BUSINESS LITIGATION: 2019 IN REVIEW

By William J. O'Sullivan*

In 2019, Connecticut's appellate courts decided numerous cases of interest to business litigators. Following is a summary of the year's most noteworthy decisions.

I. Remedies and Defenses

A. *Judgment Creditor Seeks to Unwind Questionable Real Estate Transactions*

The Connecticut Supreme Court case *McKay v. Longman*[1] involved a labyrinthine series of real estate transactions by a judgment debtor and entities that he controlled. The court evaluated various remedies pursued by his judgment creditor.

Among the transactions attacked by the plaintiff was a mortgage to M&T Bank, given by a limited liability company controlled by the defendant, on property owned by the company. The plaintiff sought to execute on the property, claiming it had been fraudulently transferred by the defendant, and aimed to void the mortgage and thereby free up equity for the plaintiff to pursue.

The plaintiff's attack on the mortgage was based on the fact that the LLC did not internally obtain proper approvals before entering into the mortgage transaction. Specifically, the defendant purported to own only a five percent membership interest in the LLC – his wife owned most of the balance – but had acted unilaterally in binding the LLC to the transaction, contrary to the company's operating agreement. The plaintiff relied on General Statutes Section 34-130, a provision of Connecticut's now-repealed Limited Liability Company Act,[2] which defined the agency powers of LLC members and managers.

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1 332 Conn. 394, 211 A.3d 20 (2019).

2 Connecticut's Limited Liability Company Act was replaced by the Connecticut Uniform Limited Liability Company Act, General Statutes § 34-243a et seq., effective July 1, 2017.

The trial court had dismissed this claim, holding that the plaintiff lacked standing to attack the mortgage on this basis. The Supreme Court agreed, noting that the plaintiff did not claim to be a member or manager of the LLC, did not claim to be a party to the mortgage, and did not establish status as an intended third-party beneficiary of the transaction. The court concluded that the plaintiff did "not fall within the zone of interests that § 34-130 was meant to protect,"[3] and thus lacked standing to seek recourse under that statute.

The trial court had ruled in favor of the plaintiff on claims of fraudulent transfer. Two properties had been repeatedly transferred among the defendant and entities controlled by him. The defendant claimed that neither property had been an "asset" of his within the meaning of the Uniform Fraudulent Transfer Act, General Statutes Section 52-550a et seq. As to one property, he claimed he had held title only temporarily as the facilitator for the LLC to obtain a loan. As to the other, he claimed that an LLC had supplied the funds for the down payment, that he had held title to the property on the LLC's behalf, and that his subsequent transfer of title to the entity was not fraudulent.

As to both these claims, the trial court conducted an exhaustive analysis of the chains of title, loan transactions and banking records, and rejected the defendant's explanations. Noting that "fraudulent intent is 'almost always proven by circumstantial evidence,'"[4] the Supreme Court found the trial court's conclusions were not clearly erroneous, and affirmed the judgment below.

Finally, the court addressed the trial court's application of the doctrine of "reverse veil piercing," an alter ego theory by which, under certain circumstances, the creditor of a person who controls an entity can disregard the corporate form and reach the assets of the entity.[5] The Supreme Court had

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[3] 332 Conn. at 413.
[4] *Id*. at 422, quoting Canty v. Otto, 304 Conn. 546, 564, 41 A.3d 280 (2012).
[5] *Id*. at 437.

discussed reverse veil piercing in an earlier case, *Commissioner of Environmental Protection v. State Five Industrial Park, Inc.*,[6] finding the doctrine unsuited to the facts of the case but not clearly stating whether or not Connecticut recognizes the doctrine at all. In *McKay*, the court concluded after a detailed analysis that the doctrine indeed exists under Connecticut law – but acknowledged the extremely limited reach of this conclusion, given that effective July 9, 2019, by operation of Public Act No. 19-181, Connecticut's General Assembly expressly abolished the reverse veil piercing doctrine.[7] The court determined that the General Assembly intended the act to operate prospectively only.[8]

B. *Supreme Court Parses "Continuing Course of Conduct" Tolling Doctrine*

The Connecticut Supreme Court's decision in *Essex Insurance Company v. William Kramer & Associates, LLC*,[9] features an extensive examination of the continuing course of conduct doctrine, by which the running of a statute of limitations may under some circumstances be tolled.

The plaintiff, an insurance company, hired the defendant, an independent claims adjuster, to adjust the loss arising from damage to an apartment complex in Florida caused by a hurricane in 2005. The plaintiff had issued second-layer insurance coverage for the property. As part of its duties to perform a "full adjustment" of the property, the defendant was required to identify any mortgages on the property, given that any mortgagees could have claims to the insurance proceeds.[10]

The defendant had also been hired by the issuer of the first layer of insurance, Aspen Specialty Insurance Company.[11] The defendant opened a separate file for its work on behalf of Aspen related to the property (the Aspen file).[12]

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6 304 Conn. 128, 37 A.3d 724 (2012).
7 332 Conn. at 432, fn. 27.
8 *Id*.
9 331 Conn. 493, 205 A.3d 534 (2019).
10 331 Conn. at 497, 498.
11 *Id*. at 497.
12 *Id*. at 498, fn. 3.

In 2006, the defendant received a document that identified the mortgage holders on various of the property owner's properties, including a mortgage to Intervest National Bank on the subject property. That document was placed into the Aspen file. But the defendant's employees who were involved in adjusting the loss for the plaintiff were unaware of that document, believed the property was mortgage-free, and communicated that belief to the plaintiff.[13] In March of 2007, the plaintiff issued a claim payment check to the property owner, without listing Intervest as a payee or informing Intervest about the payment.[14] Two months later, the defendant closed its file.

After that, the parties had contact about the matter on three occasions. First, in August or September 2007, an employee of the defendant contacted the plaintiff to inform it that another insurance company, which had issued third-layer coverage for the property, had inquired about the identity of the payee of the plaintiff's payment check. Second, in 2009, after Intervest brought an action against third parties for failure to preserve its mortgage interest in the property, the defendant notified the plaintiff that it had been served with a document subpoena. The defendant produced certain documents – although not the Aspen file – and Intervest in turn cited the plaintiff into the case as an additional defendant. And third, in 2012, the defendant informed the plaintiff that one of its employees was about to be deposed in the Intervest action. At that time, in connection with preparing for the deposition, the defendants' employees reviewed the Aspen file, noticed the mortgage schedule, and disclosed it to the plaintiff.[15] The defendants also produced the file to Intervest.

The plaintiff paid $1 million to settle Intervest's claim against it. In October 2013, the plaintiff sued the defendant for negligence, in the United States District Court for the District of Connecticut. The defendant raised, as a special

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[13] *Id.* at 499.
[14] *Id.*
[15] *Id.* at 500, 501.

defense, the 3-year statute of limitations that applies to negligence actions of this type, General Statutes Section 52-577.[16] The plaintiff replied that the statute had been tolled, by operation of the continuing course of conduct doctrine.[17]

The jury rendered a verdict for the plaintiff, expressly finding, in jury interrogatories, that the continuing course of conduct doctrine applied.[18] But the District Court judge disagreed, and granted the defendant's motion for judgment notwithstanding the verdict.[19] The plaintiff appealed to the U.S. Court of Appeals for the Second Circuit, which certified to the state supreme court the question "Is the trial evidence legally sufficient to support the jury's finding that the statute of limitations was tolled at least through October 21, 2010 [three years before the action was commenced and thus] rendering [the plaintiff's] claim timely?"[20]

The court noted that the continuing course of conduct doctrine applies if there is "evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto."[21] A "continuing duty" may exist if there is evidence of "*either* a special relationship between the parties giving rise to such a continuing duty *or* some later wrongful conduct of a defendant related to the prior act."[22]

The court examined the plaintiff's argument that the defendant, having been hired as an adjuster by the plaintiff, was the plaintiff's agent and therefore had a special relationship of trust with the plaintiff. More precisely, the court framed the question as "not whether an agency relationship existed, but whether an existing agency relationship and any attendant fiduciary duties continued after the final claim check was issued."[23]

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[16] The statute provides "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[17] 331 Conn. at 502.

