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BUSINESS LITIGATION: 2013 IN REVIEW

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In 2013, Connecticut's appellate courts often focused on the interpretation of contracts, including provisions, such as disclaimers of warranties and various boilerplate, that typically command little attention during the drafting process. These decisions provide a pointed reminder that business cases are sometimes decided not only by contract terms that are actively negotiated, but by "fine print" that is often taken for granted. This article will discuss those cases, as well as other decisions of interest to business litigators.

I. CONTRACT CASES

A. *Disclaimers of Warranties*

In *Ulbrich v. Groth*,[1] the Supreme Court found that standard "disclaimer of warranty" language was insufficient to shield a foreclosing bank from liability when it "sold" items of personal property that it never owned. The defendant TD BankNorth, N.A. (bank) foreclosed a mortgage on the real estate and a security interest in the personal property associated with a special events facility in Wallingford. At the foreclosure auction, the auctioneer provided prospective bidders with a brochure that listed the types of personal property to be sold, which included office furniture, pool equipment, sporting goods, kitchen equipment and fixtures, maintenance equipment, tents, chairs, tables and vehicles. The brochure contained a disclaimer reciting that no warranties were being made as to the quality, quantity or usefulness of items sold; that all items were being sold "as is, where is"; and that items "may have been removed or added since the preparation of this list."[2]

Before the auction, the bank learned that many items of personal property used to operate the facility had been

* Of the Hartford Bar.
[1] 310 Conn. 375, 78 A.3d 76 (2013).
[2] *Id.* at 383-84 & n. 6.

leased, not purchased, by the debtors, and therefore may not be subject to the bank's security interest. However, this was not disclosed to prospective bidders.[3]

The high bidder, who tendered a bid in the amount of $1.65 million, received two bills of sale for the personal property, each of which recited that the bank was conveying to him "all of the [bank's] right, title and interest, as such [bank] has or may have in and to the personal property described on [e]xhibit 'A' attached hereto…"[4] The bills of sale also recited that "secured party makes no warranties or representations of any kind whatsoever, express or implied, with respect to the collateral. The assets are sold 'as is' and 'where is' and the secured party specifically disclaims any warranties of merchantability or fitness for any purpose whatsoever."[5]

The high bidder subsequently learned that numerous items on the site had not been included in the sale, because the debtors had not owned them. He and his assignee brought suit under a number of theories, including breach of the warranty of title. In its defense, the bank cited the disclaimer language in the bills of sale.

As for the first disclaimer, which recited that the bank was conveying only whatever "right, title and interest as such [bank] has or may have" in the items, the court agreed with various out-of-state authorities that, under Section 2-312 of the Uniform Commercial Code, "disclaimer language must be specific, and quitclaim type language stating that the seller is selling only what interest the seller has in the property is not sufficient."[6] Applying this standard, the court concluded that the first disclaimer was not sufficiently specific.

As for the second disclaimer, that the bank "makes no warranties or representations of any kind whatsoever, express or implied" with respect to the personal property, the court similarly agreed with "a number of courts [that] have held that a general statement that property is being sold as is and that

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[3] *Id.* at 384-85.

[4] *Id.* at 386.

[5] *Id.* at 386-87.

[6] *Id.* at 418-19. The court cited, among other authorities, *Jones v. Linebaugh*, 34 Mich. App. 305, 309, 191 N.W.2d 142 (1971), for the proposition that

the seller is making no warranties of any kind is insufficient to disclaim an implied warranty of title."[7] Accordingly, the court found that the second disclaimer was inadequate.[8]

The decision in *Ulbrich* suggests that in cases involving the sale of goods, disclaimers of the warranty of title require much more specificity than disclaimers of other types of warranty, such as quality and merchantability. "Quitclaim" type language does not suffice.

Another business case involving the effect of warranty language–but in this instance, finding the contract language dispositive–was the Appellate Court's decision in *Western Dermatology Consultants, P.C. v. VitalWorks, Inc.*[9] The case involved the sale of medical-practice software, associated hardware, training and related services from the defendant VitalWorks, Inc. (VitalWorks) to the plaintiff. Claiming that the software did not function as promised, the plaintiff brought suit.

The contract between the parties disclaimed all warranties, with a limited exception.[10] The trial court concluded that VitalWorks made additional express warranties, through various pre-contract representations, demonstrations and correspondence, and breached those warranties.[11] But the Appellate Court disagreed. Noting that the contract contained a merger clause, the court found that through application of Article 2's version of the parol evidence rule, General Statutes Section 42a-2-202, all prior warranties had merged into the one articulated in the contract.[12]

The Appellate Court went on to address an issue of first impression in Connecticut: whether the merger clause also

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"very precise and unambiguous language must be used to exclude a warranty so basic to the sale of goods as is title." *Id.* at 419.

[7] *Id.* (citing cases).

[8] *Id.* at 420.

[9] 146 Conn. App. 169, 78 A.3d 167, *cert. granted,* 310 Conn. 955, 81 A.3d 1182 (2013).

[10] The agreement contained an express warranty that for 90 days after installation, the software would "substantially conform to the [d]ocumentation when used by the [c]ustomer in a manner that is consistent with the [d]ocumentation," and specifically disclaimed all other warranties. *Id.* at 184.

[11] *Id.* at 185-86.

[12] *Id.* at 190-91 (citing General Statutes § 42a-2-202).

barred the plaintiff's claim for negligent misrepresentation, which had been based on various oral statements and promises that preceded execution of the contract.[13] The court found that those representations "were explicitly superseded by the merger clause," making it clear that VitalWorks "did not intend to be bound by any representation made prior to the contract being signed, and, therefore, reliance by the plaintiff on any such representation would not have been reasonable."[14] The Appellate Court reversed the judgment below, and entered judgment for the defendant.

B. *Course of Dealing*

In *RBC Nice Bearings, Inc. v. SKF USA, Inc.,*[15] the Appellate Court addressed whether a contract can be modified through "course of dealing" notwithstanding a contract term that requires all modifications to be put into writing. The defendant, a manufacturer of ball bearings, sold its product line and associated assets to the plaintiffs. As part of the transaction, the parties entered into a contract by which the defendant would serve as the plaintiffs' exclusive distributor for certain products. Under that contract as amended, the defendant agreed to purchase prescribed minimum quantities of product, subject to certain adjustments, each contract year over a eight-year term. The contract also provided, "No provision of this [agreement] may be waived or amended other than by a written instrument signed by the party against whom enforcement of such amendment or waiver is sought."[16]

In years two and three of the contract, the parties negotiated downward adjustments of the defendant's purchase requirements. In year four, the defendant fell short by approximately $1.8 million, but the plaintiffs did not formally accept the reduced amount nor did they take immediate action to enforce the contract. The defendant's purchas-

[13] *Id.* at 194.
[14] *Id.* at 197.
[15] 146 Conn. App. 288, 78 A.3d 195, *cert. granted,* 310 Conn. 962, 83 A.3d 345 (2013).
[16] *Id.* at 291-92. This contract provision will be referred to as the "modification clause."

es again fell short in years five and six, after which the plaintiffs terminated the contract and sued for breach of contract, among other claims.[17]

Following a courtside trial, the trial court found that the parties "through their course of performance clearly modified the original terms of their agreement," allowing the defendant to make purchases in accordance with its reasonably foreseeable business needs rather than in the quantities prescribed in the contract.[18] The court therefore entered judgment for the defendant.

