BUSINESS LITIGATION: 2018 IN REVIEW

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In 2018, 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. *For Purposes of Fraudulent Concealment, Knowledge of Agent Not Imputed to Principal*

In *Carson v. Allianz Life Insurance Company of North America*,[1] the plaintiff sued the defendant insurance company for misconduct, including fraud and conversion, by one of the defendant's agents. In response to the insurer's motion for summary judgment based on the running of the statute of limitations, the plaintiff contended that the agent had fraudulently concealed his wrongdoing.

The trial court granted the defendant's motion, finding a lack of evidence that the insurance company knew about the agent's wrongdoing, and holding as a matter of law that for purposes of the fraudulent concealment doctrine, the knowledge of the agent could not be imputed to the principal. The Appellate Court affirmed the judgment below, noting "in order to toll the statutes of limitation on the basis of fraudulent concealment, the plaintiff bore the burden of demonstrating that the defendant was actually aware of the facts necessary to establish the plaintiff's cause of action. Imputed knowledge is not enough."[2] The court also noted that the elements of fraudulent concealment, including the defendant's actual knowledge and intentional concealment of the facts necessary to establish the plaintiff's cause of action, must be proven by "the more exacting standard of clear, precise and unequivocal evidence."[3]

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1 184 Conn. App. 318, 194 A.3d 1214 (2018).

2 *Id.* at 328.

3 *Id.* at 326.

B. *Claim for Equitable Accounting Is Deemed Waived Where Plaintiff's Evidence Is Adequate to Ascertain Damages*

In *Chioffi v. Martin*,[4] a suit between law partners following the dissolution of their firm, the Appellate Court found that the trial court had properly denied the plaintiff's equitable claim for an accounting.

The plaintiff's complaint included a count seeking an accounting but also claims at law, including breaches of the firm's partnership agreement and breach of fiduciary duty. At trial, "[rather] than merely establish the relationship between the plaintiff, the defendant, and the partnership, as well as a demand for an accounting ... the plaintiff, consistent with [his] breach of contract count, elected to introduce the detailed evidence [that he] claimed substantiated his position and damages for breach of contract..."[5] The plaintiff "never asserted that [he] had insufficient evidence to pursue [his] breach of contract claims to the fullest."[6] Nor did he discuss his accounting claim in his post-trial brief.

On these facts, the trial court found that the plaintiff had waived his accounting claim. The Appellate Court agreed, and further found that even absent a finding of waiver, the trial court would have been justified in denying this remedy. The Appellate Court noted that "the trial court considered detailed evidence of the partnership assets and accounts such that it was able to ascertain damages."[7] Given the adequacy of remedies at law, there was no need for the equitable remedy of an accounting.

Separately, the Appellate Court noted, in finding that the defendant had breached his fiduciary duty to the plaintiff, that an award of attorneys' fees would be at the discretion of the court, not automatic.[8]

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[4] 181 Conn. App. 111, 186 A.3d 15 (2018).
[5] *Id*. at 148.
[6] *Id*.
[7] *Id*. at 150.
[8] *Id*. at 142.

C. *Statutory Fee-Shifting May Apply If Lawsuit Is Withdrawn*

In *Connecticut Housing Finance Authority v. Alfaro*,[9] the Supreme Court ruled that if a commercial party withdraws a suit against a consumer who has raised a defense, the defendant may be entitled to an award of attorneys' fees under General Statutes Section 42-150bb (consumer fee-shifting statute).

The consumer fee-shifting statute provides that, if a commercial party sues a consumer under a contract that contains an attorney fees' clause in favor of the commercial party, and if the consumer "successfully ... defends" a complaint or counterclaim based on that contract, then an attorneys' fee "shall be awarded as a matter of law to the consumer."

In *Alfaro*, a residential mortgage foreclosure case, the plaintiff moved for summary judgment, to which the defendant objected on the grounds that there was a genuine question as to whether or not the plaintiff owned the note. The plaintiff countered by withdrawing the summary judgment motion, and then the case itself.[10] The defendant in turn moved for an award of attorneys' fees pursuant to the consumer fee-shifting statute.

The plaintiff argued, and both the trial court and Appellate Court agreed,[11] that given the plaintiff's withdrawal of the suit as a matter of right, which could have been for a variety of reasons, the defendant had failed to establish that he had "successfully defended" the suit. The defendant's motion for attorneys' fees was denied.

