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BUSINESS LITIGATION: 2012 IN REVIEW

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For Connecticut business litigators, a dominant theme of 2012's appellate case law was, "Who else can I sue?" In the course of the year, the Connecticut Supreme Court and Appellate Court examined numerous theories involving "other" defendants, such as successor liability, guarantor liability, vicarious liability, and assignee liability, as well as the reach of remedies under such doctrines as reverse veil-piercing and fraudulent transfer.

That said, perhaps the most noteworthy business-law decision of the year focused not on "Who can I sue?" but rather "When can the State sue you?" This article will discuss these cases, as well as other noteworthy decisions in the realm of business law.

I. STATE V. LOMBARDO BROTHERS

In *State v. Lombardo Brothers Mason Contractors, Inc.*,[1] the Connecticut Supreme Court confirmed the continued vitality of the ancient doctrine, known as *nullum tempus occurrit regi* (no times runs against the king), by which statutes of limitation do not apply to actions commenced by the state.[2] The state brought suit against the named defendant and twenty-seven others[3] in 2008 for alleged design and construction problems with a new library at the University of Connecticut School of Law, which had been completed in 1996.[4] The defendants countered that the state's claims were barred by applicable statutes of limitation:[5] General Statutes Sections 52-577,[6] 52-577a,[7]

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1 307 Conn. 412, 54 A.3d 1005 (2012).

2 *Id.* at 416.

3 *Id.* at 417.

4 *Id.* at 420, 421.

5 *Id.* at 418, 419, 421.

6 General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

7 General Statutes § 52-577a provides in relevant part: "(a) No product liability claim, as defined in section 52-572m, shall be brought but within three years from the date when the injury, death or property damage is first sustained or dis-

52-584,[8] 52-584a,[9] and/or 52-576.[10] The trial court agreed with the defendants, and entered judgment for them upon the granting of various motions to strike and motions for summary judgment.[11]

On appeal, the Supreme Court observed that, while the term "nullum tempus" had not been previously used in any reported Connecticut case,[12] the underlying principle had been cited in an 1888 decision of the court, in which the court had declared it "elementary law that a statute of limitations does not run against the state, the sovereign power."[13]

The court went on to note that the doctrine of *nullum tempus* has much in common with sovereign immunity, to the point that they can be characterized as "opposite sides of the same coin."[14] "'The…distinction between [the] two doctrines lies in the manner in which they are employed in litigation. Sovereign immunity is invoked as a shield by the

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covered or in the exercise of reasonable care should have been discovered, except that, subject to the provisions of subsections (c), (d) and (e) of this section, no such action may be brought against any party nor may any party be impleaded pursuant to subsection (b) of this section later than ten years from the date that the party last parted with possession or control of the product…."

8 General Statutes § 52-584 provides in relevant part: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of …."

9 General Statutes § 52-584a provides in relevant part: "(a) No action or arbitration, whether in contract, in tort, or otherwise, (1) to recover damages (A) for any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of, or land surveying in connection with, an improvement to real property; (B) for injury to property, real or personal, arising out of any such deficiency; (C) for injury to the person or for wrongful death arising out of any such deficiency, or (2) for contribution or indemnity which is brought as a result of any such claim for damages shall be brought against any architect, professional engineer or land surveyor performing or furnishing the design, planning, supervision, observation of construction or construction of, or land surveying in connection with, such improvement more than seven years after substantial completion of such improvement."

10 General Statutes § 52-576 provides in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues. …"

11 *Lombardo Brothers,* 307 Conn. at 419.

12 *Id.* at 427, fn. 19.

13 *Id.* at 427, quoting Clinton v. Bacon, 56 Conn. 508, 517, 16 A.548 (1888).

14 *Id.* at 429.

sovereign defendant against suits from parties allegedly injured by its wrongful conduct or that of its agents…Conversely, nullum tempus is invoked by the sovereign plaintiff…as a sword to strike down the statute of limitation defense raised by the defendant whose conduct is alleged to have injured the sovereign in some manner.'"[15] Both doctrines are rooted in the public policy of protecting the fiscal well-being of the state.[16]

The court found that the principle of *nullum tempus* had been consistently applied in Connecticut over the years,[17] and declined the defendants' invitation to abolish it, deeming such a change to be a matter for the legislature, not the courts, to decide.[18] The court reversed the judgment below, and remanded the case for further proceedings.[19]

Significantly, the court also held that *nullum tempus* applies even if the state has agreed contractually to be bound by statutes of limitation. In its contract with one of the defendants, Gilbane, Inc., the state, through its chief deputy commissioner of public works (commissioner), had agreed to be bound by the seven year period of repose prescribed by General Statutes Section 52-584a.[20] Gilbane argued, and the trial court agreed, that the state had contractually waived the protection of *nullum tempus*.[21]

The Supreme Court disagreed. "[O]nly the legislature, and not the attorney representing the state in a particular dispute, may waive the state's sovereign immunity. … A party who seeks to contract with the government bears the burden of making sure that the person who purportedly represents the government actually has that authority."[22]

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[15] *Id.,* quoting Indiana v. Acquisitions & Mergers, Inc., 770 A.2d 364, 372 (Pa.Commw. 2001).

[16] *Id.* at 437.

[17] *Id.* at 431-32.

[18] *Id.* at 436-38.

[19] *Id.* at 469.

[20] *Id.* at 418. Specifically, the contract provided, "'The services performed pursuant to this contract shall be considered professional work to which any statutory period of repose then otherwise applicable to professional design work under Connecticut law shall apply.'" *Id.* at 458.

[21] *Id.* at 458.

[22] *Id.* at 463 (internal citations omitted).

Here, the statute that at the relevant time authorized the commissioner to enter into contracts, General Statutes Section 4b-99, "does not expressly or by force of necessary implication authorize him to waive the state's immunity from the operation of § 52-584a."[23] The Supreme Court therefore deemed the contractual provision in question a "nullity," and rejected Gilbane's waiver argument.[24]

II. Liability

In *Robbins v. Physicians for Women's Health, LLC*,[25] a divided Appellate Court closely examined the issue of successor liability. The plaintiff brought suit for the death of her newborn son against Lawrence and Memorial Hospital; a physician and midwife; their employer, Shoreline Obstetrics and Gynecology, P.C. (Shoreline); and two companies that acquired Shoreline after the operative events, Physicians for Women's Health, LLC and Women's Health USA, Inc. (successors).[26]

The plaintiff settled with the two individual defendants and Shoreline for the $1 million policy limits of the malpractice policies covering the individuals.[27] As part of the agreement, the plaintiff executed covenants not to sue, which barred further recourse against the settling defendants but expressly reserved all rights against the successors.[28] The successors nevertheless argued that, as a matter of law, the settlement with Shoreline had the effect of discharging them, as their liability derived exclusively from that of Shoreline.[29] The trial court agreed, and entered summary judgment for the successors.[30]

By a 2-1 vote, the Appellate Court reversed. The court noted that ordinarily, the mere transfer of assets from one

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[23] *Id.* at 458.
[24] *Id.* at 466.
[25] 133 Conn. App. 577, 38 A.3d 142, *cert. granted,* 304 Conn. 926, 41 A.3d 1052 (2012).
[26] *Id.* at 580.
[27] *Id.* at 581-82.
[28] *Id.* at 581, fn. 2.
[29] *Id.* at 582.
[30] *Id.*

corporation to another does not have the effect of transferring liabilities.[31] An exception to that rule may arise under the "mere continuation theory," when the transfer results in "a single corporation after the transfer of assets, with an identity of stock, stockholder, and directors between the successor and predecessor corporations" or the "continuity of enterprise theory," when the successor "maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers."[32]

Under either theory, there is no need for successor liability if the predecessor company remains a "viable source of relief."[33] In the *Robbins* case, although the plaintiff had received $2 million in settlement funds from the predecessor company, the plaintiff's total damage had not been established, so it was unclear if Shoreline had had the resources to provide the plaintiff with complete relief.[34] Accordingly, the Appellate Court ruled that summary judgment should not enter for the successors on the grounds that their predecessor, Shoreline, represented a viable source of relief; there remained an issue of fact in this regard.[35]

The court then examined the effect of the covenant not to sue. The court noted that a covenant not to sue differs from a release in that a covenant "is not a present abandonment or relinquishment of a right or claim but is merely an agreement not to sue on an existing claim or it is an election not to proceed against a particular party."[36] In the typical context of joint tortfeasors, a covenant not to sue one tortfeasor will not bar recourse against others, particularly when the document contains an express reservation of rights against the latter.[37]

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31 *Id.* at 584.
32 *Id.* at 585.
33 *Id.* at 587.
34 *Id.* at 587-88.
35 *Id.*
36 *Id.* at 589.
37 *Id.* at 589-90.

