC v. Stoneridge Associates, LLC*,[109] an action to foreclose a mortgage securing a loan guaranty, the defendant argued to the Connecticut Supreme Court that the plaintiff, assignee of the note, had failed to establish that it had also been assigned the guaranty, and therefore lacked standing to foreclose. The defendant further argued that the plaintiff's loan calculation, based in part on calculations provided by the original holder of the note, relied on inadmissible hearsay that did not qualify as a business record under General Statutes Section 52-180.

The trial court rendered judgment of strict foreclosure. The Appellate Court reversed, rejecting the defendant's argument as to standing but accepting her hearsay argument.[110] But the Supreme Court reversed the judgment of the Appellate Court, and remanded the case to that court with instructions to affirm the judgment of foreclosure.

As to the standing issue, the Appellate Court had noted that, as argued by the defendant, the documentation by which the loan was assigned to the plaintiff did not contain

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[108] 181 Conn. App. 248, 186 A.3d 708 (2018).

[109] 334 Conn. 374, 222 A.3d 950 (2020).

[110] The Appellate Court decision is reported at 183 Conn. App. 128, 192 A.3d 455 (2018).

an express reference to the defendant's guaranty. That court nevertheless concluded, based on the totality of the circumstances, that the intent of the parties had been to assign the guaranty along with the note.[111]

The Supreme Court agreed that the guaranty followed the note, but used a different analysis to reach that conclusion. The court focused on the language of the guaranty itself, which provided in relevant part "[t]he provisions of this Guaranty … shall bind and inure to the benefit of the parties hereto and their heirs, successor and assigns … the word 'Lender' as used herein shall mean not only the original Lender named in the first paragraph of this Guaranty, but also all future holders of the Note and Loan Documents…"[112] The court found this language "clearly provides that its benefit would continue to any and all future holders of the Stoneridge note, which includes Jenzack [Partners LLC],"[113] the plaintiff.

The Supreme Court then turned to the hearsay issue. The document in question was not a document created by the original lender, Sovereign Bank; rather, it was the plaintiff's "own record of the debt owed on the Stoneridge note that incorporated an initial entry that Sovereign had provided to Jenzack in conjunction with the sale of the note."[114] Jenzack had "offered this document as its business record of the debt owed on the note," but offered no evidence "regarding the initial figure in the form it was actually received from Sovereign."[115] The defendant claimed that the initial entry on that document was inadmissible hearsay.

The court disagreed, finding that the data received from Sovereign Bank had become the plaintiff's business record, and thus satisfied that exception to the hearsay rule. "If 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

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111 183 Conn. App. at 139.
112 334 Conn. at 386.
113 *Id.*
114 *Id.* at 389.
115 *Id.*

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."[116]

The court noted the distinction between the admissibility of a business record and its accuracy, observing there "'is no requirement that the accuracy of a business record be proved as a prerequisite to its admission.'"[117] Issues about accuracy or veracity go to weight, not admissibility. "A defendant is free to undertake discovery concerning the accuracy of the information in a business record as well as to introduce or cross-examine witnesses about its accuracy."[118]

G. *Former Bank Employee's Rubber-Stamped Signature Held Sufficient to Endorse Promissory Note*

In *JPMorgan Chase Bank National Association v. Syed*,[119] a foreclosure case, the subject promissory note had been endorsed from Washington Mutual Bank, FA to JPMorgan Chase by the signature of a person who no longer worked for Washington Mutual at the time of the endorsement. That signature apparently had been affixed, using a signature stamp, by another bank employee. The defendant challenged the legal efficacy of the endorsement.

The Appellate Court agreed with the trial court that the endorsement was effective. The court noted that General Statutes Section 42a-3-401(b), which sets forth the signature requirements for negotiable instruments, broadly allows a signature to be made "(i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing."

The court framed the issue as "whether the *entity* applying the stamp to the instrument intended that the stamp consti-

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[116] *Id.* at 391.