[18] *Id*. at 502.

[19] *Id*.

[20] *Id*.

[21] *Id*. at 504.

[22] *Id*.; emphasis in original.

[23] *Id*. at 507.

The issue was not limited to whether the relationship between the parties had terminated completely. "That a relationship of agency exists does not foreclose the possibility that it may be preceded or followed by another type of legal relationship between the same parties, nor does it foreclose the possibility that another type of legal relationship may exist contemporaneously between the same parties or that the character of a relationship may evolve over time."[24]

The court noted that not all business relationships give rise to fiduciary duties. "[T]he mere fact 'that one business person trusts another and relies on [the person] to perform [his obligations] does not rise to the level of a confidential relationship for purposes of establishing a fiduciary duty.... [N]ot all business relationships implicate the duty of a fiduciary…[A] mere contractual relationship does not create a fiduciary or confidential relationship.'"[25] Rather, "[t]he unique element that inheres a fiduciary duty to one party is an elevated risk that the other party could be taken advantage of—and usually unilaterally. That is, the imposition of a fiduciary duty counterbalances opportunities for self-dealing that may arise from one party's easy access to, or heightened influence regarding, another party's moneys, property, or other valuable resources."[26]

Applying these principles to the three contacts between the parties after the plaintiff issued the claim check, the court "agree[d] that these facts evidence some sort of relationship," but "disagree[d] that it was a continuation of the special relationship formed by the agreement to provide full adjustment services."[27] When actually performing adjustment services, "the defendant was under a duty to act for the benefit of the plaintiff. The defendant's dominance or influence, and, hence, its fiduciary duties, arose because it,

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[24] *Id*. at 507, 508, quoting 2 Restatement (Third), Agency § 8.01, comment (c), p. 256 (2006).

[25] *Id*. at 508, 509, quoting Saint Bernard School of Montville, Inc. v. Bank of America, 312 Conn. 811, 836, 95 A.3d 1063 (2014). (Brackets in original.)

[26] *Id*. at 509, quoting Iacurci v. Sax, 313 Conn. 786, 801-802, 99 A.3d 1145 (2014).

[27] *Id*. at 510.

unlike the plaintiff, was licensed to perform those services in Florida."[28] But "[n]one of the defendant's actions after [the claim check was issued in] March, 2007, reasonably could be considered further performance of any of the full adjustment services previously delineated and, thus, a further continuation of that fiduciary relationship. … In addition to the fact that the defendant's post-2007 actions were not adjustment services, none of those actions bears the hallmarks of agency generally or of a fiduciary specifically."[29]

The fact that the parties' special relationship had been terminated did not end the court's inquiry; the court noted that "a duty to warn or correct a mistake may extend after the termination of the special relationship that gave rise to that duty."[30] But the continuing duty to warn or correct exists only if the defendant has "*actual* knowledge of the underlying facts and their significance" and "only so long as there remains an opportunity to cure, or at least mitigate, the injury from the original breach that gave rise to the cause of action."[31] Here, the evidence showed that the defendant lacked actual knowledge of the Intervest mortgage on the subject property until 2012 – after the statute of limitations had already run. The fact that the defendant's Aspen file contained a document with the relevant information may have established constructive knowledge on the part of the defendant, but that is not the relevant standard.

Nor was there evidence that the defendant had committed "later wrongful conduct … related to its prior omission."[32] Again, the defendant had lacked actual knowledge of its original error, and the court declined to recognize "a continuing duty to investigate as long as any business relationship existed between the parties … Generally, an agent's duty to use reasonable efforts to give his principal information that is relevant to the affairs entrusted to him

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[28] *Id*.
[29] *Id*. at 501, 511.
[30] *Id*. at 513.
[31] *Id*. at 514, 515; emphasis in original.
[32] *Id*. at 520.

ends with the termination of the agency."[33]

Thus, in reply to the certified question whether the trial evidence was legally sufficient to toll the statute of limitations under the continuing course of conduct doctrine, the court answered "no."

C. *Split Supreme Court Approves Fraudulent Transfer Claim Based on Transfers Made by Debtor's Attorney-in-Fact, Unknown to the Debtor*

In *Geriatrics, Inc. v. McGee*,[34] the Connecticut Supreme Court considered a claim, under the Connecticut Uniform Fraudulent Transfer Act (act),[35] in which a debtor's attorney-in-fact made transfers of the debtor's assets without the knowledge of the debtor. The issue presented was whether, on those facts, the transfers could be deemed "made … by [the] debtor"[36] and therefore potentially actionable under the act. In a 4-3 decision, the court ruled that they could.

The plaintiff, a skilled nursing home, provided services to the defendant Helen McGee (Helen). At all relevant times, Helen's son, Stephen, held a power of attorney over her assets. Under that power, and unbeknownst to Helen, Stephen made a series of payments to himself, out of Helen's assets, ostensibly to compensate himself for personal services rendered to Helen before she was admitted to the plaintiff's facility.

The plaintiff brought suit against both Helen and Stephen for unpaid services rendered to Helen. Among other claims, the plaintiff asserted that Stephen's orchestration of payments to himself, using Helen's assets, gave rise to liability under the act.

Following a courtside trial, the trial court rendered judgment for Stephen. Focusing on language in the act that pro-

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[33] *Id*. at 523.

[34] 332 Conn. 1, 208 A.3d 1197 (2019).

[35] CONN. GEN. STAT. § 52-552a through 52-552l.

[36] General Statutes § 52-552e and § 52-552f both provide that under some circumstances, a "transfer made or obligation incurred by a debtor" may constitute a fraudulent transfer.

vides for recovery when there is a transfer "made … by a debtor," the court found that in the present case, the transfers had been made by Stephen, a "third-party transferor,"[37] and not by the debtor. The court further found no evidence that Helen had participated in the transfers. Accordingly, the trial court ruled that the plaintiff had failed to establish liability on the part of Stephen under the act.

The Supreme Court reversed. Writing for the majority, Justice McDonald[38] noted that under General Statutes Section 52-552k, "Unless displaced by the provisions of [this act], the principles of law and equity, including … the law relating to principal and agent … supplement the provisions of said sections."[39] The court found that the power of attorney created a principal-agent relationship between Helen and Stephen, and "the law of agency generally would impute to Helen the defendant's transfer of Helen's assets."[40] The court further found that this principle of law was not displaced by other provisions of the act. Accordingly, the transfers could be actionable under the act. The court remanded this count of the complaint to the trial court.

Writing for a three-justice minority, Justice D'Auria dissented.[41] The dissenters found no ambiguity in the act's definition of "debtor" as "a person who is liable on a claim,"[42] and concluded that "according to its plain meaning, the act … refers only to transfers made, in some capacity, by the party who owes the debt."[43] The dissenters also noted that this interpretation accords with decisions in other states construing the uniform act.[44]

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37 332 Conn. at 9.
38 Justice McDonald was joined by Justices Palmer, Robinson and Ecker.
39 *Id*. at 13.
40 *Id*. at 14.
41 Justice D'Auria was joined by Justices Mullins and Kahn.
42 332 Conn. at 35, quoting General Statutes § 52-552b(6).
43 *Id*. at 36.
44 *Id*. at 36-39.

D. *Appellate Court Puts Limits on Equitable Forfeiture of Compensation*

The Appellate Court's decision in *Hospital Media Network, LLC v. Henderson*[45] is Connecticut's first appellate case to apply the equitable remedy of forfeiture of compensation since the Connecticut Supreme Court's comprehensive analysis of that doctrine in the 2017 case *Wall Systems, Inc. v. Pompa.*[46]

In *Hospital Media Network*, the defendant's employment had been terminated for "actively working for various companies unrelated to [the plaintiff] for his own benefit and without [the plaintiff's] permission or knowledge during regular business hours."[47] The defendant's side work was not in competition with the plaintiff's business, and the trial court found that he had not usurped any business opportunity available to the plaintiff.[48] Indeed, the court found that the defendant's work for the plaintiff had significantly contributed to "a sharp increase in the company's sales" and "terrific growth."[49]

But nevertheless the trial court, applying the equitable remedy of forfeiture of compensation, ordered the defendant to forfeit the entirety of the compensation that he received from the plaintiff during his approximately eight months of employment, and all of the benefit he received from his side work.[50] The court rendered judgment for the plaintiff on its claim of breach of fiduciary duty, in the amount of $454,579.76.