The Supreme Court reversed. The court found that, for purposes of the consumer fee-shifting statute, a "successful" defense includes "any resolution of the matter in which the party obtained the desired result of warding off an attack made by the action, regardless of whether there was a reso-

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[9] 328 Conn. 134, 176 A.3d 1146 (2018).

[10] *Id.* at 138.

[11] The Appellate Court decision is reported at 163 Conn. App. 587, 135 A.3d 1256 (2016).

lution on the merits."[12]

Indeed, the court held that when a commercial party withdraws a suit in the face of a defense, "the burden of proof then shifts to the commercial party to demonstrate that the withdrawal was unrelated to the defense mounted by the consumer."[13] The court must make this factual determination by a preponderance of the evidence,[14] and may do so by affidavits or, if it wishes, following an evidentiary hearing.[15]

Justices Espinosa and D'Auria dissented.

D. *Forfeiture of Deferred Compensation for Violating Non-Compete Held Subject to Reasonableness Analysis*

The Appellate Court's decision in *DeLeo v. Equale & Cirone, LLP*[16] involved a combined covenant-not-to-compete/forfeiture clause in an accounting firm's partnership agreement, which applied to partners who left the firm and took clients with them. Under the partnership agreement, departing partners would ordinarily receive deferred compensation payments, but under the clause at issue, a competing partner would forfeit those payments. The competing partner would also be required to pay the firm for the lost book of business, calculated at 150% of the firm's recent annual billings to the departing clients.

The plaintiff argued that the provision was an unreasonable and unenforceable restraint of trade. The trial court rejected that argument, finding the provision enforceable as a liquidated damages provision.

The Appellate Court reversed this part of the trial court's judgment. The Court agreed with the plaintiff that the non-compete/forfeiture clause was "an indirect restraint on competition" and "accomplishes the same result as a covenant not to compete: a restraint of trade."[17] Accordingly, the

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12 *Id*. at 143.
13 *Id*. at 148.
14 *Id*. at 151.
15 *Id*. at 153.
16 180 Conn. App. 744, 184 A.3d 1264 (2018).
17 *Id*. at 764.

clause "must be judged by the same standard used for covenants not to compete."[18] The Appellate Court remanded the case to the trial court to evaluate the provision at issue under the well-established "reasonableness" analysis that applies to covenants not to compete.

E. *Court Could Not Order Substantive Relief against Nominal Defendant in Declaratory Judgment Action*

In *Lynn v. Bosco*,[19] a company named as a nominal defendant in a declaratory judgment action, for notice purposes only, successfully complained on appeal that the trial court overreached by ordering substantive relief against it.

The plaintiffs, shareholders in a closely held company called Aerospace Techniques, Inc., brought suit against other shareholders of the company. Their claims arose from a series of transactions by which the company purchased the shares of yet another, nonparty shareholder, and in turn reissued and sold them to the defendants. The plaintiffs claimed that the defendants had acquired those shares in violation of the plaintiffs' preemptive rights as shareholders.

The defendants moved to strike the complaint, claiming that the company was "a necessary party to any declaratory judgment regarding the preemptive rights held by its shareholders."[20] The plaintiffs mooted the motion by successfully moving to cite the company into the case as a party defendant.

The amended complaint did not contain any allegations against the company or seek any relief against it. In a later pleading, the plaintiffs affirmed that the amended complaint "merely identifies [the company] as an additional defendant in its count one in recognition of the fact that [the company] is, in essence, a mere stakeholder upon the plaintiff's claims, including for declaratory relief, to validate its preemptive rights in [the company's] stock."[21]

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[18] *Id.*
[19] 182 Conn. App. 200, 189 A.3d 601 (2018).
[20] *Id.* at 205.
[21] *Id.* at 206.

Following trial, the trial court ordered the defendants to restore the shares at issue to the company's treasury. The court further ordered the company to reimburse the defendants for those shares.[22]

The company argued on appeal that the trial court "acted beyond the scope of its authority by entering an order that imposed a remedy on the company despite the fact that none of the pleadings contained any allegations against or sought relief from the company."[23] The defendants countered that this remedy was within the general demand for equitable relief contained within the claim for a declaratory judgment.

The Appellate Court agreed with the company that "the pleadings were not framed in a way that apprised the company that the court might order a remedy that would require it to pay the individual defendants."[24] The court reversed the judgment below.