[117] *Id.* at 392, quoting Federal Deposit Ins. Corp. v. Carabetta, 55 Conn. App. 369, 375, 739 A.2d 301, *cert. denied*, 251 Conn. 927, 742 A.2d 362 (1999).

[118] *Id.* at 393.

[119] 197 Conn. App. 129, 231 A.3d 286 (2020).

tute a signature for the purposes of endorsing and negotiating the instrument."[120] The evidence unambiguously showed that Washington Mutual had had the requisite intent. There was no dispute that someone at the bank had used the signature stamp. Under the applicable statute, the bank "could have used any mark to manifest its intent to create an endorsement through a signature. The name of a former employee certainly falls within the category of 'any name, including a trade or assumed name, or by a word, mark, or symbol' .... The fact that Washington Mutual chose to use a stamp bearing the signature of a former employee is of no import to the analysis pursuant to § 42a-3-401..."[121] Further evidence of intent was supplied by a separate assignment of the mortgage from Washington Mutual to JPMorgan, and by JPMorgan's possession of the original note.[122]

H. *Condominium Association Did Not Properly Authorize Suit to Foreclose Lien for Unpaid Common Charges*

In *Merritt Medical Center Owners Corp. v. Gianetti*,[123] the owner of two commercial condominium units successfully fought off the condominium association's action to foreclose its lien for unpaid common charges. Pursuant to General Statutes Section 42-258(m), an association may bring such an action only if "the executive board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit." Here, there was no such standard policy, so the issue was whether the association had properly "voted to commence a foreclosure action" against the defendant's units.

The plaintiff relied on its board's pre-suit vote to send the property "to collection."[124] The trial court deemed this sufficient, and entered a judgment of foreclosure. But the Appellate Court disagreed, finding the terms collection and foreclo-

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[120] *Id.* at 140, emphasis supplied by the court.
[121] *Id.* at 140,141.
[122] *Id.* at 141.
[123] 197 Conn. App. 226, 231 A.3d 366 (2020).
[124] *Id.* at 230, 231.

sure "readily distinguishable,"[125] and reversed.

I. *Court Lacked Jurisdiction to Foreclose, Where Bank Failed to Provide Pre-Foreclosure Emergency Mortgage Assistance Act (EMAA) Notice*

In *MTGLQ Investors, L.P. v. Hammons*,[126] the Appellate Court held that, in foreclosure cases in which the mortgagee is required to provide the mortgagor with a pre-suit Emergency Mortgage Assistance Act ("EMAA") notice pursuant to General Statutes Section 8-265ee, failure to comply with the notice requirement deprives the court of subject-matter jurisdiction.

In this case, a prior holder of the note and mortgage had provided an EMAA notice before commencing foreclosure, but that action was dismissed due to failure to prosecute with diligence. Following assignment of the paper to the plaintiff, the plaintiff did not issue a new notice before commencing suit, relying on the prior notice sent by its predecessor in interest. The Appellate Court ruled that that reliance was misplaced, and reversed the trial court's judgment of strict foreclosure, ordering that the case be dismissed.

J. *Borrower's Failure to Identify Mortgage Debt as Contested in Bankruptcy Filing Barred Her from Raising Defenses in a Foreclosure Action*

In *U.S. Bank, National Association v. Madison*,[127] a foreclosure action, the defendant's failure to list the subject debt as "contingent" or "disputed" in her bankruptcy schedules proved fatal to her ability to raise defenses when the foreclosure case resumed.

The defendant, as attorney-in-fact pursuant to a power of attorney, had executed the subject promissory note and mortgage deed for Eric S. Demander. Mr. Demander later died, and the subject property passed to the defendant by a certificate of devise.

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[125] *Id*. at 233.
[126] 196 Conn. App. 636, 230 A.3d 882 (2020).
[127] 196 Conn. App. 267, 229 A.3d 1104 (2020).

