BUSINESS LITIGATION: 2021 IN REVIEW

By William J. O'Sullivan[1]

In 2021, Connecticut's appellate courts decided numerous cases of interest to business litigators. Following is a summary of the year's most noteworthy decisions.

I. Creditors' Rights

A. *Foreclosing bank can seek damages for breach of mortgage provisions, without need for obtaining deficiency judgment*

The Appellate Court's decision in *LLP Mortgage Ltd. v. Underwood Towers Ltd. Partnership,*[2] a commercial foreclosure case involving a large apartment complex, illustrates the difference between a lender enforcing its rights under the mortgage and enforcing its rights under the note secured by the mortgage.

In *Underwood Towers*, the substitute plaintiff was the assignee of the loan obligation and mortgage, but the promissory note had been lost before the assignment.[3] Accordingly, although the substitute plaintiff retained the right to enforce the mortgage,[4] it was barred from pursuing a deficiency judgment or otherwise enforcing the note.[5]

Aside from seeking foreclosure of its mortgage, the substitute plaintiff sought, in separate counts of its complaint, money damages for the breach of certain mortgage covenants, including an assignment of rents and income. Because the substitute plaintiff lacked the power to seek a deficiency judgment, and because the underlying note had been a nonrecourse obligation,[6] the defendant argued that the substitute plaintiff lacked the right to seek this additional relief.

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[1] Of the Hartford Bar.

[2] 205 Conn. App. 763, 260 A.3d 521 (2021).

[3] *Id.* at 769.

[4] New England Savings Bank v. Bedford Realty Corp., 238 Conn. 745, 680 A.2d 301 (1996).

[5] Seven Oaks Enterprises, L.P. v. DeVito, 185 Conn. App.534, 198 A.3d 88, *cert. denied* 330 Conn. 953, 197 A.3d 803 (2018); Conn.Gen.Stat. § 42a-3-309.

[6] 205 Conn. App. at 786.

The trial court rejected this argument, and the Appellate Court agreed. Separate from its rights under the note, "a mortgagee may sue a mortgagor for damages for violation of a covenant or provision in the mortgage."[7] More particularly, "a mortgagee may proceed with an action for money damages based on a debtor's failure to pay rents, despite the existence of a nonrecourse clause in the loan documents."[8] The court rejected the proposition that the substitute plaintiff was, in effect, seeking to convert a nonrecourse loan into a recourse loan. The substitute plaintiff "is not relying on the mere fact that the defendants owe principal plus interest as provided in the note, as it would in a deficiency proceeding. Rather, the plaintiff relies on a separate provision in a separate document – the covenants in the second mortgage concerning rental income – and must assume the higher burden of proving the contract and tort causes of action it has pleaded."[9]

B. *Noteholder that did not take assignment of mortgage has standing to foreclose*

In *Goshen Mortgage, LLC v. Androulidakis*,[10] a foreclosure action, the Appellate Court reaffirmed the principle that the holder of the note has standing to foreclose, even if another party holds the mortgage. The original plaintiff, Goshen Mortgage, LLC, had assigned the mortgage to itself, as trustee for a mortgage pool, denominated Goshen Mortgage, LLC, as Separate Trustee for GDBT I Trust 2011-1 (Goshen Trustee), four days before commencing the foreclosure action. The plaintiff then moved to substitute Goshen Trustee as plaintiff. The defendant objected, claiming the original plaintiff had lacked standing to commence suit at the time the case began.

The Appellate Court noted, "whether or not the plaintiff had standing to initiate the action depends on whether it had

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7 *Id*. at 825.
8 *Id*. at 826.
9 *Id*. at 826, 827.
10 205 Conn. App. 15, 257 A.3d 360 (2021).

physical possession of the note" on the date the action was commenced. The court observed that the mortgage assignment predated the suit, but "the note itself never changed hands. Because the plaintiff transferred the note to itself as trustee, the physical possession of the note never changed."[11] Because it is "well established that the holder of a note has standing to enforce a mortgage even if the mortgage is not assigned to that party,"[12] the original plaintiff had had standing to commence suit, and the trial court had acted properly in allowing Goshen Trustee to be substituted as plaintiff and the case to proceed to a judgment of foreclosure.

C. *Trial court in foreclosure case erred in rendering judgment for defendant based on unconscionability*

In *Rockstone Capital, LLC v. Caldwell*,[13] a residential foreclosure case, the Appellate Court ruled that the trial court erred when it found that one of the defendants had proven her special defense of unconscionability.

The plaintiff sued the defendant Morgan J. Caldwell, Jr., and his business, Wesconn Automotive Center, LLC, on an unpaid line of credit. To resolve the case, the plaintiff entered into a settlement agreement with Caldwell, Wesconn, and Caldwell's life partner, Vicki A. Ditri, with whom Caldwell co-owned their residence in Norwalk (property). Ditri had no obligation under the line of credit, but mortgaged her interest in the property as part of the settlement. Following default under the settlement agreement, the plaintiff brought a second action, this time to foreclose the mortgage.

Ditri filed a special defense, claiming that, as to her, the settlement agreement was unconscionable and unenforceable. Following a bench trial, the trial court agreed, based on its findings that Ditri "lacked business acumen; the closing was rushed because the defendant was on her lunch break; the defendant was unrepresented at the closing; neither Caldwell nor Caldwell's attorneys explained the settlement

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[11] *Id*. at 26.
[12] *Id*. at 27.
[13] 206 Conn. App. 801, 261 A.3d 1171 (2021).

agreement or the mortgage to the defendant; and the documents for the defendant to sign were folded back so that only the signature page was exposed."[14]

Applying plenary review to the legal conclusion of unconscionability, the Appellate Court reversed. The court noted that, for purposes of analyzing a claim of procedural unconscionability, the relevant factors include

> the contracting party's business acumen, the party's awareness of material preconditions to the contract, whether the party was represented by counsel during the transaction period … the existence of a language barrier between the contracting parties … the contracting party's level of education, the party's ability to read and understand the agreement at issue … the reasonableness of the party's expectation to fulfill the contractual obligations … [and] the conduct of the parties during the contract's formation, focusing on the process by which the allegedly unconscionable terms found their way into the agreement.[15]

Applying these factors to the trial record, the Appellate Court found that Ditri had failed to prove her defense. The court found her level of education and business sophistication to be "largely immaterial" under the circumstances, given that "her alleged surprise regarding the contractual terms derives from her failure to read the agreement. Where a party does not attempt to understand its contractual obligations before signing, considerations such as education level, business acumen, and complexity of the contractual language becomes less relevant to our analysis."[16]

Furthermore, even if there had been some procedural impropriety, that could not be imputed to the plaintiff, which "was not even present at the time the defendant signed the settlement agreement."[17] Rather, "the alleged rushed nature of the signing, folded pages, and failure to explain the settle-

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[14] *Id*. at 811.
[15] *Id*. at 810, 811.
[16] *Id*. at 812.
[17] *Id*. at 814.

ment agreement and mortgage each stem from Caldwell, his attorneys, or the defendant's own constraints."[18] There was no showing that Caldwell had somehow acted as an agent for the plaintiff, and "[w]here the claim of unconscionability is directed at the actions and representations of third parties, rather than the plaintiff, we have required that an agency relationship exist between the plaintiff and the third party."[19]

Finally, the Appellate Court found that Ditri had failed to prove not only procedural unconscionability, but substantive unconscionability as well. She argued that she had received "no direct consideration" for mortgaging her interest in the property in connection with the loan workout – a loan for which she was not already an obligor. But under settled law, "the intangible benefit of assisting one's family is sufficient to constitute valuable consideration."[20] Furthermore, "our courts have upheld contractual agreements as enforceable where one party incurs personal liability for a third person's debts in exchange for the other party's offer to forgo pursuing legal action on those debts."[21]

D. *Foreclosure court retained equitable jurisdiction to open judgment after running of law days*

In *U.S. Bank National Association v. Rothermel*,[22] the Connecticut Supreme Court revisited the issue of when, notwithstanding the language of General Statutes Section 49-15, our courts have jurisdiction to open a judgment of strict foreclosure after the law days have passed. The statute provides, in relevant part, "no such judgment shall be opened after the title has become absolute in any encumbrancer…"

In previous caselaw, the state Supreme Court and Appellate Court, noting the equitable nature of mortgage foreclosure, have "recognized that trial courts possess inherent powers that support certain limited forms of continuing eq-

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[18] *Id*.
[19] *Id*. at 813.
[20] *Id*. at 815.
[21] *Id*. at 816.
[22] 339 Conn. 366, 260 A.3d 1187 (2021).

uitable authority [which] can be exercised in a manner consistent with § 49-15 after the passage of the law days."[23] For example, in *Wells Fargo Bank, N.A. v. Melahn*,[24] the plaintiff "had falsely certified that it had complied with the terms of a court order requiring it to provide notice to all nonappearing defendants."[25] The Appellate Court ruled that under those circumstances, "[d]espite the constraints imposed by § 49-15 … the trial court possessed an inherent, continuing, and equitable authority to enforce its previous order," including opening the judgment after title had passed to the foreclosing plaintiff. This authority may be exercised in "rare and exceptional cases."[26]

The defendant in *Rothermel* filed a motion to open a judgment of strict foreclosure one day after the law days had run. She claimed she had relied on certain "misrepresentations" by the plaintiff's loan servicer, which "caused her failure to file a motion to open before the passage of the law day."[27] The trial court denied her motion, finding that the court lacked "jurisdiction or authority" to grant her the relief she requested, but then went on to rule, on the merits, that "the equities of the case did not warrant granting relief" inconsistent with General Statutes Section 49-15.[28]

The Supreme Court disagreed with the trial court's finding that it lacked jurisdiction to open the judgment. "[T]he defendant's motion raised a colorable claim falling within a class generally recognized in equity and sought relief through the court's inherent, continuing jurisdiction as previously established in *Melahn*."[29] But the court nevertheless ruled that the trial court had properly denied the defendant's motion. Applying the "abuse of discretion" standard of review to the trial court's decision on the merits, the Supreme Court found sufficient basis for the trial court's ruling.