F. *Award of Post-Judgment Interest that Did Not Specify Rate Held a Nullity*

In *U.S. Equities Corp. v. Ceraldi*,[25] a collection action on a credit card debt, the court's judgment in favor of the plaintiff included an award of post-judgment interest pursuant to General Statutes Section 37-3a, but did not state an interest rate. That statute provides for awards of interest "at the rate of ten percent a year, and no more," and is construed as allowing interest awards at a lower rate, at the discretion of the court.[26] In the claim for relief set forth in the bank's complaint, the bank had requested post-judgment interest at the maximum statutory rate.

Years later, after the bank sent the judgment debtor a writing indicating that it had applied ten percent post-judgment interest to the debt, the judgment debtor challenged that calculation, prompting the bank to file a motion for clarification of the original judgment. The court granted

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22 *Id*. at 211.
23 *Id*. at 212.
24 *Id*. at 216.
25 186 Conn. App. 610, 200 A.3d 747 (2018).
26 *Id*. at 615.

that motion, stating that when it had rendered the original judgment, it had done so in accordance with the plaintiff's request for the ten percent maximum. The judgment debtor appealed from that order.

The Appellate Court reversed. The court held that the so-called clarification order in fact effected a substantive modification of the original judgment. The proper vehicle to modify, not merely clarify, a judgment is by filing a motion to open, pursuant to General Statutes Section 52-212a, which must be done within four months of the entry of judgment. Once the bank failed to file such a motion within that timeframe, the court lacked the authority to modify the judgment to set an interest rate. The court remanded the case with instructions to "dismiss the plaintiff's untimely motion for clarification and to correct the judgment to reflect that no post-judgment interest was properly awarded."[27]

G. *Marshal Entitled to $300,000 Commission on Levy of Execution*

In *Corsair Special Situations Fund, L.P. v. Engineered Framing Systems, Inc.*,[28] the Connecticut Supreme Court answered a certified question posed by the United States Court of Appeals for the Second Circuit, concerning a marshal's statutory 15% commission for a claimed levy of execution. On behalf of the plaintiff, which had obtained a judgment against the defendant in another jurisdiction, a Connecticut marshal served a writ of execution on a third party that owed more than $2 million to the defendant. The third party ignored the writ and paid the money to the defendant. In subsequent proceedings, the plaintiff obtained an order against, and payment from, the third party.

The plaintiff contended that under the circumstances, the marshal was not entitled to payment of a commission, which in this case would exceed $300,000. The marshal countered that he had done everything legally possible to

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27 *Id*. at 617.
28 327 Conn. 467, 174 A.2d 791 (2018).

secure the debt and thereby earn a commission pursuant to the relevant statute, General Statutes Section 52-261(a)(F). Following a detailed analysis of the statute and its predecessors, the Supreme Court agreed with the marshal.

II. Foreclosure and Collection

A. *Assignee of Already-Lost Promissory Note Lacked Standing to Enforce It*

In *Seven Oaks Enterprises, L.P. v. DeVito*,[29] the Appellate Court held that the assignee of a promissory note that had already been lost by the assignor lacked standing to enforce the note. The court concluded that this outcome was dictated by General Statutes Section 42a-3-309, a provision of Article 3 of the Uniform Commercial Code. That statute provides in relevant part that "[a] person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred…"

The plaintiff in *Seven Oaks*, assignee of the subject note pursuant to a "Bill of Sale and Assignment," was not the "person in possession of the instrument … when loss of possession occurred…" The assignor had already lost the note before entering into the assignment transaction. Thus, as a matter of law, the purported assignment was ineffective to confer upon the assignee the right to enforce the lost note.

The court was careful to distinguish its decision from the outcome in a 1996 Connecticut Supreme Court case, *New England Savings Bank v. Bedford Realty Corp*.[30] In that case, the assignee of an already-lost note was permitted to foreclose the mortgage securing the obligation; the Supreme Court "observed that because the plaintiff had 'chosen to pursue the equitable action of foreclosure of the mortgage, rather than a legal action on the note, the fact that [the plaintiff] never possessed the lost promissory note [was] not

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29 185 Conn. App. 534, 198 A.3d 88 (2018).
30 238 Conn. 745, 680 A.3d 301 (1996).

fatal to its foreclosure of the mortgage.'"[31]