Following default of payment, the bank commenced foreclosure, and the defendant filed for Chapter 7 bankruptcy protection. In the schedule of creditors that she filed in the bankruptcy case, she listed the mortgage debt. But although that schedule, Schedule D, requires contingent and disputed debts to be identified as such, the defendant provided no such information. After the defendant's bankruptcy discharge and resumption of the foreclosure action, the defendant sought to assert as a defense that her power of attorney had been improperly executed, thus voiding the note and mortgage deed.

The Appellate Court agreed with the trial court that as a result of that omission, the defendant lacked the legal capacity, and thus standing, to raise the defense. The Appellate Court affirmed the trial court's judgment of strict foreclosure.

K. *Bank's Post-Judgment Conduct Could Not be Asserted as a Counterclaim to an Opened Foreclosure Case*

In *Wells Fargo Bank v. Melahn*,[128] a residential foreclosure case, the plaintiff obtained a judgment of strict foreclosure, but failed to comply with paragraph D of the judiciary's uniform foreclosure standing orders, form JD-CV-104. That paragraph provides, "Within 10 days following the entry of judgment of strict foreclosure the plaintiff must send a letter by certified mail, return receipt requested, and by regular mail, to all non-appearing defendant owners of the equity and a copy of the notice must be sent to the clerk's office."[129] The paragraph goes on to prescribe the contents of the notice, including the terms of the judgment and a warning that the non-appearing defendant should file an appearance.

Citing the plaintiff's noncompliance with the standing order, the defendant moved to open the foreclosure judgment. Following two trips to the Appellate Court, one trip to the Connecticut Supreme Court, and a remand to the Superior Court,[130] the defendant filed special defenses and counter-

[128] 198 Conn. App. 151, 232 A.3d 1201 (2020).
[129] *Id.* at 154, 155.
[130] Wells Fargo Bank v. Melahn, 148 Conn. App. 1, 85 A.3d 1 (2014), *after remand* 181 Conn. App. 607, 186 A.3d 1215 (2018), *rev'd*, 333 Conn. 923, 218 A.3d 67 (2019).

claims, which included allegations that the bank's noncompliance with the notice order gave rise to both a special defense and a counterclaim under the Connecticut Unfair Trade Practices Act.[131] The trial court granted the bank's motion to strike the special defenses and counterclaims, and rendered judgment for the bank on the stricken counterclaims. The defendant appealed.

As to the special defenses, the Appellate Court dismissed the appeal based on lack of an appealable final judgment. As to the counterclaims, the Appellate Court stated the relevant test is whether the allegations "bear a sufficient connection to enforcement of the note or mortgage."[132] The court agreed with the trial court that allegations of noncompliance with the notice order "do not sufficiently relate to enforcement of the note or mortgage. The alleged conduct by the plaintiff regarding the violation of the uniform foreclosure standing orders occurred postjudgment, that is, after the November 22, 2010 foreclosure judgment had been rendered. Whether the plaintiff complied with the uniform foreclosure standing orders related to enforcement of that judgment, not the enforcement of the note or mortgage."[133] The Appellate Court affirmed the judgment for the bank on the stricken counterclaims.

IV. Construction

A. *Appellate Court Parses Unpaid Subcontractor's Unjust Enrichment and Mechanic's Lien Claims*

In *Professional Electrical Contractors of Connecticut, Inc. v. Stamford Hospital*,[134] the Appellate Court considered the rights of an unpaid second-tier electrical subcontractor, under a claim of unjust enrichment and a claim under the mechanic's lien statutes.

The trial court had entered summary judgment for the defendant Skanska USA Building, Inc., the general contractor.

[131] Conn. Gen. Stat. §42-110a et seq.

[132] 198 Conn. App. at 168.

[133] *Id.* at 168, 169.

[134] 196 Conn. App. 430, 230 A.3d 773 (2020).