The court recognized that the situation in *Robbins* involved directly and vicariously liable parties, not joint tortfeasors, and presented an issue of first impression in Connecticut.[38] Relying in large part on authority from other jurisdictions, the court concluded, as a matter of law, that the plaintiff's covenant not to sue Shoreline did not bar her from imposing liability upon the successors.[39] The court therefore reversed the summary judgment rendered by the trial court, and remanded the case for further proceedings.[40]

Judge Bear dissented, asserting that the majority opinion would "allow the plaintiff the opportunity for an unjustified windfall recovery from the [successors], i.e. recovery in excess of what she could have recovered from the corporate predecessor on the date of the alleged negligence."[41] In his view, Shoreline, through its settlement with the plaintiff, discharged and extinguished its liability, and thus that of the successors whose potential liability was wholly vicarious through Shoreline.[42]

The Appellate Court's decision in *Atelier Constantin Popescu, LLC v. JC Corporation*[43] contains some valuable lessons about the reach of liability. An independent building contractor accidentally caused a commercial property to burn down – ultimately burning the landlord and its insiders as well, as they were held liable to the tenant, under a variety of theories.

The plaintiff, a music studio, negotiated a lease with JC Corporation, the owner of a property that it had sought unsuccessfully to develop as a tea house.[44] The parties reached an understanding on monthly rent, as well as a lump-sum payment of $110,000 in "key money" to compensate the landlord for improvements it had made to the property.[45] When JC Corporation tendered an initial draft of doc-

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[38] *Id.* at 590-91.
[39] *Id.* at 591-95.
[40] *Id.* at 596.
[41] *Id.* at 596-97.
[42] *Id.* at 604.
[43] 134 Conn. App. 731, 49 A.3d 1003 (2012).
[44] *Id.* at 734-35.
[45] *Id.* at 736.

uments, the plaintiff was surprised to see not only a lease but also a separate "key money agreement" in favor of a different entity, Tea House on the Riverside, Inc. (Tea House).[46] The plaintiff eventually executed both documents, and remitted the $110,000 key money payment to Tea House.[47]

A few weeks later, the building was destroyed by fire.[48] The plaintiff sent JC Corporation a valid and timely notice of termination of the lease, but JC Corporation refused to return the key money.[49] At about that time, Hsiao-Wen Chen, a principal of both JC Corporation and Tea House,[50] wrote herself a $110,000 check from the Tea House Bank account, claiming the key money payment as a "return of capital."[51]

A building contractor had caused the fire, by using a plasma cutter, a tool that cuts through steel by creating temperatures in excess of 10,000 degrees Fahrenheit, to remove ductwork that was in close proximity to wooden framework.[52] The contractor's owner had previously told Julie Chen, another principal of JC Corporation and Tea House,[53] that because of the fire risk, the ductwork could not be removed safely unless the ceiling was removed first.[54] He gave his crew specific instructions to that effect, but Julie Chen overrode those instructions and convinced his crew to use the plasma cutter to cut the ductwork flush to the ceiling.[55]

The Appellate Court agreed with the trial court that JC Corporation should be held vicariously liable for the contractor's actions.[56] While an employer is not usually liable for the negligence of its independent contractors, exceptions to the rule exist when the employer "'retains control of the premises or supervises the [independent contractor's] work,

46 *Id.* at 736.
47 *Id.* at 736-37.
48 *Id.* at 737.
49 *Id.*
50 *Id.* at 761, 764.
51 *Id.* at 737.
52 *Id.* at 740-41.
53 *Id.* at 736, 764
54 *Id.* at 741.
55 *Id.*
56 *Id.* at 743-44.

when the work is inherently dangerous, or when the [employer] has a nondelegable duty to take safety precautions imposed by statute or regulation.'"[57]

The court found that all three of these exceptions applied. The contractor's compliance with Julie Chen's instructions evidenced sufficient supervision and control on the part of JC Corporation to justify the imposition of vicarious liability.[58] Use of the plasma cutter in the manner that the contractor did constituted inherently dangerous work.[59] And the landlord owed its tenant a nondelegable duty to maintain the premises in a reasonably safe condition.[60] While the landlord was free to contract out the performance of the latter duty, it could not contract out its legal responsibility.[61]

The court further found that the contractor had acted recklessly, and that JC Corporation, aside from being vicariously liable for the contractor's conduct, had itself acted recklessly, through its agent Julie Chen.[62] Not only had she instructed the contractor to proceed as it did, but she also noticed – and ignored – the smell of burnt metal in the building at the conclusion of the job.[63] Rather than address the situation, she drove away from the property, learning hours later that the building was on fire.[64] The court also found Julie Chen personally liable for recklessness.[65]

Finally, the Appellate Court found sufficient factual support for the trial court's piercing of the corporate veils of JC Corporation and Tea House to hold both Julie Chen and Hsiao-Wen Chen personally liable for the plaintiff's claims.[66]

In *L and V Contractors LLC v. Heritage Warranty Insurance Risk Retention Group, Inc.,*[67] the Appellate Court

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[57] *Id.* at 744 (alteration in original; internal citation omitted).
[58] *Id.* at 745-46.
[59] *Id.* at 748.
[60] *Id.* at 750.
[61] *Id.*
[62] *Id.* at 754.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 756-57.
[66] *Id.* at 758-765.
[67] 136 Conn. App. 662, 47 A.3d 887 (2012).

discussed the limited reach of the doctrine of apparent authority. The plaintiff brought a vehicle to the defendant Drive Train Unlimited, LLC (Drive Train) for transmission repairs. While the vehicle was in Drive Train's custody, one of its owners used it for personal use, to the extent of approximately 900 miles.[68] The plaintiff sued Drive Train for statutory theft, conversion, unfair trade practice, and fraudulent and negligent misrepresentation.[69]

Drive Train had a license agreement with AAMCO Transmissions, Inc. (AAMCO) to use the AAMCO name in exchange for payment of a fee.[70] The plaintiff therefore also sued AAMCO under the same theories, claiming that Drive Train had acted as AAMCO's agent.[71] The trial court rendered judgment for the plaintiff, finding that Drive Train had both actual and apparent authority to act for AAMCO.[72]

The Appellate Court reversed. The court found an absence of evidence that AAMCO controlled Drive Train in any relevant manner, and thus a failure of proof of actual agency.[73] As for apparent authority, the Appellate Court noted that this doctrine requires proof that "the principal held the agent out as possessing sufficient authority to embrace *the act in question,* or knowingly permitted him to act as having such authority."[74] But this does not expose a principal to liability for tortious conduct by the would-be agent that extends beyond the agent's apparent authority.[75] That was the case here, and accordingly the trial court erred in finding AAMCO liable under this theory.

In the Appellate Court's decision in *Yellow Book Sales & Distribution Co. v. Valle*,[76] the issue was whether or not the defendant business owner, in signing certain contracts for the company, had also assumed personal liability as a guarantor.

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[68] *Id.* at 665.
[69] *Id.*
[70] *Id.* at 668.
[71] *Id.*
[72] *Id.* at 666.
[73] *Id.* at 668.
[74] *Id.* at 669 (emphasis added).
[75] *Id.* at 669, 670.
[76] 133 Conn. App. 75, 35 A.3d 1082, *cert. granted,* 304 Conn. 922, 41 A.3d 661 (2012).

The trial court had entered summary judgment for the defendant, finding that the agreements were ambiguous as to whether or not he had signed as a guarantor, and were therefore unenforceable against him under the Statute of Frauds.[77]

The contracts contained a provision that recited "The signer of this agreement does, by his execution personally and individually undertake and assume the full performance hereof including payments of the amounts due hereunder."[78] But in each instance, the defendant signed the contract as "David Valle, President."[79] The court found that this manner of executing the contracts, read in light of other provisions that appeared to designate Yellow Book and Valle's company as the sole parties, created an ambiguity as to whether or not the defendant individually was a party to the contracts.[80] The court observed that, in order to satisfy the Statute of Frauds, the writing must be free of ambiguity with respect to the status of the would-be guarantor.[81]

The plaintiff also argued that the obligation assumed by the defendant had been an original undertaking, not a guaranty governed by the Statute of Frauds.[82] However, in deposition testimony, the plaintiff's agent admitted that the plaintiff had extended credit to Valle's company, not to Valle personally, and not on the strength of his individual credit.[83] Accordingly, both the trial court and the Appellate Court rejected this argument.[84]

The Appellate Court contrasted the case before it with prior case law[85] in which the evidence showed that a creditor had extended credit to a company based on an individual's

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[77] *Id.* at 79. The Statute of Frauds, General Statutes § 52-550, provides in relevant part, "(a) No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged … (2) against any person upon any special promise to answer for the debt, default or miscarriage of another…."

[78] *Id.* at 78.

[79] *Id.*

[80] *Id.* at 84.

[81] *Id.* at 83.

[82] *Id.* at 80.

[83] *Id.* at 82.

[84] *Id.* at 80.

