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BUSINESS LITIGATION: 2017 IN REVIEW

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In 2017, Connecticut's appellate courts decided numerous cases of interest to business litigators. Following is a summary of some of the year's most noteworthy decisions.

I. REMEDIES AND DEFENSES

A. *Equitable Forfeiture in Employee Disloyalty Claims*

The Connecticut Supreme Court's decision in *Wall Systems, Inc. v. Pompa*[1] features an exhaustive discussion of the equitable remedy of forfeiture of compensation paid to an employee who breaches the duty of loyalty to his or her employer. The plaintiff employer, a building contractor, contended that this remedy was mandatory upon proof of a breach. The trial court had found that the defendant employee breached his duty by demanding kickbacks from one subcontractor and moonlighting for another,[2] but declined to order the remedy of equitable forfeiture.

The Supreme Court agreed with the defendant and the trial court that equitable forfeiture is a discretionary remedy, not a mandatory one. The trial court noted that the plaintiff had failed to prove damage from the defendant's actions, or that the defendant's moonlighting activities had been on company time, and these factors weighed heavily in the court's ruling.[3] The Supreme Court held that while equitable forfeiture may be ordered in a proper case even absent proof of actual damage,[4] the trial court properly acted within its discretion in denying that remedy in the case in question.

The court went on to broadly discuss the parameters of the equitable forfeiture doctrine. Responding to the plaintiff's contention that the defendant should have forfeited

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[1] 324 Conn. 718, 154 A.3d 989 (2017).
[2] *Id.* at 725, 726.
[3] *Id.* at 725.
[4] *Id.* at 729.

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every dollar of compensation he received during his term of employment, the court noted that normally, forfeiture should be "limited to the period of time during which the employee engaged in disloyal activity... [I]f an employee's disloyalty is confined to particular pay periods, so is the required forfeiture of compensation."[5] The court provided a non-exhaustive list of the factors that a trial court should consider in determining whether to order forfeiture:

> the employee's position, duties and degree of responsibility with the employer; the level of compensation that the employee receives from the employer; the frequency, timing and egregiousness of the employee's disloyal acts; the effect of the disloyal acts on the value of the employee's properly performed services to the employer; the potential for harm, or actual harm, to the employer's business as a result of the disloyal acts; the degree of planning taken by the employee to undermine the employer; and the adequacy of other remedies.[6]

B. *Attorney's Fees Awards Arising from Litigation with a Third Party*

In *Chicago Title Insurance Co. v. Accurate Title Searches, Inc.*,[7] the Connecticut Appellate Court explained some limits on the "American rule" that parties ordinarily bear their own legal expense. The plaintiff, a title insurance company, brought a negligence action against a title-search company it had retained. The defendant's title search failed to pick up two recorded encumbrances against the property, and in reliance upon the faulty title report, the plaintiff issued a title-insurance policy. The plaintiff paid sums of money to investigate and settle those encumbrances, and incurred legal expense in the process of doing so.

The trial court awarded the plaintiff damages equal to the settlement sums, but denied the plaintiff's request to include, as an element of damage, the legal fees that it incurred in connection with settling the underlying claims

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[5] *Id.* at 734 and fn. 11.
[6] *Id.* at 737.
[7] 173 Conn. App. 463, 164 A.3d 682 (2017).

(as opposed to its legal expense incurred in the suit before the court). The court cited the "American rule" as grounds for denying the latter element of the plaintiff's damages claim.

The Appellate Court reversed, citing a prior decision of our Supreme Court holding that "attorney's fees incurred in other litigation against a third party, which are awarded as an element of compensatory damages, do not fall within the contemplation of the American [r]ule."[8]

C. *Post-Judgment Enforcement Procedures*

1. Wages Deposited into Bank Account No Longer Entitled to Protection from Garnishment

In *Cadle Company v. Fletcher*,[9] the Connecticut Supreme Court examined the issue of whether a judgment debtor's wages, once deposited into a bank account, are still protected by General Statutes Section 52-361a(f), which limits the portion of wages that may be garnished.[10] The judgment debtor, who had been subject to a garnishment order, had been depositing his residual wages into a bank account owned by his wife, transactions that the judgment creditor deemed fraudulent transfers. The judgment debtor countered that "if the earnings were subject to garnishment before being deposited, as they were in the present case, the judgment creditor is not entitled to execute against any portion of the deposited funds."[11]

The Supreme Court agreed with the judgment creditor, holding that "wages that a judgment debtor has deposited into a bank account do not constitute a debt payable by the employer," and thus no longer qualify as earnings or wages

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[8] *Id.* at 497 (quoting Chapman Lumber, Inc. v. Tager, 288 Conn. 69, 97 n. 31, 952 A.2d 1 (2008)).

[9] 324 Conn. 228, 151 A. 3d 1262 (2017).

[10] The statute provides in relevant part: "The maximum part of the aggregate weekly earnings of an individual which may be subject under this section to levy or other withholding for payment of a judgment is the lesser of (1) twenty-five per cent of his disposable earnings for that week, or (2) the amount by which his disposable earnings for that week exceed forty times the higher of (A) the minimum hourly wage prescribed by Section 6 (a) (1) of the Fair Labor Standards Act of 1938, USC Title 29, Section 206 (a) (1), or (B) the full minimum fair wage established by subsection (i) of section 31–58, in effect at the time the earnings are payable...."

[11] 324 Conn. at 235.

protected by the statutory garnishment cap.[12] The court observed "if a judgment creditor were permanently barred from executing against the residual wages of a judgment debtor, the judgment debtor could accumulate large amounts of money in cash or in a bank account while his debt to the judgment creditor remained unsatisfied."[13] The court found that construction of Connecticut's statutory scheme illogical.

2. Inapplicability of the Homestead Exemption to Certain Lien Foreclosures

In *Rockstone Capital, LLC v. Sanzo*,[14] the plaintiff recorded judgment liens against the defendants' primary residence, and brought an action to foreclose the liens. The parties then entered into a forbearance agreement, by which the liens were rolled into a mortgage, with the plaintiff agreeing to refrain from foreclosing so long as the defendants abided by a payment plan.