The Appellate Court reversed, holding that the parties' agreement limited their ability to make a modification without a signed writing.[19] The court noted that the Uniform Commercial Code (UCC) provides, at General Statutes Section 42a-1-303(f), that the parties' course of performance "is relevant to show a waiver or modification of any term inconsistent with the course of performance."[20] But the same statute further states that this principle is subject to General Statutes Section 42a-2-209, which requires enforcement of a contractual modification clause.[21] Because the subject contract contained clear and unambiguous language to this effect, the Appellate Court found that the trial court erred in holding that the contract had been modified through the parties' course of dealing.[22]

Another "course of dealing" case, but with a very different outcome, was the Appellate Court's decision in *Alarmax Distributors, Inc. v. New Canaan Alarm Company*.[23] The plaintiff, a wholesale distributor of fire and home security equipment, and the defendant, an installer and servicer of security and fire alarm systems, entered into a credit agreement in 1999. Under their agreement, the plaintiff agreed

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[17] *Id.* at 293, 296-98.

[18] *Id.* at 299.

[19] *Id.* at 304 (citing General Statutes § 42a-2-209, which provides in relevant part that "[a] signed agreement which excludes modification or rescission except by a signed writing cannot otherwise be modified or rescinded")

[20] *Id.* at 300 (citing General Statutes § 42a-1-303(f)).

[21] *Id.* at 299-300.

[22] *Id.* at 299-301.

[23] 141 Conn. App. 319, 61 A.3d 1142 (2013).

to ship product on credit, and the defendant agreed to pay its account in full within thirty days of shipment.[24]

In practice, though, the parties ignored the thirty-day provision; the plaintiff routinely allowed late payments while continuing to ship product upon the defendant's request, and the defendant periodically rendered lump-sum payments, always in round numbers. This pattern persisted for a period of years.[25]

In 2005, the defendant found itself in financial crisis due to an embezzling bookkeeper. The defendant made a final purchase from the plaintiff in May 2005, received a demand letter from the plaintiff that November for an account balance of $112,309.90, and rendered partial payments of $2,500 in December 2005 and $1,500 in February 2006. The defendant made no further payments, and in September 2009, the plaintiff sued. The defendant asserted that its last payment had been due in June 2005 (thirty days after the final shipment), more than four years before the commencement of suit, and sought refuge in the four-year statute of limitations prescribed by General Statutes Section 42a-2-725, which applies to actions for the sale of goods.[26]

The trial court found that, through the parties' course of dealing, they had modified their agreement from an "invoice by invoice" system to an open account arrangement. The court further found that the defendant's partial payment in February 2006 constituted an acknowledgement of the debt–the entire running debt, since the parties were now on an "open account" system–thus tolling the statute of limitations, and rendered judgment for the entire principal balance claimed by the plaintiff, in the amount of $109,984.55. Rather incongruously, given the finding that the parties' original written agreement had been extinguished by their course of dealing, the trial court also awarded the plaintiff finance charges, in the amount of 1.5% percent per month, as provided in the parties' credit agreement.[27]

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[24] *Id.* at 321-22.
[25] *Id.* at 324.
[26] *Id.* at 322-24.
[27] *Id.* at 324-25. The finance charges were almost equal to the amount of the underlying debt, with a total of $105,546.88 in accrued finance charges. *Id.* at 325.

The Appellate Court agreed with the trial court's conclusion that the parties had modified their agreement to the point that the original agreement was extinguished and a new contract had been formed through course of dealing, and affirmed that part of the judgment.[28] However, the court reversed the award of finance charges, agreeing with the defendant that the plaintiff "cannot rely on the original agreement as a basis to support the imposition of the finance charges while simultaneously relying on the existence of a new contract to reset the tolling of the statute of limitations."[29]

A comparison of the outcomes in *RBC Nice Bearings* and *Alarmax Distributors* is telling. In both instances, the plaintiff persuaded the trial court that the parties' contractual relationship had been fundamentally changed by their course of dealing. The key distinguishing feature, resulting in opposite outcomes following appeal, was that one contract included a "no amendments without a writing" clause, and the other apparently did not.

C. *Other Contract Cases*

In *National Groups, LLC v. Nardi,*[30] the Appellate Court rejected the argument that, as a matter of law, a false representation in a written contract may support a claim for negligent misrepresentation even if the party bringing the claim was unaware of the term. The plaintiff wished to move its business into the defendant's building, and entered into a lease and purchase-option contract to that effect. The contract contained boilerplate language reciting that there was no pending litigation with respect to the property (no-litigation clause). In point of fact, there was a pending action between the defendant and the ground lessor of the property, pertaining to the number of available parking spaces at the site. The no-litigation clause slipped through the drafting process even though the attorneys for both sides knew about the pending action.[31]

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[28] *Id.* at 334.
[29] *Id.* at 336.
[30] 145 Conn. App. 189, 75 A.3d 68 (2013).
[31] *Id.* at 191-92.

When the pending action was concluded, the defendant was left with access to only forty-eight of the eighty-eight parking spaces at the site, which was inadequate for the plaintiff's needs.[32] The plaintiff sued, claiming, among other theories, negligent misrepresentation based on the no-litigation clause. The trial court entered judgment for the defendant. The court found that the plaintiff, through its attorney, had actual knowledge of the pending action. The plaintiff's principal testified that she personally did not have such knowledge, and the trial court found that testimony credible. However, the court rejected her further testimony that she had relied on the no-litigation clause, noting that the "rather generic clause" was buried in the midst of a seventy-five page document.[33]

On appeal, the plaintiff argued that because knowledge of all terms of a contract are imputed to contracting parties, it should follow as a matter of law that the parties are deemed to rely on those terms. The Appellate Court rejected this argument, noting that "the principles of contract law are not dispositive in a claim of negligent misrepresentation, which sounds in tort.... Imputed knowledge of the contract terms may justify enforcing the contract, but in tort a party's knowledge does not automatically result in reasonable reliance. Reasonable reliance is distinct from mere knowledge."[34]

In *Keeper's, Inc. v. ATGCKG Realestate, LLC,*[35] the Appellate Court refused to enforce a tenant's right of first refusal against a landlord that had received an unsolicited purchase offer at a time when the landlord had no interest in selling the property. The plaintiff tenant and defendant landlord were parties to a lease that provided in relevant part: "If, during the term of the lease, or any renewal or extension thereof, landlord receives a written, bona fide offer to purchase the premises, landlord shall provide ten-