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[23] *Id*. at 376, 377.
[24] 148 Conn. App. 1, 85 A.3d 1 (2014).
[25] 339 Conn. at 378.
[26] *Id*. at 379.
[27] *Id*. at 371.
[28] *Id*.
[29] *Id*. at 380.

E. *Supreme Court reverses Appellate Court decision requiring defendant in pending foreclosure to pay property taxes and insurance premiums*

In *JPMorgan Chase Bank v. Essaghof*,[30] a foreclosure case, the Connecticut Supreme Court reversed a decision of the Appellate Court affirming the trial court's order that the defendant homeowners reimburse the plaintiff bank for its advances of property taxes and insurance premiums during the pendency of the appeal.

The court noted the essentially *in rem* nature of mortgage foreclosure, and characterized the interim reimbursement order as a remedy *in personam*, because it did not directly relate to title to the mortgaged premises. "To the contrary, it operated on the defendants personally with respect to *other* property owned by them, by requiring them to pay over money under threat of contempt."[31]

But it was improper for the court to order relief *in personam* in this manner. Under Connecticut foreclosure law, "a deficiency judgment is the only procedure by which a court may order a mortgagor to pay money to a mortgagee in the context of a strict foreclosure."[32] The court noted that the state's eviction statutes provide for use and occupancy payments by a defendant while an eviction case is pending or on appeal, but that no counterpart exists in the foreclosure statutes. "Where the legislature has taken action in an area, [this court] generally interpret[s] the legislature's failure to take similar action in a closely related area as indicative of a decision not to do so."[33]

F. *Municipal rent receiver has limited powers*

In *Boardwalk Realty Associates, LLC v. Gateway Associates, LLC*,[34] the Connecticut Supreme Court narrowly cir-

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[30] 336 Conn. 633, 249 A.3d 327 (2021).
[31] *Id.* at 645. (Emphasis supplied by the court.)
[32] *Id.* at 643.
[33] *Id.* at 644, quoting Bell Atlantic NYNEX Mobile, Inc. v. Commissioner of Revenue Services, 273 Conn. 240, 255, 869 A.2d 611 (2005).
[34] 340 Conn. 115, 263 A.3d 87 (2021).

cumscribed the powers of a municipal rent receiver, which had been appointed, pursuant to General Statutes Section 12-163a (receivership statute), to collect rent payments and apply them to unpaid property taxes. That statute provides, in relevant part, that a receiver appointed thereunder is empowered to "collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner, agent, lessor or manager," and from those proceeds, pay the property taxes owing to the town. The court held that, upon the peculiar facts of this case, in which the landlord had abandoned the property and its tenant remained on the property subject to no lease, the rent receiver was effectively powerless.

The subject property was a commercial parcel in Canton leased to the defendant Gateway Associates, LLC (Gateway) and occupied by Gateway's subtenant, Mitchell Volkswagen, LLC (Mitchell), a car dealership. The owner of the property, Cadle Properties of Connecticut, Inc. (Cadle), effectively abandoned the property shortly after the Superior Court issued an order, on December 4, 2000, requiring Cadle to comply with a pollution abatement order.[35] At about that time, effective October 31, 2001, Cadle's lease of the property to Gateway expired. Since then, neither Cadle nor Gateway has rendered real property taxes to the town, and Mitchell has remained on the property.

In 2011, the town successfully petitioned to have the plaintiff appointed as rent receiver for the property. The plaintiff then served Gateway with a notice to quit, which sparked litigation that led to an Appellate Court decision holding that under the receivership statute, the receiver lacked authority to evict a tenant or lease the property to a new tenant.[36] The plaintiff then brought a new action against Gateway and Mitchell for use and occupancy payments.

The trial court granted the defendants' motion for summary judgment, noting that, in light of Cadle's abandonment

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[35] *Id*. at 119.

[36] *Id*. at 121, summarizing the holding in Canton v. Cadle Properties of Connecticut, Inc., 188 Conn. App. 36, 204 A.3d 62 (2019).

of the property and the termination of the lease, "there is no 'rent' for the receiver to collect."[37] The trial court observed that the plaintiff was bound by "the consequences of Cadle's abandonment of the property in 2001," and noted that the lease lacked "holdover provisions, which, after the lease expired, would (1) have defined the defendants' status on the property, and (2) have set forth the tenants' payment obligations while in this status."[38]

The Supreme Court affirmed. The court observed that the receivership statute "authorizes the collection of 'all' rents or use and occupancy payments 'in place of the owner, agent, lessor or manager' but is silent as to whether the receiver may establish those use and occupancy payments in the first instance, or whether such payments are limited to those that are the product of an existing landlord-tenant relationship."[39] The court then focused on the statute's reference to payments that are "forthcoming," and determined that that language "suggests an existing obligation as between the property owner and the tenants."[40] Given that interpretation, the receiver was "not statutorily authorized to impose and collect rent or use and occupancy payments under the circumstances of this case, when the property has been abandoned by the owner prior to the appointment of the receiver and there is no existing obligation for the receiver to enforce."[41]

The court noted that the town's ultimate recourse "lies with the legislature."[42]

G. *Appellate Court finds substantial compliance with note provision concerning method of transmitting default notice*

In *Onthank v. Onthank*,[43] the Appellate Court discussed the principle of "substantial compliance" with a contract requirement, as applied to the method of transmitting a de-

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[37] *Id*. at 123.
[38] *Id*.
[39] *Id*. at 127.
[40] *Id*. at 127, 128.
[41] *Id*. at 118.
[42] *Id*. at 136.
[43] 206 Conn.App. 54, 260 A.3d 575 (2021).

fault notice.

The case involved a promissory note, which required notices of default to be transmitted "by certified mail, postage prepaid or personal delivery." It was undisputed that the plaintiff, the holder of the note, sent a default notice by regular mail, not by certified mail, which was actually received by the defendants. In rendering judgment for the plaintiff, the trial court found that the plaintiff had strictly complied, or, alternatively, had substantially complied, with the notice requirement.

The Appellate Court affirmed, finding substantial compliance while declining to address the alternative conclusion of actual compliance. The court noted that "substantial compliance" is "closely intertwined with the doctrine of substantial performance," by which "a technical breach of the terms of a contract is excused, not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial."[44] The principle applies "only where performance of a *nonessential* condition is lacking, so that the benefits received by a party are far greater than the injury done to him by the breach of the other party."[45]

The Appellate Court found that the trial court had properly applied this doctrine to the situation at hand, given the circumstances that "there is no contractual requirement of proof of actual delivery, actual delivery is not contested, and any noncompliance with the requisite method of delivery did not result in any prejudice to the defendants."[46]

II. Business Torts

A. *Terminated fraternity's tort claims against Wesleyan University stymied by terminable-at-will provision in contract*

Kent Literary Club of Wesleyan University at Middletown

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[44] *Id*. at 63.
[45] *Id*.
[46] *Id*. at 65.

v. Wesleyan University[47] was a business tort case arising from Wesleyan University's decision, announced on September 22, 2014, to require all residential fraternities on campus to coeducate.

Following the announcement of that policy, the university negotiated with the all-male fraternities on campus, including Delta Kappa Epsilon (DKE), over the terms of their coeducation plans. The DKE chapter resided in a fraternity house owned by an affiliated entity, Kent Literary Club of Wesleyan University at Middletown (Kent). When negotiations with DKE broke down, on February 7, 2015, the university notified the fraternity that it was terminating their Greek Organization Standard Agreement (agreement), the contract that governed their relationship, effective at the end of that academic year. As a result, Wesleyan students would no longer be allowed to reside in or use the DKE fraternity house. DKE, Kent, and a student member of DKE responded by bringing suit.

The plaintiffs claimed that the university failed to negotiate in good faith. They alleged the university had falsely reassured them that, under the new policy, they would be deemed in compliance if they allowed female students to live in fraternity housing even without full membership in the fraternity. They framed this as a promise that "they relied [on] to their detriment, such as by taking steps necessary to prepare a residential coeducation plan."[48] They also claimed the university reneged on a promise to give them three years to coeducate, so long as they fulfilled certain criteria, and broke a promise to prospective and incoming students that the DKE house would be a housing option for them.[49]

The agreement between the university and DKE contained a provision that allowed either party to terminate the relationship, for any reason, upon thirty days' notice.[50] The plaintiffs sought to sidestep that barrier by refraining from

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47 338 Conn. 189, 257 A.3d 874 (2021).
48 *Id.* at 199.
49 *Id.*
50 *Id.* at 196.

alleging breach of contract. Instead, they claimed promissory estoppel, negligent misrepresentation, tortious interference with business expectancies, and violations of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a set seq. (CUTPA).

Following a jury trial, the court entered judgment for the plaintiffs in the amount of $386,000, plus attorneys' fees and costs under CUTPA, and injunctive relief. But the Supreme Court reversed.

The court observed, "if the plaintiffs have any enforceable rights, those rights are grounded, first and foremost, in the parties' contracts," under which the fraternity's "ability to lease its property to Wesleyan students under the auspices of the university's official program housing system could be curtailed at Wesleyan's sole discretion."[51] Given that reality, the plaintiff assumed the burden of establishing that "Wesleyan's allegedly deceptive and misleading conduct was *independently tortious*," and "gave rise to a separate, supra-contractual, but enforceable, obligation for Wesleyan to continue to conduct business with Kent and to assign students to live in the DKE House."[52]

The court acknowledged, "it is possible, under certain limited circumstances, to commit a tort or an unfair trade practice in the context of exercising one's legitimate contractual rights."[53] For example, this may arise "if one party negotiates in bad faith so as to cause the other party reasonably to rely on a false belief that an annual contract will be renewed or extended."[54] Thus, "[t]o this limited degree, the plaintiffs' claims are cognizable."[55] But this is subject to the limiting principle that "a party generally cannot recover more in tort than it would have been entitled to recover under the contract."[56]

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[51] *Id*. at 202.
[52] *Id*. at 203 (emphasis in original).
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.