The Appellate Court also noted that in 2002, the drafters of the Model Uniform Commercial Code adopted a revision to section 3-309 of the UCC, which would confer standing upon a plaintiff standing in the shoes of the plaintiff in *Seven Oaks*. But Connecticut is not among the states that have adopted that revision.[32]

B. *Assignee of Debt Failed to Prove that Documents Used to Prove Debt Qualified as Business Records Absent Evidence of a Duty to Report the Information Contained in the Documents; Assignee Had Standing to Sue Guarantors*

In *Jenzack Partners, LLC v. Stoneridge Associates, LLC*,[33] the Appellate Court reversed the trial court's judgment of strict foreclosure, finding that the plaintiff's debt calculation had been based on inadmissible hearsay.

The plaintiff acquired the loan from the original lender, Sovereign Bank. At trial, the plaintiff's witness presented a debt calculation that admittedly was based in part on a calculation that Sovereign Bank had performed and had provided to the plaintiff at the time of the loan sale. The plaintiff offered no testimony from any employee of Sovereign Bank. The trial court found the Sovereign Bank calculation to be a business record of the plaintiff, and therefore admissible under that exception to the hearsay rule.

The Appellate Court disagreed. The court noted that a document that a business receives and retains in the ordinary course, but does not itself create, may under some circumstances qualify as a business record. However, "[t]he presumption that a business record is reliable is based in large part on the entrant having a business duty to report. The mere fact that the [party] received this letter in the ordinary course of business and included the document in

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[31] 185 Conn. App. at 547, 548 (quoting New England Savings Bank v. Bedford Realty Corp., 238 Conn. 745, 759-760 (1996)).

[32] *Id.* at 549.

[33] 183 Conn. App. 128, 192 A.3d 455, *cert. granted* 330 Conn. 921, 922, 193 A. 3d 1213, 194 A.3d 288 (2018).

its files tells us nothing about the motivation of the maker of the record, and therefore would not ordinarily satisfy the requirements of [General Statutes] 52-180."[34] As applied here, "there [was] no evidence in the record ... regarding Sovereign's business records or its duty to report an accurate starting balance to the plaintiff."[35]

The decision should be read in tandem with the Appellate Court's 2017 decision in *LM Insurance Corporation v. Connecticut Dismanteling, LLC*,[36] in which the court took a seemingly more expansive view of admissibility under these circumstances. The *LM Insurance* case involved a dispute over the calculation 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, the defendant objected to the report's admissibility 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 Appellate Court agreed that the trial court properly overruled that objection, 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."[37]

The holdings in *Jenzack* and *LM Insurance* can be reconciled by their shared emphasis on a duty to maintain a record. In the latter case, the party offering the document into evidence had contracted for its creation, creating a legal duty on the part of the document's creator to render an accurate document for the offering party's benefit. In contrast,

[34] *Id*. at 142.
[35] *Id*. at 143.
[36] 172 Conn. App. 622, 161 A.3d 562 (2017). The spelling of "Dismanteling" is as reported.
[37] *Id*. at 632.

the court in *Jenzack* found this foundation lacking.

Separately, the defendant in *Jenczak*, a guarantor of the debt, also argued that the plaintiff lacked standing to sue her. She based this argument on the fact that when the note was assigned from Sovereign Bank to the plaintiff, the bank executed an allonge that referenced the note but made no mention of the guaranty. Therefore, she argued, the plaintiff never acquired the right to sue her.

The Appellate Court rejected this argument, agreeing with the plaintiff that as part of the assignment transaction, the guaranty followed the note. But the court declined to declare a bright-line rule on this issue, instead concluding, based on the totality of the circumstances, and with support from Section 13 of the Restatement (Third) of Suretyship and Guaranty, that "the parties intended the assignment of the defendant's limited guarantee as part of the assignment of the Stoneridge note."[38]

C. *Bank's Violation of HAMP Guidelines May Support Unclean Hands Defense and Counterclaim by Borrower*

In *U.S. Bank National Association v. Eichten*,[39] a foreclosure action, the Appellate Court found that the trial court had improperly entered summary judgment for the plaintiff on the issue of liability.