The Appellate Court reversed. The court observed that the trial court had noted the defendant's significant contributions to the plaintiff, and that his acts had been "uninformed" and "stupid" but not malicious. Applying the criteria set forth in the *Wall Systems* case, the Appellate Court found

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45 187 Conn. App. 40, 201 A.3d 1059 (2019).
46 324 Conn. 718, 154 A.3d 989 (2017).
47 187 Conn. App. at 43.
48 *Id.* at 47.
49 *Id.* at 56.
50 *Id.* at 47, 48.

"the award of monetary relief was disproportionate to the misconduct at issue and failed to take into account the equities of the case at hand."[51] The court remanded the case for a new hearing in damages.

The *Hospital Media Network* case is noteworthy for the Appellate Court's observation that the employee duty of loyalty is a type of fiduciary duty.[52] Thus, it should follow that in cases involving this type of claim, as with other fiduciary duty cases, the burden shifts to the defendant employee to prove, by clear and convincing evidence, that his conduct was consistent with his fiduciary duty. The shifting burden of proof and enhanced standard of proof were not at issue in *Hospital Media Network*, because the defendant had been defaulted, thus establishing liability as a matter of law, and the court rendered judgment after a hearing in damages.

E. *Attorneys' Fees Awarded Due to Bad-Faith Defenses*

In *Stamford Hospital v. Schwartz*,[53] the Appellate Court affirmed the trial court's award of attorneys' fees to the plaintiff based on the defendants' bad faith in asserting frivolous defenses. The case was a collection action, for hospital services rendered to the defendants' minor daughter. For compelling evidence of bad faith, both the trial court and the Appellate Court took special note that in the defendants' trial testimony, they professed uncertainty about whether their daughter was actually their child.

The defendants argued that because the plaintiff's claim was for a consumer debt, any award of legal fees was subject to a cap of fifteen percent of the claim, pursuant to General Statutes Section 42-150aa(b). The Appellate Court rejected that argument, holding that, when an award of legal fees is based on the court's inherent power to punish bad faith, the statutory cap does not apply.

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[51] *Id*. at 54.

[52] *Id*. at 42, fn. 2.

[53] 190 Conn. App. 63, 209 A.3d 1243, *cert. denied* 332 Conn. 911, 209 A.3d 644 (2019).

F. *Encumbered Assets Could Not Be the Subject of a Fraudulent Transfer*

In *Smith v. Marshview Fitness, LLC*,[54] a fraudulent transfer action under both the common law and the Uniform Fraudulent Transfer Act (act),[55] the Appellate Court affirmed the trial court's entry of summary judgment in favor of the defendant. The trial court found that the subject of the transfer, equipment used in the operation of two fitness centers, had been fully encumbered by a security interest held by a bank. Accordingly, the items did not constitute "assets" within the meaning of the act, which by definition excludes "[p]roperty to the extent it is encumbered by a valid lien."[56] Because the act applies only to transfers of "assets," the equipment at issue could not be the subject of a claim under the act. The Appellate Court affirmed, noting that logically, the statutory definition should also apply to the plaintiff's common-law claim.[57]

G. *Judgment Debtor Failed to Preserve Property Exemption Rights*

In *Colon-Collazo v. Cox*,[58] the Appellate Court held that, if a judgment debtor wishes to claim that an item of personal property is exempt from execution, to the debtor must file a signed exemption claim form as prescribed by General Statutes Section 52-361b(d).

In this case, the judgment creditor levied upon the contents of a storage unit that was in the name of the judgment debtor's father, and filed a claim for determination of interests in disputed property, directed to the contents of the storage unit. Following an evidentiary hearing, the trial court determined that the contents of the unit were owned by the judgment debtor, but went on to hold that certain items were exempt from execution. The judgment debtor had not filed

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54 191 Conn. App. 1, 212 A.3d 767 (2019).
55 Conn. Gen. Stat. § 52-552a et seq.
56 Conn. Gen. Stat. § 52-552b(2)(A).
57 191 Conn. App. at 10, fn. 4.
58 191 Conn. App. 251, 219 A.3d 512 (2019).

an exemption claim form. The Appellate Court held that the statutory procedure for claiming an exemption is mandatory, and that given the judgment debtor's failure to follow the procedure, the court's exemption order was error.

H. *Attorneys' Fees Awarded Even Though Most of the Plaintiffs' Claim for Relief Was Denied as Moot*

In *Francini v. Riggione*,[59] the defendant challenged the court's award of attorneys' fees to the plaintiffs as prevailing party, pursuant to a fee-shifting provision in their contract. The plaintiffs had purchased a building lot from the defendant, and their contract required the defendant to perform improvements on the subject parcel, including installing a driveway apron, installing curb cuts, and planting two trees (the subject lot obligations).[60] The contract also required the defendant to perform certain tasks on an adjoining lot that he retained, specifically to level a thirteen-foot topsoil pile and trim some tree limbs, all of which obscured the plaintiffs' view of Long Island Sound (the adjoining lot obligations).[61]

The plaintiffs prevailed at trial on their claim for breach of the subject lot obligations, and the court awarded damages in the amount of $4,100.[62] However, the court denied the plaintiffs' claim for injunctive relief as to the adjoining lot obligations, finding that the defendant had made those claims moot by performing the required work while the trial was in progress.[63]

Following an evidentiary hearing on the plaintiffs' subsequent motion for attorneys' fees, the court made an award of $93,405.[64]

The defendant contended that this award was excessive in comparison to the monetary damages, and given that the claims for injunctive relief had been rendered moot. The Ap-

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[59] 193 Conn. App. 321, 219 A.3d 452 (2019).
[60] 193 Conn. App. at 326, fn. 7.
[61] *Id*. at 325.
[62] *Id*. at 326.
[63] *Id*. at 326, 328.
[64] *Id*. at 327.

pellate Court disagreed. "[R]egardless of whether the defendant's ultimate performance was court ordered or done by his own volition, the fact remains that the defendant, despite his contractual obligations, removed the view-obscuring impediments only after significant litigation. The fact that the defendant rendered the plaintiffs' claims for injunctive relief under the breach of contract claims moot by performing as required under the contract well into trial does not obviate the plaintiffs' legitimate claim for attorney's fees pursuant to the contract."[65]

I. *Developer Held Unjustly Enriched by Unpaid Architectural Services for Unbuilt Project*

In *Crosskey Architects, LLC v. POKO Partners, LLC*,[66] the defendant real estate developer contended it could not have been unjustly enriched by the plaintiff's unpaid architectural services, given that the project never went forward. The trial court disagreed, and entered judgment for the plaintiff on its claim for quantum meruit.

The Appellate Court affirmed. "Under the equitable doctrine of quantum meruit, a defendant that obtains the services requested receives a benefit. ... 'The defendant is benefitted when he gets what he wants, regardless of market value.'"[67]

The Appellate Court also found that it was within the trial court's discretion to use the price set forth in the parties' unsigned and therefore unconsummated contract as the measure of damages. "'Although not directly enforceable under the contract, the contract price is evidence of the reasonable value of the benefit the defendant received from the plaintiff.'"[68]

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[65] *Id*. at 332, 333.

[66] 192 Conn. App. 378, 218 A.3d 133 (2019).

[67] 192 Conn. App. at 396, quoting 1 D. Dobbs, Law of Remedies (2d Ed. 1993) § 4.5(2), p. 634.

[68] *Id*. at 398, quoting Walpole Woodworkers, Inc. v. Manning, 307 Conn. 582, 590, 57 A.3d 730 (2012).