The defendants defaulted, and the plaintiff sought to foreclose the mortgage. The defendants challenged the enforceability of the mortgage, arguing that it was the product of a de facto waiver of their homestead exemption under General Statutes Section 52-352b, and therefore void as a matter of public policy.

The Appellate Court rejected the homeowners' argument. The court found that the mortgage was a consensual lien and therefore outside the application of the homestead exemption. The circumstances leading up to the execution of the mortgage played no apparent role in the court's decision.

3. Levying "Out-of-State" Assets by Turnover Order to a Connecticut Financial Institution

In *JPMorgan Chase Bank, N.A. v. Herman*,[15] the Appellate Court addressed jurisdictional issues pertain-

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12 *Id.*
13 324 Conn. at 242.
14 175 Conn. App. 770, 717 A. 3d 77 (2017).
15 175 Conn. App. 662, 168 A.3d 514 (2017).

ing to the levy of execution on securities in satisfaction of a foreign judgment. The plaintiff obtained a judgment of $259,539.96 against the defendant, in the courts of Florida. The plaintiff then learned that the defendant had a brokerage account with the Westport, Connecticut office of UBS Financial Services, Inc. Accordingly, the plaintiff registered its Florida judgment in the courts of Connecticut, and successfully sought a turnover order directed to UBS. The defendant appealed from that order.

The defendant argued that because he had no nexus with Connecticut other than his broker's office being situated here, it was constitutionally improper for the Connecticut courts to exercise jurisdiction over him. The Appellate Court disagreed, noting that the U.S. Supreme Court had rejected a similar argument in its decision in *Shaffer v. Heitner*.[16] In *Shaffer*, the Supreme Court observed "we know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him. ... Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."[17]

The defendant further argued that it was improper for the court to direct a turnover order to the Connecticut broker, in light of the fact that the actual documents for the underlying securities were held for UBS by a custodian in New York. The court rejected that argument, finding that UBS was a "securities intermediary" as defined by Article 8 of the Uniform Commercial Code, and that under relevant provisions of that article – General Statutes Section 42a-8-112 and accompanying commentary – process had been properly served on UBS in that capacity.

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[16] 433 U.S. 186 (1977).

[17] 175 Conn. App. at 669, 670 (quoting *Shaffer* at 210, n. 36).

D. *Res Judicata and Collateral Estoppel Effect of a Foreign Veil-Piercing Judgment*

The Connecticut Appellate Court's decision in *Deutsche Bank AG v. Sebastian Holdings, Inc.*,[18] includes a detailed discussion of the doctrines of res judicata and collateral estoppel in the context of an alter ego claim. Before beginning an action in Connecticut, the plaintiff had sued Sebastian Holdings, Inc. ("Sebastian") in the courts of England, claiming breach of contract. The plaintiff's claims arose from trading losses that Sebastian had incurred through accounts it had opened with the plaintiff, which led to unpaid margin calls and closeouts of its accounts. The plaintiff obtained a judgment against Sebastian in the amount of $243 million in the English courts.

The plaintiff then brought suit in Connecticut against Sebastian and its principal, Alexander Vik, seeking to pierce Sebastian's corporate veil. The parties filed cross motions for summary judgment, both of which were denied. Both sides appealed.[19]

The defendants contended that the plaintiff's veil piercing claim should have been raised in the English action, and accordingly should be barred in Connecticut on res judicata grounds. The Appellate Court disagreed, observing "the plaintiff in the present action is not seeking to relitigate a claim of contractual liability that previously was decided in the English judgment. Instead, the plaintiff's claims here are seeking to enforce the unsatisfied English judgment against Vik under a corporate veil piercing theory [which arises from] a distinct nucleus of operative facts."[20] The court added "[r]equiring the plaintiff to have pursued such a claim in the English action would produce an unjust result, as the plaintiff would have been required to have anticipated that Sebastian would refuse to satisfy the

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[18] 174 Conn. App. 573, 166 A.3d 716 (2017).

[19] The Appellate Court noted that, while denials of summary judgment ordinarily are not immediately appealable, there is an exception that allows immediate appeals when the motion is based on res judicata or collateral estoppel. *Id.* at 578, fn. 4.

[20] *Id.* at 585.

English judgment."[21]

Conversely, the plaintiff claimed it was entitled to summary judgment based on collateral estoppel. The plaintiff relied on two rulings by the English court. First, in denying a counterclaim by Sebastian, the English court made a finding that Vik had been in control of Sebastian's funds. But the Appellate Court ruled that this was not equivalent to a finding that Vik was the alter ego of Sebastian.[22] Furthermore, this finding was unnecessary to the English court's conclusion, given that the court also found that the plaintiff had not breached any duty to Sebastian. "Only those issues that were necessarily determined by the English court could invoke the doctrine of collateral estoppel."[23]

Second, the plaintiff pointed to one aspect of the English court's ruling, in which it invoked a procedure that shifted the plaintiff's legal fees and costs to nonparty Vik based on his "extensive involvement with the English action."[24] But the Appellate Court noted that "the English costs judgment was the result of a summary proceeding that did not afford the parties the ability to present new evidence, to call witnesses, or to cross-examine witnesses."[25] Furthermore, the English court had noted a lack of identity of the issues.[26] Accordingly, the Appellate Court held that the English cost proceeding was not entitled to preclusive effect.

II. Causes of Action

A. *Covenant of Good Faith and Fair Dealing Must Arise from a Contract Term*

The Appellate Court's decision in *Financial Freedom Acquisition, LLC v. Griffin*[27] contains a detailed discussion of the implied covenant of good faith and fair dealing, heavily emphasizing the doctrine's roots in the law of contract

[21] *Id.*
[22] *Id.* at 586.
[23] *Id.* at 589.
[24] *Id.* at 577.
[25] *Id.* at 591.
[26] *Id.*
[27] 176 Conn App. 314, 170 A.3d 41 (2017).

rather than tort.