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[32] *Id.*
[33] *Id.* at 191-93.
[34] *Id.* at 196, 197, 198.
[35] 146 Conn. App. 789, 80 A.3d 88 (2013, *cert. denied,* 311 Conn. 913, 84 A.3d 881 (2014).

ant with a copy thereof. Tenant shall have ten (10) days after receipt thereof to notify landlord that it elects to purchase the premises under the same terms and conditions as set forth in said offer …"[36]

The landlord received an unsolicited written purchase offer from an unrelated party. The landlord had never offered to sell the property, and had no desire to do so. Within ten days, the tenant, which discovered the offer under circumstances unclear from the record, gave the landlord a written notice of its intent to exercise the right of first refusal. When the landlord refused to sell, the tenant sued for specific performance.[37]

The trial court granted the defendant landlord's motion for summary judgment. The Appellate Court affirmed, citing numerous authorities in support of the proposition that as a matter of law, a right of first refusal becomes operative only if the property owner decides to sell. A right of first refusal is thus distinguishable from an option, which may be effective regardless of the owner's wishes.[38]

The Appellate Court's decision in *Salce v. Wolczek*[39] addressed a real estate purchaser's contractual obligation to share his profit with the seller, if the purchaser subsequently transferred "any ownership interest in the Premises" to a third party. The plaintiff and defendant each owned a half-interest in a limited liability company (LLC), which owned a property in Trumbull, Connecticut (premises). In April of 2007, they entered into an agreement (buyout agreement) by which the defendant would buy out the plaintiff's interest for $1.75 million. The buyout agreement provided "If within one year of the closing hereunder any ownership interest in the Premises is transferred [to a person unaffiliated with the defendant's family] based on a whole property value of more than $3,500,000, Buyer

[36] *Id.* at 792.
[37] *Id.* at 792-93.
[38] *Id.* at 796-97.
[39] 141 Conn. App. 528, 61 A.3d 1177, *cert. granted,* 308 Conn. 944, 66 A.3d 885 (2013).

[defendant] shall pay to Seller [plaintiff] an additional purchase price equal to one-half the excess at the same time as the transfer" (disgorgement clause).[40]

The parties closed on May 31, 2007 (parties' closing date), and the LLC promptly conveyed the premises to an entity (family LLC) owned by the defendant's family, which the parties agreed did not trigger the disgorgement clause. However, on March 19, 2007, within one year of the parties' closing date, the family LLC entered into a real property purchase agreement with one Brian Vaughn (Vaughn purchase agreement) to sell the premises for $5.5 million. The latter closing transpired on July 1, 2008, more than a year after the parties' closing date. The plaintiff sued, claiming that the Vaughn purchase agreement, which was executed within one year of the parties' closing date, triggered the disgorgement clause. The trial court agreed, and granted his motion for summary judgment in the amount of $1 million.[41]

A divided panel of the Appellate Court affirmed.[42] The majority noted that, under the doctrine of equitable conversion, the Vaughn purchase agreement had the effect of immediately transferring an equitable interest in the premises, even though the transfer of physical title would not occur until later. The disgorgement clause broadly applied to the transfer of "any ownership interest," not more narrowly to, say, the "transfer of title at closing."[43]

II. Remedies

In 2013, Connecticut's appellate courts also issued a number of decisions about remedies available to plaintiffs in business cases.

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[40] *Id.* at 530-31.

[41] *Id.* at 530-32.

[42] Judge Borden dissented, opining that the disgorgement clause was ambiguous, making the case unsuitable for disposition by summary judgment. He noted that the clause provides for disgorgement of half the profit "at the same time as the transfer" to the third party. This suggests that the parties may have intended the disgorgement clause to apply only if the "actual transfer of legal title"–the event that typically generates funds–transpired within the one-year window.

[43] *Id.* at 534-35.

A. *The Economic Loss Doctrine*

The Supreme Court's decision in the foreclosure-auction case *Ulbrich v. Groth*,[44] was notable also for its discussion of the economic loss doctrine (doctrine). Under that doctrine, as first articulated by the Connecticut Supreme Court in 1998, in *Flagg Energy Development Corp. v. General Motors Corp.,* "commercial losses arising out of the defective performance of contracts for the sale of goods cannot be combined with negligent misrepresentation."[45] The defendants in *Ulbrich* argued that under this principle, the plaintiffs' claims for negligence and negligent misrepresentation should be barred.[46]

The doctrine is rooted in General Statutes Section 42a-2-721, which provides in relevant part, "Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy."[47] According to the court in *Flagg Energy Development Corp.,* the implication of the statute "is to make actions for fraud or misrepresentation presumptively inconsistent with postacceptance claims for breach of warranty."[48] Putting it another way, as the court did in *Ulbrich*, a burned buyer in a purchase-of-goods case can "choose between (1) pursuing a breach of warranty claim under the contract and (2) rescinding the contract and pursuing a tort claim" – not both.[49]

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[44] 310 Conn. 375, 78 A.3d 76 (2013). For a discussion of other aspects of this case, *see supra* at note 1 and surrounding text.

[45] 244 Conn. 126, 153, 709 A.2d 1075 (1998).

[46] *Ulbrich*, 310 Conn. at 399.

[47] The Supreme Court found, contrary to the trial court, that while the doctrine has its roots in Article 2 of the UCC, it may be applied in the Article 9 setting. *Id.* at 402.

[48] *Id.* at 401.

[49] *Id.* at 407, n. 29. The court acknowledged that in *Williams Ford, Inc. v. Hartford Courant Co.,* 232 Conn. 559, 579 (1995), it had stated broadly that "a remedy on the contract is independent of a remedy for negligent misrepresentation," but clarified that the court intended to say in that case "a remedy on the contract and a remedy for negligent misrepresentation *may be* independent remedies." *Ulbrich,* 310 Conn. at 405-06 (emphasis in original). Cases that implicate the economic loss doctrine are among those in which the two categories of remedies may not be pursued concurrently.