Here, "Kent and DKE's right to house Wesleyan students was grounded entirely in, and limited by, the terms of the Greek Organization Standards Agreement, to which they repeatedly had assented."[57] As a result, any liability on the part of Wesleyan "extends only so far as they made misrepresentations regarding the renewal or extension of the contract or otherwise bargained in bad faith between September 22, 2014, and February 13, 2015 (the negotiation period)."[58] It follows that Kent's damages are "limited to any documented costs it accrued during that negotiation period in reliance on Wesleyan's alleged misrepresentations."[59]

The court turned to the plaintiffs' claim of promissory estoppel. The court agreed that the defendants had properly sought a jury instruction that "[a] party cannot prevail on a claim for promissory estoppel based on alleged promises that contradict the terms of a written contract."[60] But the defendants went too far when they sought a further instruction that "promissory estoppel applies only when there is no enforceable contract between the parties."[61] The court noted, "[t]hat is not strictly the law. The existence of a contract does not create an absolute bar to a promissory estoppel claim when that claim addresses aspects of the parties' relationship that are collateral to the subject matter, and does not directly vary or contradict the terms, of the written agreement."[62]

As applied here, the plaintiffs' claim of promissory estoppel was cognizable, but to a limited extent: "only insofar as they allege that Wesleyan made promises and commitments that did not alter or contradict the terms of the Greek Organization Standards Agreement."[63] Given Wesleyan's termination rights under the agreement, the plaintiffs had "no legal grounds for contesting Wesleyan's unilateral decision

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[57] *Id.* at 204.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 210, 211.
[61] *Id.* at 211.
[62] *Id.*
[63] *Id.* at 211, 212.

not to readmit DKE into program housing for the 2015–2016 academic year."[64]

The Supreme Court found the trial court's jury instructions on these principles had been inadequate. Along similar lines, the court faulted the trial court's instructions with respect to the plaintiff's claims of unfair trade practice and tortious interference, noting "the trial court should have instructed the jury that the Greek Organization Standards Agreement limited the defendants' potential exposure to only those losses—if any—that Kent incurred prior to the expiration of that contract on June 18, 2015."[65]

The court also took issue with the jury instructions concerning the plaintiffs' claim of negligent misrepresentation. The court noted, "[a]s a general matter, the damages available to a plaintiff in connection with a claim for negligent misrepresentation are measured by the plaintiff's costs incurred in reliance on the defendant's misstatements and false promises, rather than by the profits that the plaintiffs hoped to accrue therefrom."[66]

Here, the plaintiffs had provided evidence of detrimental reliance, such as "hiring an architect and otherwise preparing for coeducation of the DKE House,"[67] but the jury's damages clearly extended beyond reliance damages into "benefit of the bargain losses."[68] The Supreme Court found the trial court's jury instructions had provided insufficient guidance as to the proper measure of damages.

In its remand instructions, the court noted that in previous decisions, the Connecticut Supreme Court has questioned the continuing vitality of the "cigarette rule" as the framework for deciding CUTPA cases. Under the cigarette rule, which arose from the U.S. Supreme Court's decision in *Federal Trade Commission v. Sperry & Hutchinson Co.*,[69]

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64 *Id*. at 214.
65 *Id*. at 220.
66 *Id*. at 223.
67 *Id*. at 224.
68 *Id*.
69 405 U.S. 233, 244-45 n. 5 (1972).

the FTC's standard for identifying an unfair trade practice is "(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]."[70] Connecticut's courts have long applied that analysis to CUTPA cases.

The court in *Wesleyan University* noted that the FTC and federal courts no longer apply the cigarette rule in unfair trade practice cases, having abandoned it in favor of the "unjustified injury test."[71] Accordingly, in several decisions of the Connecticut Supreme Court, the court has weighed the possibility of following suit, and nudged the state legislature to consider clarifying legislation. But, in *Wesleyan University*, the court resolved the issue, finding that the legislature has clearly acquiesced in the application of the cigarette rule. Accordingly, our Supreme Court expressly confirmed that that remains the proper standard.

B. *Appellate Court unravels liability issues in defective construction case*

In *Onofrio v. Mineri*,[72] the Appellate Court addressed significant liability issues concerning the sale of a defective new house. Defendant Joseph Mineri (Mineri) was a fifty percent owner of defendant Timberwood Homes, LLC (Timberwood), a house builder, and he also owned fifty percent of G & M Properties, LLC (G & M), a buyer and seller of real property. The plaintiffs bought from G & M a new house, which had been built by Timberwood on an old foundation.

Mineri knew, but did not disclose to the plaintiffs, that the property was vulnerable to flooding. After repeated in-

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[70] 338 Conn. at 232.
[71] *Id.* at 231.
[72] 207 Conn.App. 630, ___ A.3d ___ (2021).

stances of flooding in the house's basement, the plaintiffs sued Mineri, Timberwood and G & M under a variety of theories. Following a courtside trial, the trial court determined, among other things, that all three defendants were liable to the plaintiffs under the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. (CUTPA), and that Timberwood, a non-party to the sale transaction, was also liable under the New Home Warranties Act, General Statutes Section 47-116 et seq. Mineri and Timberwood, but not G & M, appealed.

Mineri claimed the trial court erred when it extended G & M's liability under CUTPA to him personally. The Appellate Court disagreed, finding sufficient evidence in the record to support this conclusion. The court noted that under existing law, such personal liability may be imposed based on proof of "(1) the entity's violation of CUTPA; (2) the individual's participation in the acts or practices, or the authority to control them; and (3) the individual's knowledge of the wrongdoing at issue."[73]

But the Appellate Court agreed with Timberwood that the trial court erred when it also imputed G & M's liability under CUTPA to Timberwood, upon the court's finding that G & M, Mineri and Timberwood had "jointly coordinated" the activities that constituted an unfair trade practice. The Appellate Court noted that the Connecticut Supreme Court had previously imposed CUTPA liability upon "an individual who engages in unfair or unscrupulous conduct on behalf of a business entity," but has never gone so far as to extend such liability to "another entity that has a controlling shareholder or officer in common with the entity found to have engaged in unfair or unscrupulous conduct."[74] The Appellate Court was unwilling to take that further step.

The Appellate Court also considered whether Timberwood, which built the house but was not the direct seller to the plaintiffs, could be held liable under the New Home

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[73] *Id*. at 643.
[74] *Id*. at 644.

Warranties Act. The court framed the issue, one of first impression, as "whether the implied warranties created by § 47-118 '[i]n every sale of an improvement by a vendor to a purchaser'; General Statutes § 47-118 (a); are owed by the builder/vendor of such improvement to the original purchaser notwithstanding the fact that the home was sold by an intermediary vendor."[75] The court answered that question in the affirmative.

C. *Alleged fraudulent nondisclosure in public filings did not support private fraud claim*

In *Asnat Realty, LLC v. United Illuminating Company*,[76] the plaintiffs, the purchasers of environmentally contaminated property previously owned by the principal defendant, United Illuminating Company (UI), alleged that that company had fraudulently failed to disclose its knowledge, based on a confidential environmental report, about the condition of the property. The plaintiffs brought suit against UI and various affiliated entities and persons.

The plaintiffs and the defendants did not deal with each other directly; UI conveyed the parcel to a third party in 2000, which in turn conveyed the property to the plaintiffs in 2006. The defendants' alleged fraudulent nondisclosures arose in the context of testimony at a public hearing before the Connecticut Department of Public Utility Control, and Form 10-K statements that UI filed with the Securities and Exchange Commission.[77]

The defendants moved to strike the plaintiffs' claims, asserting that these alleged nondisclosures in public forums could not support a fraud claim. The trial court agreed with the defendants, granting the motion to strike and entering judgment on the stricken counts.

The Appellate Court affirmed. The court "agree[d] with the trial court that the complaint failed to allege, with the

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[75] *Id*. at 648.
[76] 204 Conn. App. 313, 253 A.3d 56 (2021).
[77] *Id*. at 316, 317.

requisite specificity, that the defendants' alleged fraud was done to induce the plaintiffs to act.… [T]he plaintiffs' broad claims alleging the existence of an indeterminate future market of potential purchasers of the property are insufficient to properly allege the intent 'to induce action' that is necessary to plead claims of fraud."[78] The plaintiffs failed to allege fraudulent misconduct on the part of the defendants that was "done with the intention or purpose to induce *these* plaintiffs to act to their detriment."[79] The court noted that the plaintiffs had been parties to neither the DPUC proceedings nor to UI's initial sale of the property.[80]

As for UI's SEC filing, the Appellate Court agreed with the trial court's conclusion that UI owed the plaintiffs no legal duty of disclosure. "[T]he class of persons intended to be protected by [the Securities Exchange Act of 1934] consists of investors in the securities market…Accordingly, the plaintiffs as purchasers of the site, do not come within the class of persons that the [act] is intended to protect. … [A]lthough the defendants' duty to disclose truthfully likely was owed to securities investors, it was not owed to the plaintiffs here."[81]

D. *Mutual withdrawal of claims did not provide predicate for later claim for vexatious litigation*

In *Carolina Casualty Insurance Company v. Connecticut Solid Surface, LLC*,[82] the Appellate Court affirmed the trial court's grant of summary judgment for the defendant in a claim for vexatious litigation. The underlying case, which included a counterclaim, had been resolved by way of cross motions to dismiss, which had been simultaneously granted by agreement of the parties. The trial court ruled, and the Appellate Court agreed, that upon that record, a party alleging vexatious litigation could not prove an essential element: that the underlying case had terminated in its favor.