[85] Kerin Agency, Inc. v. West Haven Painting & Decorating, Inc., 38 Conn. App. 329, 660 A.2d 882 (1995).

personal guaranty and the creditor's review of his personal financial statement.[86] In the latter instance, the individual defendant's undertaking was held to be original, not collateral, and accordingly the Statute of Frauds did not apply.[87]

The Appellate Court's decision in *Sunset Gold Realty, LLC v. Premier Building and Development, Inc.*[88] illustrates how an e-mail message may help fulfill a statutory "written agreement" requirement and thereby create an enforceable contract. The plaintiff, a real estate agency, entered into a listing agreement with the defendant Premier Building and Development, Inc. (Premier), which held an option to acquire a piece of commercial property.[89] The listing agreement gave the plaintiff an exclusive right to sell, lease or exchange the property for one year.[90] Through the plaintiff's efforts, the property was leased for the development of a CVS store on the property.[91] Premier acquired title to the property, but promptly conveyed title to an affiliated entity, Cobblestone Associates, LLC (Cobblestone).[92] When the defendants refused to pay the plaintiff's commission, the plaintiff brought suit.[93] Following a courtside trial, the trial court entered judgment for the plaintiff against both defendants.[94]

Cobblestone contended that because it was not a party to the listing agreement, the trial court erred in finding it liable thereunder.[95] More particularly, Cobblestone sought cover under General Statutes Section 20-325a, which requires a suit for an unpaid real estate commission to be founded on a writing that contains certain prescribed content, including the signature of "the person for whom the acts were done or services rendered" or such person's agent.[96] Recovery may

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[86] *Yellow Book*, 133 Conn. App. at 81.
[87] *Id.*
[88] 133 Conn. App. 445, 36 A.3d 243, *cert. denied,* 304 Conn.912, 40 A.3d 319 (2012).
[89] *Id.* at 448.
[90] *Id.*
[91] *Id.* at 449.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 451.
[96] *Id.* at 453-54.

nevertheless be permitted under an agreement that substantially complies with the statutory requirements, when it would be inequitable to deny recovery.[97]

The Appellate Court agreed with the trial court that liability should attach to Cobblestone. The listing agreement provided that it was binding on Premier and its assigns.[98] The court imposed assignee liability upon Cobblestone based in part on Premier's transfer of the property to Cobblestone, which shared a common owner with Premier.[99]

The court also attached considerable significance to an e-mail from another of Cobblestone's members to the plaintiff's broker, four months after the property transfer, assuring him: "If a sale [of the subject property] took place you would have been paid … period. If and when a deal occurs with CVS, you will get paid what you are entitled to … period."[100] The court found that this e-mail substantially complied with General Statutes Section 20-325a, in that, it "identified Cobblestone's obligation to compensate Sunset Realty for its services, contained the names of both the real estate broker and the person for whom services were rendered and was signed by the person for whom the services were rendered."[101] Given substantial compliance with the statute, and adopting the trial court's finding that it would be inequitable to deny recovery to the plaintiff, the Appellate Court affirmed the judgment for the plaintiff.[102]

In *City of Hartford v. McKeever*,[103] a divided panel of the Appellate Court ruled that the assignee of a promissory note is subject to defenses, but not affirmative claims, arising from conduct of the assignor prior to the assignment. In 1983, the defendant had borrowed money from the Community Development Corporation (corporation), secured by a mortgage and collateral assignment of leases and rentals on a

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[97] *Id.* at 454.
[98] *Id.* at 454-55.
[99] *Id.* at 455.
[100] *Id.* (internal punctuation in original).
[101] *Id.* at 455-56.
[102] *Id.* at 456-57.
[103] 139 Conn. App. 277, 55 A.3d 787 (2012), *cert. granted,* 307 Conn. 956, 59 A.3d 1191 (2013).

multi-tenant rental property that he owned.[104] At some point, the corporation declared the loan to be in default, but rather than accelerate the loan, exercised its right to collect rental payments from the defendant's tenants.[105]

In 2001, the loan was assigned to the plaintiff.[106] By that time, the defendant had fully paid the loan, and indeed had overpaid, due to the corporation's collection of rent payments.[107] But the plaintiff, believing otherwise, commenced foreclosure proceedings in 2003.[108] The defendant filed a counterclaim, seeking, *inter alia,* restitution for his overpayments.[109] The plaintiff eventually acknowledged that the defendant had overpaid, and withdrew its foreclosure complaint.[110]

Following trial on the defendant's counterclaim, the trial court held the plaintiff liable for $195,909, which represented the totality of the defendant's overpayments, including those rendered both before and after the loan was assigned to the plaintiff.[111]

The Appellate Court reversed, holding that as assignee of the loan contract, the plaintiff took the loan subject to all defenses that might have been asserted against the assignor, but not affirmative claims arising from the assignor's conduct, absent an express agreement to do so.[112] Because the assignment agreement at issue contained no such provision, the plaintiff's liability to the defendant should have been limited to overpayments rendered after the note had been assigned.[113]

Judge Gruendel dissented, disagreeing with the bright-line rule laid down by the majority.[114] He cited a number of authorities holding that the assignee of a note takes it sub-

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104 *Id.* at 280.
105 *Id.* at 291 (Gruendel, J., dissenting).
106 *Id.* at 281.
107 *Id.* at 291 (Gruendel, J., dissenting).
108 *Id.* at 281.
109 *Id.*
110 *Id.*
111 *Id.* at 282.
112 *Id.* at 286.
113 *Id.* at 287.
114 *Id.* at 288.

ject to all of the "equities" then existing.[115] Therefore, in his view, an obligor should be able to assert equitable (as opposed to legal) claims against an assignee arising from the conduct of the assignor.[116] This would include an equitable claim for restitution arising from overpayment of the obligation.[117]

III. Remedies

In *Commissioner of Environmental Protection v. State Five Industrial Park, Inc.*,[118] the state Supreme Court took its first look at the equitable remedy of reverse veil piercing, a doctrine first approved by the Appellate Court ten years earlier,[119] and found that the trial court had committed error in applying it.

The plaintiffs had pursued an earlier environmental enforcement action against Joseph Farricielli and certain corporations that he owned and/or controlled, and in 2001 obtained a $3.8 million judgment against them.[120] When that judgment remained unsatisfied, the plaintiffs brought a second action, against State Five Industrial Park, Inc., and Farricielli's wife, Jean.[121] State Five was owned by another entity, Recycling Enterprises, which in turn was owned 80% by Jean and 20% by the Farricielliis' sons.[122] The sons had no involvement in the operation of either State Five or Recycling Enterprises.[123] Despite his lack of formal affiliation with State Five, Joseph Farricielli was heavily involved in its operations.[124] Although thinly capitalized, State Five spent thousands of dollars on personal expenses for Jean and Joseph.[125]

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[115] *Id.* at 300.

[116] *Id.*

[117] *Id.* at 301.

[118] 304 Conn. 128, 37 A.3d 724 (2012).

[119] The Appellate Court approved the use of the doctrine in *Litchfield Asset Management Corp. v. Howell,* 70 Conn. App. 133, 799 A.2d 298, *cert. denied,* 261 Conn. 911, 806 A.2d 49 (2002).

[120] *State Five,* 304 Conn. at 130-31.

[121] *Id.* at 133.

[122] *Id.* at 134.

[123] *Id.* at 134-35.

[124] *Id.* at 135.

[125] *Id.* at 136.

The trial court found State Five liable for Joseph Farricielli's judgment debt, under the theory of reverse veil piercing.[126] The court then applied traditional veil piercing–upon these facts, "successive" or "triangular" veil piercing–to find Jean Farricielli liable as well.[127]

The Supreme Court reversed. In its analysis, the court took pains to distinguish reverse veil piercing from traditional veil piercing. Under traditional veil piercing, a creditor of a business entity asks the court to disregard the corporate veil, allowing pursuit of a corporate insider and his personal assets.[128] This is permitted "only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice."[129] In contrast, reverse veil piercing allows the opposite approach: pursuing the assets of a corporation or other business entity to satisfy a claim or judgment against an insider of the company.[130]

While superficially, traditional veil piercing and reverse piercing may look like "two sides of the same coin,"[131] they in fact raise different policy concerns and thus command different analytical frameworks.[132] The court identified three such distinctions. First, when the creditors of an individual are allowed to attach the assets of a company, that may prejudice the rightful creditors of the company, who extended credit in reliance on the company's separate existence and assets.[133] Second, the process may prejudice other nonculpable shareholders.[134] And third, there are various legal remedies that can reach an individual's interest in a company, which should be exhausted before resort to the equi-

[126] *Id.* at 130.

[127] *Id.* at 131, fn. 4.

[128] *Id.* at 139.

[129] *Id.*, quoting *Angelo Tomasso, Inc., v. Armor Construction & Paving, Inc.,* 187 Conn. 544, 557, 447 A.2d 406 (1982).

[130] *State Five,* 304 Conn. at 139.

[131] *Id.* at 154 (Zarella, concurring).

[132] *Id.* at 140.