The defendant had asserted a number of special defenses, based on her communications with the plaintiff about a possible modification of her loan under the federal government's Home Affordable Modification Program (HAMP). As described in the summary judgment affidavits, in June or July of 2010, the defendant applied for a HAMP loan modification. At that time, she documented that her "housing ratio" (percentage of gross household income that went toward her current mortgage) was slightly under 38%, within HAMP guidelines.[40] The plaintiff promptly sent her a letter offering her a trial period plan (TPP) under HAMP, by

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[38] 183 Conn. App. at 139.
[39] 184 Conn. App. 727, 196 A.3d 328 (2018).
[40] *Id*. at 738, fn. 9, 741.

which she would make modified payments for a period of time and would thereafter have her mortgage permanently modified if she "continue[d] to meet all program eligibility requirements."[41]

The defendant timely paid all three TPP payments, in August, September and October of 2010. For months thereafter, the plaintiff requested the same financial information from the defendant over and over again, and she consistently responded. Finally, in July of 2011, about nine months after the TPP had ended, the plaintiff notified the defendant that her application had been rejected. This was based on the fact that by then, her housing ratio had declined to less than 25%, too low under HAMP guidelines.[42] The defendant never received or accepted final loan modification documents.

The Appellate Court noted that under Treasury Department guidelines, the plaintiff should have offered the defendant a modification at the end of the TPP, but had not done so. Furthermore, certain of the bank's documents suggested that it had approved the defendant's application in March of 2011 but never communicated that fact, before reversing course and rejecting her application four months later.[43]

The court noted that while ordinarily a special defense to a foreclosure action must relate to the making, enforcement or validity of the loan, that limitation does not apply to a defense of unclean hands, so long as the allegations are "directly and inseparably connected" to the foreclosure action.[44] The court found a genuine issue of material fact as to the defendant's special defense of unclean hands, making the trial court's entry of summary judgment unwarranted.

For the purpose of further proceedings after remand, the court went on to address the defendant's additional special defense of equitable estoppel, which was based on the fact that the bank had advised her to stop making her mortgage

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41 *Id*. at 736.
42 *Id*. at 737, 740.
43 *Id*. at 749.
44 *Id*. at 753.

payments as a prerequisite to applying for relief under HAMP. The defendant contended that "the event of default was contrived" by the plaintiff.[45] The Appellate Court rejected this defense, noting the defendant's undisputed financial distress and a dearth of "evidence that she could have or would have remained current on the mortgage had she not been instructed to default to take advantage of the opportunity for a modification."[46]

The Appellate Court also ruled that the trial court erred in granting summary judgment for the bank on the defendant's counterclaim for breach of contract. The trial court had ruled that the counterclaim was improperly joined with the foreclosure action, failing the requirement under section 10-10 of the Practice Book that a counterclaim "arise[] out of the transaction or one of the transactions which is the subject of the plaintiff's complaint." The trial court had relied on the Appellate Court's decision in *U.S. Bank National Association v. Sorrentino*,[47] in which the court found that counterclaims arising from the lender's alleged misconduct in connection with the foreclosure mediation process "did not reasonably relate to the making, validity or enforcement of the mortgage" and thus could not properly be joined with the foreclosure complaint.[48]

The Appellate Court disagreed, finding Ms. Eichten's counterclaim distinguishable from the one in *Sorrentino* "because it is intertwined sufficiently with the subject of the foreclosure complaint. The defendant's counterclaim alleges the formation and breach of a contractual agreement, prior to the commencement of this action, intended to lead to an offer from the plaintiff for a permanent modification of the defendant's note and mortgage, which, if accepted, would avoid a foreclosure."[49]

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45 *Id*. at 754.
46 *Id*. at 759.
47 158 Conn. App. 84, 118 A.3d 607, *cert. denied*, 319 Conn. 951, 125 A.3d 530 (2015).
48 184 Conn. App. at 751.
49 *Id*. at 771.

D. *Default Notice Delivered Improperly, Preventing Foreclosure*

In *Aurora Loan Services, LLC v. Condron*,[50] the Appellate Court reversed a judgment of strict foreclosure rendered by the trial court. The subject mortgage provided that, upon an event of default, the lender was required to send the borrower a notice-and-cure letter by first-class mail. The lender instead sent the notice by certified mail, return receipt requested. The borrowers denied receiving the notice, and the lender provided no evidence of actual delivery.

The trial court found that certified mail constituted either a species of first-class mail or substantial compliance with the contract's requirement of first-class mail. The Appellate Court disagreed with both propositions, at least in the absence of proof that the notice had been actually delivered.