Because the contract in *Ulbrich* "involves a sale of goods covered by the UCC, the exclusive remedy for [a negligent misrepresentation] claim would be to reject the goods and to rescind the contract, a remedy that the plaintiffs in the present case do not seek."[50] Rather, they sought damages, a remedy not permitted under the economic loss rule. Accordingly, the Supreme Court reversed the judgment for the plaintiffs on their negligence and negligent misrepresentation claims.[51]

The court next turned to the issue of whether or not the economic loss rule similarly barred the plaintiffs' claims under CUTPA, as the Supreme Court had ruled in the *Flagg Energy Development Corp*. case. Overruling that aspect of the *Flagg* decision,[52] the court declared that "the economic loss doctrine does not bar claims arising from a breach of contract, including a breach of contract for the sale of goods covered by the UCC, when the plaintiff has alleged that the breach was accompanied by intentional, reckless, unethical or unscrupulous conduct."[53] Because "aggravated" contract breaches of this type may support a CUTPA claim,[54] and because the plaintiffs had pled and proved such conduct, judgment in their favor on the CUTPA count was proper.[55]

B. *Attorneys' Fees, Costs, Punitive Damages and Interest*

In *Total Recycling Services of Connecticut, Inc. v. Connecticut Oil Recycling Services, LLC,*[56] the Connecticut Supreme Court weighed in, for the first time, on the issue of awarding legal fees to a successful litigant when some but not all of the claims provide for such an award. The plaintiff sued the defendant for the breach of three contracts in connection with the defendant's purchase of the plaintiff's business. Of the three contracts–one for the sale of equipment (equipment contract), one for the sale of goodwill

[50] *Id*. at 406.
[51] *Id*. at 407-08.
[52] *Id*. at 409.
[53] *Id*. at 412.
[54] *Id*. at 410.
[55] *Id*. at 413.
[56] 308 Conn. 312, 63 A.3d 896 (2013).

(goodwill contract) and a covenant not to compete (noncompete contract)–all but the equipment contract contained a provision entitling the defendant to attorneys' fees in the event of a breach by the plaintiff.[57]

The defendant counterclaimed for breaches by the plaintiff of all three contracts. Following trial, a jury rejected the plaintiff's contract claims; found for the plaintiff on a claim of unjust enrichment; and found for the defendant on its counterclaim. The jury awarded the defendant damages only for breach of the equipment contract, the only contract lacking an attorneys' fees provision.[58]

The trial court initially denied the defendant's motion for attorney's fees, and the Appellate Court reversed.[59] On remand, at a hearing on the defendant's ensuing motion for attorneys' fees, the defendant argued that apportionment of legal fees among the claims and counterclaims under the various contracts was not possible, and introduced expert testimony that "apportionment in a case such as the present one was neither practicable nor consistent with general legal billing practices."[60] The trial court again denied the motion for attorney's fees, noting that the defendant did not "identify which reasonable attorney's fees were incurred in prosecuting its breach of contract counterclaims with regard to the contracts that specifically provide for attorney's fees."[61] A divided panel of the Appellate Court affirmed.[62]

The Supreme Court reversed. Drawing in large part on federal caselaw, as well as several Connecticut Appellate Court cases addressing fee awards under CUTPA,[63] the court ruled that "when certain claims provide for a party's recovery of contractual attorney's fees but others do not, a party is nevertheless entitled to a full recovery of reasonable

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[57] *Id.* at 315.
[58] *Id.* at 316.
[59] *Id.* (citing Total Recycling Servs. of Connecticut, Inc. v. Connecticut Oil Recycling Servs., LLC, 114 Conn. App. 671, 680-81, 970 A.2d 807 (2009)).
[60] *Id.* at 318.
[61] *Id.* at 319.
[62] *Id.* (citing Total Recycling Servs. of Connecticut, Inc. v. Connecticut Oil Recycling Servs., LLC, 129 Conn. App. 296, 305, 20 A.3d 716 (2011)).
[63] *Id.* at 328-33.

attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined."[64] The court remanded the case for further proceedings.[65]

In *Aaron Manor, Inc. v. Irving*,[66] the Connecticut Supreme Court gave an expansive reading to General Statutes Section 42-150bb (statute),[67] which allows a consumer who successfully defends or prosecutes a claim arising under a commercial contract to be awarded an attorneys' fee, if the contract contains an attorneys' fee clause for the benefit of the commercial party.

The plaintiff, a skilled nursing care facility, brought suit against the defendant, who had signed a "Patient/Resident Admissions Agreement" (admission agreement) in connection with her father's admission into the plaintiff's facility. Under the admission agreement, the defendant signed as a "responsible party" who agreed that, to the extent she had control over or access to her father's assets, she would use those funds for her father's welfare, including paying the plaintiff for services rendered to him. However, the defendant never had her father's power of attorney, nor was ever appointed conservatrix over his person or estate while he was alive, nor executrix or conservatrix of his estate after he

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[64] *Id.* at 333.

[65] *Id.* at 337-38.

[66] 307 Conn. 608, 57 A.3d 342 (2013).

[67] The statute provides: "Whenever any contract or lease entered into on or after October 1, 1979, to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. No attorney's fee shall be awarded to a commercial party who is represented by its salaried employee. In any action in which the consumer is entitled to an attorney's fee under this section and in which the commercial party is represented by its salaried employee, the attorney's fee awarded to the consumer shall be in a reasonable amount regardless of the size of the fee provided in the contract or lease for either party. For the purposes of this section, 'commercial party' means the seller, creditor, lessor or assignee of any of them, and 'consumer' means the buyer, debtor, lessee or personal representative of any of them. The provisions of this section shall apply only to contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes."

died. Her brother held her father's power of attorney, and handled his financial affairs.[68]

Following the death of the defendant's father, the plaintiff sued her for unpaid services, claiming breach of contract and fraud. The admission agreement contained an attorneys' fees provision. The defendant prevailed at trial, and subsequently moved for an award of attorneys' fees pursuant to the statute.[69]

The court noted that the statute provides protection to a "consumer," defined as "the buyer, debtor, lessee or *personal representative* of any of them."[70] Reversing a divided panel of the Appellate Court,[71] the Supreme Court held that the defendant was her father's "personal representative" for purposes of the statute, even though she did not hold an "official" position such as conservatrix or attorney-in-fact.[72]

In *Clem Martone Construction, LLC v. DePino*,[73] the Appellate Court ruled that, in establishing recoverable attorneys' fees for a foreclosing mechanic's lienor, the trial court erred in excluding fees associated with defending against the homeowner's counterclaim for poor workmanship. The court noted that "in order to succeed on the foreclosure claim, the plaintiff's counsel necessarily had to defend against the defendant's counterclaim … that the plaintiff had failed to render substantial performance under the contract."[74]

On a cross-appeal in *Ulbrich v. Groth*,[75] the plaintiff challenged the trial court's denial of his request for an award of "nontaxable" costs, for such items as trial equipment, transcripts, third party copying, Westlaw research,

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[68] 307 Conn. at 611-12.

[69] *Id.* at 613, 617.

[70] *Id.* at 616 (emphasis in original).

[71] The Appellate Court decision is reported at 126 Conn. App. 646, 12 A.3d 584 (2011).

[72] 307 Conn. at 617.

[73] 145 Conn. App. 316, 77 A.3d 760, *cert. denied,* 310 Conn. 947, 80 A.3d 906 (2013).

[74] *Id.* at 331.