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78 *Id*. at 324.
79 *Id*. at 324, 325.
80 *Id*. at 325.
81 *Id*. at 327.
82 207 Conn. App. 525, 262 A.3d 885 (2021).

For purposes of a vexatious litigation claim, it is true that "final determination on the merits is not necessary to satisfy the favorable termination requirement … [P]roof of a dismissal or abandonment of a prior action is sufficient so long as the proceeding has terminated without consideration."[83] But here, the parties' stipulation to mutual dismissals "constituted a contractual agreement supported by consideration akin to a negotiated settlement of the action."[84] This outcome "was not, as a matter of law, a termination of the action in favor of" the party claiming vexatious litigation.[85]

E. *Paralegal fired for refusing to witness false affidavit stated claim for wrongful termination*

The plaintiff in *Sieranski v. TJC Esq., A Professional Services Corporation*,[86] a paralegal at a law firm, brought suit for wrongful termination, claiming among other things that she had been terminated for refusing to notarize an affidavit that she knew to be false. As alleged in her complaint, the defendant law firm had missed a deadline to appeal from an arbitrator's decision, and the plaintiff's supervising attorney instructed her to prepare and notarize an affidavit falsely asserting that the firm had never received the arbitrator's decision. When she refused, she was fired.

In the first count of the plaintiff's complaint, she alleged common-law wrongful discharge in violation of public policy. She relied upon the public policies embodied in General Statutes Section 3-94h, which provides in relevant part "A notary public shall not (1) perform any official action with intent to deceive or defraud…," and General Statutes Section 53a-157b, the provision from the penal code that defines the crime of making a false statement.

But the trial court did not perceive a violation of public policy, taking a narrow view of the plaintiff's duties as a notary public. The court observed, "a notary has the authority

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[83] *Id.* at 531; internal punctuation and citation omitted.
[84] *Id.* at 536.
[85] *Id.*
[86] 203 Conn.App. 75, 247 A.3d 201 (2021).

to administer oaths, take an acknowledgement, and provide a jurat, but does not have the power to themselves affirm the truth of the contents of the document signed by another."[87] The court granted the defendant's motion to strike this count of the complaint.

The Appellate Court reversed. The court found that, given the plaintiff's actual knowledge of the falsity of the affidavit, by notarizing it she "would have performed her notarial duties in a manner that knowingly assisted the affiant in deceiving the court."[88] The statutes that she relied upon "outline a public policy" against this kind of conduct.[89] Accordingly, her complaint had "sufficiently pleaded facts that, if proven, would fall under the public policy exception to the at-will employment doctrine."[90]

III. Contracts

A. *Non-solicitation provision in partnership agreement held unenforceable*

In *DeLeo v. Equale & Cirone, LLP*,[91] the Appellate Court affirmed the judgment of the trial court voiding the non-solicitation provision[92] in an accounting firm's partnership agreement. That provision applied to former partners who provided auditing, tax or consulting services to clients of the firm during the five years after the partner separated from the firm. A partner who breached the provision would be required to pay to the firm 150% of the firm's average annual billings to the client during the two years before the partner's separation from the firm. The partner would also forfeit deferred compensation payments that would otherwise have

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87 *Id*. at 78, 79.
88 *Id*. at 88.
89 *Id*. at 89.
90 *Id*.
91 202 Conn.App. 650, 246 A.3d 988 (2021).
92 The court consistently referred to the provision at issue as a "noncompete" provision. However, the provision applied only to the plaintiff's provision of services to former clients of the defendant firm, not to working in the accounting field in general. Client-specific provisions of this type are typically referred to as non-solicitation provisions.

been payable by the firm.

The court applied the familiar five-prong test for assessing the reasonableness of a noncompete. Those are: "(1) the length of time the restriction is to be in effect; (2) the geographic area covered by the restriction; (3) the degree of protection afforded to the party in whose favor the covenant is made; (4) the restrictions on the employee's ability to pursue his occupation; and (5) the extent of interference with the public's interests."[93]

The trial court found the five-year proscription period to be excessive. "The five year term is considerably longer than the one to two year terms usually considered reasonable if needed to protect an established business interest. ... [A]ny business for a former or present [partnership] client during the five year period would trigger the penalty even if that client had not been [a partnership] client during most of the restricted period, or had left [the partnership] for reasons unrelated to [the plaintiff], or had stayed with [the partnership] but used [the plaintiff] for only part of the work during the period or had only come to [the plaintiff] years after the client left [the partnership] for other reasons without any solicitation by [the plaintiff]."[94]

As for "reasonableness" prong number three, the court found the provision's restraints were greater than necessary to protect the firm's legitimate interests. For example, the provision "does not distinguish between clients brought into the firm by [the plaintiff] and those he serviced while at [the partnership] who were integrated firm clients or clients developed and/or referred to [the plaintiff] by others at the firm."[95]

This broad language was significant, given the trial court's finding that the plaintiff's clientele "identified with him and the client relationship was primarily with him, not [with the partnership]. When he left nearly 100 percent of his clients

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[93] *Id*. at 672.
[94] *Id*. at 662.
[95] *Id*. at 662, 663.

at [the partnership] followed him to his new firm. This is compelling evidence the clients did not consider themselves [partnership] clients."[96] Along similar lines, "There is no evidence that [the partnership] did anything special to generate goodwill in [the plaintiff's] client base other than to pay the ordinary overhead attributable to providing accounting services (i.e., staff, technology, fixed costs, etc.)…"[97]

The trial court further found that the plaintiff had not benefited from proprietary information of the partnership. "Any customer list would be a list of [the plaintiff's] own clients. … His familiarity with the clients and their needs would not alone suffice as specialized knowledge of [the partnership] to uphold the restrictions as that information could easily have been obtained from the clients themselves when they engaged [the plaintiff's] services."[98] The court concluded that enforcing the non-solicitation provision would result in a "'windfall' to the defendants that is 'disproportionate to the goodwill of the former [partnership's] clients who followed [the plaintiff] to his new practice.'"[99]

Turning to "reasonableness" prong number four, the trial court found the provision "interferes with the plaintiff's ability to pursue his occupation as a certified public accountant…. [T]he court found credible the plaintiff's testimony that he would be unable to continue his accounting practice if he were required to pay the fees called for under the non-compete provision….[The plaintiff's] livelihood and welfare would be jeopardized if he had no access to the client base he developed…"[100]

Finally, the trial court found that the provision would "adversely affect the public's interest in freely engaging with the certified public accountant of its choice."[101] The court noted that the relationship between accountant and client is one of

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96 *Id*. at 663, 664.
97 *Id*. at 664.
98 *Id*. at 664.
99 *Id*. at 665.
100 *Id*. at 668, 669.
101 *Id*. at 670.

"trust and knowledge of the clients' affairs and businesses," one that would be "difficult to recreate elsewhere."[102]

Applying "clearly erroneous" review to the trial court's findings of fact and plenary review to the legal conclusion of unreasonableness, the Appellate Court agreed that the provision was unenforceable. The court was unmoved by the firm's argument that "the parties' equal bargaining power and sophisticated knowledge of the industry are compelling reasons to uphold the enforcement of the noncompete provision."[103]

B. *Appellate Court explains law of third-party beneficiaries*

In *Anderson v. Bloomfield*,[104] the Appellate Court expounded on the law of third-party beneficiaries to contracts. The plaintiff, a homeowner in Bloomfield, needed a new roof for her house. She availed herself of a residential rehabilitation assistance program, by which the town would retain a contractor and pay for the work at no immediate cost to the homeowner. In exchange, the plaintiff granted the town a lien on her house in an amount equal to the contract price, to be settled when she sold or transferred ownership of the property.

The town retained the defendant Plourde Enterprises, LLC, to perform the work. Within months after the job was completed, water began entering the house through the ceilings and walls. An inspection led to the determination that the defendant had installed a defective roof. The plaintiff sued the contractor, claiming to be a third-party beneficiary of the contract between the town and the contractor.

The defendant moved to dismiss, claiming that the plaintiff lacked standing to pursue a contract claim. The trial court agreed, and granted the motion. The court noted that, although the plaintiff was a foreseeable beneficiary of the contract between the defendant and the town, that was in-

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[102] *Id.*
[103] *Id.* at 673.
[104] 203 Conn.App. 182, 247 A.3d 642 (2021).

sufficient to confer third-party beneficiary status upon the plaintiff. The trial court reasoned, "although the plaintiff's home is specifically referenced in the contract, and although the purpose of the contract includes, inter alia, performing work on the plaintiff's home, there is no expressed intent to create an obligation on the part of [the defendant] directly to the plaintiff. Instead, all of the contract terms were negotiated with the town ... [I]t is incumbent on the plaintiff to identify specific language in the contract evidencing [the defendant's] intent to create a direct obligation to her."[105]

The plaintiff appealed, claiming that, because she was the intended beneficiary of the work, and because the property address was identified in the contract, she had third-party beneficiary status. At the very least, she contended, the contract was ambiguous on this point, and the issue should have been submitted to the finder of fact.

The Appellate Court agreed with the latter argument, and reversed. The court noted that a person cannot claim third-party beneficiary status based only on the fact that that person was a foreseeable beneficiary of the contract. "[A] third party seeking to enforce a contract must allege and prove that the contracting parties intended that the promisor should assume a direct obligation to the third party."[106] To have standing, that person must prove status as an intended beneficiary, as defined by Section 302 of the Restatement (Second) of Contracts: "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."[107]

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[105] *Id*. at 186, 187.
[106] *Id*. at 190, quoting Stowe v. Smith, 184 Conn. 194, 196, 441 A.2d 81 (1981).
[107] *Id*. at 190.