[133] *Id.*

[134] *Id.*

table remedy of reverse veil piercing.[135] These include attaching the individual's shares in the company; garnishing his or her pay from the company; pursuing an action for fraudulent transfer of assets to the company; or suing the company itself for the individual's wrongdoing, under such theories of agency or respondeat superior.[136]

The Supreme Court found that the facts of the case did not justify the imposition of reverse veil piercing. The Farriciellis' sons, as passive minority owners of State Five, would be unfairly victimized by imputing Joseph's liability to State Five.[137] The company had a line of credit from a bank that similarly would be unfairly prejudiced by a judgment against State Five.[138] While Joseph transferred assets from himself and his corporations to State Five during the years following the 2001 judgment, the value of those assets added up to less than ten percent of the judgment against him, making it inequitable to subject State Five's assets to the entirety of the judgment.[139] Joseph had also transferred two parcels of land to State Five during the pendency of the first case, and before judgment, but the plaintiffs' recourse for those transactions would have been to bring suit under the Uniform Fraudulent Transfer Act,[140] which they failed to do.[141]

The Supreme Court found it "understandable" that the trial court was "troubled by the fact that State Five, owned by Joseph's family members, had assets that benefited Joseph while the obligations imposed by the 2001 judgment remained outstanding."[142] But the corporate form may not be disregarded "simply because it stands as a bar to a litigant's recovery of property … [T]he segregation of assets within State Five and the control of Joseph and Jean over

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[135] *Id.* at 141.
[136] *Id.* at 141, 142.
[137] *Id.* at 142-44.
[138] *Id.* at 144-45.
[139] *Id.* at 148, fn. 18.
[140] CONN. GEN. STAT. § 52-552a *et seq.*
[141] *Id.* at 148, fn. 19.
[142] *Id.* at 150.

the family owned corporation, standing alone, cannot constitute the basis for veil piercing."[143]

Justice Zarella, writing separately, concurred in the result but argued for the abolition of the doctrine of reverse veil piercing in its entirety, absent an act of the legislature permitting it.[144]

In *Canty v. Otto*,[145] the state Supreme Court ruled that a distribution of property pursuant to a divorce judgment may constitute a transfer of assets for purposes of the Uniform Fraudulent Transfer Act (act).[146]

The sordid backdrop for the case was Kenneth Otto's murder[147] of Shamia Smith, an exotic dancer with whom he had been intimately involved.[148] As the criminal investigation intensified in April of 2007, Otto and his wife hastened the transfer of certain assets from him to her, and her commencement of a divorce action against him.[149] Within weeks, Smith's estate commenced a wrongful death action against Otto, and he was arrested for the murder of Smith.[150]

In the wrongful death action, Smith's estate sought a prejudgment remedy against Otto's assets.[151] In granting that application after an evidentiary hearing, the trial court observed that based on the evidence, Otto's wife still loved him, did not truly intend to divorce him, and had joined him in orchestrating the divorce to ensure that she, rather than Smith's estate, would wind up with most of Otto's assets.[152]

The divorce action went to trial in June of 2008.[153] The court rendered a judgment of dissolution, and awarded the

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[143] *Id.* at 150-51.
[144] *Id.* at 160-61.
[145] 304 Conn. 546, 41 A.3d 280 (2012).
[146] The act is codified at CONN. GEN. STAT. § 52-552a *et seq.*
[147] Otto was convicted of the killing on February 9, 2009, and sentenced to 60 years of incarceration. His conviction was affirmed by the Connecticut Supreme Court. State v. Otto, 305 Conn. 51, 43 A.3d 629 (2012).
[148] *Canty*, 304 Conn. at 549-50.
[149] *Id.* at 550.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 551-52.
[153] *Id.* at 551.

vast majority of Otto's assets to his wife.[154] Smith's estate subsequently brought suit against the wife, claiming that the property award constituted a fraudulent transfer, in violation of the act.[155] The estate obtained a prejudgment remedy against the wife in connection with that action, from which the wife appealed.[156]

The wife contended that the estate's lawsuit under the act constituted an improper collateral attack on the divorce judgment.[157] She further argued that distributions of marital property as part of a dissolution judgment are not "transfers"[158] of assets within the coverage of the act, but rather are "equitable determinations as to which portion of the marital estate each party is entitled."[159]

The Supreme Court rejected these arguments. As for the wife's contention that the estate was mounting an improper collateral attack on the divorce decree, the court noted that the estate was not seeking to set aside that decree; rather, she was seeking to attach assets transferred pursuant to that decree.[160] Furthermore, because the estate had been a stranger to the divorce action, and thus had not had the opportunity therein to litigate its claims, it would be proper for the estate to collaterally attack the decree if it so desired.[161] Thus the estate's suit under the act did not constitute an improper collateral attack on the judgment of the divorce court.[162]

As for whether or not the divorce decree had implemented a "transfer" for purposes of the act, the court noted that the term "transfer" is defined very broadly under the statute, and that many other jurisdictions have construed

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[154] *Id.*
[155] *Id.* at 552.
[156] *Id.*
[157] *Id.*
[158] The act broadly defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." CONN. GEN. STAT. § 52-552(b)(12).
[159] *Canty*, 304 Conn. at 561.
[160] *Id.* at 570.
[161] *Id.* at 569-70.
[162] *Id.* at 570.

the term as applying to dissolution judgments.[163] Furthermore, bankruptcy courts have consistently construed "transfer," for purposes of fraudulent transfer actions under the Bankruptcy Code, as applying to divorce decrees.[164] The Supreme Court found these authorities persuasive, and agreed with the trial court that the estate had showed probable cause for a claim under the act.[165]

In *Kosiorek v. Smigelski,*[166] the Appellate Court noted a key distinction between claims for fraudulent conveyance under the common law and claims for fraudulent transfer under the Uniform Fraudulent Transfer Act (act).[167] Claims based on actual (as opposed to constructive) fraud under the common law require proof "that the conveyance was made with a fraudulent intent in which the grantee participated."[168] However, the counterpart provision of the act, General Statutes Section 52-552e(a), does not require proof of the transferee's state of mind. Under the act the plaintiff must prove that the debtor made a transfer or incurred an obligation "[w]ith actual intent to hinder, delay or defraud" a creditor, but the statute is silent as to the intent of the transferee.

In *Kosiorek*, the trial court had directed a verdict for the defendants on both the fraudulent conveyance and fraudulent transfer claims.[169] The Appellate Court held that, given the absence of evidence of fraudulent intent on the part of the transferees, the trial court had ruled properly with respect to the plaintiff's claim for common law fraudulent conveyance.[170] However, because no such proof is required as part of the statutory claim, and because the

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[163] *Id.* at 559.

[164] *Id.* at 560.

[165] *Id.* at 571.

[166] 138 Conn. App. 695, 54 A.3d 564 (2012), *cert. denied,* 308 Conn. 901, 60 A.3d 287 (2013). The author's law firm represented one of the defendants in *Kosiorek* at the trial level for a period of time, but was out of the case before the case went to judgment.

[167] CONN. GEN. STAT. § 52-550a *et seq.*

[168] 138 Conn. App. at 724, quoting Certain Underwriters at Lloyd's, London v. Cooperman, 289 Conn. 383, 394-95, 957 A.2d 836 (2008).

[169] 138 Conn. App. at 721.

[170] *Id.* at 727.

trier of fact could have found fraudulent intent on the part of the transferor, the court erred in directing a verdict as to the plaintiff's claim under the act.[171]

The Appellate Court's decision in *Kelley v. Five S Group, LLC*[172] is noteworthy for some language that reflects a startlingly broad view of the doctrine of unjust enrichment. The plaintiff, an experienced developer of golf courses, entered into an informal agreement with a representative of the defendant, by which the plaintiff would contribute his expertise, and the defendant would contribute the necessary land, for the construction and operation of a golf course.[173] Under that informal agreement, the plaintiff and defendant would equally share the operating costs and profits, and at the end of a 30-year lease, the defendant would buy out the plaintiff in exchange for a payment of $1.5 million.[174]

As the conversations continued, the defendant retreated from the buyout provision, claiming that such a large lump sum at the end of the lease would pose a hardship.[175] The plaintiff agreed, while indicating that he wanted to receive the $1.5 million in some other way.[176] But the parties never nailed down the issue, and ultimately signed closing documents, which the plaintiff never bothered to read, that did not provide for any such payment.[177] The plaintiff learned of the omission several years later, and brought a suit asserting, among other claims, one for unjust enrichment.[178]

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[171] *Id.* The court's decision raises the question of why a creditor would ever bring suit for common-law fraudulent conveyance and thereby take on an additional element of proof, fraudulent intent on the part of the transferee, that is unnecessary for a suit under the Act. One such example is a case in which the plaintiff is a creditor whose claim arose after the fraudulent conveyance. Under the common law, a future creditor may have standing to sue for fraudulent conveyance; *Rocklen v. Radulesco,* 10 Conn. App. 271, 277, 278, 522 A.2d 846 (1987); while under the Act, a creditor has standing only if his or her claim arose before the transfer. General Statutes § 52-552e(a).

[172] 136 Conn. App. 57, 45 A.3d 647, *cert. denied,* 306 Conn. 904, 52 A.3d 731 (2012).

[173] *Id.* at 59.

[174] *Id.* at 59-60.

[175] *Id.* at 60.

[176] *Id.*

[177] *Id.* at 61.

[178] *Id.* at 62.