Skanska had terminated the first-tier electrical subcontractor, Semac Electrical Company, Inc. Skanska's total payments to Semac and to Semac's replacement exceeded the total set forth in the subcontract between Skanska and Semac. Therefore, Skanska argued, as a matter of law, it could not be unjustly enriched by refusing to pay the plaintiff.[135]

But the Appellate Court disagreed, framing the issue as "whether the owner, or in this case, Skanska, paid for the precise goods and/or services supplied by the subcontractor."[136] The court noted "it is entirely possible that the additional costs incurred by Skanska for electrical work were unrelated to the work performed by the plaintiff."[137] Accordingly, Skanska would be entitled to summary judgment "only if it submitted evidence sufficient to establish that there was no genuine issue of material fact that it paid for the specific work performed by the plaintiff."[138] Because Skanska had not done so, the trial court erred when it entered summary judgment for Skanska on this count of the complaint.

As for the plaintiff's mechanic's lien claim, that issue turned on whether the lien had attached to a lienable fund. The concept of "lienable fund" derives from certain limitations, imposed by the mechanic's lien statutes, on a property owner's exposure to lien claims. General Statutes Section 49-36 provides that no mechanic's lien may attach in "a greater amount in the whole than the price which the owner agreed to pay" contractually, reduced by credits equal to "whatever payments he has made, in good faith, to the original contractor or contractors, before receiving notice of the lien or liens." The lienable fund is also limited by General Statutes Section 49-33(f), which provides that if the general contractor defaults, the total of lien claims by subcontractors may not exceed the delta between the general contract price and the reasonable cost of completing the project, with further downward adjustments for "any damages resulting from such de-

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135 *Id*. at 440.
136 *Id*. at 442.
137 *Id*. at 441.
138 *Id*. at 442.

fault" and "all bona fide payments …made by the owner before receiving notice of such lien or liens…."

Here, the adjusted general contract price was $284,091,867.00, of which the owner, Stamford Hospital, had paid $216,637,556.56 at the time it received notice of the plaintiff's mechanic's lien.[139] The owner went on to pay the balance of the contract price to Skanska, except for a minor holdback for retainage.[140] The defendants argued that by virtue of the owner's payment of the full contract price, "the lienable fund was exhausted in completing the project, and there were no funds remaining to give to the plaintiff."[141]

The Appellate Court framed the issue at hand, characterized as one of first impression, as "whether a lienable fund is exhausted when, *after proper notice* that a subcontractor has filed a mechanic's lien on the property, the property owner continues to pay the general contractor for work on the project until the general contractor has been paid the full contract price."[142]

The court determined that the answer depends on whether the general contractor defaulted in its obligations to the property owner. If the general contractor is not in default, the lienable fund is based on the balance owing under the contract when the owner receives notice of the subcontractor's lien; subsequent payments to the general contractor will not reduce the amount of the lienable fund.[143] "[W]here the general contractor is not in default, there is no need to protect the owner by permitting it to continue to pay the general contractor at the expense of subcontractors who have filed valid mechanic's liens on the owner's property. The owner need only withhold payments from the general contractor until the subcontractor's mechanic's liens are resolved."[144]

But that calculus changes if the general contractor de-

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[139] *Id*. at 434.
[140] *Id*.
[141] *Id*. at 444, 445.
[142] *Id*. at 446, 447, emphasis supplied by the court.
[143] *Id*. at 447.
[144] *Id*. at 461.

faults under its contract. General Statutes Section 49-33(f) "[gives] the owner an additional credit for any funds it had to pay after notice of the subcontractor's lien, *due to the general contractor's default*."[145] The court reasoned that it makes sense to provide the owner with additional protection in a default scenario, because "once the general contractor defaults, the owner would be forced to find someone else to complete the project and would be required to pay that third party for their work."[146] Under that limited circumstance, the statutory scheme "place[s] the risk of the defaulting general contractor on the subcontractor and not the owner, to the extent the owner's costs of completing the construction project equaled or exceeded the amount he had contracted to pay the general contractor."[147]

Here, the owner did not claim that the general contractor, Skanska, had defaulted under the contract.[148] Accordingly, "the lienable fund was the amount owed by the hospital to Skanska at the time the plaintiff gave notice of its mechanic's lien to the hospital…"[149] Because the plaintiff's lien had attached to a lienable fund, the trial court erred when it rendered summary judgment for the defendants on the plaintiff's lien claim.