In this context, "intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties ... [I]t is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed [third-party] beneficiary."[108] The trial court therefore erred "when it determined that the plaintiff failed to establish standing simply because there was no 'specific language in the contract evidencing [the defendant's] intent to create a direct obligation to her.'"[109]

The Appellate Court noted that, on the issue of intent to benefit the plaintiff, the language of the contract in question cuts both ways. "The identification of the plaintiff's home as the location where the work is to be done can be read as evidencing an intent that she is a third-party beneficiary of the contract. At the same time, the fact that the contract provides rights to review the work performed by the defendant and remedies for breach of the defendant's obligations solely to the town can be read as evidencing the parties' intent that the plaintiff is not a third-party beneficiary."[110]

The court reversed and remanded the case to the trial court, holding that "an evidentiary hearing is required to make the critical factual finding as to whether the plaintiff has standing as a third-party beneficiary."[111] The court instructed, "because resolution of this factual issue is intertwined with the merits of the case, resolution of this jurisdictional question should be resolved by the ultimate fact finder as part of the trial on the merits."[112]

C. *Doctrine of contra proferentem bars contractor's claim against homeowners*

In *C&H Shoreline, LLC v. Rubino*,[113] the Appellate Court

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[108] *Id.* at 191, quoting Dow & Condon, Inc. v. Brookfield Development Corp., 266 Conn. 572, 580, 581, 833 A.2d 908 (2003).

[109] *Id.* at 196.

[110] *Id.*

[111] *Id.* at 197.

[112] *Id.*

[113] 203 Conn.App. 351, 248 A.3d 77 (2021).

used the rule of contra proferentem, by which ambiguities in a written instrument are construed against the drafter, to bar a commercial party's claim for nonpayment under its own preprinted contract.

The plaintiff, doing business as 'Servpro,' had been hired by the defendants to clean their summer home after a flood caused by bursting pipes. The relationship was governed by a written contract provided by the plaintiff. The defendants refused to pay the plaintiff for its work, claiming a lack of proper performance, and the plaintiff sued them for nonpayment. The plaintiff brought suit more than 18 months after the dispute arose.

The defendants asserted a special defense based on paragraph seven of the contract, which provided as follows: "Any claim by Client for faulty performance, for nonperformance or breach under this Contract for damages shall be made in writing to Provider within sixty (60) days after completion of services. Failure to make such a written claim for any matter which could have been corrected by Provider shall be deemed a waiver by Client. NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION."[114]

The parties offered differing interpretations of this provision. The plaintiff argued "because the first two sentences of paragraph 7 relate solely to claims brought by the 'Client,' it necessarily follows that the term 'Claiming Party' in the third sentence refers only to the customer."[115] Thus, the one-year limitation period would have no effect on claims asserted by the plaintiff as "Provider." The defendants countered that "Claiming Party" was a "newly introduced term" that refers to "any party bringing a cause of action relating to the parties' agreement."[116]

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[114] *Id*. at 353.
[115] *Id*. at 357.
[116] *Id*. at 358.

The Appellate Court found paragraph seven to be ambiguous, and noted that the plaintiff "does not suggest that there is any countervailing extrinsic evidence to support a finding that the parties understood the third sentence to apply only to claims brought by the 'Client' or 'Customer.'"[117] Accordingly, given the undisputed fact that the parties' agreement was a contract of adhesion supplied by the plaintiff, the court applied the rule of contra proferentem to paragraph seven, "which resolves the ambiguity against the plaintiff as the undisputed drafter. … and conclude[d] that the one year limitation period contained therein applies to any contracting party asserting a cause of action."[118] The court affirmed the trial court's judgment for the defendants.

The plaintiff's complaint was in six counts, including claims for unjust enrichment, quantum meruit, and negligent misrepresentation. Without specifically pointing out that it was doing so, the Appellate Court effectively held that the contract language at issue, which barred "[any] action, regardless of form, relating to the subject matter of this contract," covered claims sounding in quasi-contract and tort.

IV. Closely Held Businesses

A. *Appellate Court affirms finding of implied partnership*

In *Villanueva v. Villanueva*,[119] the Appellate Court affirmed the trial court's finding that the plaintiff and defendant had entered into an implied partnership, a family landscaping business.

The court noted that an implied contract may be "inferred from the conduct of the parties though not expressed in words."[120] Here, the trial court found "strong evidence the parties were *de facto* partners."[121] Although the defendant had initially been hired by the plaintiff as an employee, the

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[117] *Id*. at 359.
[118] *Id*.
[119] 206 Conn.App. 36, 260 A.3d 568 (2021).
[120] *Id*. at 41.
[121] *Id*.

court observed that "in later years, they regarded each other as partners compensated by withdrawals from the business accounts for personal expenses, which may be characterized as draws and distributions; not salary. … [T]hey acted as mutual agents and jointly managed the business and shared its profits. … Their joint purchase of real estate using corporate [sic] funds epitomized the informal understanding between the brothers. The informal nature of distributions and draws, and the absence of contrary credible proof, suggests they were equal partners. The totality of evidence satisfied the test for formation of a partnership ...."[122]

The defendant argued that a finding of implied partnership "cannot survive the plaintiff's own denial that any such agreement existed," but the trial court had found that "by his conduct, the plaintiff manifested an intent to operate the business alongside the defendant" as a partner.[123] In the trial court's memorandum of decision,[124] the court had cited the Connecticut Supreme Court's decision in *Connecticut Light and Power Co. v. Proctor*[125] for the proposition that "conduct of one party, from which the other may reasonably draw the inference of a promise, is effective in law as a promise. …As long as the conduct of [the] party is volitional and that party knows or reasonably ought to know that the other party might reasonably infer from the conduct an assent to contract, such conduct will amount to a manifestation of assent."

The Appellate Court concluded that the trial court's factual finding of an implied partnership was not clearly erroneous, and affirmed the judgment below.

B. *Fiduciary duty between partners required full disclosure of terms of partner loan to partnership*

In *ASPIC, LLC v. Poitier*,[126] real estate partner A loaned funds to the venture and took back promissory notes from

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[122] *Id*. at 41, 42.
[123] *Id*. at 42.
[124] 2019 WL 6327396 (Conn.Super. October 30, 2019).
[125] 324 Conn. 245, 259-260, 152 A.3d 470 (2016).
[126] 208 Conn.App. 731, ___ A.3d ___ (2021)

the partnership, but he failed to fully apprise partner B of the transactions. The Appellate Court ruled that under the circumstances, partner B could not be held personally liable for the partnership debts.

The case involved notes that were obligations of four limited partnerships, collectively known as the Court Hill Partnerships (Court Hill). Court Hill owned low-income rental properties in the New Haven area. Each partnership had the same three general partners, and each had a partnership agreement imposing unlimited personal liability on all the general partners for partnership debts.

Unbeknownst to one of the partners, Poitier, another partner, Harp, signed two notes totaling almost $3 million on behalf of Court Hill, one to Harp personally and one to a company owned by Harp, called Renaissance Management Company, Inc. (Renaissance Management).[127] In so doing, Harp purported to obligate the other partners, including Poitier, personally. The plaintiff, an assignee of the notes, brought suit against Poitier.

Poitier raised various defenses, including the contention that Harp's execution of the notes had been in breach of his fiduciary duty to Poitier.[128] The trial court agreed: following a bench trial, the court rendered judgment for the defendant, based on that special defense.

On appeal, the plaintiff disputed the trial court's finding that the defendant had lacked notice of the promissory notes. The plaintiff cited various communications in which Harp had informed Poitier about Court Hill's financial straits, asked Poitier to inject needed funds, proposed buying out his interest and that of the third partner, and warned Poitier that absent a buyout, "I will simply borrow the additional funds available to me and assign my collateral debts from Court Hill to [the plaintiff]."[129] The plaintiff also pointed to

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[127] *Id*. at 736.

[128] 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 742.

[129] *Id*. at 744.

Court Hill's audited financial statements, which showed the payables owing to Harp and Renaissance Management.

But the Appellate Court agreed with the trial court that the plaintiff did not adequately prove notice to Poitier of the specific obligations at issue. "[N]either the letters nor the audited financial statements constitute evidence of Harp notifying the defendant of his intent to issue promissory notes totaling more than $3 million on behalf of Court Hill to himself and to Renaissance Management… Owning accounts receivable, even if confirmed by Court Hill's audited financial statements, is materially different from being the holder of a promissory note that provides a clear and explicit obligation to pay the amount set forth in the note pursuant to specific terms…In addition, the [notes] gave Harp and Renaissance Management remedies not available to them without the notes."[130]

C. *Distinction between earnings and dividends proves crucial in divorce decree*

In *Boyd-Mullineaux v. Mullineaux*,[131] a divorce case, the Appellate Court drew a dividing line between the defendant's income for services rendered to a small business, which was subject to apportionment with the plaintiff as alimony and child support, and distributions that the defendant received as a member of a limited liability partnership, which were not.

In 2013, the parties entered into a marital separation agreement, which was incorporated into the court's divorce decree. That agreement required the defendant to pay alimony and child support based on percentages of his "Gross Annual Income Earned from Employment," defined as "any and all earnings of any nature whatsoever actually received by the [defendant] in the form of cash or cash equivalents, or which the [defendant] is entitled to receive, from any and all sources relating to the services rendered by the [defendant] by way of his past, current or future employment …."[132] At

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[130] *Id*. at 747, 748.
[131] 203 Conn.App. 664, 249 A.3d 759 (2021).
[132] *Id*. at 668.

the time, the defendant was employed as a managing director of an investment company called Liquidity Finance, LLC.