The case involved the foreclosure of a reverse mortgage. The loan documents provided that upon the death of the borrower, the full loan balance would become due and payable unless, within thirty days, the lender and the representatives of the decedent's estate reached a written agreement to cooperate in selling the property.

Following the death of the borrower, the defendant, executrix of the borrower's probate estate, made prompt and frequent contact with the plaintiff to try to work out a cooperative sale. When the plaintiff nevertheless elected to foreclose, the defendant asserted a special defense based on breach of the implied covenant.

The trial court rejected this defense and entered a judgment of foreclosure. The court found that the defendant was trying to enforce "nonexistent obligations" under the note, and observed that "there was no written agreement between the named plaintiff and the defendants extending the repayment due date and that there was no meeting of the minds between the parties regarding a repayment extension."[28]

The Appellate Court agreed. It cited prior case law in support of the proposition that "the covenant of good faith and fair dealing is not implicated by conduct that does not impair contractual rights"[29] and that breach of the covenant "must be tied to an alleged breach of a specific contract term."[30] Here, "in the absence of a written agreement extending the deadline to allow the executrix to sell the decedent's home, the named plaintiff had no obligation to undertake any action facilitating the executrix's sale of the property."[31]

The decision also contains an exhaustive analysis of the law of bank mergers, as applied to the right of a successor entity to foreclose.

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[28] *Id*. at 338.

[29] *Id*. at 340, (citing Capstone Building Corp. v. American Motorists Ins. Co., 308 Conn. 760, 794-95, 67 A.3d 961 (2013)).

[30] *Id*., (citing Landry v. Spitz, 102 Conn. App. 34, 47, 925 A 2d 334 (2007)).

[31] *Id*. at 342.

B. *Violation of Public Policy Sufficient to Support a CUTPA Claim Even without Violation of Express Statutory Provisions Motivated by the Policy*

In *Freeman v. A Better Way Wholesale Autos, Inc.*,[32] the Appellate Court reaffirmed the principle that a violation of the Connecticut Unfair Trade Practices Act ("CUTPA")[33] may be based on conduct that violates the public policy behind a statute, even if the conduct does not violate the statute itself. The defendant, an auto dealership, failed to properly disclose finance terms to the plaintiff, a prospective purchaser. Because the purchase was never consummated, the defendant argued that it could not have violated the federal and state Truth in Lending Acts.[34] However, the trial court found that the defendant had violated the public policy behind the acts, and thus had violated CUTPA. The Appellate Court agreed.

C. *"Instrumentality Test" for Veil Piercing Requires that Corporate Form Be Used to Carry Out a Wrong*

The Connecticut Appellate Court's decision in *Cohen v. Meyers*,[35] contains a useful discussion – largely an adoption of the trial court's findings – of the "instrumentality test" applied to alter-ego claims. The plaintiff, a property owner, brought suit against a home construction company, Robert M. Meyers, Inc. ("RMMI"), and its sole owner, Robert M. Meyers, for, among other things, violations of the Connecticut Unfair Trade Practices Act[36] arising from failures to comply with the New Home Construction Contractors Act.[37] The plaintiff claimed that the construction company's corporate veil should be pierced and Meyer held personally liable. The trial court found for the plaintiff on the CUTPA claim against RMMI but denied the claim as to Meyers himself, notwithstanding his admission that he had "complete control and domination of all business and

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[32] 174 Conn. App. 649, 166 A. 3d 857 (2017).
[33] CONN. GEN. STAT. § 42-110a et seq.
[34] 15 U.S.C. § 1601 et seq.; CONN. GEN. STAT. § 36a-675.
[35] 175 Conn. App. 519, 167 A.3d 1157 (2017).
[36] CONN. GEN. STAT. § 42-110a et seq.
[37] CONN. GEN. STAT. § 20-417a et seq.

fiscal policies and procedures of the corporation."[38]

The trial court found that Meyers did not exercise his control over RMMI in a way that would justifying piercing the veil. The court noted a lack of evidence that Meyers "used the corporate form to perpetrate a fraud" or any evidence that he "did not respect and observe the laws which afford him the right to form and manage a corporation of which he was the sole shareholder."[39] The court noted that RMMI "had its own accounts, made payments to and from those accounts and conducted regular business as a general contractor, and apparently existed for years on its own, separate and distinct from ... Meyers as an individual."[40] Shareholder loans and repayments were duly documented in the company's financial records.[41] Applying the "clearly erroneous" standard of review, the Appellate Court affirmed.

Notably, the decision makes no mention of the Supreme Court's earlier decision in *Joseph General Contracting, Inc. v. Couto*,[42] in which the court held that the corporate veil did not shield from CUTPA liability the corporate actor who personally committed the wrongful conduct at issue. Apparently that potential path toward imposing liability on Meyers was not presented to the court by the litigants in the *Cohen* case.

III. Foreclosure and Collection

A. Standing to Foreclose

1. Holder of Note Can Foreclose, Notwithstanding Questions About Chain of Endorsements

In *21st Mortgage Corporation v. Schumacher*,[43] the defendant contested the plaintiff's standing to foreclose a mortgage, pointing to claimed irregularities in the chain of

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38 175 Conn. App. at 524.
39 *Id.* at 542.
40 *Id.*
41 *Id.*
42 317 Conn. 565, 119 A.3d 570 (2015).
43 171 Conn. App. 470, 157 A.3d 714 (2017).

ownership of the underlying promissory note, and claimed that the trial court erred in granting the plaintiff's motion for summary judgment. Among other things, the plaintiff's affidavit provided no explanation for certain allonges attached thereto, some of which were undated.[44]

The Appellate Court noted that the plaintiff was in possession of the original note, and that the final endorsement was a special endorsement to the plaintiff. As such, the plaintiff met the definition of a holder of the note in General Statutes Section 42a-1-201(b)(21)(A). That statute defines a holder as "The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the holder in possession." The court saw no need to drill deeper into the chain of title, and affirmed the judgment below.