The Appellate Court noted that pursuant to the mortgage deed, a default notice "shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."[51] The court construed this language as giving "a default notice sent by first class mail ... a presumption of receipt, while notices sent by other means are not entitled to such a presumption. Rather, proof of actual delivery is required by the mortgagee when the notice is sent by other means."[52] The court noted that actual delivery of certified mail imposes additional requirements upon the recipient, making that form of delivery distinguishable from regular first-class mail.

The Appellate Court rejected the borrowers' additional argument that under the Emergency Mortgage Assistance Program, General Statutes Section 8-265ee, the lender was required to show proof of actual delivery of notice of the program before commencing foreclosure. The statute requires that the notice be sent by certified mail, but does not require

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50 181 Conn. App. 248, 186 A.3d 708 (2018).
51 *Id*. at 264.
52 *Id*.

proof of actual delivery.

E. *Law Days May Start on Last Day of Appeal Period*

In *Real Estate Mortgage Network, Inc. v. Squillante*,[53] a foreclosure case, the trial court set an initial law day that fell on the final day of the appeal period following the entry of judgment. The defendant claimed that as a matter of law, the first law day needed to be at least one day later; i.e., after the final day of the appeal period.

The Appellate Court affirmed the judgment below. The appeal period expired at 5:00 p.m. on the day in question, when the clerk's office closed, while the defendant's opportunity to redeem extended until midnight of that day, effectively postponing the vesting of title in the bank until then. Accordingly, the defendant had had the benefit of the full appeal period, and the law days as set by the trial court therefore were proper.

III. Contracts

A. *Lack of Evidence that Prospective Purchasers Breached Mortgage Contingency Clause*

In *Li v. Yaggi*,[54] the plaintiffs, would-be purchasers of a home from the defendants, sued for return of their deposit when they were unable to obtain mortgage financing. Following a courtside trial, the trial court entered judgment for the defendants, but the Appellate Court reversed.

The subject purchase and sale agreement provided "If Buyer is unable to obtain a written [mortgage] commitment and notifies Seller in writing by 5:00 p.m. on [the] Commitment Date, this Agreement shall be null and void and any Deposits shall be immediately returned to Buyer." Two days before the Commitment Date, the plaintiffs sent the defendants an e-mail stating "Attached is a request of mortgage extension. … We expect a commitment from a bank next week."[55] Over a period of weeks, the parties had

[53] 184 Conn. App. 356, 194 A.3d 1262 (2018).
[54] 185 Conn. App. 691, 198 A.3d 123 (2018).
[55] *Id*. at 695.

further communications about possible extensions of the Commitment Date, but never reached an express agreement in that regard, and the deal ultimately fell through. The defendants refused to return the plaintiffs' deposit.

The trial court found that the plaintiffs had breached the purchase and sale agreement by failing to timely terminate the contract and failing to diligently pursue financing.[56] The Appellate Court determined that both of these findings were clearly erroneous. On the first issue, the trial court had faulted the plaintiff for not terminating the contract by the Commitment Date, but the contract did not require a termination notice as such; it required notice that the buyers were "unable to obtain a written commitment." The Appellate Court found that the trial court "erred in interpreting the mortgage contingency clause to require notice of termination and consequently failed to make a factual determination as to whether the November 24 e-mail constituted notice of an inability to obtain a written commitment."[57]

The Appellate Court also remanded the case for further proceedings on the trial court's finding that the plaintiffs had shown a "lack of diligence" in pursuing mortgage financing. That finding relied on certain bank notices that were issued after the Commitment Date had already passed. The Appellate Court held that "[t]hose notices were ambiguous as to whether they reflected the plaintiffs' efforts up to the commitment date and, therefore, shed light on the plaintiff's diligence in pursuing financing during the relevant timeframe, or whether they reflected plaintiffs' efforts after the commitment date, i.e. after the deadline for the plaintiff's use of diligence had passed."[58]

B. *Promise to Indemnify for Tax Bills Governed by Six-Year Statute of Limitations for Breach of Contract, Not Three-Year Statute for Indemnity Actions*

In *Randazzo v. Sakon*,[59] the Appellate Court found that

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56 *Id.* at 697.
57 *Id.* at 705.
58 *Id.* at 702-703.
59 181 Conn. App. 80, 189 A.3d 616, *cert. denied* 330 Conn. 909, 193 A.3d 560 (2018).

the three-year statute of limitations for indemnity actions did not apply to the enforcement of a contractual payment obligation styled as a duty to indemnify.