[75] *Ulbrich,* 310 Conn. 375. For a discussion of other aspects of this case, *see supra* at note 1 and surrounding text and note 44 and surrounding text.

delivery costs, marshal fees, the jury fee and court fees.[76] Ulbrich had made this request[77] pursuant to General Statutes Section 42-110g(d), a section of CUTPA that allows award for "costs and reasonable attorneys' fees." The trial court denied the request, based on a decision of the Appellate Court, *Miller v. Guimaraes*,[78] holding that awards for "costs" pursuant to General Statutes Section 42-110g(d) are limited to those specifically taxable by statute.[79]

The Supreme Court reversed this aspect of the trial court's decision. The court noted "it is well established that nontaxable costs may be awarded as punitive damages under the common law."[80] Given that CUTPA separately provides for awards of punitive damages pursuant to General Statutes Section 42-110g(a), and in light of the remedial purpose of CUTPA as a whole, the Supreme Court held that nontaxable costs may be recoverable as an element of punitive damages under the latter statute.[81]

The *Ulbrich* decision is noteworthy also for a detailed analysis, under the factors articulated by the United States Supreme Court in *Exxon Shipping Co. v. Baker*,[82] of whether or not the trial court's separate award of punitive damages under CUTPA passed constitutional muster. Those factors include "whether the defendant's conduct was reckless, intentional or malicious; whether the defendant's action was taken or omitted in order to augment profit; whether the wrongdoing was hard to detect; whether the injury and compensatory damages were small, providing a low incentive to bring the action; and whether the award will deter the defendant and others from similar conduct, without financially destroying the defendant…. Of these factors, the reprehensibility of the defendant's conduct is the most important."[83] The court found that the trial court's award of treble damages was justified under the *Exxon* analysis.

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[76] *Id.* at 461.
[77] *Id.*
[78] 78 Conn. App. 760, 782-83, 829 A.2d 422 (2003).
[79] *Ulbrich*, 310 Conn. at 462.
[80] *Id.*
[81] *Id.* at 462-63.
[82] 554 U.S. 471 (2008).
[83] *Ulbrich*, 310 Conn. at 454-55 (citations and internal punctuation omitted).

Sikorsky Financial Credit Union, Inc. v. Butts[84] presented the question of whether a contract term that governed the "postmaturity" interest rate, but did not explicitly apply "postjudgment," should control the court's award of postjudgment interest. The contract at issue, an installment sale contract for the purchase of a motor vehicle, imposed interest at the rate of 9.14% per annum, both before and after maturity. Upon the borrower's default, the plaintiff repossessed and sold the vehicle, sued for a deficiency, and obtained a judgment. The trial court applied the contract interest rate up to the date of judgment, but awarded discretionary postjudgment interest at two percent per annum, pursuant to General Statutes Section 37-3a.[85]

On appeal, the plaintiff argued that the contractual interest rate should have applied to both pre- and postjudgment interest. Noting that the contract did not expressly address postjudgment interest, the Appellate Court disagreed, and affirmed the judgment below.[86]

C. *Other Remedies Cases*

In *Nation Electrical Contracting, LLC v. St. Dimitrie Romanian Orthodox Church*,[87] the Appellate Court found a property owner liable in unjust enrichment to a subcontractor that had performed work on its property, even though the owner had fully paid its obligation to the general contractor on the project. The defendant contracted with Primrose Construction Company, Inc. (Primrose) to construct a church on its property. Primrose in turn hired the plaintiff to perform electrical work. In January of 2008, the plaintiff submitted an invoice to Primrose in the amount of $40,000 for services rendered. The following month, Primrose ceased work on the project, and submitted a final progress bill to the defendant, which refused to pay. That bill included the work performed by the plaintiff, which had

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[84] 144 Conn. App. 755, 75 A.3d 700, *cert. granted,* 310 Conn. 931, 78 A.3d 857 (2013).

[85] *Id.* at 756-58.

[86] *Id.* at 758-60.

[87] 144 Conn. App. 808, 74 A.3d 474 (2013).

fully performed its obligations under its subcontract, and in a workmanlike manner.[88]

Primrose recorded a mechanic's lien against the defendant's property. In a subsequent proceeding to discharge the lien, the court found that Primrose's work overall had been unworkmanlike, that the defendant had reasonably expended funds in excess of the contract price to have the project completed by another contractor, that the defendant owed nothing further to Primrose, and that there was no lienable fund to which Primrose's mechanic's lien could attach. The court granted the defendant's application to discharge Primrose's lien.[89]

In a separate action, the plaintiff sued the defendant for its unpaid work, claiming, among other theories, unjust enrichment. The defendant argued that such a claim should be barred, in light of the ruling in the earlier case that it owed nothing further to Primrose, the general contractor. The trial court disagreed with the defendant, finding that the earlier ruling in the Primrose litigation had no such preclusive effect. Given that the defendant had received the benefit of the plaintiff's work, and that the defendant had paid neither the plaintiff nor Primrose for that particular work, the plaintiff's claim was subject to a straightforward analysis under the principles of unjust enrichment, which supported a judgment for the plaintiff. The trial court also awarded the plaintiff statutory prejudgment interest, pursuant to General Statutes Section 37-3a.[90]

The Appellate Court affirmed. The court agreed that the ruling in the first case discharging Primrose's mechanic's lien did not create an obstacle to the plaintiff's subsequent claim for unjust enrichment. The court further found, in an apparent matter of appellate first impression, that statutory prejudgment interest for the wrongful detention of money may be awarded in actions for unjust enrichment.[91]

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[88] *Id.* at 810-11.
[89] *Id.* at 811-12.
[90] *Id.* at 813-14, 819.
[91] *Id.* at 818-21.

In *DDS Wireless International, Inc. v. Nutmeg Leasing, Inc.,*[92] the Appellate Court ruled that the common-law contract defense known as frustration of purpose cannot trump remedies spelled out in the parties' contract. The defendant, an operator of a fleet of taxi cabs, had purchased a mobile dispatch system, with an associated service contract, from the plaintiff. The service contract allowed either party to cancel the agreement following default by the other party and expiration of a thirty-day notice-and-cure period.[93]

When Nutmeg sent DDS Wireless a termination notice that did not comply with the notice provision in the agreement, DDS Wireless sued for nonpayment under the service contract. At trial, a principal of Nutmeg testified that the dispatch system was unreliable. Crediting that testimony, the trial court entered judgment for the defendant, finding that the purpose of the service agreement had been frustrated.[94]

The Appellate Court reversed. Tracing the doctrine of frustration of purpose back to an English case from 1903,[95] the court noted that the doctrine has been adopted in Connecticut and "acts to provide an excuse for nonperformance by a party whose purposes were thwarted by events the parties did not contemplate and could not foresee."[96] The Appellate Court ruled that the doctrine did not apply in the case before it, given that the parties had indeed contemplated the very circumstance at hand–dissatisfaction on the part of the customer with the performance of the system–and had prescribed a legal avenue to end the contractual relationship. Accordingly, and given that the defendant had not properly invoked the mechanism permitted

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[92] 145 Conn. App. 520, 75 A.3d 86 (2013).

[93] *Id.* at 522.

[94] *Id.* at 522-23.