2. Loan Servicer Has Standing to Foreclose

In *Citimortgage, Inc. v. Tanasi*,[45] the Appellate Court addressed the issue of a loan servicer's standing to foreclose on behalf of another entity that is the actual owner of a note. Citing prior law, the court noted that the holder of the note is presumed to own it, and can establish that presumption by simply producing the note.[46] If the defendant then meets the burden of proving that the holder is not the owner, the burden shifts to the plaintiff to prove "that the rightful owner had in some way vested in it the right to collect the debt on the owner's behalf."[47]

3. Note Enforceable by Nonholder in Possession

In *Valley National Bank v. Marcano*,[48] the Appellate Court underscored the principle that a promissory note may be enforced not only by a holder of the note, but also under

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[44] *Id*. at 478.

[45] 176 Conn. App. 829, 171 A.3d 516 (2017).

[46] *Id*. at 836.

[47] *Id*. at 836 (quoting JPMorgan Chase Bank, National Association v. Simouldis, 161 Conn App. 133, 145, 126 A.3d 1098 (2015)), *cert. denied*, 320 Conn 913, 130 A.3d 266 (2016).

[48] 174 Conn. App. 206, 166 A.3d 80 (2017).

some circumstances by a nonholder. The original lender and holder of the subject note was Park Avenue Bank. That entity failed, and was taken over by the Federal Deposit Insurance Corporation, which assigned all of Park Avenue's assets to the plaintiff, Valley National Bank, via a purchase-and-assumption agreement. The subject note was not endorsed, either to the plaintiff or in blank.[49]

The defendant, a guarantor of the loan, argued that because the note had not been endorsed, the plaintiff lacked standing to enforce it. While the defendant argued correctly that the plaintiff lacked "holder" status under General Statutes Section 42a-1-201(b)(21),[50] that did not end the discussion, because General Statutes Section 42a-3-301 allows a note to be enforced by either a holder or "also a "nonholder in possession of the instrument who has the rights of a holder."

In an earlier case, the Appellate Court had observed "a note that is unendorsed can still be transferred to a third party. Although that third party technically is not a holder of the note, the third party nevertheless acquires the right to enforce the note so long as that was the intent of the transferor."[51] Applying this principle to the *Marcano* case, the Appellate Court agreed with the trial court that the plaintiff had acquired the original lender's right to enforce the note.

4. Modified Note Did Not Lose Status as Negotiable Instrument

In *Deutsche Bank National Trust Co. v. Pardo*,[52] the plaintiff, assignee of a mortgage note, brought a foreclosure action. The defendant claimed that the plaintiff was not a holder of the note, and therefore lacked standing to fore-

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[49] 174 Conn. App. at 211.

[50] The statute defines "holder" in relevant part as "The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

[51] 174 Conn. App. at 212 (quoting Berkshire Bank v. Hartford Club, 158 Conn. App. 705, 712, 120 A.3d 544, *cert. denied*, 319 Conn. 925, 125 A.3d 200 (2015)).

[52] 170 Conn. App. 642, 155 A.3d 764 (2017).

close. The defendant's argument had several elements.

Pointing out that the note had been the subject of two loan modification agreements, the defendant argued that the note had thereby ceased to constitute an "unconditional promise or order to pay a fixed amount of money," and thus no longer qualified as a "negotiable instrument" under General Statutes Section 42a-3-104(a). More particularly, the defendant argued that because of the modification agreements, the note's "promise or order is subject to or governed by another writing," making the promise conditional, not unconditional, by operation of General Statutes Section 42a-3-106(a).[53] That statute provides in relevant part that "for the purposes of section 42a-3-104(a), a promise or order is unconditional unless it states ... (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing."

The defendant further argued that because the note was no longer a "negotiable instrument," the plaintiff could not qualify as a holder of the note, because the Uniform Commercial Code defines "holder" in relevant part as "[t]he person in possession of a negotiable instrument."[54] General Statutes Section 42a-1-201(21). If there was no negotiable instrument, went the argument, then there could be no holder. And because a foreclosure can be prosecuted only by "a holder of an instrument or someone who has the rights of a holder,"[55] the defendant argued that the plaintiff's lack of holder status deprived it of standing to prosecute.

The Appellate Court disagreed. The court focused on General Statutes Section 42a-3-106, the statute relied upon by the defendant for the proposition that the loan modification agreements rendered the note "conditional." More particularly, the court zeroed in on the statute's prefatory language that "a promise or order is unconditional unless it states...." The court construed this language as "plainly

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[53] *Id.* at 645, 646.

[54] *Id.* at 649.

[55] *Id.* at 648 (quoting Property Asset Management, Inc. v. Lazarte, 163 Conn. App. 737, 746, 138 A.3d 290 (2016)).

indicat[ing] that in order for subsections (ii) or (iii) to apply, the promise or order must *itself* contain the reference to the other writing."[56] Here, the note itself did not contain a reference to the modification agreements, or any other indication that it was subject to another writing. The court concluded that the plaintiff qualified as a holder of the note, and had standing to foreclose.

B. *Subdivision Status Did Not Affect Right to Foreclose*

In *ARS Investors II 2012-1 HVB, LLC v. Crystal, LLC*,[57] the defendant had filed an unapproved subdivision map, purporting to divide its property into parcels I, II and III. It then mortgaged parcels I and III to the plaintiff's predecessor in interest. Following the defendant's default, and the commencement of foreclosure proceedings, the defendant resisted on the grounds that a judgment of foreclosure would unlawfully "validate" the illegal subdivision of the property.[58]

The Supreme Court disagreed. The court acknowledged that General Statutes Section 8-25 provides that "the filing or recording of a subdivision plan without [approval by the city] shall be void," but noted that "nothing in § 8-25 otherwise prohibits or voids the sale of an unapproved parcel."[59] More broadly, "the zoning statutes and municipal zoning regulations govern the use of property, but do not prevent its transfer to a new owner."[60]

The court also took note of the validating act, General Statutes Section 47-36aa, which, among other things, cures any instrument that "conveys an interest in a lot or parcel of land in a subdivision that was not submitted for approval or that was submitted for approval but was not approved…"[61] The Supreme Court affirmed the judgment of strict foreclosure rendered by the trial court.