A year later, the defendant acquired a membership interest in an affiliated entity, Liquidity Finance, LLP. In that capacity, he received member distributions, while continuing to earn commission income as an employee of the LLC. He did not include his member distributions when calculating his support obligations. The plaintiff challenged this approach, claiming "the distributions were related to the defendant's employment, and, therefore, were included in the definition of earned income from employment contained in the parties' separation agreement."[133]

The Appellate Court ruled that the trial court properly rejected this argument. The court noted that the defendant's two income streams were governed by two separate written agreements, a service agreement with the LLC and a members' agreement with the LLP.[134] Under the latter agreement, members were required to make capital contributions, and received profits based on their "relevant proportion."[135] The agreement did not require employment by the LLC as a condition of membership.[136] The separation agreement's definition of earned income from employment specifically excluded "[c]apital [g]ains, interest and dividends, and all other income earned by the [defendant] due to his investment of assets distributed to him in connection with this dissolution proceeding…"[137]

The court also addressed an issue that often arises in the law of small businesses: conflating termination of the employment relationship with termination of the ownership relationship. The plaintiff argued that under the LLP membership agreement, "if the defendant leaves his employment with the LLC, his capital account would be paid back to him and he would no longer qualify for further profit distributions

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[133] *Id*. at 666.
[134] *Id*. at 669.
[135] *Id*.
[136] *Id*. at 671.
[137] *Id*.

as a member of the LLP."[138] But the court rejected that argument as a "misreading of the members' agreement," which actually provided, "a *member who leaves the LLP* shall have his capital returned to him."[139]

V. Remedies and Defenses

A. *Supreme Court finds lack of minimum contacts to support jurisdiction over Austrian company in breach of contract case*

The Connecticut Supreme Court's decision in *North Sails Group, LLC v. Boards & More GmbH*,[140] a breach of contract case, featured an exhaustive "minimum contacts" analysis in connection with a jurisdictional challenge raised by the defendant, Boards & More GmbH (B&M), a company based in Austria. A divided Supreme Court affirmed the trial court's judgment dismissing the action.

The plaintiff, a Connecticut company, brought suit in Connecticut against the defendant, a surfing products company, for breach of an agreement under which the plaintiff had licensed the "North Surf" tradename and trademark to the defendant. The initial licensing agreement had spanned ten years, 1990 to 2000, followed by a new agreement in 2000 that had a one-year term but provided for yearly renewal.[141] The plaintiff alleged that the defendant breached the parties' contract by launching its own trademark and replacing the plaintiff's North Surf trademark on its products with its own.

The defendant moved to dismiss on the grounds of lack of personal jurisdiction. The trial court granted the motion, concluding that "because the actions that allegedly constituted a breach of contract had occurred in Europe, not in Connecticut, the defendants lacked sufficient minimum contacts with Connecticut, and the exercise of personal jurisdic-

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[138] *Id*. at 671.
[139] *Id*. at 671; emphasis supplied by the court.
[140] 340 Conn. 266, ___ A.3d ___ (2021).
[141] *Id*. at 271, 272.

tion over them would offend principles of due process."[142] The plaintiff appealed, and the Supreme Court transferred the appeal from the Appellate Court to itself.

The Connecticut Supreme Court analyzed the case under the framework of the United States Supreme Court's decision in *Burger King v. Rudzewicz*.[143] In *Burger King*, the court noted that under the Due Process Clause, an individual has a "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"[144] It follows that individuals are constitutionally entitled to "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign."[145] The constitutional touchstone is "whether the defendant purposefully established 'minimum contacts' in the forum."[146]

The Connecticut Supreme Court noted, "[t]o determine whether a single contract suffices to establish the minimum contacts necessary for the exercise of specific jurisdiction over a nonresident defendant, courts review the totality of the circumstances surrounding that relationship to determine whether the defendant, by its actions, purposefully has availed itself of the benefits of the forum state."[147]

The court's task is to "determine whether the contract and its surrounding circumstances demonstrate that the nonresident defendant 'reach[ed] out beyond one state and create[d] continuing relationships and obligations with citizens of another state ....'"[148] When that is the case, "the nonresident defendant is understood to have purposefully availed itself of the benefit of its activities in the forum state," making it fair to subject the defendant to suit there for claims arising from those activities.[149]

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[142] *Id*. at 273.

[143] 471 U.S. 462 (1985).

[144] 471 U.S. at 471, 472, quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[145] *Id*. at 472, quoting Shaffner v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

[146] *Id*. at 474.

[147] 340 Conn. at 277.

[148] *Id*. at 278, quoting *Burger King*, 471 U.S. at 473.

[149] *Id*. at 278.

Courts must take a "'highly realistic approach that recognizes that a contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction. ... It is these factors—*prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing*—that must be evaluated in determining whether the defendant purposefully established minimum contacts with the forum.'"[150]

Through this lens, the court evaluated the contacts between the defendant and Connecticut, and found them insufficient to constitute "minimum contacts" that would constitutionally support jurisdiction.

In its effort to establish minimum contacts, the plaintiff "relie[d] heavily on the long-term relationship between the parties."[151] But although the initial license deal between the parties had a ten-year term, the agreement in effect at the time of the alleged breach was a one-year deal that provided for yearly renewal. Thus, unlike the franchise agreement in *Burger King*, the parties "did not anticipate a relationship for a specific amount of time."[152] Also, the court observed that the subject contract "did not envision an interactive, highly regulated relationship."[153] "[I]t is not the length of the relationship, but the quality of the relationship—i.e., the extent the defendant has purposefully reached into the forum—that matters most for determining forum contacts."[154]

The court observed that one relevant factor is "whether the defendant reached into the forum, including whether the defendant initiated contact."[155] Here, the plaintiff offered no evidence that the defendant had "purposefully 'reached out' to the forum state by initiating contact with the plaintiff."[156] Nor did the defendant "reach into" the Connecticut forum

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[150] *Id*. at 279, quoting *Burger King*, 471 U.S. at 479. (Emphasis in original.)
[151] *Id*. at 286.
[152] *Id*. at 287.
[153] *Id*.
[154] *Id*.
[155] *Id*. at 289.
[156] *Id*. at 291.

through a physical presence here. "Physical presence may include maintaining offices, employees, real or personal property, or an agent for service of process in the forum state, none of which B&M maintains in the present case."[157]

Physical presence "also may include traveling to the forum to negotiate, execute, or perform the contract,"[158] but the plaintiff could point to only "a single visit to the forum [by a representative of the defendant] after the contract was executed."[159] "[A] single visit to the forum is of minimal weight when considered under the totality of the circumstances, especially when, as here, the defendant did not initiate contact, and the contract does not require performance by the defendant in the forum."[160]

The court also considered the jurisdiction in which the contract was to be performed. The plaintiff pointed out that it would "perform its obligations from and suffer any consequences in Connecticut,"[161] but "it is the defendant's contacts with the forum state, not those of the plaintiff, that are relevant."[162] Thus, "[n]one of the plaintiff's forum contacts—its performance in the forum, its use of the royalty funds in the forum, its sales and marketing in the forum, any harm it suffers in the forum—is relevant to determining whether the defendant has minimum contacts with the forum."[163]

As for the defendant, it "never conducted any business in Connecticut," and did "not perform its contractual obligations in Connecticut, [nor did] the contract … require it to do so."[164] The contract did not require the defendant to render payments to the plaintiff at its office in Connecticut; instead, B&M sent its quarterly license fees to a bank designated by the plaintiff, which was located in Milwaukee, Wisconsin.[165]

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157 *Id*. at 292.
158 *Id*. at 293.
159 *Id*. at 291.
160 *Id*. at 293.
161 *Id*. at 296.
162 *Id*. at 276.
163 *Id*. at 297.
164 *Id*. at 299.
165 *Id*. at 271.

The absence of contract performance in Connecticut "weighs heavily against finding minimum contacts."[166]

The plaintiff also pointed out its numerous communications with the defendant, directed to and from its office in Connecticut, concerning the contractual relationship. The parties indeed "communicated regularly and consistently regarding the contract, including communications regarding [the defendant's] payment of royalties. …. The parties also communicated via e-mail regarding the alleged breach of contract at issue."[167] But such communications "do not weigh in favor of jurisdiction because they were ancillary to the performance of the contract rather than demonstrative of continuous collaboration between the parties."[168]

The court went on to compare the contractual relationship at issue in the *Burger King* case with the one before the court. From its corporate headquarters in Florida, Burger King "imposed many requirements on franchisees and, thus, controlled the defendant's daily operations. Among other things, Burger King regulated the defendant's accounting and insurance practices, hours of operation, building layout, service and cleanliness standards, as well as the range, quality, appearance, size, taste, and processing of menu items. … [Burger King's] control over the [defendant's] business required him to consistently and continuously reach out to Florida to obtain authorization for the operation of his business, thereby establishing purposeful availment and providing him with notice that he could be sued in Florida."[169]

The court found these factors to be largely absent from the relationship between North Sails and B&M. The contract at issue

> [did] not require B&M to conduct its business in any particular fashion or require it to comply with any decisions the plaintiff makes regarding its business operations be-

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[166] *Id*.
[167] *Id*. at 301, 302.
[168] *Id*. at 302.
[169] *Id*. at 311, 312.

> yond those relating to the use of the trademarks and trade name. Although the agreement permits the plaintiff to inspect B&M's premises and the licensed products, as well as to audit B&M, these oversight measures do not highly regulate B&M's business—and certainly not in the same way Burger King possessed almost complete control and authority over the defendant's restaurant in Burger King. Rather, the agreement's oversight provisions regulate only B&M's use of the plaintiff's trademarks and trade name.[170]

The court went on to observe:

> [a]lthough the licensing agreement requires B&M to obtain approval from the plaintiff as to the design of certain licensed products, the plaintiff is not authorized to regulate the daily operations of B&M's business. Unlike in *Burger King*, in which the defendant consistently and continuously had to reach out to Florida to obtain authorization for the operation of his business, B&M was not required to reach out to Connecticut to run its business. Rather, the limited supervisory contractual provisions, such as the right to inspect and the right to receive royalty reports, are ancillary and incidental to the licensing agreement.[171]

On this basis, the court agreed with the trial court that there had been an absence of "minimum contacts" sufficient to support jurisdiction, and affirmed the judgment below.