[95] The court referred to *Krell v. Henry,* 2 K.B. 740 (C.A. 1903), in which a would-be spectator of the coronation of King Edward VII contracted to rent an apartment overlooking the procession route. When the coronation was postponed and the procession cancelled, the spectator refused to pay for the rental. Following suit by the apartment owner, the court excused the breach, on the grounds that "the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed." *Id.* at 525-26.

[96] *Id.* at 526.

under the contract, the court found that the trial court had erred in applying the frustration doctrine, and reversed the judgment below.[97]

The promissory note at issue in *General Electric Capital Corporation v. Metz Family Enterprises, LLC*[98] contained a forum selection clause requiring any dispute to be litigated on the merits in New York, but allowing a party to elect any other jurisdiction "for equitable relief … including, but not limited to orders of attachment or injunction necessary to maintain the status quo pending litigation or to enforce judgments …"[99] The plaintiff obtained a prejudgment remedy in the Connecticut Superior Court, from which the defendants appealed, claiming that through operation of the forum selection clause, the court lacked personal jurisdiction over them. The Appellate Court agreed with the defendants, and reversed the judgment below.[100]

The court noted that under Connecticut practice, "a plaintiff's application for a prejudgment remedy is not a stand-alone pleading," but rather "is entirely dependent upon … an action … upon which a Connecticut court will render judgment."[101] The action brought by the plaintiff sought "legal relief in the form of money damages . . . [and not] any form of equitable relief."[102] That is, although the plaintiff sought equitable relief by way of its PJR application, the complaint itself "did not seek equitable relief and, instead, proceeded on a general breach of contract theory for which it sought legal relief."[103] Thus the plaintiff's action "did not fall under the limited exception of the forum selection clause."[104]

The court's reasoning is puzzling, given that the forum selection clause is not limited to "bringing an action for

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[97] *Id.* at 527.
[98] 141 Conn. App. 412, 61 A.3d 1154 (2013).
[99] *Id.* at 417, n. 2.
[100] *Id.* at 422-23.
[101] *Id.* at 424 (quoting Cahaly v. Benistar Property Exchange Trust Co., 268 Conn. 264, 273-74, 842 A.2d 1113 (2004)).
[102] *Id.* at 425.
[103] *Id.* at 427.
[104] *Id.*

equitable relief"; rather, it broadly allows a party to "apply" for equitable relief in a forum of its choosing, which appears to be just what the plaintiff did in the case.

In *Chief Information Officer v. Computers Plus Center, Inc.,*[105] the Supreme Court held that when the state files a lawsuit against a private party, it may still assert sovereign immunity against a counterclaim for damages. The court rejected the defendant's contention that in filing suit, the state had implicitly waived immunity to counterclaims. A defendant sued by the state must obtain the permission of the Claims Commissioner before counterclaiming for damages.[106]

The decision applies only to counterclaims at law; consistent with ancient caselaw, sovereign immunity does not bar equitable counterclaims to suits in equity.[107] In *dictum*, the court strongly intimated that sovereign immunity similarly would not bar counterclaims in recoupment–limited to reducing or defeating the state's claim, but not seeking affirmative recovery.[108]

In *Citibank N.A. v. Lindland,*[109] the Supreme Court ruled that the successful bidder at a foreclosure auction could properly intervene in a foreclosure action, and move to open and modify the court's supplemental judgment, even after title to the property had passed to him. The plaintiff sued to foreclose a second-position mortgage on property in Cromwell. The trial court, not realizing that the mortgage at issue was a second mortgage and that the property lacked equity, ordered a judgment of foreclosure by sale. The committee for sale was unaware of the first mortgage, and therefore did not disclose it to prospective bidders. Robert Olsen tendered the high bid in the amount of $216,000, and consummated the purchase on January 21, 2009, similarly unaware that the property was subject to a first mortgage–and indeed that that first mortgage had recently been foreclosed, in a separate action.[110]

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[105] 310 Conn. 60, 74 A.3d 1242 (2013).
[106] *Id.* at 79, 91.
[107] *Id.* at 83.
[108] *Id.* at 77, n. 21.
[109] 310 Conn. 147, 75 A.3d 651 (2013).
[110] *Id.* at 151-54.

On February 26, 2009, the trial court entered a supplemental judgment disbursing $91,854.27 to the plaintiff in satisfaction of its mortgage debt.[111] The court then entered a further supplemental judgment authorizing disbursement to the property owner, but execution of that order was stayed, and the court retained custody of the balance of the sale proceeds.[112]

In April of 2009, Olsen learned the true state of affairs, successfully moved to intervene in the case, and moved to open and vacate the judgments of foreclosure by sale and the supplemental judgments. The trial court granted the motion to open.[113]

The plaintiff appealed from that order, and the Appellate Court reversed, holding that Olsen lacked standing to pursue his claims against the plaintiff, and that the court lacked authority to open the foreclosure judgments after title to the property passed to him.[114] The Supreme Court granted certification to appeal, and reversed.[115] The court concluded that, given that Olsen had expended funds for the purchase of the property, and that the supplemental judgments addressed the distribution of those funds, Olsen met the test of classical aggrievement and thus had standing to pursue his claims.[116] As for the court's authority to grant him relief after title had passed, the Supreme Court noted that Olsen "does not seek any remedy relating to the property itself; it is the proceeds from the sale and the restitution thereof that is at issue."[117] Because the trial court's authority over the property was immaterial, and its authority over the sale proceeds was clear, the court had authority to open the supplemental judgments.[118]

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[111] *Id.* at 154.
[112] *Id.*
[113] *Id.* at 154-56.
[114] Citibank, N.A. v. Lindland, 131 Conn. App. 653, 656, 666, 27 A.3d 423 (2011).
[115] 310 Conn. at 175.
[116] *Id.* at 164-65.
[117] *Id.* at 168.
[118] *Id.*

III. Business Torts

2013 featured several appellate cases about the reach of liability for tortious interference and unfair trade practice.

Landmark Investment Group, LLC v. Calco Construction and Development Company,[119] the Appellate Court drew a distinction between "aggressive business practices"[120] and tortious interference–agreeing with the trial court that the defendants had committed the former but not the latter. The plaintiff was a party to a purchase and sale agreement with Chung Family Realty Partnership, LLC (Chung, LLC) pertaining to a parcel of land in New Britain. Those parties had a falling out, and the plaintiff sued Chung, LLC seeking to enforce the agreement (Chung litigation). Meanwhile, the defendant John Senese, through his company Calco Construction and Development Company (Calco), entered into a backup agreement with Chung, LLC for the purchase of the property, which was contingent upon Chung, LLC prevailing in the Chung litigation. Senese played additional angles as well, purchasing the existing mortgages on the parcel, and funding Chung, LLC's legal fees in connection with the Chung litigation.[121]

The plaintiff prevailed in the Chung litigation, obtaining an order, affirmed by the Appellate Court, of specific performance directing Chung, LLC to convey the property to the plaintiff.[122] But the plaintiff was unable to capitalize on its victory, as the town had meanwhile commenced foreclosure of tax liens on the property, which eventually went to auction. The high bidder was a company formed by Senese.[123]

The plaintiff sued Senese and Calco, asserting claims of tortious interference, unfair trade practice, and civil conspiracy. The plaintiff sought a prejudgment remedy, but following a three-day hearing, the trial court denied the plain-

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[119] 141 Conn. App. 40, 60 A.3d 983 (2013).