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[56] *Id*. at 650 (emphasis in original).
[57] 324 Conn. 680, 154 A.3d 518 (2017).
[58] *Id*. at 683.
[59] *Id*. at 686.
[60] *Id*.
[61] *Id*. at 687.

C. *Debt Can Be Proven Via Affidavit if Not Specifically Challenged*

In *Bank of America v. Chainani*,[62] the defendant claimed that the trial court erred in allowing the bank to prove the amount of the debt by way of affidavit rather than by live testimony. The relevant Practice Book rule, Section 23-18(a), allows the debt to be proven via affidavit "where no defense as to the amount of the mortgage debt is interposed." In his answer to the complaint, the defendant had pled a rote denial of liability, and claimed insufficient knowledge to admit or deny the alleged amount of the debt.

The Appellate Court ruled that the defendant had not adequately challenged the debt so as to prevent proof by way of affidavit. A true defense "must be based on some articulated legal reason or fact" and must be "actively made."[63] A "denied-for-lack-of-knowledge-or-information" pleading is not sufficient. The court noted that a challenge to the debt calculation need not be made in a pleading; it may be raised for the first time at trial. Such an objection must be "supported with evidence and arguments challenging the amount of the debt, upon the attempted introduction of the affidavit in court."[64]

D. *Bank's Conduct During Foreclosure Mediation Cannot Support Counterclaim in Foreclosure Action*

In *Bank of New York Mellon v. Mauro*[65] and in *U.S. Bank National Association v. Blowers*,[66] the Appellate Court reaffirmed the principle, previously articulated in *U.S. Bank National Association v. Sorrentino*,[67] that in a foreclosure action it is improper for the borrower to assert a counterclaim based on the lender's conduct in the foreclosure mediation process. Such a counterclaim fails the "transaction test" of Practice Book Section 10-10, which requires a coun-

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[62] 174 Conn. App. 476, 166 A 3d 670 (2017).
[63] *Id*. at 486.
[64] *Id*.
[65] 177 Conn. App. 295, 172 A.3d 303 (2017).
[66] 177 Conn. App. 622, 172 A.3d 837 (2017).
[67] 158 Conn. App. 84, 113 A.3d 607, *cert. denied*, 319 Conn. 951, 125 A.3d 530 (2015).

terclaim to "arise[] out of the transaction or one of the transactions which is the subject of the plaintiff's complaint." The mediation process is a separate "transaction" from the underlying loan.

The trial court in *Mauro* had entered summary judgment for the plaintiff on the defendant's counterclaim. The Appellate Court clarified that the judgment should be treated as a judgment of dismissal based on improper joinder of claims, not a judgment on the merits.[68] If those claims are not time barred, the defendant remains free to pursue them in a separate action.[69]

In *Blowers*, the bank's allegedly wrongful conduct occurred not only during the judicial mediation process but also during pre-suit loan modification discussions. Writing in dissent, Judge Prescott found the *Blowers* case thus distinguishable from *Sorrentino*, and opined that the borrowers should have been given leave to pursue not only counterclaims but also special defenses based on the bank's conduct.

E. *Borrower in Foreclosure Appeal Required to Pay Carrying Costs for Property*

In *JPMorgan Chase Bank, National Association v Essaghof*,[70] the Appellate Court ruled that the trial court had the authority, after its judgment of foreclosure was appealed, to order the defendants to pay obligations for property tax and property insurance that accrued while the appeal was pending. The trial court noted that the defendants' obligation "to pay the real estate taxes ... is not subject to the automatic stay and will not be affected by the trial court and appellate litigation." The Appellate Court found that the trial court's order was "within the realm of issues that the court's equitable powers were designed to address."

F. *Statute of Frauds Applies to Loans, Not Extensions of Credit*

In *American Express Bank, FSB v. Rutkowski*,[71] a col-

[68] 177 Conn. App. at 319.
[69] 177 Conn. App. at 320.
[70] 177 Conn. App. 144, 171 A.3d 494 (2017).
[71] 174 Conn. App. 472, A.3d 908 (2017).

lection action for an unpaid credit card obligation, the Appellate Court rejected the defendants' contention that the action was barred by the Statute of Frauds, General Statutes Section 52-550. The defendants relied on subsection (a)(6) of the statute, which bars enforcement of a loan exceeding $50,000 in the absence of a writing signed by the party to be charged.

Noting other case law that distinguishes the making of a loan from the extension of credit, the court found the statute inapplicable. The court determined that "the underlying credit agreement was not a loan within the meaning of the statute of frauds."[72]

IV. Contracts

A. *Contractual Cap on Liability Did Not Limit Award for Attorney's Fees*

In *CCT Communications, Inc. v. Zone Telecom, Inc.*,[73] the Supreme Court held that a contractual cap on liability did not apply to a separate award for attorney's fees under the same agreement. The defendant prevailed on a counterclaim against the plaintiff based on a service agreement between the parties. The trial court found, based on a limitation of liability clause, that damages were capped at $694,000, even though actual damages were far greater. But the court went on to also award more than $900,000 in legal fees, based on an attorney's fees clause in the contract.

On appeal, the plaintiff argued that the liability cap should have applied to the entire award, including attorney's fees. The Supreme Court rejected this argument, noting that the limitation of liability clause and attorney's fees clause were in separate parts of the agreement, and contained no references to each other.

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[72] *Id.* at 475.

[73] 324 Conn. 654, 153 A. 3d 1249 (2017), *superseded on other grounds* 327 Conn. 114, 172 A 3d 1228 (2017).

B. *Chapter 11 Bankruptcy Filing Did Not Provide Cause to Terminate Service Contract*

Following reargument of its first decision in the *CCT Communications* case, the Supreme Court issued a second decision that addressed an entirely different issue. In *CCT Communications, Inc. v. Zone Telecom, Inc.*,[74] the court considered the enforceability of a provision in a service contract that allowed one party to terminate the contract if the other party filed for bankruptcy protection.