J. *Landlord Could Pursue Unjust Enrichment in Parallel with Summary Process Action*

A1Z7, LLC v. Dombek[69] involved a plaintiff that had taken title to a residential property following a tax auction, and had brought a summary process action against the previous owner, who continued to occupy the house. In connection with the summary process action, the plaintiff obtained an order of use-and-occupancy payments, pursuant to General Statutes Section 47a-26b (use and occupancy statute). That statute authorizes the court to order such payments prospectively only, from the date of the order.

The plaintiff also brought a separate action, under the theory of unjust enrichment, for the defendant's use and occupancy of the property for the months preceding the payment order in the summary process action. The defendant claimed the second action was improper, asserting that the plaintiff's rights under the use and occupancy statute, under the umbrella of the summary process action, was an exclusive one.

The Appellate Court disagreed, noting that summary process is supposed be a "quick and effective" means of dispossessing a tenant, and for that reason does not provide for money damages for past use and occupancy. The court found that the parallel action claiming unjust enrichment did not frustrate the purposes of the use and occupancy statute, and was proper.

K. *Law Firm Representing Itself in Claim for Unpaid Fees Cannot Tack on Fees for the Collection Action*

In *Rosenthal Law Firm, LLC v. Cohen*,[70] the plaintiff law firm obtained an arbitration award against a former client for nonpayment of fees, and then brought a separate action for attorneys' fees incurred in obtaining the award, confirming it in the Superior Court and defending it in the Appellate Court. The plaintiff relied on a provision in its retention

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[69] 188 Conn. App. 714, 205 A.3d 740 (2019).
[70] 190 Conn. App. 284, 210 A.2d 579 (2019).

agreement with the defendant that made the defendant liable for "all costs related to a collection action including [the plaintiff's] attorney fees…"[71] The plaintiff's sole member represented the firm throughout the arbitration and litigation.

The trial court rendered judgment for the defendant, based on the principle that a pro se plaintiff is not entitled to an award of attorneys' fees. The plaintiff argued, unsuccessfully, that that principle should not apply to a self-represented law firm. The Appellate Court affirmed the judgment for the defendant.

II. Creditors' Rights

A. *Bank's Alleged Misconduct in Post-Default Workout Negotiations and Mediation May Give Rise to Foreclosure Defenses*

In *U.S. Bank National Association v. Blowers*,[72] the Connecticut Supreme Court vacated a judgment of strict foreclosure that had been affirmed by the Appellate Court.[73] The trial court had stricken special defenses and counterclaims based on alleged improper conduct by the bank in connection with negotiating a post-default modification, and its participation in court-annexed mediation. The Appellate Court agreed with the trial court that, under established law, special defenses in a foreclosure action must address "the making, validity or enforcement of the mortgage, the note or both,"[74] and that the allegations at issue did not satisfy that test.

The Supreme Court disagreed, finding that the allegations had a sufficient nexus to "enforcement" of the mortgage. "[A] proper construction of 'enforcement' includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications,

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[71] 190 Conn. App. at 286.

[72] 332 Conn. 656, 212 A.3d 226 (2019).

[73] The Appellate Court decision is reported at 177 Conn. App. 622, 172 A.3d 837 (2017).

[74] 332 Conn. at 663.

when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default."[75] Allegations that the mortgagee "reneged upon modifications" would also meet the test.[76]

B. *Divided Appellate Court Denies Foreclosure Due to Faulty Loan Documents*

In *JPMorgan Chase Bank v. Virgulak*,[77] a divided panel of the Appellate Court affirmed the trial court's judgment in favor of the defendant, Theresa Virgulak, in a residential foreclosure action.

The defendant's husband, Robert Virgulak, executed a $533,000 note to the plaintiff bank. Theresa did not co-sign the note, nor did she sign a guaranty of the obligation. She did execute a mortgage of residential property that she owned. The mortgage properly recited the date and amount of the loan, but erroneously identified Theresa as maker of the note. The mortgage did not reference Robert. Based on the discrepancy in the loan documents, Theresa denied liability and pled special defenses.

The plaintiff argued that it could foreclose the mortgage as written, or alternatively that the court should order reformation of the note and/or mortgage, and then a judgment of foreclosure. The trial court denied both forms of relief, and entered judgment for the defendant.

The Appellate Court agreed that the mortgage could not be foreclosed as executed, characterizing it as "a nullity because it secured a nonexistent debt."[78] The court also described the equitable remedy of reformation as "the proper prerequisite in order for the plaintiff to correct the purported mistake in the mortgage document."[79]

But the court also affirmed the trial court's denial of the

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[75] *Id*. at 667.
[76] *Id*. at 675.
[77] 192 Conn. App. 688, 218 A.3d 596, *cert. granted* 333 Conn. 945, 219 A.3d 375 (2019).
[78] *Id*. at 703.
[79] *Id*. at 703, 704.

plaintiff's claim for reformation, agreeing with the defendant that the plaintiff "did not meet its burden of proving by 'clear, substantial and convincing evidence' that there was a mutual mistake made by the parties to warrant reformation."[80] The Appellate Court cited "many gaps ... in the factual record,"[81] such as questions about the defendant's state of mind when she signed the mortgage and associated closing documents, an absence of direct communications between the bank and defendant, and a lack of evidence that the mortgage had been integral to the bank's decision to extend the loan to Robert.[82]

Judge Bear dissented, arguing that the mortgage could be foreclosed as executed. "When the essence of a transaction is clear, as it is in this case, a court must look to its substance, instead of relying upon errors of form, to determine its enforceability against a party to it. As our Supreme Court observed, '[e]quity always looks to the substance of a transaction and not to mere form ... and seeks to prevent injustice.'"[83]

Judge Bear went on to characterize the substance of the transaction. "[T]he note and the mortgage ... although signed separately, constituted one unified transaction through the joint and concerted actions, with full knowledge of the consequences, of the defendant and Robert, and resulted in them obtaining $533,000 from JPMorgan Chase while also providing security for repayment of the loan."[84]

To his mind, that made it appropriate to "view the note and mortgage as elements of one transaction or alternatively, to view the mortgage from the defendant to JPMorgan Chase as a grant of security, in the nature of a guaranty, for the repayment of Robert's note to JPMorgan Chase. ... In the present case, the defendant provided security in connection with, but only to the extent of, her equity in the real prop-

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[80] *Id*. at 706.
[81] *Id*. at 714.
[82] *Id*. at 713-715.
[83] *Id*. at 725, quoting Natural Harmony, Inc. v. Normand, 211 Conn. 145, 149, 558 A.2d 231 (1989).
[84] *Id*. at 729.

erty."[85] Framing the transaction thus, in Judge Bear's view, the mortgage could be foreclosed.

C. *Notice to Only One Joint Obligor Deemed Sufficient*

In *Deutsche Bank National Trust Co. v. Ponger*,[86] the Appellate Court reaffirmed the principle that notice to one joint obligor or one joint tenant is deemed to be notice to the other. One defendant, the husband, signed a promissory note, and both defendants, husband and wife, who were joint tenants of a residential property, signed the corresponding mortgage deed. The bank sent a notice of default and acceleration to the husband only. The wife claimed that the lack of notice to her provided a bar to foreclosure, but the trial court disagreed, rendering a judgment of strict foreclosure. The Appellate Court affirmed.

D. *State-Law Remedies for Bankruptcy Abuse Held Preempted by Federal Law*

In *Metcalf v. Fitzgerald*,[87] the Connecticut Supreme Court ruled that federal bankruptcy law preempts state law for claims based on alleged misconduct by a creditor and its attorneys in connection with a bankruptcy proceeding.

The plaintiff, Jonathan Metcalf, had been a debtor in a Chapter 7 bankruptcy case. Ion Bank, a creditor, brought an adversary proceeding in Bankruptcy Court, seeking to prevent discharge of the debt. In the face of Metcalf's motion for summary judgment and supporting evidence, the bank voluntarily dismissed the adversary proceeding.

Metcalf in turn brought an action in Connecticut Superior Court, claiming that the bank's pursuit of the adversary proceeding constituted vexatious litigation and an unfair trade practice under Connecticut law. The trial court dismissed the action, finding that the claims were preempted by the Bankruptcy Code, thus depriving the state courts of subject-matter jurisdiction.