The plaintiff had granted the defendant an easement upon certain property owned by the plaintiff. Under the easement agreement, the defendant agreed to "indemnify and hold harmless [plaintiff] from ... any and all real estate taxes imposed upon the Easement Area." The defendant failed to reimburse the plaintiff for tax payments over a period of years, and the plaintiff brought suit.

Seeking to limit its exposure, the defendant cited General Statutes Section 52-598a, which provides "an action for indemnification may be brought within three years from the date of the determination of the action against the party which is seeking indemnification by either judgment or settlement." The plaintiff countered that the applicable statute of limitations was General Statutes Section 52-576, which provides a six-year window to sue on "any simple or implied contract."

The Appellate Court found that, notwithstanding the "indemnity" nomenclature in the easement agreement, the statute of limitations for contracts, not indemnity, applied. The language of General Statutes Section 52-598a did not apply because the plaintiff was "not seeking indemnity from the defendant for a third party tort action for which the plaintiff owed damages as a result of a judgment or a settlement."[60] Rather, "this reimbursement is for money that the plaintiff and the defendant agreed would be an ongoing obligation of the defendant as set forth in the easement deed itself."[61]

C. *Multiple Contingencies in Real Estate Contract Voided Would-Be Purchaser's Status as Ready, Willing and Able*

In *Reyher v. Finkeldey*,[62] the Appellate Court reversed a judgment in favor of a real estate broker for an unpaid com-

60 *Id.* at 95.
61 *Id.*
62 182 Conn. App. 159, 189 A.3d 179 (2018).

mission. The broker had procured a prospective purchaser who tendered the required asking price, but contingent upon financing, inspection of the property and a 120-day environmental review period.

The trial court found that notwithstanding these contingencies, the broker had fulfilled his contractual obligation to procure a purchaser who was "ready, able and willing" to purchase the property. The Appellate Court found that determination to be clearly erroneous and reversed.

V. Miscellaneous Business Cases

A. *Standing to Sue*

1. Personal vs. Derivative Claims by Part Owner of Limited Liability Company

Bongiorno v. Capone[63] provided another opportunity for the Appellate Court to weigh in on who has standing to pursue claims associated with a limited liability company. The plaintiff, a fifty-percent owner of a family business, entered into an agreement to buy the fifty-percent interest owned by the defendant, his brother-in-law.

One day after the parties executed a purchase and sale agreement, and nine days before the actual closing, the defendant withdrew $17,000 from the LLC's bank account. The plaintiff, in his personal capacity, brought suit for breach of the purchase and sale agreement and for civil theft. After trial to an attorney trial referee, the trial court entered judgment for the plaintiff for the full $17,000 on his contract claim and treble damages on the theft claim.

The Appellate Court reversed the judgment on the civil theft claim, finding that the theft involved LLC assets and thus the entity, not the entity's owner, had sole standing to pursue that claim. As for the contract claim, the court agreed with the trial court that the plaintiff personally had suffered a loss, as the defendant had wrongfully devalued the asset that the defendant had agreed to sell to the plain-

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[63] 185 Conn. App. 176, 196 A.3d 1212, *cert. denied* 330 Conn. 943, 195 A.3d 1134 (2018).

tiff, in breach of their agreement. But because that asset was a half-interest in the company, the plaintiff's personal loss was half of the misappropriated funds. Accordingly, the court reduced the plaintiff's judgment on the contract claim by half, to $8,500.

2. Foreseeable Beneficiary of Contract Not Necessarily a Third-Party Beneficiary with Standing to Enforce Contract

In *Hilario's Truck Center, LLC v. Rinaldi*,[64] the plaintiff sued Nationwide Insurance Company for unpaid towing services rendered to Nationwide's insured, co-defendant Laura Rinaldi. The plaintiff claimed to be a third-party beneficiary of the insurance contract, which provided in relevant part "We will pay for damages for which you are legally liable as a result of an accident arising out of the ... use ... of your auto."[65] The trial court rejected this argument and granted Nationwide's motion to dismiss, finding that the plaintiff lacked standing to bring suit against Nationwide.