The plaintiff was a middleman for the provision of telecommunications services, buying long-distance telephone services from a third party, Global Crossing Telecommunication, Inc. ("Global") and selling them to the defendant after a markup. Following an extended dispute between the plaintiff and Global, Global cut off service to the plaintiff, which prompted the plaintiff to file for Chapter 11 bankruptcy protection.

Global concluded that, under the automatic stay provision of the Bankruptcy Code, it was required to restore service to the plaintiff, and promptly did so.[75] Thus, the plaintiff continued to receive its supply of services from Global for resale to the defendant. But the defendant nevertheless notified the plaintiff that it was terminating their contract, citing a provision that allowed either party to terminate upon thirty days' written notice if the other party filed a voluntary bankruptcy petition (bankruptcy termination clause).[76]

The plaintiff's bankruptcy petition was eventually dismissed, upon which the plaintiff brought an action against the defendant in Connecticut Superior Court for breach of contract. After a courtside trial, the trial court rendered judgment for the defendant on the plaintiff's complaint and on the defendant's counterclaim. The trial court found that the defendant had properly terminated the contract.

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[74] 327 Conn. 114, 182 A. 3d 1228 (2017). The decision follows reargument of the court's decision at 324 Conn. 654, 153 A.3d 1249.

[75] 327 Conn. at 122.

[76] *Id.*

The Supreme Court reversed. The court's approach was to consider first whether the plaintiff's bankruptcy filing constituted a default under the contract, and second, separate and apart from the "default" issue, whether the bankruptcy termination clause was enforceable. The court noted that neither the contract nor the common law made a bankruptcy filing an event of default under the contract. While the bankruptcy termination clause identified bankruptcy as a ground for termination, it did not identity a bankruptcy as an event of default. "It is well established that a contract may allow for termination under conditions that do not constitute a material breach."[77]

As for whether the plaintiff's bankruptcy filing constituted a default as a matter of law, "the common law no longer permits a party to a contract to treat another party's declaration of bankruptcy, without more, as a material breach.... [a bankruptcy filing] does not excuse performance by the other party in the absence of some further indication that the party filing for bankruptcy either cannot, or does not, intend to perform."[78] Here, "the trial court did not find that the plaintiff either could not or did not intend to perform its obligations as a result of its bankruptcy filing."[79] The trial court erred in finding that the plaintiff breached the contract by filing for bankruptcy protection.

The Supreme Court further found that the bankruptcy termination clause was unenforceable as a matter of law. The court noted that under section 365(e)(1) of the Bankruptcy Code, clauses of this type in an executory contract are ordinarily unenforceable.

The trial court had noted a principle of bankruptcy law, called the "ride-through doctrine," that applies when a Chapter 11 bankruptcy trustee neither assumes nor rejects an executory contract or unexpired lease. Under that doctrine, such a contract or lease is deemed to "ride through" the bankruptcy process, and survive as an obligation of the

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[77] *Id.* at 138.
[78] *Id.* at 139.
[79] *Id.*

reorganized debtor.[80] In the plaintiff's bankruptcy, the trustee neither assumed nor rejected the plaintiff's contract with the defendant. The trial court concluded that under the ride-through doctrine, the subject contract remained unaffected by the bankruptcy, and thus the defendant's purported termination of the contract under the bankruptcy termination clause became valid once the plaintiff's bankruptcy petition was dismissed.

But the Supreme Court disagreed, finding a lack of "any cases in which a Court has applied the doctrine when a bankruptcy petition is dismissed prior to the confirmation of a reorganization plan."[81] The court concluded "that 11 U.S.C. Section 365(e) rendered the defendant's purported termination of the purchase agreement ineffective, and that the trial court incorrectly concluded that the ride-through doctrine applied so as to retroactively validate the termination."[82] The court pointedly noted that the defendant may well have had cause to properly terminate the contract – if it had waited until dismissal of the plaintiff's bankruptcy case before doing so.[83]

C. *Comments on Draft Contract Did Not Give Rise to Binding, Modified Agreement*

In *Al Dente, LLC v. Consiglio*,[84] the would-be purchasers of the iconic Sally's Apizza in New Haven (including its building) sued the owner/sellers, claiming the parties had a binding contract. The plaintiffs had tendered a written purchase and sale agreement, to which the defendants replied with an unsigned document, captioned "Comments to Al Dente Contract," that listed nine comments.[85] The plaintiffs, in turn, added language to the comment sheet deeming it a proposed addendum to which they assented, signed it, and declared that they now had a binding, albeit modified, purchase contract.[86]

The trial court disagreed, entering summary judgment

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80 *Id*. at 143-144.
81 *Id*. at 146.
82 *Id*. at 156-157.
83 *Id*. at 153.
84 171 Conn. App. 576, 157 A.3d 743 (2017).
85 *Id*. at 594.
86 *Id*. at 584.

for the defendant sellers. The Appellate Court affirmed, noting that because the defendants had not signed the comment sheet, the Statute of Frauds was likely fatal to the plaintiffs' case.[87]

Furthermore, the court found no objective evidence that the offer sheet constituted a rejection of the original offer coupled with a counter-offer. Citing a variety of contract treatises, the court noted "a mere inquiry regarding the possibility of different terms ... or a comment upon the terms of the offer, is ordinarily not a counter-offer. ... mere request for modification does not ordinarily constitute counteroffer ... 'requests' and 'suggestions' do not constitute counteroffers."[88]

D. *Late Settlement Payment Acceptable, Given Lack of "Time of the Essence" Clause*

The Appellate Court's decision in *JPMorgan Chase Bank, N.A. v. Cam*[89] illustrates how significant the presence – or absence – of a "time is of the essence" clause may be when interpreting a contract. The parties executed a settlement agreement on September 17, 2014 (the "contract date"), by which the defendant stipulated to a judgment of strict foreclosure in exchange for the bank's promise to render two payments to the defendant: one within thirty days of the agreement, and another within ten days after title vested in the bank. The parties appeared in court on October 7, 2014, to enter the stipulated judgment, but the court declined to do so, based on concern that another defendant in the case had not been properly served. Resolution of the matter bogged down for several months, and the bank did not render the first payment within thirty days after the contract date, or at all. The defendant then sought to repudiate the settlement agreement, claiming that the bank's nonpayment constituted a material breach that excused the defendant's performance.