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[85] *Id*. at 730, 732.
[86] 191 Conn. App. 76, 213 A.3d 495 (2019).
[87] 333 Conn. 1, 214 A.3d 361 (2019).

The state Supreme Court agreed. The court noted that there are three types of preemption: express preemption, when explicit Congressional language clearly bars state-law claims; implied preemption, when Congress has "occupied the field," to the exclusion of state law; and conflict preemption, when compliance with both federal law and state law is impossible or impracticable.

The court found that the principle of implied preemption applied to the issue at hand. "[B]ecause Congress has enacted such a comprehensive statutory scheme, inclusive of provisions for sanctions and remedies for abuse of the bankruptcy process, Congress has implicitly occupied the field, leaving no room for state law."[88]

The court noted that Section 105 of the Bankruptcy Code gives the bankruptcy courts broad equitable powers to "implement the provisions of Title 11 and to prevent an abuse of the bankruptcy process."[89] In addition, Bankruptcy Rule 9011 authorizes the bankruptcy courts to "sanction parties who file documents in bad faith or for an 'improper purpose, such as to cause unnecessary delay or ... cost ...'"[90] The court inferred from these provisions that Congress intended to "occup[y] the field by legislating comprehensively as to penalties and sanctions for abuse of [the bankruptcy] process."[91] The court also concluded that "Congress' interest in uniformity in the bankruptcy process is so dominant as to prevent collateral attacks through state law vexatious litigation and CUTPA claims."[92]

E. *Bankruptcy Filing Automatically Reset Foreclosure Law Days*

In *Seminole Realty, LLC v. Sekretaev*,[93] the Appellate Court reaffirmed its 2004 holding in *Provident Bank v. Lewitt*[94] about the legal effect of a mortgagor filing for bank-

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88 333 Conn. at 13.
89 *Id*. at 16, 17.
90 *Id*. at 18.
91 *Id*. at 20.
92 *Id*. at 21.
93 192 Conn. App. 405, 218 A.3d 198, *cert. denied* 334 Conn. 905, 220 A.3d 35 (2019).
94 84 Conn. App. 204, 852 A.2d 852, *cert. denied*, 271 Conn. 924, 859 A.2d 580 (2004).

ruptcy relief after a judgment of strict foreclosure has entered but before the running of the law days.

The court held that the automatic stay under 11 U.S.C. Section 362(a) does not stop the running of the law days. "[T]he automatic stay provision of § 362(a) prevents only certain affirmative acts taken by a creditor, and the running of time is not one of those acts."[95]

Rather, the applicable provision under the Bankruptcy Code is 11 U. S.C. § 108(b).[96] That statute provides in relevant part "[i]f ... an order entered in a nonbankruptcy proceeding, or an agreement fixes a period of time within which the debtor ... may ... cure a default ... and such period has not expired before the date of the filing of the petition, the trustee may only ... cure ... before the later of – (1) the end of such period ... or (2) 60 days after the order for relief."

For purposes of this statute, the foreclosure court's setting of law days "fixes a period of time within which the debtor … may …. cure a default," and the filing of a bankruptcy petition constitutes an "order for relief." Thus, by operation of 11 U.S.C. § 108(b), the running of the law days "was not stayed when [the mortgagor] filed a chapter 7 petition in bankruptcy, but was extended by sixty days after she filed her petition."[97]

F. *Bank Barred from Opening and Modifying Supplemental Judgment, Three Years after Judgment, Based on Borrower's Fraud*

In *Stamford v. Rahman*,[98] the Appellate Court weighed a trial court's order opening and vacating a supplemental judgment entered in a foreclosure case more than three years earlier. The plaintiff brought suit to foreclose a blight lien, and named three subsequent encumbrancers as defendants: mortgage holders Wells Fargo Bank, Bank of America and JPMorgan Chase. The first named defendant, owner of the

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[95] 192 Conn. App. at 419, quoting *Provident Bank*, 84 Conn. App. at 208.
[96] *Id*. at 419, 420.
[97] *Id*. at 420.
[98] 188 Conn. App. 1, 204 A.3d 27 (2019).

property, had procured the Bank of America mortgage with the help of a fraudulent satisfaction of mortgage that purportedly released the prior Wells Fargo mortgage. That false instrument was never recorded in the land records.

Wells Fargo never filed an appearance in the city's foreclosure action, and was defaulted. Following a judgment of foreclosure by sale, the property was auctioned, and generated $348,097.16 in surplus proceeds that were paid into court. Bank of America filed a motion for supplemental judgment, seeking an award of the surplus proceeds. Bank of America noted that Wells Fargo had never appeared, had never submitted an affidavit showing what amount, if any, remained owing on its mortgage, and through its inaction threated to tie up the auction proceeds indefinitely. The court granted Bank of America's motion.

Three years later, Wells Fargo filed an appearance in the case, and moved to open the supplemental judgment. Wells Fargo argued that the usual four-month time limit to open a judgment (the four-month rule), under General Statutes Section 52-212a, should not apply because the supplemental judgment had been obtained by fraud – on the part of the borrower, not of Bank of America. The trial court agreed that the four-month rule did not apply, because of fraud and also because Bank of America had not provided Wells Fargo – which had been defaulted for failure to appear – with notice of the motion for supplemental judgment. The trial court went on to open the supplemental judgment in favor of Bank of America, and entered a new supplemental judgment awarding the auction proceeds to Wells Fargo.

Following an appeal by Bank of America, the Appellate Court reversed. The trial court had made a factual finding that Wells Fargo acted with reasonable diligence to identify the fraud and exercise its rights, but the Appellate Court determined that that finding was clearly erroneous. Furthermore, the court made two conclusions of law relevant to avoidance of the four-month rule: that the defaulted Wells Fargo had not been entitled to a service copy of the motion for supplemental judgment, and the "judgment obtained by

fraud" exception was inapplicable given that the fraud had been committed not by Bank of America but by another party, the borrower.

G. *Bankruptcy Stay Did Not Bar Immediate Payment to Court-Appointed Foreclosure Committee*

In *U.S. Bank National Association v. Crawford*,[99] the Connecticut Supreme Court held that when a foreclosure defendant files for bankruptcy protection after a foreclosure by sale has been ordered, the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a)(1), does not bar the committee for sale from immediately seeking payment from the foreclosing bank for the committee's fees and expenses.

The trial court entered a judgment of foreclosure by sale, and appointed an attorney to serve as committee to conduct the sale. After the committee had performed work and incurred expenses, but before the auction took place, the defendant filed for bankruptcy protection. The committee promptly filed a motion under General Statutes Section 49-25, which provides in relevant part "if for any reason the sale does not take place, the expense of the sale and appraisal or appraisals shall be paid by the plaintiff and be taxed with the costs of the case…"

The trial court denied the committee's motion, relying on the Appellate Court's decision in *Equity One, Inc. v. Shivers*.[100] In that case, the court had ruled that the Bankruptcy Code's automatic stay barred a similarly situated committee from obtaining payment for the committee's fees and expenses from the nondebtor plaintiff.

Upon the committee's writ of error, the Supreme Court overruled Shivers, holding that the state courts lack subject-matter jurisdiction to extend the automatic stay provision to proceedings against nondebtors.[101]

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[99] 333 Conn. 731, 219 A.3d 744 (2019).
[100] 150 Conn. App. 745, 93 A.3d 1167 (2014).
[101] 333 Conn. at 750.

H. Validating Act Cured Improperly Witnessed Mortgage Deed

In *Wells Fargo Bank v. Fratarcangeli*,[102] a foreclosure action, the defendant claimed that the mortgage deed should not be enforced against her. Specifically, she claimed that the notary had not provided a second witness to execution of the deed, as required by General Statutes Section 47-5(a). Rather, the notary had her husband "witness" the defendant's signature after the closing, and affix his signature to the mortgage deed without the defendant's knowledge. The defendant contended that the mortgage was therefore fraudulent, and pled special defenses of illegal attestation and unclean hands.

The bank successfully moved to strike these defenses, based on the validating act, General Statutes Section 47-36aa. That act provides that this type of mortgage defect is deemed automatically cured unless an action challenging the mortgage is commenced, and a corresponding notice of lis pendens recorded in the land records, within two years after the mortgage is recorded.