Following a courtside trial, the trial court entered judgment for the defendant.[179] The court found that the plaintiff's design and construction services had been balanced by the defendant's contribution of the land,[180] and that the defendant had not been unjustly enriched by the deal as spelled out in the documents.[181] On appeal, the plaintiff challenged the trial court's finding that his contribution of expertise to the enterprise had been offset by the defendant's contribution of land.[182]

The Appellate Court found that the plaintiff had failed to establish a factual foundation for his claim.[183] The court noted that the parties' contracts "reflect an understanding that the defendant's contribution of its land for the construction and operation of the golf course adequately matched the plaintiff's contribution of his services."[184] But then the court continued, "To prevail on his claim, the plaintiff had the burden of proving that this perceived equivalence was inaccurate, thereby conferring an unjust benefit on the defendant."[185] Observing that the record contained no evidence of the market value of the parties' respective contributions,[186] the Appellate Court rejected this argument, as well as the others put forth by the plaintiff, and affirmed the judgment below.[187]

The decision is remarkable in suggesting that the court should conduct an independent assessment of whether or not this "equivalency" premise was factually correct–and potentially allow recovery in unjust enrichment if it was not. The agreement in question comprised written contracts between commercial parties. Presumably they were fully competent to make their own determination of whether or not they were making equivalent contributions in exchange for equal

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[179] *Id.* at 62-63.
[180] *Id.* at 62.
[181] *Id.* at 63.
[182] *Id.* at 64.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.* at 67.

profit-sharing. The decision in *Kelley* suggests that, even when that is the case, a party may be able to invoke the doctrine of unjust enrichment to wriggle out of his agreement.

In *Rana v. Terdjanian*,[188] the Appellate Court illustrated the breadth of the civil theft statute, General Statutes Section 52-564, which imposes treble damages against one who "steals any property of another" or "knowingly receives and conceals stolen property." The statute applies not only to "stealing" as commonly understood in laymen's terms, but to all forms of larceny under General Statutes Section 53a-119.[189]

One form of larceny under the latter statute is failing to restore, to the rightful owner, property that a person acquires with knowledge that it was lost, mislaid, or mistakenly delivered.[190] In *Rana*, the Appellate Court affirmed the judgment of the trial court imposing treble damages for civil theft based on this form of larceny.[191]

In *Trenwick America Reinsurance Corporation v. W. R. Berkley Corporation*,[192] the Appellate Court ruled that a commercial party that made payments under a misreading of a contract could not recover those payments under the doctrine of unjust enrichment. The plaintiff, a reinsurance company, entered into reinsurance contracts with the defendant, an insurance holding company, and certain of its affiliates.[193] In 2004, they entered into a commutation and release agreement (commutation agreement) that sought to terminate the parties' obligations under those contracts.[194]

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[188] 136 Conn. App. 99, 46 A.3d 175, *cert. denied,* 305 Conn. 926, 47 A.3d 886 (2012).

[189] *Id.* at 113-14.

[190] The statute provides in relevant part, at General Statutes § 53a-119(4), as follows: "A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of larceny if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to it."

[191] *Rana*, 136 Conn. App. at 115.

[192] 138 Conn. App. 741, 54 A.3d 209, *cert. denied,* 307 Conn. 945, 60 A.3d 738 (2012).

[193] *Id.* at 744.

[194] *Id.* at 745.

The plaintiff nevertheless continued to pay more than $450,000.00 in claims during the next several years in connection with one particular reinsurance facility, known as Special Casualty and Accident Reinsurance Facility (SCARF II), while accepting some $56,000.00 in premium payments from the defendant.[195] In 2008, a newly appointed executive of the plaintiff concluded that the commutation agreement of 2004 had terminated SCARF II, prompting the plaintiff to stop making further payments and seek reimbursement for those it had rendered after the commutation agreement.[196] When the defendant refused, the plaintiff brought suit, seeking a declaratory judgment as to its future obligations under SCARF II, and restitution, under the doctrine of unjust enrichment, for the payments it had mistakenly made.[197]

The trial court agreed that the commutation agreement had terminated SCARF II, and rendered a declaratory judgment as sought by the plaintiff.[198] But the court denied the plaintiff's claim for restitution, holding that that claim was barred pursuant to the voluntary payment doctrine.[199]

The Appellate Court agreed, quoting a 1925 decision of the Connecticut Supreme Court[200] for the proposition that "when the parties to a written contract stand on an equal footing as to means of knowledge of their contract obligations, money paid by one to the other, in part performance of the contract, in response to a claim made in good faith and based upon a permissible but erroneous construction of the contract, cannot be recovered back as money paid under a mistake of law."[201] A key element of this doctrine is that the payee accept the erroneous payments in the honest belief that he is entitled to them.[202]

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[195] *Id.* at 746.
[196] *Id.* at 747.
[197] *Id.* at 747.
[198] *Id.* at 747-48.
[199] *Id.* at 748.
[200] Rockwell v. New Departure Manufacturing Company, 102 Conn. 255, 128 A.302 (1925).
[201] 138 Conn. App. at 757, quoting *Rockwell*, 102 Conn. at 307-308.
[202] 138 Conn. App. at 757.

IV. Foreclosure

In *Deutsche Bank National Trust Company v. DelMastro*,[203] the Appellate Court examined the doctrine of equitable subordination of mortgages. Francis DelMastro (Francis) obtained a $650,000 loan from New Century Mortgage Corporation (New Century), which took a first-position mortgage on property that Francis owned.[204] Four months later, he granted a second mortgage to his mother, Mary Lou DelMastro (Mary Lou), in the amount of $325,000, after she agreed to mortgage her own home as guarantor for certain business loans that Francis obtained from third parties.[205] Her mortgage was recorded on June 19, 2007.[206]

Meanwhile, Francis was pursuing a refinance of the first mortgage through Saxon Mortgage, Inc. (Saxon), predecessor in interest to the plaintiff.[207] Saxon arranged for a title search to be performed on May 30, 2007, which predated the recordation of Mary Lou's second mortgage, and therefore did not uncover it.[208] Saxon never arranged for an updated title search in connection with the refinance.[209] The Saxon mortgage, in the amount of $749,999, was therefore recorded seven weeks after Mary Lou's, and the paid-off first mortgage to New Century was released.[210]

In the context of a foreclosure action, the plaintiff sought an order of the court subordinating Mary Lou's mortgage to that of the plaintiff, under the doctrine of equitable subordination.[211] Under that doctrine, "Where fairness and justice require, one who advances money to discharge a prior lien on real or personal property and takes a new mortgage as security is entitled to be subrogated to the rights under the prior lien against the holder of an intervening lien of which he was ignorant."[212]

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[203] 133 Conn. App. 669, 38 A.3d 166, *cert. denied,* 304 Conn. 917, 40 A.3d 783 (2012).
[204] *Id.* at 671.
[205] *Id.* at 671-72.
[206] *Id.* at 672.
[207] *Id.*
[208] *Id.* at 674.
[209] *Id.*
[210] *Id.* at 672.
[211] *Id.* at 671.
[212] *Id.* at 675 (citations omitted) (internal quotations omitted).

The trial court rejected the proposition that equitable subordination should apply, and the Appellate Court agreed.[213] The plaintiff could not claim to be "ignorant" of Mary Lou's intervening mortgage, because it had constructive notice of that mortgage, which was recorded in the land records long before that of the plaintiff.[214] Nor could Mary Lou be deemed to have obtained an undue advantage or windfall; while she had taken her second mortgage knowing that she was behind a first mortgage in the amount of $650,000, she never agreed to subordinate her position to the larger sum of $749,999, the amount of the refinance.[215] The trial court also found a complete absence of evidence that Mary Lou had acted negligently or inappropriately, a finding left undisturbed by the Appellate Court.[216]

In *J.P. Morgan Chase Bank, N.A. v. Winthrop Properties, LLC*,[217] the plaintiff commenced an action in two counts: in count one, to foreclose a mortgage, and in count two, to enforce a guaranty. After obtaining an interlocutory summary judgment on liability as to both counts, the plaintiff proceeded to a judgment of strict foreclosure.[218] After title to the mortgaged property vested, the plaintiff missed the 30-day deadline under General Statutes Section 49-14[219] to file a motion for deficiency judgment.[220]

Undaunted, the plaintiff sought a hearing in damages as to count two of the complaint, and thereby obtained judg-

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[213] *Id.* at 673-74.

[214] *Id.* at 678.

[215] *Id.*

[216] *Id.* at 679.

[217] 137 Conn. App. 680, 683, 50 A.3d 328, *cert. granted,* 307 Conn. 922, 54 A.3d 183 (2012).

[218] *Id.* at 683-84.

[219] General Statutes § 49-14 provides in relevant part as follows: "(a) At any time within thirty days after the time limited for redemption has expired, any party to a mortgage foreclosure may file a motion seeking a deficiency judgment. Such motion shall be placed on the short calendar for an evidentiary hearing. Such hearing shall be held not less than fifteen days following the filing of the motion, except as the court may otherwise order. At such hearing the court shall hear the evidence, establish a valuation for the mortgaged property and shall render judgment for the plaintiff for the difference, if any, between such valuation and the plaintiff's claim. The plaintiff in any further action upon the debt, note or obligation, shall recover only the amount of such judgment."