The trial court disagreed, as did the Appellate Court.

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[87] *Id.* at 592.
[88] *Id.* at 593, 594 (citations and internal punctuation omitted).
[89] 172 Conn. App. 659, 161 A.3d 650 (2017).

Looking at what the settlement agreement said and did not say, and specifically noting the absence of a "time is of the essence" clause, the Appellate Court found the agreement "clearly and unambiguously indicates that the parties did not intend for the plaintiff's payment to the defendant to be time critical, but, instead, intended for performance to be consummated within a 'reasonable time' of the thirty day deadline."[90]

E. *No "Implied Conditions Precedent" in Fully Integrated Contract*

EH Investment Co., LLC v. Chappo LLC,[91] contains a detailed discussion by the Appellate Court about implied condition precedents in a contract. The plaintiff, which owned a commercial office building, retained the defendant, a commercial loan broker, to find a mortgage lender. The plaintiff was in negotiations with the building's sole tenant to extend the tenant's lease.

The defendant found a willing lender that tendered a commitment letter for the plaintiff's signature. The loan was contingent upon the plaintiff's locking in the lease extension. But the plaintiff's lease negotiations with the tenant broke down, and the plaintiff refused to sign the commitment letter. The plaintiff demanded that the defendant return a deposit paid at the start of their engagement, and when the defendant refused, the plaintiff brought suit.

The plaintiff claimed that because the hoped-for lease extension was essential for obtaining the loan, and both parties knew so from the outset, procurement of the lease extension was a condition precedent to the defendant's entitlement to retain the deposit. Because the parties' contract contained no such provision, the plaintiff relied on the principles of implied conditions precedent.

The Appellate Court disagreed with the plaintiff. When construing a fully integrated contract between sophisticated commercial parties, "the court should be particularly wary

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[90] *Id.* at 666.
[91] 174 Conn. App. 344, 166 A.3d 800 (2017).

before construing the contract to include an implied condition precedent, especially when supplying such a term will result in one of the parties forfeiting the benefit of his performance."[92] This is particularly so "if the forfeiture falls on a party who had no control over whether the condition or event would occur."[93]

Applying these principles to the case before it, the court viewed the contract's deposit requirement as "a means to protect the defendants in the event that they secured a commitment but the loan failed to close through no fault of their own."[94] This was a reasonable allocation of risk "to the party that was in control of the lease negotiations: the plaintiff."[95] The court ruled that the defendant broker was entitled to keep the deposit.

F. *"Substantial Compliance" Did not Excuse Underpayment of Insurance Premium*

In *21st Century North American Insurance Company v. Perez*,[96] the Appellate Court ruled that the doctrine of substantial compliance did not apply to the underpayment, however minor, of an insurance premium, and therefore could not rescue the policy from cancellation. "Because timely payment under the policy goes to the root and essence of the contract, the doctrine of substantial performance cannot excuse an insured's failure to make full payment of the monthly installment due under the policy."[97]

V. Miscellaneous Business Cases

A. *Attorney Homeowner did not Invoke Home Improvement Act in Bad Faith*

In *Burns v. Adler*,[98] the Supreme Court reversed the Appellate Court's decision in favor of a contractor who had

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[92] *Id*. at 367.
[93] *Id*. at 361.
[94] *Id*. at 357.
[95] *Id*.
[96] 177 Conn. App. 802, 173 A.3d 64 (2017).
[97] *Id*. at 818.
[98] 325 Conn. 14, 155 A.3d 1223 (2017).

failed to comply with the Home Improvement Act, General Statutes Section 20-418 et seq. The trial court had found, after trial, that the defendant homeowner, an attorney, had invoked the act in bad faith, thus allowing the subcontractor to enforce his claim for payment. The Appellate Court affirmed the judgment below, but a majority of the Supreme Court disagreed.

The trial court's finding of bad faith was founded on such factors as the homeowner's incessant requests for additional work without inquiring into the cost; his awareness that the contractor owed significant sums to subcontractors and suppliers; and his pressuring of the contractor into performing additional work by threatening that in the event of litigation the homeowner, as an attorney, would represent himself and thereby avoid legal expense.[99]

But the Supreme Court emphasized the trial court's finding, undisturbed by the Appellate Court, that the builder's billing records were very poor, which contributed greatly to the friction between the parties and to the ensuing litigation.[100] The court found that a contractor who does not comply with the act may not recover under the bad-faith exception when "a homeowner receives goods and services from a contractor in the belief that they ultimately will have to be paid for, but then repudiates the contract because the contractor's noncompliance with the act gave rise to a genuine, good faith dispute about the scope of the work or the contract price."[101] When this is the case, "the inability of a contractor to enforce the homeowner's payment obligation is exactly what the act contemplates, even as to work the contractor actually performed."[102]

Justice Robinson penned a lengthy dissent, joined by Justice Espinosa.

B. *Attorneys in Dissolved Law Firm Ordered to Share Fees*

Horner v. Bagnell[103] was an action between the two part-

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[99] *Id.* at 33, 34.
[100] *Id.* at 28.
[101] *Id.* at 36.
[102] *Id.* at 37.
[103] 324 Conn. 695, 154 A.3d 975 (2017).

ners in a law firm that had been dissolved. The defendant took several pending contingency-fee cases with him to his new practice, and litigated them to conclusion. The plaintiff contended that he should be entitled to a share of the fees reasonably allocated to work performed under the auspices of the old firm, and sued under several theories, including unjust enrichment. Upon that theory, the trial court entered judgment for the plaintiff following a bench trial.