The Appellate Court affirmed. The court rejected the defendant's contention that there was an implicit fraud exception to the validating act. The court further agreed that the defense of unclean hands, being entirely derivative of the defective attestation defense, was ineffective.

III. Closely Held Businesses

A. *Prior Version of LLC Act Did Not Provide for Derivative Actions by Members*

In *Saunders v. Briner*,[103] the Connecticut Supreme Court ruled that under the now-repealed Connecticut Limited Liability Company Act, General Statutes (Rev. to 2017) Section 34-100 *et seq*. (LLC Act), a member of an LLC does not have standing to pursue a derivative action on behalf of the entity, unless the company's operating agreement authorizes it.

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[102] 192 Conn. App. 159, 217 A.3d 649 (2019).
[103] 334 Conn. 135, 221 A.3d 1 (2019).

The court noted that the LLC Act contains no express provision for derivative actions, and contrasted the act with the Connecticut Uniform Limited Liability Company Act, enacted effective July 1, 2017, which does.[104] Rather, Section 34-187 of the LLC Act authorizes members "to collectively commence an action in the name of the limited liability company upon a requisite vote of disinterested members or managers."[105] That section of the LLC Act was modeled on section 1102 of the Prototype Limited Liability Company Act, whose drafters "emphasize[d] that [§ 1102] does not permit derivative suits unless they are provided for in the operating agreement."[106] Rather, prototype section 1102 was intended as "a substitute for the derivative action," appropriate in the LLC setting given that the "members can be expected to be actively interested in the firm, and … can readily be coordinated for a vote on a suit by the firm."[107]

The court also declined to find that members of an LLC have a common-law right to bring a derivative action. The court noted that limited liability companies are creatures of statute, not the common law, and held that recognizing such a common-law remedy would conflict with or frustrate the purpose of the LLC Act.[108]

The court also addressed certain counts of the complaint asserted by an individual plaintiff, claiming nonpayment of a loan he had made through an LLC owned solely by him. The defendants challenged his standing to personally pursue claims held by his LLC.

The court acknowledged the "general rule" that "members of limited liability companies cannot bring a direct action alleging harm to the company,"[109] but had "not addressed the specific question of whether the member of a single-member limited liability company has standing to bring an action di-

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[104] 334 Conn. at 160, fn. 26.
[105] *Id*. at 158.
[106] *Id*. at 159, 160, quoting 3 L. Ribstein & R. Keatinge, Limited Liability Companies (2d Ed. 2011) Appendix C, p. App. C-109.
[107] *Id*. at 160, 161, quoting Ribstein at p. App. C-10.
[108] *Id*. at 163, 164.
[109] *Id*. at 168.

rectly on behalf of the company."[110] The court held that such a claim may be permitted if "to do so will not (1) unfairly expose the company or defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors of the company, or (3) negatively impact other owners or creditors of the company by interfering with a fair distribution of the recovery among all interested parties."[111]

Justices Robinson, McDonald and Mullins dissented regarding the part of the opinion that held that the sole member of a one-member limited liability company may have individual standing to pursue a claim held by the entity.

B. *In Shareholder Buyout in Lieu of Dissolution, No Discount for Minority Status or Lack of Marketability*

In *R.D. Clark & Sons, Inc. v. Clark*,[112] the Appellate Court addressed several issues relating to a closely held corporation's buyout of its shareholder in lieu of dissolution, pursuant to General Statutes Section 33-900. The parties were unable to reach agreement on a purchase price for the petitioning shareholder's one-third interest in the company, so the court conducted a trial on the issue of fair value.

The corporation argued to the trial court that, in making factual findings on the corporation's projected future earnings, the court should apply a reduction based on anticipated pass-through tax liabilities to the shareholders – even though the entity itself, as an S corporation, did not pay taxes. Noting a split of legal and accounting authority on this issue, the trial court declined to apply a "tax affecting" discount to the company's income projections. The Appellate Court affirmed, finding that the trial court had properly exercised its discretion in this regard.

The corporation also argued that the petitioner's one-third interest should be discounted due to his status as a minority owner. Noting the distinction between "fair value" – the

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[110] *Id*.
[111] *Id*. at 176.
[112] 194 Conn. App. 690, 222 A.3d. 515 (2019).

touchstone under the statute – and "fair market value," the trial court set fair value at one-third of the value of the entire company, with no minority discount. The court justified this approach by finding that the petitioner had been subject to oppression at the hands of the majority shareholders. That finding, in turn, was based on the fact that after the petitioner's termination as an employee of the company, the majority owners had "excluded him from the corporation's long-standing policy of providing shareholders with funds to pay the federal tax liabilities they incurred as shareholders in an S corporation."[113]

The Appellate Court affirmed. The court determined that the trial court's finding of oppression was not clearly erroneous, nor did the court abuse its discretion in declining to apply a minority discount to the petitioner's interest in the company.

The trial court also addressed the corporation's claim that the petitioner's shares should be discounted due to lack of marketability. Marketability discounts are premised on "the lack of liquidity on the open market of an ownership interest in a closely held corporation."[114] The court found that such a discount should apply in the context of a fair-value hearing only if there are "extraordinary circumstances" to justify it, but such extraordinary circumstances were absent here. Again, applying the "abuse of discretion" standard, the Appellate Court affirmed.

C. *Provision in Partnership Agreement that Chose Delaware Law Did Not Import Delaware Statute of Limitations*

In *Reclaimant Corp. v. Deutsch*,[115] the Connecticut Supreme Court addressed a thorny choice of law issue at the intersection of Delaware and Connecticut law, in the context of an internal partnership battle.

In 2013, the plaintiff, successor in interest to a Delaware

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[113] 194 Conn. App. at 706.
[114] *Id.* at 714.
[115] 332 Conn. 590, 211 A.3d 976 (2019).

limited partnership, sued two Connecticut limited partners in Connecticut Superior Court. The plaintiff claimed that the defendants had been unjustly enriched by improperly calculated – and unduly generous – distributions paid by the limited partnership in 2008.

The defendants asserted that these claims were barred by section 17-607(c) of the Delaware Revised Uniform Limited Partnership Act. That statute provides "[u]nless otherwise agreed, a limited partner who receives a distribution from a limited partnership shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of 3 years from the date of the distribution."

The trial court noted that the limited partnership agreement contained a choice of law provision that recited "This [a]greement and all rights and liabilities of the parties hereto shall be governed by and construed in accordance with the laws of the [s]tate of Delaware, without regard to its conflict of law principles."[116] On that basis, the court agreed with the defendants that the claims were time-barred under Delaware law.

The Connecticut Supreme Court reversed. The court agreed that Delaware law controlled the relevant substantive law, including the plaintiff's unjust enrichment claims. However, on issues of procedure, the law of the forum controls, and that ordinarily applies to statutes of limitation.

The court examined Delaware's law of unjust enrichment, and determined that, as in Connecticut, that cause of action existed under the common law. That is, it does not arise under a statute containing an embedded time limit that may be deemed substantive law. "Given the common-law origin of the plaintiff's unjust enrichment claims, we conclude that the limitation period is properly characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right. Accordingly, Connecticut

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[116] 332 Conn. at 596.

law, rather than Delaware law, governs the timeliness of the plaintiff's claims."[117]

The court noted that the choice of law provision in the limited partnership agreement could have been written in a way that included procedural law, including the statute of limitations, but was not. "Choice of law provisions in contracts are generally understood to incorporate only substantive law, not procedural law such as statutes of limitations ... [A]bsent an express statement that the parties intended another state's limitations statute to apply, the procedural law of the forum governs time restrictions."[118]

Turning to Connecticut law on the issue at hand, the court reaffirmed the principle that unjust enrichment "is an equitable claim for relief. As an equitable claim, its timeliness is not subject to a statute of limitations but, rather, to the equitable doctrine of laches."[119] Noting that the trial court had made no factual filings as to that defense, the Supreme Court remanded the case to the trial court for further proceedings.