[220] *J.P. Morgan Chase Bank*, 137 Conn. App. at 684.

ment against the defendant guarantors.[221] The Appellate Court reversed, noting that General Statutes Section 49-1 provides in relevant part that "[t]he foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment who are made parties to the foreclosure ...."[222] General Statutes Section 49-14, which allows the foreclosing mortgagee to obtain a deficiency judgment upon the timely filing of a motion for deficiency, provides the only exception to the bar rule of Section 49-1.[223] Because the plaintiff in this case had failed to properly invoke that remedy, it was barred from further pursuit of the defendant guarantors.[224]

In *Kennedy Funding, Inc. v. Greenwich Landing, LLC*,[225] the Appellate Court elaborated on the state Supreme Court's 2011 holding in *RMS Residential Properties, LLC v. Miller*[226] that the holder of a promissory note secured by a mortgage has standing to commence foreclosure even before taking a formal assignment of the mortgage. The issue presented in *Kennedy Funding* was whether or not that holds true even when the holder is described in the note as an agent for a number of identified principals.[227] The defendant had moved to dismiss, claiming that the plaintiff lacked standing to foreclose because it was a mere collection agent, not the owner of the debt.[228]

Relying on the Restatement (Third) of Agency,[229] the court noted that an agent may be a party to a contract that he enters into on behalf of a principal, depending upon the language of the contract and the assent of the agent and the other party to the contract.[230] Here, the plaintiff was not

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[221] *Id.* at 685.
[222] *Id.* at 687-88.
[223] *Id.* at 688.
[224] *Id.* at 687-90.
[225] 135 Conn. App. 58, 43 A.3d 664, *cert. denied,* 305 Conn. 914, 45 A.3d 99 (2012).
[226] 303 Conn. 224, 32 A.3d 307 (2011).
[227] *Kennedy Funding,* 135 Conn. App. at 60.
[228] *Id.* at 60, 63.
[229] More particularly, the court noted 2 RESTATEMENT (THIRD) AGENCY § 6.01, Comment (d) (1), pp. 12-13 (2006).
[230] *Kennedy Funding,* 135 Conn. App. at 63.

merely a collection agent, but rather had been specifically designated as the payee and holder of the note.[231] The principals had thereby "unequivocally manifested their intention to authorize the plaintiff to exercise the rights that the law of negotiable instruments confers on the holder of a negotiable promissory note," giving the plaintiff standing to enforce the note.[232]

V. DAMAGES

In *Gianetti v. Norwalk Hospital*,[233] the state Supreme Court brought a merciful end to an epic 28-year lawsuit[234] between a plastic surgeon and a hospital that declined to renew his privileges–in 1983. The issue at the hand was application of the "lost volume seller" measure of damages.

For a number of years through 1983, Dr. Gianetti had privileges as on on-call emergency department plastic surgeon at Norwalk Hospital as well as several hospitals in Bridgeport.[235] In 1983, he handled 46 cases in Norwalk, and approximately 125 to 130 in Bridgeport, for a total of 171 to 176 cases.[236] During the five preceding years, his total number of cases ranged from 168 to 217.[237]

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[231] *Id.* at 64.

[232] *Id.*

[233] 304 Conn. 754, 43 A.3d 567 (2012) *(Gianetti III).*

[234] The key procedural events unfolded as follows: in 1984, commencement of suit; in 1987, issuance of a report by the attorney trial referee who presided over the trial; in 1989, issuance of a decision by the state Supreme Court on two reserved questions of law, pursuant to General Statutes § 52-235, in *Gianetti v. Norwalk Hospital,* 211 Conn. 51, 557 A.2d 1249 (1989) *(Gianetti I);* in 1993, after an unexplained four-year gap, acceptance by the trial court of the attorney trial referee's report, and entry of an interlocutory judgment for the plaintiff, on liability only; in 1999, after an unexplained six-year gap, hearing to determine relief, and an award to the plaintiff of nominal damages only; in 2001, issuance of a decision by the Appellate Court, reversing the trial court's award of nominal damages only, in *Gianetti v. Norwalk Hospital,* 64 Conn. App. 218, 779 A.2d 847 (2001); in 2003, following a grant of certiorari, issuance of a second decision by the state Supreme Court on the issue of damages, with an order of remand, in *Gianetti v. Norwalk Hospital,* 266 Conn. 544, 833 A.2d 891 (2003) *(Gianetti II);* in 2009, after another unexplained six-year gap, issuance of a memorandum of decision by the trial court following a hearing in damages. *Gianetti,* 304 Conn. at 758-63.

[235] *Gianetti III*, 304 Conn. at 759.

[236] *Id.* at 768, fn. 7.

[237] *Id.*

In 1983, Norwalk Hospital declined to renew his privileges for 1984.[238] He continued to work in Bridgeport, and his caseload there increased dramatically, to 263 in 1984, easily exceeding his combined annual totals for Bridgeport plus Norwalk during the preceding years.[239] He nevertheless sued Norwalk Hospital,[240] claiming that he could have continued to handle his caseload in Norwalk in 1984 and beyond even while handling his increased caseload in Bridgeport.[241] The trial court agreed, finding that he was a lost volume seller of services, and that he had proven damages to a reasonable degree of certainty for the first five years following his nonrenewal.[242]

The Supreme Court affirmed. The court observed that recovery as a lost volume seller requires proof of three elements: that the non-breaching party had the ability to perform both contracts simultaneously; that the second contract would have been profitable; and that the seller of services probably would have entered into the second contract even if the first contract had not been terminated.[243] Here, Dr. Gianetti established that even with his dramatically larger caseload in Bridgeport following the termination of his Norwalk contract, he would have been able to handle Norwalk as well.[244] The court concluded that he had satisfied all three prongs of the lost volume seller test, and affirmed the judgment below.[245]

The Appellate Court's decision in *One Country, LLC v. Johnson*[246] addressed issues that lie at the intersection of law and accounting. The plaintiff Scott Porter (Porter) and his wife, through an LLC that they owned, Iboport, LLC

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[238] *Id.* at 760.
[239] *Id.* at 768.
[240] His theory of liability was that a contractual relationship existed between him and the hospital, and that the hospital had breached the contract by failing to follow its bylaws in connection with the nonrenewal of his privileges. *Id.* at 760.
[241] *Id.* at 764.
[242] *Id.* at 763.
[243] *Id.* at 767.
[244] *Id.* at 768-70.
[245] *Id.* at 777.
[246] 137 Conn. App. 810, 49 A.3d 1030, *cert. granted,* 307 Conn. 944, 60 A.3d 738 (2012).

(Iboport), invested $200,000 into the defendant One Country LLC (One Country) in connection with a contemplated real estate development.[247] The venture failed, and One Country's mortgage lender foreclosed on the property.[248] Porter negotiated a release of the bank's deficiency claim in exchange for a payment of $300,000.[249] Porter thereupon sued the other members of One Country for indemnity from his payment to the bank, under backstop guarantees that they had executed in his favor.[250]

Following a courtside trial, the trial court entered judgment for the defendants, finding that notwithstanding his payment to the bank, Porter had not suffered a loss.[251] The court based this conclusion on the fact that for tax purposes, Porter had characterized his payment to the bank as an additional capital contribution to Iboport, and had claimed the benefit of a pass-through loss on his personal tax return.[252] The court found that Porter had in effect contributed to Iboport the obligations owing to him, and that that contribution, coupled with Iboport's subsequent conversion of the debt to equity, precluded a finding that either Porter or Iboport had suffered a loss.[253]

A divided panel of the Appellate Court reversed. The majority relied in large part on the airtight language of the backstop guarantees, which waived all defenses to the fullest extent of the law, and were absolute and unconditional.[255] The majority further noted testimony from Porter's accountant that if he successfully recouped some of his payment to the bank, he would have to report that income, which would require amending his tax return and relinquishing some of the tax benefit he had initially

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[247] *Id.* at 812-13.
[248] *Id.* at 814.
[249] *Id.*
[250] *Id.*
[251] *Id.* at 815-16.
[252] *Id.* at 814-15.
[253] *Id.* at 815-16.
[254] *Id.* at 820.
[255] *Id.*

claimed. The majority, Alvord and Gruendel, JJ., remanded the case to the trial court with instructions to render judgment for the plaintiff.[256]

Judge Schaller dissented, asserting that Porter had implicitly assigned his rights under the backstop guarantees to Iboport, and therefore lacked standing to bring suit.[257]

VI. Interest

In *Ballou v. Law Offices Howard Lee Schiff, P.C.*,[258] the Supreme Court, in response to a certified question from the United States District Court, ruled that postjudgment interest does not automatically accrue on judgments in which the court has entered an installment payment order pursuant to General Statutes Section 52-356d (installment order statute).[259] The installment order statute provides that postjudgment interest "shall continue to accrue" under any installment payment order, while General Statutes Section 37-3a (postjudgment interest statute)[260] vests the

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[256] *Id.* at 821.