B. *Contract Language Barred Subcontractor's Claim that Midstream Changes to Work Constituted Cardinal Change*

The Appellate Court's decision in *Semac Electric Co. v. Skanska USA Building, Inc.*,[150] involved a complex, multimillion-dollar construction dispute the outcome of which was decided, in large part, by language in the parties' contract.

The defendant was the general contractor for the construction of a hospital building in Stamford, and the plaintiff was the subcontractor for all necessary electrical work. The plaintiff's work was significantly delayed and complicated by cer-

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[145] *Id*. at 460, emphasis supplied by the court.
[146] *Id*. at 461, 462.
[147] *Id*. at 461.
[148] *Id*. at 434.
[149] *Id*. at 463.
[150] 195 Conn. App. 695, 226 A.3d 1095 (2020).

tain events beyond its control, including delays in construction of the building's steel frame and glass siding, which left the site open to the elements.[151]

After several months of work, the plaintiff sent to the defendant a notice that there had been a "cardinal change" in the contract, which courts have characterized as "a drastic modification beyond the scope of the contract that altered the nature of the thing to be constructed … [a change that] is so profound that it is not redressable under the contract" and constitutes a breach of contract.[152] In the notice, the plaintiff asserted there had been "drastic and unforeseen modifications and changes that have been made to [the plaintiff's] sequence of construction and the schedule parameters set forth in the subcontract, which has unreasonably altered the character of the work and unduly increased its cost."[153] The plaintiff declared that it would continue to work under the subcontract only if the defendant agreed to new financial terms; otherwise the plaintiff would "be excused from further performance and cease work."[154]

Two days later, the defendant responded with a writing that if the plaintiff failed to continue working under the existing terms of their contract, the plaintiff would be deemed to be in default. One day after that, the defendant followed up with a notice of termination.

The plaintiff promptly brought suit, asserting that the defendant's putative cardinal change constituted a material breach, and that the defendant had wrongfully terminated the contract. The plaintiff's claim for damages included the amount of the unpaid portion of the contract price.[155] The defendant counterclaimed, asserting that the plaintiff had breached the contract by abandoning performance. The defendants' damages claim included the full amount that it paid to other subcontractors and suppliers to complete the

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[151] *Id*. at 706.
[152] *Id*. at 710, quoting Pellerin Construction, Inc. v. Witco Corp., 169 F.Supp.2d 568, 587 (E.D.La. 2001).
[153] *Id*. at 699.
[154] *Id*. at 700.
[155] *Id*. at 702.

plaintiff's work.[156]

Following a courtside trial, the trial court concluded that both sides had breached the contract, and the Appellate Court agreed. The plaintiff's claim of "cardinal change" was undermined by numerous provisions in the parties' contract, which repeatedly and emphatically drove home the point that significant changes and complications were to be expected. Under the subcontract, the plaintiff represented that it had "taken into consideration and made allowances for all hindrances and delays incident to its work."[157] The plaintiff agreed to work according to the schedule set by the defendant, "as it may be revised and amended from time to time by [the defendant]," which retained the right to "decide the time, order and priority for performance of the various portions of [the plaintiff's] work."[158] The plaintiff would "not be entitled to an adjustment of the subcontract amount or an extension of time in connection with any such direction by [the defendant] as [the plaintiff] shall anticipate and provide for such activities in the subcontract amount and agreed time for performance."[159] The defendant had the right to require the plaintiff to "increase its labor force, number of shifts and/or overtime operations, days of work, or to provide additional equipment or materials."[160]

Given this contract language, the plaintiff's claim failed because it "was required to anticipate issues of this nature when it submitted its bid for and signed the contract. The explicit language of the contract demonstrated that the parties contemplated the possibility, and even the likelihood, of delays and changes in the originally planned schedule, and required [the plaintiff] to anticipate those possibilities."[161] The court acknowledge that the project had experienced significant delays and complications, but the plaintiff "was still performing the same work that it had contracted to perform."[162]