[120] *Id.* at 47 (this is the trial court's characterization of the behavior of the defendants that gave rise to the suit).

[121] *Id.* at 41-46.

[122] *Id.* at 46 (citing Landmark Inv. Grp., LLC v. Chung Family Realty P'ship, LLC, 125 Conn. App. 678, 10 A.3d 61 (2010), *cert. denied,* 300 Conn. 914, 13 A.3d 1100 (2011)).

[123] *Id.*

tiff's application, finding "no evidence that Senese enticed or manipulated Chung, LLC, into terminating its agreement with the plaintiff" or that "Senese and/or Calco made any misrepresentations or committed any other tort in the course of conduct which ultimately injured [the plaintiff]."[124] The plaintiff appealed, but the Appellate Court, deferring to the trial court's findings of credibility and weighing of the evidenced, affirmed the judgment below.[125]

In *Marinos v. Poirot*,[126] the Supreme Court revisited the requirement that a plaintiff filing suit under CUTPA must allege and prove he or she has suffered an "ascertainable loss of money or property."[127] The plaintiff, executrix of the estate of a deceased attorney, brought suit against two attorneys, including a former employee, alleging that they had stolen clients, files, supplies and staff time from the decedent's law office. Among the plaintiff's various causes of action was a claim under CUTPA.[128]

In response to the defendants' discovery request seeking a calculation of the alleged loss, plaintiff replied that an accounting "is ongoing, therefore no itemization can be listed herein. As soon as the cumulative value has been assessed we will forward a copy of the same."[129] However, the plaintiff never followed through with the promised information, and the trial court granted the defendants' motion for summary judgment, observing that the plaintiff's objection included no proof of loss beyond "conclusory statements and a list of office supplies allegedly taken . . . ."[130]

The Supreme Court affirmed. The court observed that, for purposes of CUTPA, "ascertainable loss" need only be "capable of being discovered, observed or established," and not necessarily measured in a precise amount.[131] But here, in the face of a summary judgment motion, the plaintiff

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[124] *Id.* at 47-48.
[125] *Id.* at 52-55.
[126] 308 Conn. 706, 66 A.3d 860 (2013).
[127] *Id.* at 708 (citing CONN. GEN. STAT. § 42-110g(a)).
[128] *Id.* at 709-11.
[129] *Id.* at 711.
[130] *Id.*
[131] *Id.* at 714.

"fail[ed] to offer *any* proof of any loss allegedly suffered."[132] The court brushed aside the plaintiff's list of allegedly purloined office supplies, such as copy paper, paper clips, and note pads, observing that the act "is not designed to afford a remedy for trifles."[133]

In *Reyes v. Chetta,*[134] a business owner sold his business, used self-help to take the business back when his buyer defaulted–and found himself liable to the third party who in turn had bought the business from his buyer.

In 2007, Michael Amoruso entered into an agreement to sell his landscaping and snow removal business (business), consisting of customer accounts and equipment, to Nicholas Chetta, for the sum of $85,000. The debt was evidenced by a promissory note, which provided for acceleration of the debt upon default, but did not provide that Amoruso would thereupon have the right to take back his customers.[135]

Within a few months, in January of 2008, Chetta sold the business to the plaintiff, for a cash price of $50,000. That spring, Chetta stopped making payments on his note to Amoruso, and Amoruso learned that Chetta had sold the business to the plaintiff. Amoruso responded by contacting his former customers, telling them he was back in business, and encouraging them to cancel their business relationship with the plaintiff and return to him. He succeeded in recapturing approximately seventy percent of his former customers.[136]

Upon trial of the plaintiff's ensuing lawsuit against both Amoruso and Chetta, the court found Amoruso liable for tortious interference with business relations and violations of CUTPA. The court entered judgment for the plaintiff for the entire $50,000 purchase price he had paid to Chetta, together with an award of prejudgment interest.[137]

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[132] *Id.* at 716 (emphasis in original).
[133] *Id.* at 715, n. 5 (citing Hinchcliffe v. Am. Motors Corp., 184 Conn. 607, 614, 440 A.2d 810 (1981)).
[134] 143 Conn. App. 758, 71 A.3d 1255 (2013).
[135] *Id.* at 760-61.
[136] *Id.* at 761.
[137] *Id.* at 762-63.

The Appellate Court agreed with the trial court's findings as to liability, attaching particular significance to the fact that the loan agreement between the plaintiff and Amoruso did not provide Amoruso with the remedy of taking his customers back upon default.[138] The court also noted that the purchase agreement provided that its terms would inure to each party's successors and assigns, evidencing that the parties contemplated that Chetta might sell the business to a third party.[139]

In *State v. Acordia, Inc.,*[140] the state sued the defendant, an independent insurance broker, alleging violations of the Connecticut Unfair Insurance Practices Act (CUIPA) and CUTPA.[141] The defendant had entered into a program with five insurance carriers, under which the defendant would give them preferential consideration in placing insurance, and the carriers in turn would rebate one percent of the total premiums written through the defendant. The defendant did not disclose the existence of this program to its customers.[142]

At trial, four of the defendant's customers testified that they relied on the defendant to provide unbiased and independent advice regarding the purchase of insurance coverage, but that they had never been made aware of the program. The trial court found that the defendant had breached its fiduciary duty to its customers, and that this in turn gave rise to violations of CUIPA and CUTPA.[143]

On appeal, the defendant argued that, as a matter of law, alleged violations of the common law, such as breach of fiduciary duty, cannot provide the predicate for violations of CUIPA. The Supreme Court agreed. CUIPA defines prohibited conduct as either those acts defined in General Statutes Section 38a-816, which has 22 subsections describing a broad array of practices, or those found to be unfair

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[138] *Id.* at 766.
[139] *Id.* at 766, n. 7.
[140] 310 Conn. 1, 73 A.3d 711 (2013).
[141] *Id.* at 4 (specifically alleging violations of General Statutes §§ 42-110m and 38a-816).
[142] *Id.* at 12.
[143] *Id.* at 12-14.

practices after a hearing before the insurance commissioner, pursuant to General Statutes Sections 38a-817 and 818. The Supreme Court found that these are the only avenues for establishing a violation of CUIPA.[144] The court further found that, absent a violation of CUIPA, the plaintiff's claim under CUTPA could not stand.[145]

IV. Extensions Of Liability

In several cases, the appellate courts rewarded creative plaintiffs who sought to extend liability beyond the parties with whom they had contracted.