[257] *Id.* at 825-26.

[258] 304 Conn. 348, 39 A.3d 1075 (2012). As reported, the defendant's name does not contain the word "of."

[259] General Statutes § 52-356d provides in relevant part: "(a) When a judgment is rendered against a natural person, the judgment creditor or judgment debtor may move the court for an order for installment payments in accordance with a money judgment. After hearing and consideration of the judgment debtor's financial circumstances, the court may order installment payments reasonably calculated to facilitate payment of the judgment. … (c) Notwithstanding the hearing requirement of subsection (a) of this section, on motion of the judgment creditor for an order of nominal payments, the court shall issue ex parte, without hearing, an order for nominal installment payments. The amount which shall constitute an order of nominal payments shall be set by the judges of the Superior Court. Such an order for nominal payments may be modified on motion of either party after hearing and consideration of the judgment debtor's financial circumstances. (d) An installment payment order shall not be enforced by contempt proceedings, but on the judgment debtor's default on payments thereon, the judgment creditor may apply for a wage execution pursuant to section 52-361a. (e) Interest on a money judgment shall continue to accrue under any installment payment order on such portion of the judgment as remains unpa*Id.* (f) On motion of either party and after notice and hearing or pursuant to a stipulation, the court may make such modification of an installment payment order as is reasonable."

[260] General Statutes § 37-3a(a) provides in relevant part, "interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable…."

trial court with the authority, in its discretion, to award interest of up to ten percent per annum on a debt that has been reduced to judgment.[261]

By way of background, the defendant, a law firm (firm), had previously obtained two judgments, including installment payment orders, against Ms. Ballou on behalf of a client in connection with certain credit card debts.[262] The firm did not seek orders for postjudgment interest.[263] The firm sought a bank execution against Ms. Ballou, and directed the marshal to add postjudgment interest in the amount of ten percent to the judgment amounts.[264] Ms. Ballou countered by suing the firm, alleging violations of the Fair Debt Collection Practices Act.[265]

The key issue was whether or not the mandatory "shall continue to accrue" language of the installment order statute trumped the discretionary language of the postjudgment interest statute, thus making an award of postjudgment interest automatic whenever an installment order is entered. The Supreme Court construed the operative language in the installment order statute in the same manner as the Appellate Court had done in its 2011 decision in *Discover Bank v. Mayer*.[266] In the phrase "shall continue to accrue," the word "shall" is juxtaposed with "continue," not "accrue."[267] The statute therefore does not require interest to accrue; rather, it requires the accrual of interest to "continue" if the trial court has specifically awarded it.[268] The installment order statute does not provide an independent basis to mandate the award of interest in the first place.[269]

The *Ballou* decision is noteworthy for a lengthy concurrence by Justice Zarella, joined by Justice McLachlan, which comprehensively addresses Connecticut law on post-

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[261] *Ballou*, 304 Conn. at 353.
[262] *Id.* at 351.
[263] *Id.*
[264] *Id.*
[265] *Id.* The Fair Debt Collection Practices Act is codified at 15 U.S.C. § 1692 *et seq.*
[266] 127 Conn. App. 813, 17 A.3d 80 (2011).
[267] *Ballou*, 304 Conn. at 355.
[268] *Id.*
[269] *Id.*

judgment interest. While the majority opinion focused on the interplay between the installment order statute and the postjudgment interest statute, the concurrence further discussed General Statutes Section 37-1 (contract interest statute),[270] which mandates the award of interest in the context of loan agreements.[271] The concurrence noted that the contract interest statute affirms the right of parties to agree contractually to any nonusurious rate of interest, which may accrue before and after the date of maturity, including any postjudgment period.[272] If the parties' agreement contemplates interest, explicitly or implicitly, but fails to spell out a rate, then the rate prescribed by the contract interest statute, currently eight percent, applies.[273] The concurrence emphasized that the majority opinion, focused on discretionary awards of interest under the postjudgment interest statute, should not be construed as altering established law under the contract interest statute.[274]

The majority expressly declined to address the contract interest statute, noting that the parties had not raised any arguments under that statute, and observing "it is by no means clear that an extension of credit pursuant to a credit card agreement represents the kind of loan agreement that falls within the purview of § 37-1."[275]

In *Haworth v. Dieffenbach*,[276] the Appellate Court barred the plaintiffs from enforcing a stipulated judgment, finding that the judgment violated Connecticut's usury statute, General Statutes Section 37-4.[277] The plaintiffs had

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[270] General Statutes § 37-1 provides: "(a) The compensation for forbearance of property loaned at a fixed valuation, or for money, shall, in the absence of any agreement to the contrary, be at the rate of eight per cent a year; and, in computing interest, three hundred and sixty days may be considered to be a year. (b) Unless otherwise provided by agreement, interest at the legal rate from the date of maturity of a debt shall accrue as an addition to the debt."

[271] *Ballou*, 304 Conn. at 356, fn. 8.

[272] *Id.* at 376.

[273] *Id.*

[274] *Id.* at 382-83.

[275] *Id.* at 365-66, fn. 10.

[276] 133 Conn. App. 773, 38 A.3d 1203 (2012).

[277] General Statutes § 37-4 provides: "No person and no firm or corporation or agent thereof, other than a pawnbroker as provided in section 21-44, shall, as guarantor or otherwise, directly or indirectly, loan money to any person and, directly or indirectly, charge, demand, accept or make any agreement to receive therefor

brought suit on two promissory notes from December 1998, in a combined principal sum of $21,000, accruing interest at the rate of ten percent per annum.[278] The parties entered into a stipulated judgment on October 4, 2000, by which the defendant agreed to pay the sum of $30,000 unless he paid the entire principal plus outstanding interest by November 30, 2000.[279] The figure of $30,000 represented twenty-two percent interest above and beyond the unpaid principal plus interest that had accrued under the note.[280]

When the plaintiffs sought to execute on the judgment, the defendant moved for a protective order, claiming that the judgment was usurious and thus unenforceable.[281] The trial court denied the motion, but the Appellate Court reversed, characterizing the judgment as "illegal."[282]

VII. Other Business Cases Of Interest

In *418 Meadow Street Associates, LLC v. Clean Air Partners, LLC*,[283] the state Supreme Court examined General Statutes Section 34-187 (LLC authority statute),[284] which addresses the authority of limited liability company members to bring suit on behalf of the entity. In this case, members of an LLC who collectively held a 50% interest in the entity brought suit on its behalf against another LLC. The woman

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interest at a rate greater than twelve per cent per annum." Numerous types of loans are excepted from the usury statute, as set forth in General Statutes § 37-9.

[278] *Haworth*, 133 Conn. App. at 775.

[279] *Id.*

[280] *Id.* at 782.

[281] *Id.* at 777-78.

[282] *Id.* at 784-85.

[283] 304 Conn. 820, 43 A.3d 607 (2012).

[284] General Statutes § 34-187 provides: "(a) Except as otherwise provided in an operating agreement, suit on behalf of the limited liability company may be brought in the name of the limited liability company by: (1) Any member or members of a limited liability company, whether or not the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote of a majority in interest of the members, unless the vote of all members shall be required pursuant to subsection (b) of section 34-142; or (2) any manager or managers of a limited liability company, if the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote required pursuant to section 34-142. (b) In determining the vote required under section 34-142 for purposes of this section, the vote of any member or manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded."

who owned the remaining 50% of the plaintiff, Barbara Levine, was married to Steven Levine, a minority owner of the defendant, and she disapproved of the lawsuit.[285]

The defendant asserted that because the plaintiff's suit had not been approved by a majority of its membership, the plaintiff lacked corporate authority to pursue the case, and the action should be dismissed due to lack of standing.[286] The plaintiff countered that Barbara Levine had an interest in the outcome of the suit adverse to that of the plaintiff, and so by operation of the LLC authority statute, her vote was properly excluded for purposes of determining the plaintiff's authority to bring suit.[287]

The trial court agreed with the defendant that Barbara Levine should have had a voice in the plaintiff's decision to sue or not sue, and that the plaintiff therefore lacked standing to bring suit.[288] The court noted that she was not a party to the suit, and that she lacked a proprietary interest in the defendant LLC.[289] The trial court found that her status as wife of a minority member of the defendant was insufficient to disqualify her as a voting member of the plaintiff.[290]

The Supreme Court disagreed, finding that through her marriage to Steven Levine, a part owner of the defendant, Barbara Levine had an interest in the outcome of the suit that was "adverse" to that of the plaintiff for purposes of the LLC authority statute.[291] Accordingly, the remaining members of the plaintiff LLC had acted properly when they authorized suit without her input.