The Supreme Court affirmed, joining the trial court in rejecting the defendant's argument that this outcome amounted to unauthorized fee-sharing in violation of rule 1.5(e) of the Rules of Professional Conduct.[104] The court relied in part on the official commentary to that rule, which provides in relevant part that the rule "does not prohibit or regulate divisions of fees to be received in the future for work done when lawyers were previously associated in a law firm."[105] The court also relied on a principle of partnership law called the unfinished business doctrine, which provides "'absent a contrary agreement, any income generated though the winding up of unfinished business is allocated to the former partners according to their respective interests in the partnership.'"[106]

C. *Documents Created by Third Party may be Admissible Business Records*

In *LM Insurance Corporation v. Connecticut Dismanteling, LLC*,[107] the Appellate Court reaffirmed the principle that a document may constitute a company's "business record," and thus be admissible under the hearsay exception codified at General Statutes Section 52-180, even if the company did not create the document.

The *LM Insurance* case involved a dispute over the cal-

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[104] The rules provides: "A division of fee between lawyers who are not in the same firm may be made only if: (1) The client is advised in writing of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and (2) The total fee is reasonable."

[105] 324 Conn. at 709, 710.

[106] *Id.* at 710-712 (quoting Jewel v. Boxer, 156 Cal. App.3d 171, 176, 203 Cal. Rptr. 13 (1984)).

[107] 172 Conn. App. 622, 161 A.3d 562 (2017). The spelling of "Dismanteling" is as reported.

culation of premiums for the defendant's worker's compensation insurance policy. The plaintiff insurance company hired an independent contractor to perform a field audit of the defendant, to determine the proper classification for the defendant's employees. The contractor provided the plaintiff with a written audit report, which the plaintiff maintained in its files.

At trial, counsel for the plaintiff examined an employee of the plaintiff on the elements of a "business record," for the purpose of offering the audit report as an exhibit. The defendant objected to the exhibit on the grounds that the report had been prepared by an employee of a third party company and therefore could not be a business record of the plaintiff. The trial court overruled that objection, and allowed the audit report to be admitted into evidence.

The Appellate Court agreed that the trial court had ruled properly. The court noted a prior decision of the Appellate Court,[108] later cited with approval by the Connecticut Supreme Court,[109] holding that "the keeping of a report in a [company's] file," even if prepared by a third party, may "satisf[y] the statutory requirement of 'record' and that such a record could reasonably be found to have been made in the course of the [company's] business."[110]

D. *Brokerage Agreement Held to be Unenforceable Tying Agreement*

In *Reserve Realty, LLC v. Windemere Reserve, LLC*,[111] the Appellate Court struck down a real estate brokerage agreement that had been foisted upon a reluctant real estate developer as a condition of its land purchase, on the grounds that the agreement constituted an illegal tying arrangement in violation of the Connecticut Antitrust Act,

[108] Crest Plumbing & Heating Co. v. DiLoreto, 12 Conn. App. 468, 531 A.2d 177 (1987).

[109] New England Savings Bank v. Bedford Realty Corp., 246 Conn. 594, 717 A.2d 713 (1998).

[110] LM Insurance Corp. v. Connecticut Dismanteling, LLC, 172 Conn. App. 622, 632, 161 A.3d 562 (2017) (quoting Crest Plumbing & Heating Co., 12 Conn. App. at 475-76).

[111] 174 Conn. App. 130, 165 A.3d 162 (2017).

General Statutes Section 35-24 et seq. (act).

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 that it would be binding upon a subsequent 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 (listing agreement). The defendants did so, but the relationship soured and the defendants terminated the listing agreement, prompting the plaintiffs to sue. The defendants sought to void the listing agreement, on the grounds that the agreement violated the act.

The trial court agreed with the defendants, and the Appellate Court affirmed. General Statutes Section 35-29,[112] which is modeled after section 3 of the federal Clayton Act,[113] proscribes tying arrangements, which are "agreement[s] by a party to sell one 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 another supplier."[114] Such agreements are "per se illegal, whenever the party has sufficient economic power with respect to the tying product to appreciably restrain free

[112] The statute provides "Every lease, sale or contract for the furnishing of services or for the sale of commodities, or for the fixing of prices charged therefor, or for the giving or selling of a discount or rebate therefrom, on the condition or understanding that the lessee or purchaser shall not deal in the services or the commodities of a competitor or competitors of the lessor or seller, shall be unlawful where the effect of such lease or sale or contract for sale or such condition or understanding may be to substantially lessen competition or tend to create a monopoly in any part of trade or commerce and where such goods or services are for the use, consumption or resale in this state."

[113] 174 Conn. App. at 142. Section 3 of the Clayton Act is codified at 15 U.S.C. § 14.

[114] 174 Conn. App. at 142 (quoting State v. Hossan-Maxwell, Inc., 181 Conn. 655, 659, 453 A.2d 427, 430 (1980).

competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected."[115]

The Appellate Court noted an earlier Connecticut Supreme Court case under the act,[116] involving a subdivision whose sixty-four lots were bound by restrictive covenants requiring all purchasers to use the services of a designated broker, in which the court found "the tying arrangement met the sufficient economic power test because the residential property was sufficiently unique that the tying party had some advantage in the market not shared by his competitors."[117] Along similar lines, the court found the Reserve to be "sufficiently unique that the trial court logically could have inferred that Woodland restrained free competition when it required subsequent purchasers of property in the Reserve to use the brokerage services of [the plaintiffs], because that requirement forced such purchasers to use a brokerage service that they would not have used otherwise."[118]

E. *Employees' Knowledge of Embezzlement Imputed to Company*

In *Village Mortgage Company v. Veneziano*,[119] the Appellate Court ruled that a company's embezzlement claims against its shareholder-officer-director could not be deemed "fraudulently concealed," tolling the statute of limitations, when its bookkeepers and other financial employees had had actual knowledge of the misdeeds. The plaintiff emphasized that its board of directors had been unaware of the situation, but the court found "no legal authority for the proposition that knowledge of a corporation can only be imputed through its board of directors."[120]

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[115] *Id.* at 143.
[116] State v. Hossan-Maxwell, Inc., 181 Conn. 655, 659. 436 A.2d 284 (1980).
[117] 174 Conn. App. at 145.
[118] 174 Conn. App. at 146.
[119] 175 Conn. App. 59, 167 A.3d 430 (2017).
[120] *Id.* at 79.