IV. Unfair Trade Practices

A. *Hardball Business Practices Did Not Violate CUTPA*

In *Cadco, Ltd. v. Doctor's Associates, Inc.*,[120] the Appellate Court agreed with the trial court that, as a matter of law, some very aggressive business practices did not constitute violations of the Connecticut Unfair Trade Practices Act, General Statutes Sections 42-110a et seq. ("CUTPA").

The plaintiff, a manufacturer, negotiated with the defendants, the franchisor of the Subway restaurant chain and affiliates of the franchisor (collectively, "Subway"), about the creation and production of a flat metal heating plate to cook a proposed new flatbread pizza product called the "Flatizza." Over months of negotiations, the plaintiff created multiple

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[117] *Id*. at 607, citation and internal punctuation omitted.
[118] *Id*. at 609, 607, citation and internal punctuation omitted.
[119] *Id*. at 613.
[120] 188 Conn. App. 122, 204 A.3d 737 (2019).

prototypes of the heating plate, which Subway paid for and tested, and shared detailed design information with Subway.[121] The plaintiff claimed that, during the course of the parties' communications, it informed Subway that it had applied for a patent for its heating plate.[122] It was undisputed that the parties did not enter into a confidentiality agreement with respect to the design information.[123]

After some 20 months of communications, Subway informed the plaintiff that it had decided to procure the heating plate from another supplier. The plaintiff subsequently learned that Subway had moved ahead with the rollout of the Flatizza, and that its restaurants were using heating plates that were virtually identical to the plaintiff's, provided by a different supplier. An executive of that supplier was married to the president of Subway, who had been copied on emails between the plaintiff and Subway concerning the heating plate project.[124]

The plaintiff brought suit, claiming Subway had violated CUTPA by inducing the plaintiff to believe it would receive the contract, and thereby causing it to share its design information; giving that design information to a competitor that had personal ties with Subway; and then awarding the contract to the competitor. The trial court granted Subway's motion for summary judgment.

The Appellate Court affirmed. It agreed with the trial court that there was "no factual basis for the plaintiff's claim that it was unfairly induced to act to its own detriment in any way. To the contrary … the plaintiff freely sold the defendants a product and the design specifications therefor that were unprotected, and thus fully available to the defendants to use, refine or copy as they saw fit."[125]

As for the plaintiff's complaint that it had informed Subway about a pending patent application for the heating plate,

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[121] 188 Conn. App. at 125.
[122] *Id.* at 135.
[123] *Id.*
[124] *Id.* at 128, 129.
[125] *Id.* at 132.

and that Subway nevertheless took the design to a competitor, the Appellate Court rejected the proposition that such conduct, if proven, would violate any public policy and thus support a CUTPA claim. "By informing the defendants that they were in the process of applying for a patent and marking their product 'Patent Pending,' the plaintiff merely gave notice that the plate might be subject to future protection. … The defendants were free to do as they wished with the plaintiff's products that they purchased in that time frame, including showing those products, which they then owned without restriction, to other companies and asking those companies to refine the products' design. The public policy underlying our patent law supports such imitation and refinement."[126] The court noted that the plaintiff could have "obtain[ed] a confidentiality agreement or some other stopgap measure to protect its product design until the patent it had applied for was issued,"[127] but had not.

The Appellate Court further found "Nothing about the fact that the defendants gave the contract to a manufacturer run by the spouse of the president of [Subway] offends public policy."[128]

B. *Mortgage Servicer's Misconduct in Post-Default Workout Negotiations May Violate CUTPA*

In *Cenatiempo v. Bank of America, N.A.*,[129] the Connecticut Supreme Court ruled that a mortgage servicer may violate the Connecticut Unfair Trade Practices Act[130] through "systematic misrepresentations, delays and evasiveness" in connection with post-default negotiations to restructure a residential mortgage loan.

The plaintiffs alleged that the defendant had repeatedly requested duplicative and unnecessary documentation, created extended delays in the loan modification process, re-

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[126] *Id*. at 136, 137.
[127] *Id*. at 141.
[128] *Id*. at 137.
[129] 333 Conn. 769, 219 A.3d 767 (2019).
[130] Conn. Gen. Stat. § 42-110a et seq.

peatedly changed the personnel responsible for communicating with the plaintiffs, issued confusing and contradictory written instructions, and discouraged the plaintiffs from participating in foreclosure mediation.[131] The plaintiffs claimed that this conduct offended the public policy embodied in the federal Home Affordable Modification Program (HAMP), the federal Real Estate Settlement Procedures Act,[132] a federal consent order, a national mortgage settlement to which the defendant was a party, and the state's foreclosure mediation program.[133] The plaintiffs asserted claims under CUTPA and negligence.

The trial court granted the defendant's motion to strike both counts of the complaint. But the Supreme Court, applying the three-prong "cigarette rule" for evaluating CUTPA claims, ruled that this was error as to the CUTPA count. The court found that the statutes, regulations and court orders regulating mortgage modifications "form a comprehensive policy framework," and allegations that the defendant "made a conscious decision to depart from those standards and deliberately engage in a pattern of conduct intended to prevent homeowners, like the plaintiffs, from receiving HAMP modifications" sufficed to state a CUTPA claim.[134]

The court further held that the trial court had properly stricken the plaintiffs' claim for common-law negligence, finding as a matter of law that the lender owed the borrowers no duty of care under the circumstances. The plaintiffs argued on appeal that their negligence claim could be construed as including a theory of negligence per se, based on the defendant's alleged breach of statutory provisions, but the Supreme Court disagreed that the complaint could be read that broadly. Accordingly, the court declined to address the issue of whether such a claim may be legally viable.

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131 333 Conn. at 777.
132 12 U.S.C. Section 2601 et seq.
133 333 Conn. at 777.
134 *Id*. at 791.

V. Contracts

A. *Lease Guaranty Did Not Extend into Renewal Term*

In *1916 Post Road Associates, LLC v. Mrs. Green's of Fairfield, Inc.*,[135] the plaintiff landlord sued the defendant, the guarantor of a commercial lease, based on the tenant's default of rent payments. The defaults occurred after the lease's original term of fifteen years had passed, and the tenant had exercised its option to renew.

The defendant guarantor contended that its guaranty obligation did not extend beyond the original lease term. The defendant noted that its written guarantee "contains no indication that it was intended to continue in the event the tenant exercised its option to extend the lease term,"[136] and required the defendant to guaranty the tenant's obligations under the lease "effective as of the date hereof."[137] The defendant argues that this language "unambiguously limits the guarantee to the obligations that the tenant had under the lease when the guarantee went into effect, which did not include the optional lease term." The trial court agreed with the defendant, rendering summary judgment in its favor, and the Appellate Court affirmed.

B. *Termination of Service Contract upon Four Days' Notice Rather than Five as Required by Contract Held Not Actionable*

In *A.C. Consulting, LLC v. Alexion Pharmaceuticals, Inc.*,[138] the parties had entered into a four-year written service contract, by which the defendant was permitted to terminate the plaintiff's services upon five days' written notice. Following the defendant's termination of the agreement, the plaintiff sued the defendant for doing so despite oral assurances to the contrary, and without providing "sufficient notice under the contract."[139]

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[135] 191 Conn. App. 16, 212 A.3d 744 (2019).
[136] *Id*. at 24.
[137] *Id*. at 25.
[138] 194 Conn. App. 316, 220 A.3d 890 (2019).
[139] *Id*. at 330.