Justice Ecker, joined by Justice Kahn, penned a vigorous 85-page dissent. In their view, "[t]he simple fact of the matter is that B&M made a voluntary, informed choice to enter into a long-term contractual relationship with North Sails, and it did so knowing full well that North Sails would perform its principal obligations under the contract—including filing, processing, maintaining, and protecting the parties' rights to and the value of the North Marks trade name—from its headquarters in Milford."[172] The dissenters faulted the majority for "fail[ing] to give any weight at all to the fact

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[170] *Id.* at 312.
[171] *Id.*
[172] *Id.* at 326.

that the parties were engaged in a decades long business partnership rather than a single product sale or some one-off contractual arrangement."[173]

The dissenters also took issue with the majority's analysis of the U.S. Supreme Court's decision in the *Burger King* case. In their view, that case "holds, in broad, clear, and unequivocal terms, that creating continuing contractual obligations with a forum resident subjects a foreign defendant to jurisdiction in the forum."[174]

In the view of the dissenters, the lesson of *Burger King* is "[w]hen a commercial entity knowingly and voluntarily *chooses* to become business partners with a resident of a state, and follows through by engaging in a long-term relationship, it necessarily accepts a connection with the state itself—its laws, economy, transportation and communication infrastructure, and other residents—in all sorts of ways, both predictable and unexpected, such that it should reasonably anticipate the possibility that a contract related dispute may be adjudicated by that state's courts."[175]

B. *Supreme Court clarifies standard for awarding attorneys' fees under CUTPA*

In *Stone v. East Coast Swappers, LLC*,[176] the Connecticut Supreme Court clarified the standards that apply to awards of attorney's fees to prevailing plaintiffs in cases under the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. ("CUTPA").

Following a courtside trial, the plaintiff obtained a judgment against the defendant, an automobile repair business, in the amount of $8,300. In the memorandum of decision, the trial court held that the plaintiff had "proven a violation of CUTPA [but had] not proven the evil motive or malice necessary to award punitive damages," and on the same basis,

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[173] *Id*. at 336.
[174] *Id*. at 340.
[175] *Id*. at 344.
[176] 337 Conn. 589, 255 A.3d 851 (2021). The author argued the appeal for the plaintiff.

pre-emptively denied any award of attorney's fees.[177] On appeal, the plaintiff contended that the trial court abused its discretion in refusing to award attorney's fees. The Appellate Court affirmed the judgment below.[178]

Following a grant of the plaintiff's petition for certification to appeal, the Supreme Court agreed with the plaintiff that the trial court erred when it "relied on the same factors to deny attorneys' fees as it did to deny punitive damages."[179] In so doing, the court "failed to recognize the different purposes that attorney's fees and punitive damages serve under CUTPA."[180] The purpose of the former is "to foster the use of private attorneys in vindicating the public goal of ferreting out unfair trade practices in consumer transactions by commercial actors generally," while the latter is "focused on deterrence and punishment of particular commercial actors."[181] "[I]n exercising its discretion, a trial court must consider the purpose of CUTPA attorney's fees when deciding whether a prevailing plaintiff should be awarded such fees."[182]

The Supreme Court found that it was an abuse of discretion for the trial court to apply "the more demanding test for awarding punitive damages – intentional, wanton, malicious, or evil conduct- as its rationale for not awarding attorney's fees."[183] The court reversed the judgment below with respect to the denial of attorneys' fees, and remanded the case for further proceedings.

C. *Multiple actions arising from the same construction project raise claim preclusion and issue preclusion issues*

The Appellate Court's decision in *Strazza Building & Construction, Inc. v. Harris*[184] addressed important issues about claim preclusion and issue preclusion in the context of

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[177] *Id*. at 596-598.

[178] The Appellate Court decision is reported at 191 Conn. App. 63, 213 A.3d 499 (2019).

[179] *Id*. at 611.

[180] *Id*. at 610.

[181] *Id*. at 603.

[182] *Id*. at 609.

[183] *Id*. at 610, 611.

[184] 207 Conn. App. 649, 262 A.3d 996 (2021).

a construction case. The plaintiff, the general contractor for a house renovation project, sought to foreclose a mechanic's lien for sums allegedly due from the property owner. One of the plaintiff's subcontractors, which had performed plumbing work, had filed its own mechanic's lien.

In a separate, earlier proceeding (subcontractor case), the property owner applied to discharge the plumbing subcontractor's lien. Following a trial in the subcontractor case, as to which the general contractor was not a party, the court discharged the lien.

The court in the subcontractor case noted that under established law, "a subcontractor only can enforce a mechanic's lien to the extent that there is unpaid contract debt owed to the general contractor by the owner."[185] Thus, to determine the viability of the plumbing subcontractor's lien, the court had to decide if there was a "lienable fund" measured by what, if anything, was owing to the general contractor. This required findings about work performed by the general contractor and other subcontractors, who were nonparties to the subcontractor case. The court in that case determined that there was no lienable fund.

When the general contractor sought to foreclose its own mechanic's lien, the property owner moved for summary judgment. Citing the decision in the subcontractor case, the owner asserted that the general contractor was in privity with its subcontractor, and therefore was bound by that earlier decision on the grounds of res judicata and collateral estoppel. The owner relied on the Connecticut Supreme Court's decision in *Girolametti v. Michael Horton Associates, Inc.*,[186] in which the court held "when a property owner and a general contractor enter into binding, unrestricted arbitration to resolve disputes arising from a construction project, subcontractors are presumptively in privity with the general contractor with respect to the preclusive effects of the arbitration on subsequent litigation arising from the project."

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[185] *Id.* at 654.
[186] 332 Conn. 67, 87, 208 A.3d 1223 (2019).

The trial court denied the owner's motion, and the Appellate Court affirmed, agreeing that the decision in favor of the property owner in the subcontractor case did not dispose of the subsequent claim by the general contractor.[187] The court distinguished *Girolametti* on the basis that, in that case, "the presumption of privity arises from the 'flow down' obligation that a general contractor owes to a subcontractor… [G]eneral contractors are vicariously or derivatively liable for the work of their subcontractors."[188] But, "the opposite is not necessarily true, meaning that there is no corresponding 'flow up' obligation that extends from a subcontractor to a general contractor."[189]

More particularly, in *Girolametti*, "[t]he first action involved the general contractor who presumably had involvement in all aspects of the job," and accordingly "the owner, who was a party to the first proceeding brought by the general contractor, was bound by the rulings in that case when subsequent cases were brought by the subcontractors …"[190] The owner "had every opportunity to assert any claim that he might have against a [subcontractor] in the case against the general contractor."[191]

But, in the present case, "the opposite was true."[192] The earlier decision in the subcontractor case included findings about "many portions of the renovations and improvements to the subject property with which [the plumbing subcontractor] had virtually no involvement."[193] The plumbing subcontractor "would not have firsthand knowledge [of] or significant involvement [in] many aspects of the required performance of other areas of necessary performance under the general contract."[194] Accordingly, under the circumstances, "a genuine is-

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[187] The court noted, "Generally, the denial of a motion for summary judgment is not appealable, but the denial of a motion for summary judgment predicated on the doctrine of res judicata is a final judgment for purposes of appeal." 207 Conn. App. at 651, n.2.

[188] *Id*. at 662.

[189] *Id*.

[190] *Id*. at 664.

[191] *Id*.

[192] *Id*. at 663.

[193] *Id*.

[194] *Id*. at 664.

sue of material fact existed as to the question of whether [the general contractor's] interests were sufficiently represented" in the subcontractor case.[195] It followed that the property owner could not establish, as a matter of law, that res judicata or collateral estoppel barred the general contractor's claims.

D. *Appellate Court provides guidance on statute of limitations tolling doctrines*

The Appellate Court's decision in *Medical Device Solutions, LLC v. Aferzon*[196] provides useful guidance about three tolling doctrines that relate to the running of a statute of limitations: fraudulent concealment, continuing course of conduct and continuing violation.

In 2004, the plaintiff, a medical device designer and developer, and the first named defendant, Dr. Joseph Aferzon, a neurosurgeon and inventor, entered into an agreement concerning a spinal fusion device conceived by Aferzon. Under the agreement, the plaintiff would provide detailed drawings and a prototype of the device, and would receive fifty percent of the total compensation from sales of the device or versions thereof.

The plaintiff developed a prototype that was successfully tested in a cadaver, but afterward shifted to a modified design, and provided new drawings to Aferzon. In the meantime, Aferzon became dissatisfied with the plaintiff's work, and worked on the device on his own and with his son. Aferzon and his son obtained a patent on the modified device, and he and another doctor formed a company, the defendant International Spinal Innovations, LLC (ISI), to monetize it. Meanwhile, Aferzon ignored repeated inquiries from the plaintiff about the status of the project.[197]

ISI licensed the device, and between 2010 and 2019, the company received a series of royalty payments aggregating more than three million dollars.[198] None of this money was shared with the plaintiff.

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[195] *Id*. at 663.
[196] 207 Conn.App. 707, ___ A.3d ___ (2021).
[197] *Id*. at 718.
[198] *Id*. at 719.