The decision is noteworthy for the Supreme Court's emphasis on the point that the LLC statutes are "default rules" that the members of an LLC are free to modify through the company's operating agreement.[292] As applied to the case at bar, the members of the plaintiff could have

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[285] *418 Meadow Street Associates, LLC,* 304 Conn. at 823-24.
[286] *Id.* at 824.
[287] *Id.* at 825.
[288] *Id.* at 825-26.
[289] *Id.* at 826.
[290] *Id.*
[291] *Id.* at 832.
[292] *Id.* at 834.

drafted the operating agreement specifically "to allow a member's vote to be included even when his or her spouse's interest may conflict with the company's interest."[293] This part of the decision raises intriguing questions about how much latitude the drafters of an operating agreement may have before the courts will intervene.

In *Meyers v. Livingston, Adler, Pulda, Meiklejohn and Kelly, P.C.,*[294] the Appellate Court revisited a vexing issue: when a law firm is sued by a dissatisfied ex-client, when can the claims properly be framed as arising under contract rather than tort, and thus governed by the longer statute of limitations that applies to contract claims?

The plaintiff in *Meyers* had engaged the defendant (firm) to bring suit against certain third parties.[295] While the action was pending, the firm was retained by another client to pursue similar claims against the same third parties, and joined the claims into a single action.[296] The firm eventually reported to the court that the entire case had been settled, but Meyers initially balked at signing a release, eventually doing so only after the defendants in the underlying case filed a motion to enforce the settlement agreement.[297]

Slightly less than six years after the settlement was consummated, Meyers brought suit against the firm, claiming the firm had breached its contractual duties to her by settling the underlying case contrary to her interests, wishes and instructions.[298] The firm moved for summary judgment, claiming inter alia that the case actually sounded in tort, not contract; was governed by the three-year statute of limitations that applies to torts;[299] and was untimely under that statute.[300] The trial court agreed.[301]

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[293] *Id.* at 834-35.

[294] 134 Conn. App. 785, 41 A.3d 674, *cert. granted,* 305 Conn. 920, 47 A.3d 881 (2012).

[295] *Id.* at 786.

[296] *Id.*

[297] *Id.* at 786-87.

[298] *Id.* at 787, fn. 2.

[299] CONN. GEN. STAT. § 52-577. The statute of limitations for breach of contract, General Statutes § 52-576, prescribes a six-year limitation period.

[300] *Meyer*, 134 Conn. App. at 787.

[301] *Id.* at 788.

A divided panel of the Appellate Court affirmed. The court noted that Connecticut law recognizes both contract and tort claims against attorneys, but observed that "'[T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims.'"[302] Here, the plaintiff had not alleged in her complaint that the firm had breached its contract with her by failing to obtain a specific result or perform a specific task.[303] Rather, the essence of her claim was that the firm had breached its professional duties–functionally, a claim of professional negligence.[304] Accordingly, the trial court had ruled correctly in treating the claim as one that sounds in tort, not contract, and thus untimely under the three-year limitation period that applies to negligence actions.[305]

Judge Bishop dissented. In an earlier case, the Appellate Court had applied the six-year statute of limitations to claims based on an attorney's alleged deliberate "refusal to perform his duties pursuant to his contract with the plaintiff."[306] Meyers had alleged in her complaint that the firm had ignored her express instructions to reject the proposed settlement and continue litigation of the underlying lawsuit.[307] On the flip side, her complaint did not contain any express allegations that the firm had acted negligently, or had performed below the prevailing standard of competence.[308] Thus, reading the complaint as a whole, Judge Bishop construed Meyers' claim as based on the firm's refusal to follow her specific instructions, contrary to its contractual duties to her, and thus sounding in contract, not tort.[309]

In *Demiraj v. Uljaj,*[310] the Appellate Court addressed whether or not the defendants had made an offer to sell securities in Connecticut, thus implicating the Connecticut

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[302] *Id.* at 790 (Internal citations omitted).
[303] *Id.* at 791.
[304] *Id.* at 792.
[305] *Id.* at 793.
[306] *Id.* at 798, citing Hill v. Williams, 74 Conn.App. 654, 662, 813 A.2d 130, *cert. denied,* 263 Conn. 918, 822 A.2d 242 (2003).
[307] *Meyer*, 134 Conn. App. at 796.
[308] *Id.* at 798, fn. 3.
[309] *Id.* at 798.
[310] 137 Conn. App. 800, 50 A.3d 333 (2012).

Uniform Securities Act, General Statutes Section 36b-2 et seq. (Act). The plaintiffs and defendants had had a preliminary meeting in Waterbury to discuss the possibility of the plaintiffs acquiring a minority interest in a closely held New York corporation owned by the defendants.[311] At that meeting, the defendants predicted that the business, an air travel company, would be successful, and asserted that it had all necessary permits and a value of $5 million.[312] The defendants told the plaintiffs that their proposed 25% interest would cost $1.25 million.[313]

The parties later entered into a stock purchase agreement, and the plaintiffs made a partial payment before the business failed.[314] The plaintiffs later brought suit under multiple theories, including a claimed violation of the Act.[315] The defendants moved for a directed verdict as to the claim under the Act, asserting that their contacts with the plaintiffs in Waterbury, apparently the only relevant contacts that took place in Connecticut, were insufficient to bring the Act into play.[316] The trial court granted the motion.[317]

The Appellate Court reversed. Under the Act, an "offer" to sell securities includes a "solicitation of an offer to buy."[318] The court found that a jury could reasonably conclude that the parties' meeting in Waterbury had given rise to such a solicitation, and that the trial court had erred by taking the issue out of the jury's hands.[319]

The Appellate Court's decision in *Specialized Freight Forwarders v. Dragone Classic Motorcars, Inc.*[320] which involved unpaid invoices for the cost of shipping several classic cars from the United States to the Netherlands, addressed two issues of import.

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[311] *Id.* at 802.
[312] *Id.*
[313] *Id.*
[314] *Id.* at 802-03.
[315] *Id.* at 803.
[316] *Id.*
[317] *Id.*
[318] *Id.* at 806, quoting from General Statutes § 36b-3(16)(B).
[319] *Id.* at 809.
[320] 137 Conn. App. 623, 49 A.3d 798, *cert. denied*, 307 Conn. 925, 55 A.3d 565 (2012).

The defendant claimed on appeal that the state courts of Connecticut lacked jurisdiction over the case, on the grounds that it was an admiralty matter within the exclusive jurisdiction of the federal courts.[321] The Appellate Court disagreed, quoting a United State Supreme Court decision for the proposition that exclusive federal jurisdiction attaches only to admiralty cases "begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien."[322] Because the case at bar was an action in *personam* seeking a money judgment, with possible claims under both admiralty law and state law, the federal and state courts had concurrent jurisdiction.[323]

The defendant also claimed that the term "freight collect" on the bills of lading indicated that the responsibility for shipping costs lay entirely with the buyers of the shipped goods, not the defendant seller.[324] The Appellate Court held that while this term does suggest that the buyers bore ultimate responsibility for the shipping costs, the phrase, standing alone, does not rebut the presumption that the seller is liable to the shipper that it engaged.[325]

In *Willamette Management Associates, Inc. v. Palczynski,*[326] the Appellate Court held void, due to failure of consideration, an unperformed agreement between a creditor and a debtor that reduced the debt balance and implemented a payment schedule.[327] The defendant had entered into a written agreement with the plaintiff, an accounting firm, for professional services in connection with her divorce proceedings.[328] The defendant paid an initial retainer of $5,000 but rendered no further payments toward bills that totaled $72,000.[329] The parties then signed a new agreement, expressly in substitution of the original engage-

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[321] *Id.* at 627.
[322] *Id.* at 628, quoting *Madruga v. Superior Court,* 346 U.S. 556, 560 (1954).
[323] *Specialized Freight Forwarders,* 137 Conn. App. at 628.
[324] *Id.* at 629.
[325] *Id.* at 631-32.
[326] 134 Conn. App. 58, 38 A.3d 1212 (2012).
[327] *Id.* at 61-62.
[328] *Id.* at 60-61.
[329] *Id.* at 61.

ment, reducing the outstanding sum by $10,000, and providing for monthly payments of the reduced balance.[330]

The defendant rendered no payments, and the plaintiff brought suit on both the original agreement and the substitute agreement.[331] The trial court rendered judgment upon the original agreement.[332] That court found that the second agreement failed for lack of consideration, given that that it had conferred no benefit upon the plaintiff, which was still required to perform the same work and still bore the same risk of nonpayment.[333] The trial court further found that even if the second agreement could be deemed supported by consideration, the defendant's complete failure of performance constituted a repudiation of the agreement, which barred her from enforcing it.[334] The Appellate Court agreed, and affirmed the judgment below.[335]

VIII. Conclusion

Connecticut's business litigation bar continues to push the boundaries of theories of liability, and in 2012 the judiciary responded with an impressive body of case law. As the cases demonstrate, business attorneys need to think creatively and proactively in sizing up potential liabilities, not only in planning litigation strategies but also in structuring business transactions and drafting waivers, releases, indemnities and hold-harmless provisions. Collaboration between transactional attorneys and litigators is ever more important.

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[330] *Id.* at 61-62.
[331] *Id.* at 62.
[332] *Id.* at 63.
[333] *Id.* at 73.
[334] *Id.* at 75-76.
[335] *Id.* at 76.