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[156] *Id.*
[157] *Id.* at 711, internal punctuation omitted.
[158] *Id.*, internal punctuation omitted.
[159] *Id.*, internal punctuation omitted.
[160] *Id.*
[161] *Id.* at 713.
[162] *Id.*

The delays "were not extraordinary in a project of this magnitude and complexity … were contemplated in the contract between [the parties], and [the plaintiff] was compensated for them right up until it issued its Notice of Cardinal Change to [the defendant]."[163]

The defendant too had breached the contract, by failing to provide the plaintiff with a full 48-hour period to cure its breach, as the contract required, before terminating the contract. The defendant acknowledged that it had waited only one day, not two, before sending the plaintiff a termination notice after rejecting the Notice of Cardinal Change, but sought to avoid the notice-and-cure provision by way of various common-law principles, such as first breach, repudiation, anticipatory breach, and waiver.[164]

The Appellate Court rejected the application of any such principles, given "the clear language of § 12.1 of the contract that outlined the procedure to be followed if [the plaintiff] abandoned the project or otherwise defaulted on its contractual obligations."[165] That provision "explicitly and comprehensively sets forth the parties' rights and responsibilities in the event [the plaintiff] was terminated for its abandonment of the project, the very basis for [the defendant's] termination."[166]

V. Miscellaneous Business Cases

A. *Exercise of Purchase Option Triggers 17-Year Legal Battle*

In *Pack 2000, Inc. v. Cushman*,[167] the Appellate Court wrote the latest chapter in a 17-year saga about two properties operated as Midas muffler shops.

In 2003, the plaintiff, lessee of the two properties, notified the defendant landlord that it was exercising an option under the leases to purchase the properties. The defendant

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[163] *Id.* at 714.
[164] *Id.* at 717.
[165] *Id.*
[166] *Id.*
[167] 198 Conn. App. 428, 234 A.3d 49 (2020).

refused, claiming the option was contingent on the plaintiff's strict compliance with the leases and a management agreement, and that the plaintiff had breached the management agreement by way of various late payments.[168] The trial court ruled in favor of the plaintiff, finding that substantial compliance, not strict compliance, was the applicable standard, and that the plaintiff had met that standard.[169] The court entered a judgment of specific performance. After extended litigation, in 2014 the Connecticut Supreme Court agreed with the trial court and the plaintiff.[170]

Following remand to the trial court, the plaintiff moved for orders (1) setting the purchase price based on appraisals using 2003 valuations, following the valuation process set forth in the leases; (2) declaring that the plaintiff's payments for rent and use and occupancy since its proper exercise of the purchase option in 2003 should be credited toward the purchase price (indeed creating an overpayment); and (3) ordering that the defendant remit the overpayment to the plaintiff.[171] The defendant opposed the motion, and the trial court ordered the parties to procure appraisals based on current values, not 2003 values. The court further ordered that the plaintiff's rent payments would not be credited toward the purchase price.[172] The court then rendered a judgment setting the purchase price based on the new appraisals, which reflected significant appreciation since 2003.[173]

The Appellate Court reversed. The court noted the specific performance is an equitable remedy, and found that in applying present-day valuations, the trial court "deprives the plaintiff of the benefit of its bargain while giving a significant windfall to the defendant – the breaching party."[174] Accordingly, the court should have ordered purchase prices based on 2003 valuations.

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[168] *Id*. at 434.
[169] *Id*. at 435.
[170] The Connecticut Supreme Court's decision is reported at 311 Conn. 662 (2014), 89 A.3d 869.
[171] 198 Conn. App. at 435, 436.
[172] *Id*. at 436.
[173] *Id*. at 435, fn. 8, 436, 437.
[174] *Id*. at 445.