In 2017, the plaintiff learned by happenstance that Aferzon had successfully developed and monetized a spinal fusion device. The plaintiff brought suit in 2018, and following a courtside trial, prevailed on claims of breach of contract and violation of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. (CUTPA). The court awarded the plaintiff fifty percent of all the royalty payments received by ISI, reaching back to the first payment received in 2010. In response to the defendants' contention that recovery of the earlier payments was barred by the applicable statutes of limitation, the trial court concluded that the running of the limitation periods had been tolled by both the fraudulent concealment doctrine and continuing course of conduct doctrine.[199]

The trial court noted, "'the first breach of the agreement that could have justified a lawsuit was in 2010,' when ISI first received a royalty payment."[200] But in finding fraudulent concealment, the court relied in substantial part on various acts and willful omissions by Aferzon that preceded that first payment. These included a letter in 2006 to the plaintiff in which Aferzon falsely claimed that the project was dormant; Aferzon's deliberate failure to reply to two inquiring emails from the plaintiff in 2008; and Aferzon's transfer of his patent rights to ISI.

The Appellate Court ruled that, for purposes of the fraudulent concealment analysis, it was error for the trial court to rely on events that occurred before the plaintiff's cause of action accrued. Under established law, "merely concealing [the] existence of wrongdoing is insufficient" to support the application of this doctrine.[201] Rather, "[t]o prove fraudulent concealment, the plaintiff must demonstrate the defendant's *actual awareness* of the facts necessary to establish the plaintiff's *cause of action* and its intentional concealment of these facts."[202] As to Aferzon's acts and omissions before

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[199] *Id*. at 723, 724.
[200] *Id*. at 747.
[201] *Id*. at 748.
[202] *Id*. at 747. (Emphasis in original.)

2010, "[t]he facts necessary to establish the cause of action did not [yet] exist … so it was impossible at those times for Aferzon either to have had actual awareness of the plaintiff's nonexistent cause of action for breach of contract or to have intentionally concealed such a cause of action from the plaintiff."[203]

The Appellate Court noted that the trial court had also relied on Aferzon's nondisclosure to the plaintiff of the royalty payments received by ISI. But absent a fiduciary duty, "mere nondisclosure paired with an ordinary contractual duty to disclose is insufficient to establish fraudulent concealment."[204] Applying the "clear, precise and unequivocal evidence" standard of proof to the issue at hand,"[205] the Appellate Court concluded that the trial court had erred in applying the fraudulent concealment doctrine to the defendants' actions.

The Appellate Court then addressed the trial court's conclusion that the limitation periods had also been tolled by the continuing course of conduct doctrine. The trial court had characterized the defendants' actions as "a series of distinct breaches" of Aferzon's duty, "[u]nder the contract, each time the device made money … to notify [the plaintiff] and pay it 50 percent of the total compensation."[206] The trial court "then engaged in a discussion of both continuing violation analysis and the continuing course of conduct doctrine, referring to them interchangeably,"[207] before concluding that the continuing course of conduct doctrine applied.[208]

The Appellate Court ruled that this too was error, because "the nature of the defendants' breaches is incompatible with the continuing course of conduct doctrine."[209] That doctrine applies when "the act or omission that commences the limitation period [is] not discrete and attributable to a

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[203] *Id*. at 748.
[204] *Id*. at 751.
[205] *Id*. at 745.
[206] *Id*. at 755.
[207] *Id*.
[208] *Id*. at 756.
[209] *Id*.

fixed point in time … under circumstances where [i]t may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury."[210] One example is a case involving "the negligent failure of a physician to warn a patient of the harmful side effects of a drug that the physician had prescribed and that the patient had continued to ingest over a period of time."[211]

But here, "the defendants repeatedly breached the agreement, and every breach is readily identifiable … [the evidence] clearly delineat[ed] the date and amount of each distinct royalty payment which the defendants received … without notifying the plaintiff."[212] This is an example of a continuing violation, as to which tolling does not apply. "[T]he damages from each discrete act … would be readily calculable without waiting for the entire series of acts to end. There would be no excuse for the delay."[213] The case at hand "involves a series of separate breaches to which the continuing course of conduct doctrine does not apply because each such breach caused separate damages that were readily calculable at the time of breach."[214] Indeed, the continuing course of conduct doctrine "is one classically applicable to causes of action in tort, rather than in contract," and it is questionable "whether the doctrine should ever be applied to breach of contract claims."[215]

E. *Probate Court decree collaterally estops later tortious interference claim*

In *Solon v. Slater*,[216] the widow of Michael Solon (decedent) sued the decedent's son and attorney for tortiously interfering with the amendment of his will and their prenuptial agreement in ways that would have benefited her. Before she commenced suit, the Probate Court issued a de-

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[210] *Id.* at 759.
[211] *Id.* at 758.
[212] *Id.* at 759.
[213] *Id.*
[214] *Id.* at 761.
[215] *Id.*
[216] 204 Conn. App. 647, 253 A.3d 503 (2021).

cree admitting the decedent's will, after a contested hearing at which the plaintiff claimed undue influence on the part of the defendants. The plaintiff did not appeal from the probate decree.

The defendants moved for summary judgment on the tortious interference claims, asserting that, because of the Probate Court decree, she was collaterally estopped from asserting them. The trial court agreed, and granted the defendants' motion.

The Appellate Court affirmed. The court identified the elements, under established Connecticut law, of claims for undue influence and tortious interference, and noted, "In support of her claims of tortious interference, the plaintiff relies on the same factual predicate that she offered in support of her undue influence claim in Probate Court."[217] Those common allegations were that "the decedent's 2014 will was executed 'under the influence and control' of the defendants" and "the antenuptial agreement was not modified … because the defendants… '…forcibly removed and essentially kidnapped [the decedent] from the marital home ... so [that the decedent] would be in their complete control and custody and under their influence and manipulation.'"[218]

The Appellate Court noted that the Probate Court "already has determined that the aforementioned factual predicate on which the plaintiff relies to support her tortious interference claims does not rise to a level of impropriety, of whatever character, by the defendants such as to affect the disposition of the decedent's estate."[219] The court concluded that the plaintiff was improperly "attempting to relitigate the propriety of the defendants' conduct with respect to the disposition of the decedent's estate."[220] Accordingly, the trial court had properly applied the doctrine of collateral estoppel to bar her tortious interference claims.

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[217] *Id*. at 663.
[218] *Id*. at 663, 664.
[219] *Id*. at 664.
[220] *Id*. at 665.

F. *Exchange of emails gives rise to summarily enforceable settlement agreement*

In *Wittman v. Intense Movers, Inc.*,[221] the Appellate Court enforced the trial court's order summarily enforcing a settlement agreement evidenced by a memorandum of understanding, followed up by a formal settlement agreement transmitted by email but never signed.

The plaintiffs, shareholders in a closely held corporation, brought an action to dissolve the company. Defendant Alexander Leute, who was another shareholder, filed a notice of intent to purchase the plaintiffs' shares in lieu of dissolution, pursuant to General Statutes Section 33-900(b).

The parties subsequently executed a memorandum of understanding, which as characterized by the court, "resolv[ed] the primary issues" while providing "the parties would enter into a more detailed settlement that would provide, among other things, the necessary terms to effectuate the plaintiffs' transfer of their shares."[222] To that end, the parties followed up with numerous emails concerning the proposed settlement agreement.

In November of 2018, Mr. Leute sent an email to counsel for the plaintiffs, concerning the most recent draft agreement, requesting a change but also saying "[e]verything else looks good. I will have this signed and sent over to you ASAP once that small change is made and I will have the check mailed out as well."[223] Counsel for the plaintiffs promptly made the requested change and tendered the revised agreement, but Mr. Leute refused to sign it, claiming the parties had understood that the agreement was contingent upon him obtaining the necessary financing.

The trial court found that the parties had entered into an enforceable settlement agreement, and that the agreement unambiguously did not include a financing contingency. The court granted the plaintiffs' motion for an order summarily

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[221] 202 Conn. App. 87, 245 A.3d 479 (2021).
[222] *Id.* at 90.
[223] *Id.* at 94.

enforcing the agreement. The Appellate Court affirmed, concluding that the defendants had "failed to establish that the court improperly enforced the settlement agreement, which consisted of the signed memorandum of understanding as supplemented by the unsigned settlement document with its attachments."[224]

G. *Constitutional limits on punitive damages held inapplicable to awards of statutory damages*

In *Your Mansion Real Estate, LLC v. RCN Capital Funding, LLC*,[225] the Appellate Court ruled that constitutional constraints on awards of punitive damages do not apply to awards of statutory damages. The plaintiff, the owner of a parcel of real estate, sued the defendant, the mortgagee of the property, for failing to timely tender a release of the mortgage after it had been paid off, in violation of General Statutes Section 49-8(c). The statute provides that, if a mortgagee fails to provide a release within sixty days of a written request for the same, the mortgagee shall thereafter be liable for the greater of actual damages or statutory damages in the amount of $200 per week, up to a cap of $5,000.

The defendant's delivery of a release was more than two years late. Because the plaintiff stipulated that it had not suffered actual harm, the trial court awarded the plaintiff statutory damages, in the maximum sum of $5,000.

The defendant argued that, given the absence of actual harm, the imposition of statutory damages violated its right to due process under the Fourteenth Amendment of the Constitution, pursuant to the principles articulated by the United States Supreme Court in *BMW of North America, Inc. v. Gore*.[226] Under that decision, one factor a court should consider when reviewing awards of punitive damages is "the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award."[227]

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[224] *Id*. at 105.
[225] 206 Conn. App. 316, 261 A.3d 110 (2021).
[226] 517 U.S. 559 (1996).
[227] 206 Conn. App. at 333, 334, quoting BMW of North America, Inc. v. Gore, 517 U.S. 559 at 575.

The Appellate Court rejected this argument, holding "*Gore* is not applicable to this case because the statutory damages available under §49-8 are not punitive damages for purposes of *Gore*."[228] The court observed that punitive damages and statutory damages are "fundamentally different…[P]unitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. Statutory damages, on the other hand, not only are subject to limits established by the legislature, but they are at least partly (if not principally) designed to provide compensation to individuals where actual damages are difficult or impossible to determine."[229]

[228] 206 Conn. App. at 334.
[229] *Id*. at 334, 335.