The Appellate Court affirmed, finding that "[t]he plaintiff's assertion simply confounds the distinction between those persons or entities that might foreseeably benefit from Rinaldi's contractual receipt of liability coverage with those persons or entities to whom both Rinaldi and Nationwide specifically intended that Nationwide would assume a direct obligation.... [T]he fact that a person is a foreseeable beneficiary of a contract is not sufficient for him to claim rights as a third party beneficiary."[66]

B. *Breach of Fiduciary Duty*

1. Agency Agreement Created Fiduciary Relationship

In *Jolen, Inc. v. Brodie and Stone, PLC*,[67] the Appellate Court held that a product distribution agreement created a fiduciary relationship between the manufacturer and dis-

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[64] 183 Conn. App. 597, 193 A.3d 683, *cert. denied* 330 Conn. 925, 194 A.3d 776 (2018).
[65] *Id.* at 608.
[66] *Id.*
[67] 186 Conn. App. 516, 200 A.3d 742 (2018).

tributor. The plaintiff and defendant were parties to a contract by which the defendant served as exclusive distributor, in the United Kingdom and the Republic of Ireland, for a product manufactured by the plaintiff. The trial court found, pursuant to the distribution agreement, that the defendant was the plaintiff's agent for the distribution of the plaintiff's product within the designated market area. But the court went on to find that "a contractual duty to act as [a] distributor of a manufacturer's product does not necessarily impose fiduciary duties on a distributor to the manufacturer," and that in this case, the relationship was not a fiduciary one.[68] The court entered summary judgment for the defendant on the plaintiff's claim for breach of fiduciary duty.

The Appellate Court reversed. The court cited prior authority holding that agents are per se fiduciaries.[69] In the present case, the trial court had concluded that "the distribution agreement established as a matter of law the existence of a principal-agent relationship between the parties," a conclusion that was not challenged on appeal.[70] Given this determination, "it necessarily followed that the defendant had been the plaintiff's fiduciary with respect to matters within the scope if its agency."[71]

2. Burden of proof shifts in application for prejudgment remedy in fiduciary duty case

In *ASPIC, LLC v. Poitier*,[72] the Appellate Court addressed the burden of proof and standard of proof that apply in prejudgment remedy proceedings involving an allegation of breach of fiduciary duty.

The case involved promissory notes that were obligations of four limited partnerships, collectively known as the Court Hill Partnerships. Each partnership had the same three general partners, and each had a partnership agreement imposing unlimited personal liability on all the general

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[68] *Id*. at 522.
[69] *Id*. at 523.
[70] *Id*. at 524.
[71] *Id*.
[72] 179 Conn. App. 631, 181 A.3d 593 (2018).

partners for partnership debts. Unbeknownst to one of the partners, another partner, had signed two notes on behalf of the partnership, one to the signing partner personally and one to a company owned by the signing partner.[73] In so doing, the signing partner purported to obligate the other partners personally. The plaintiff, an assignee of the notes, sought a $3,000,000 prejudgment remedy against one of the non-signing partners to secure a claim on the notes.

The defendant raised various defenses, including the contention that the signing partner's execution of the notes had been in breach of his fiduciary duty to the defendant.[74] After a hearing, the trial court found that "too little is known presently for any prediction to be made regarding the ultimate fate of the fiduciary duty defense,"[75] but nevertheless granted the PJR application, in the apparent compromise amount of $1,000,000.[76]

The Appellate Court reversed. The court noted the longstanding principle that once a party establishes the existence of a fiduciary duty, the burden of proof shifts to the fiduciary to establish fair dealing, and by the enhanced standard of "clear and convincing evidence." Here, it was undisputed that the signing partner owed a fiduciary duty to the defendant. Thus "the plaintiff had the burden at the prejudgment remedy hearing to establish probable cause that it could prove the fairness of the transactions, just as it had the burden to establish probable cause that it could prove the other essential elements of its claims."[77] Furthermore, the trial court must consider the likelihood that the plaintiff will meet the enhanced "clear and convincing evidence" standard of proof at trial.[78] The trial court "did not conduct such an analysis."[79]

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73 *Id.* at 634.

74 The plaintiff acquired the notes after they were in default and therefore did not have the status of a holder in due course under General Statutes § 42a-3-302(a). Accordingly, the plaintiff took the notes subject to all defenses. *Id.* at 641, fn. 6.

75 *Id.* at 638.

76 *Id.*

77 *Id.* at 642.

78 *Id.* at 643.

79 *Id.* at 644.