The Appellate Court held that the trial court properly struck the claim founded on insufficient notice. The court agreed with the trial court that the complaint "did not provide the necessary factual allegations describing the manner in which the notice [the plaintiff] received was insufficient.... [I]nsufficient notice could refer to a defect in either the timing of the notice, the form of the notice, or both."[140]

The court noted that, on appeal, the plaintiff made the unpled assertion that he had been provided only four days' notice of termination. But even if that allegation could be read into the complaint as pled, that would not save the claim. "[I]t was the termination of the contract itself, not the precise manner in which the defendant effectuated that termination, that formed the basis for the plaintiff's claims ... [T]he plaintiff made no factual allegation that it had been damaged by that particular alleged breach... [T]he plaintiff failed to allege that it was harmed by the purported one day lack of notice."[141]

C. *"Gross Negligence," Although Not an Independent Cause of Action, Has Meaning as a Contract Term*

In *Commerce Park Associates, LLC v. Robbins*,[142] the Appellate Court examined the concept of "gross negligence" as used in a commercial lease. The plaintiff landlord sued the defendant tenant for breach of lease and unpaid rent. The defendant claimed by way of special defense and counterclaim that her business had been constructively evicted due to sewerage backups that flooded the premises. Under the lease, the landlord had no liability or responsibility for "overflow of water or sewerage in any part of the Demised Premises" unless the condition was "caused by the gross negligence or willfulness of Landlord."[143]

The trial court found that the landlord's gross negligence

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[140] *Id.*

[141] *Id.* at 331.

[142] 193 Conn. App. 697, 220 A.3d 86, *cert. denied* 334 Conn. 912, 221 A.3d 447 and 221 A.3d 448 (2019).

[143] *Id.* at 705.

had led to the sewerage condition and the resulting untenantable state of the premises. Gross negligence is "very great or excessive negligence, or … the want of, or failure to exercise, even slight or scant care or slight diligence."[144] The court found that the landlord, in ignoring a contractor's advice after prior floods to make repairs and conduct preventive maintenance, had behaved with "more than 'mere neglect' but, [rather], a conscious choice to risk future floods and expose [the tenant] to repeated disruption of its business."[145]

The Appellate Court affirmed. The landlord argued, correctly, that Connecticut does not recognize gross negligence as a separate and distinct cause of action. But that does not bar a court, "in the course of adjudicating a negligence cause of action ... from recognizing a distinction between negligent and grossly negligent conduct. This is particularly so if, as in the present case, it is necessary to make such a distinction in order to determine the applicability of a contractual provision that waives a landlord's liability for ordinary negligence but not for gross negligence."[146]

The trial court found that the landlord's conduct, while grossly negligent, "'did not sink to the level of highly unreasonable conduct, involving an extreme departure from ordinary care' and, thus, "'did not constitute reckless conduct.'"[147] Accordingly, the court denied the count of the tenant's counterclaim sounding in recklessness. The tenant did not challenge this determination on appeal.

VI. Miscelleanous Business Cases

A. *Arbitration Award Based on Arbitration Clause in General Contract Held Binding upon Subcontractors*

In *Girolametti v. Michael Horton Associates, Inc.*,[148] the Connecticut Supreme Court affirmed a decision of the Ap-

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[144] *Id*. at 714, quoting 19 Perry Street, LLC v. Unionville Water Co., 294 Conn. 611, 631 n. 11, 987 A.2d 1009 (2010).

[145] *Id*. at 714.

[146] *Id*. at 729.

[147] *Id*. at 715.

[148] 332 Conn. 67, 208 A.3d 1223 (2019).

pellate Court[149] holding that, in a construction arbitration between a commercial property owner and general contractor, the arbitrator's award was binding as to the project's subcontractors, even though they did not participate in the arbitration.

The owner and general contractor entered into an arbitration, pursuant to the contract between them. The owner also brought lawsuits against several of the subcontractors, who were not parties to the prime contract, or participants in the arbitration proceedings. The general contractor prevailed in the arbitration, and the subcontractors claimed that that outcome was res judicata as to the owner's claims against them in the lawsuits. The trial court denied the subcontractors' motions for summary judgment on those grounds, but the Appellate Court reversed, and the Supreme Court affirmed.

The Supreme Court found "a general contractor is presumptively in privity with its subcontractors for purposes of res judicata,"[150] and that the presumption was not rebutted here. In reaching that conclusion, the court relied in large part on the fact that, under the standard form contract between the owner and the general contractor, the contractor was responsible for the work of all the subcontractors.[151] The general contractor thus had both the incentive and the opportunity to address the work of the subcontractors in the arbitration.

The court noted that the "presumptive" rule of privity between a general contractor and its subcontractors is a rule that the parties are free to contract out of; "nothing precludes the parties to a construction project from negotiating a contract that carves out certain issues or certain third parties from the scope of arbitration."[152]

The court also addressed the concern that, under the

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[149] Girolametti v. Michael Horton Associates, Inc., 173 Conn. App. 630, 164 A.3d 731 (2017).

[150] 332 Conn. at 77.

[151] *Id*. at 78, 88.

[152] *Id*. at 84.

rule adopted, an arbitration award that promptly follows completion of the project could bar an owner from pursuing claims based on conditions "not [yet] apparent and addressable" at the time of the arbitration proceedings, such as "claims involving extended warranties, latent defects [or] defects fraudulently concealed."[153] The court found that concern to be unfounded. "We recognize, of course, that a property owner cannot possibly raise in arbitration claims that have not yet arisen, such as latent defects, refusal to honor an extended warranty or ongoing service commitment, and the like. But for that very reason, such claims would fail to satisfy the third element of res judicata, which is that there must have been an adequate opportunity to litigate the matter fully. Accordingly, an owner would not be barred from raising claims of this sort in a subsequent action, regardless of the existence of privity."[154]

B. *Auction Solicitation of "Highest and Best Offers" Did Not Bind Seller in Advance*

In *Restaurant Supply, LLC v. Giardi Limited Partnership*,[155] the plaintiff tendered the high bid for a parcel of real estate whose owner had invited all prospective purchasers to tender their "highest and best offers." Notwithstanding the plaintiff's high bid, the owner sold the property to a lower bidder, Hartford Auto Park, LLC (Hartford Auto Park) and the plaintiff brought an action for specific performance.

Hartford Auto Park moved to strike the complaint, asserting that because the plaintiff had failed to allege the existence of a purchase agreement signed by the seller, the claim was barred by the statute of frauds, General Statutes Section 52-550.[156] The plaintiff countered that, because the owner had offered to sell the property to the highest bidder, the plaintiff's bid was an acceptance, not an offer, and thus

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[153] *Id*. at 82.
[154] *Id*. at 83.
[155] 330 Conn. 642, 200 A.3d 182 (2019).
[156] The statute provides, at subpart (a), that a contract for the sale of real estate is enforceable only if there is a "writing … signed by the party … to be charged…"

gave rise to a binding contract.[157] The trial court granted the motion, and entered judgment for the defendant on the stricken complaint.

The Supreme Court affirmed. The court examined General Statutes Section 42a-2-328, a provision of the Uniform Commercial Code that governs auctions of goods. The statute provides that auctions are deemed to be "with reserve" – meaning the seller has the right to reject all bids – "unless the goods are in explicit terms put up without reserve." Without expressly holding that that provision applies to the sale of real estate,[158] the court borrowed from the statute and found, contrary to the plaintiff's claim, that a request for "highest and best offers" does not constitute an announcement in "explicit terms" that the property is offered "without reserve," nor does it otherwise create an advance commitment to be bound by any such offer.

C. *Appellate Court Clarifies Approach to Jurisdictional Challenges*

The Appellate Court's decision in *Designs for Health, Inc. v. Miller*[159] provides Connecticut's first appellate articulation of the standard of proof that applies when an out-of-state defendant files a motion to dismiss based on lack of personal jurisdiction.

The court adopted the "sliding scale" approach utilized by the federal courts. Prior to discovery, the plaintiff may defeat such a motion simply by pleading, in the complaint, "sufficient allegations of jurisdiction."[160] At that stage, a prima facie showing of jurisdiction will suffice.

After discovery, the plaintiff's allegations must be beefed up with "an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant."[161] If the defendant submits evidence contesting those factual

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[157] 330 Conn. at 646, fn. 4.
[158] *Id*. at 645, fn. 3.
[159] 187 Conn. App. 1, 201 A.3d 1125 (2019).
[160] *Id*. at 11, 12.
[161] *Id*. at 12.

allegation, then a hearing as to the jurisdictional issue is required, at which the court should apply the preponderance of the evidence standard. If the competing submissions indicate that there is a critical factual dispute, and if neither party requests an evidentiary hearing, then the court should deny the motion.[162]

[162] *Id*. at 20.