The Appellate Court also agreed with the plaintiff that when it properly invoked its purchase option, it became the equitable owner of the properties. The court noted that under the doctrine of equitable conversion, "the purchaser of land under an executory contract is regarded as the owner, subject to the vendor's lien for the unpaid purchase price, and the vendor holds the legal title in trust for the purchaser."[175] The court further noted, "a person who validly exercises an option and properly tenders the option price has duly performed all of the conditions to be performed on its part, and as of that date became the equitable owner of the property."[176] Once the plaintiff thereby became owner of the properties, its obligations under the leases were extinguished, and its payments were properly credited toward purchase of the property, not for rent, or for use and occupancy.[177] The court further found "[t]o the extent that the defendant has received, in total, more than the purchase price of the properties, he has no legal or equitable entitlement to such funds and must return them."[178]

B. *Modification of Commercial Lease by Some, But Not All, of the Co-Owners Sparks Litigation*

In *Platt v. Tilcon Connecticut, Inc.*,[179] the Appellate Court addressed the consequences that ensued when some, but not all, the owners of two commercial properties entered into lease modifications with the properties' tenant.

The plaintiff held a 12.5% ownership interest in the properties, which were asphalt plants in Danbury and Newtown. The plants were the subject of leases to the defendant, executed in 1974, each of which had an initial 20-year term followed by three 10-year option periods. Each lease provided that, if the defendant declined to exercise any renewal option, then the defendant would be required to purchase the plant.[180]

Early in 1993, as the original lease expiration date ap-

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175 *Id*. at 447, 448.
176 *Id*. at 448.
177 *Id*. at 462, 463.
178 *Id*. at 464.
179 196 Conn. App. 564, 230 A.3d 854 (2020).
180 *Id*. at 567.

proached, the defendant provided written notice to the landlords that it was exercising its purchase option.[181] The owners who collectively held the remaining 87.5% ownership interest in the properties informed the defendant that rather than sell the plants, they would be amenable to renewing the leases upon modified rent terms that would be more favorable to the defendant. The plaintiff disagreed with this concept.

Negotiations between the majority owners and the defendant progressed. In a writing from the plaintiff's counsel to the defendant's counsel, the plaintiff took the position that the defendant had waived its purchase option, and that the plaintiff would consider the defendant a holdover tenant after the original lease term expired.[182] The majority owners and the defendant proceeded to execute written lease modification agreements. Each agreement specifically noted that the plaintiff did not consent to the modification, and required the majority owners to indemnify the defendant from any claim or loss arising from the plaintiff's lack of consent.[183]

Following the lease modifications, the defendant remitted rent to all the landlords, including the plaintiff, as calculated under the modification agreements. The plaintiff sued the defendant for breach of contract, claiming that the defendant should have continued to remit the plaintiff's part of the rent as provided in the original leases. Following a courtside trial, the trial court entered judgment for the defendant.[184]

The Appellate Court agreed with the trial court's conclusion that there was no contract between the plaintiff and the defendant. As the original lease term drew to a close in 1993, the defendant had two options: extend the leases as provided therein, or exercise the purchase option. The defendant chose the second option, but then shifted gears, entering into lease renewals with the majority owners on modified terms. The plaintiff "expressly rejected those terms and did not enter

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[181] *Id.* at 568.
[182] *Id.* at 570.
[183] *Id.* at 570, 571.
[184] The plaintiff also sued for unjust enrichment. The trial court entered judgment for the defendant on those claims as well, which the plaintiff did not challenge on appeal. *Id.* at 565, fn. 2.

into any other agreement with the defendant…. [T]here was no meeting of the minds between the parties with respect to extending the terms of the original leases."[185] Thus "the plaintiff and the defendant did not form an agreement to extend the terms of the original leases beyond the expiration of the primary term."[186] It follows that the plaintiff's contention that "the defendant has been obligated to pay the plaintiff rent in accordance with the terms of the original leases … is without merit."[187] As to the plaintiff's 12.5% interest in the properties, the defendant's status was that of a holdover tenant with a month-to-month tenancy.[188]

[185] *Id*. at 579, 580.
[186] *Id*. at 579.
[187] *Id*. at 580.
[188] *Id*. at 580, 581.