In *Brett Stone Painting and Maintenance, LLC v. New England Bank,*[146] a bank implicitly assumed its borrower's obligations under a home construction contract, and became liable for the entire cost of completing the house. The defendant bank (bank) agreed to lend up to $374,810 to Frederick Villar for the construction of a house. As part of the security for the loan, Villar granted the bank a conditional assignment of his construction contract with the plaintiff builder.[147]

Following default of Villar's obligations under the loan agreement, an officer of the bank urged the plaintiff to continue working on the house, knowing that the cost to complete would exceed the balance of funds available under the loan agreement.[148] The plaintiff did so, and the bank rendered three partial payments but refused to pay the plaintiff in full for the work it had performed.[149]

The trial court found that through its conduct, the bank had implicitly exercised its rights as assignee of the construction contract, thereby stepping into the shoes of the borrower and assuming the duty to pay. The court entered judgment for the plaintiff in the amount of $61,852.14, plus an award for attorneys' fees pursuant to the contract.[150]

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[144] *Id.* at 20-27.

[145] *Id.* at 37-38.

[146] 143 Conn. App. 671, 72 A.3d 1121 (2013).

[147] *Id.* at 674-75.

[148] *Id.* at 678. The loan agreement required the improvements to be completed by February 28, 2008, which was not accomplished. *Id.* at 676.

[149] *Id.* at 677, 686.

[150] *Id.* at 678.

The Appellate Court found that the trial court's factual finding as to assumption of the contract was not clearly erroneous, and affirmed the judgment below.[151]

In *Coppola Construction Company v. Hoffman Enterprises Ltd. Partnership,*[152] the Supreme Court examined another angle of a many-faceted issue: when does the corporate form protect a company's principal from personal liability in tort?

The plaintiff brought suit against both the first-named defendant (Hoffman Enterprises) and its principal, Jeffrey S. Hoffman (Hoffman). The action arose from certain site work that the plaintiff, a construction contractor, had performed on property owned by Hoffman Enterprises. In connection with that work, the plaintiff had dealt with Hoffman Enterprises' putative construction manager and agent, Signature Construction Services, LLC (Signature). Signature purported to authorize the plaintiff to perform extra work, for which the plaintiff was never paid.[153]

In the single count of its complaint directed against the individual Hoffman, the plaintiff alleged that after the plaintiff performed its work, Hoffman repudiated his earlier representations that Signature was the agent for Hoffman Enterprises. The plaintiff therefore pursued Hoffman personally on a claim of negligent misrepresentation.[154]

In a motion to strike, Hoffman countered that the plaintiff's claim against him was legally insufficient. Hoffman argued that even assuming Signature had lacked actual authority to act as Hoffman Enterprises' agent, if he on behalf of Hoffman Enterprises had assured the plaintiff to the contrary (as alleged), that would have the effect of conferring apparent authority upon Signature to bind Hoffman Enterprises. In other words, if the plaintiff indeed had reasonably relied upon Hoffman's representations that Signature was the agent of Hoffman Enterprises, that would give the plaintiff a contract remedy against Hoffman Enterprises, meaning there had been no "detrimental"

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[151] *Id.* at 686.
[152] 309 Conn. 342, 71 A.3d 480 (2013).
[153] *Id.* at 344-46.
[154] *Id.* at 346.

reliance as required for a viable claim of negligent misrepresentation. The trial court agreed with Hoffman, and granted his motion to strike.[155]

The Appellate Court reversed, noting that the plaintiff had the "right to plead alternative causes of action based on the same facts" and that "tort remedies may be different from contract remedies, and damages may be sought from different parties."[156] Following a grant of certification the Supreme Court agreed and affirmed the judgment of the Appellate Court. The Supreme Court noted the "black letter law that an officer of a corporation who commits a tort is personally liable to the victim regardless of whether the corporation itself is liable."[157] The court also noted that, while the precise issue at hand appeared to be one of national first impression, courts in other jurisdictions had found "viable claims of negligent misrepresentation brought against corporate officers, despite the existence of contractual remedies against the corporate entity arising from the same conduct."[158]

In *Joseph General Contracting, Inc. v. Couto,*[159] the Appellate Court imposed personal contract liability upon the owner of a business that was a party to a contract, finding that in his conduct of post-contract modifications and dealings, he had left it unclear if he was acting personally or as an agent of the company.

The plaintiff, Joseph General Contracting, Inc. (company), entered into a written contract with the defendants, John Couto and Jane Couto, for the construction of a house and carriage house. The owner and president of the company was Anthony J. Silvestri.[160] As the project bogged down, Silvestri did a number of things that, in the eyes of the court, "muddied the waters so that, over the course of per-

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[155] *Id.* at 346-47.
[156] *Id.* at 348 (citing Coppola Constr. Co. v. Hoffman Enters. Ltd. P'ship, 134 Conn.App. 203, 210, n. 4, 38 A.3d 215 (2012)).
[157] *Id.* at 354 (quoting Kilduff v. Adams, Inc., 219 Conn. 314, 331, 332, 593 A.2d 478 (1991)).
[158] *Id.* at 354-55.
[159] 144 Conn. App. 241, 72 A.3d 413, *cert. granted,* 310 Conn. 924, 77 A.3d 139 (2013).
[160] *Id.* at 244-45.

formance, it became unclear to [the Coutos] with whom they were transacting business."[161] Silvestri "pressured the Coutos to change the nature of the contract by paying for the development up front."[162] When the company was unable to obtain sufficient financing, he struck an agreement with the Coutos that they would be reimbursed for interest they paid on a construction loan that they procured. He also "individually" signed an escrow agreement with the Coutos in connection with estate paving, and obtained a permit for a dock associated with the project.[163]

The trial court found that on such facts, the Coutos "reasonably were entitled to infer from Silvestri's conduct that he personally had become a party to the [construction] contract."[164] On the Coutos' counterclaim, the court found Silvestri jointly and severally liable with the company for breach of that contract, as well as breach of implied warranty, trespass, and violations of CUTPA.[165]

The Appellate Court affirmed, finding it "reasonable for the [trial] court to find that . . . [Silvestri] did not clearly inform the Coutos that he continued, at all times, to be acting in a representative rather than in an individual capacity" and was therefore "a party to the modified contract and hence personally liable for breach of contract."[166]

V. Miscellaneous Business Law Cases

In *J.E. Robert Company v. Signature Properties, LLC,*[167] the Supreme Court found that a mortgage loan servicer, which was neither the owner nor the holder of the loan in question, had standing to pursue foreclosure in its own name. The court noted that under relevant provisions of the Uniform Commercial Code, persons entitled to enforce a negotiable instrument are not limited to owners and

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[161] *Id.* at 252.
[162] *Id.*
[163] *Id.*
[164] *Id.* at 252-53.
[165] *Id.* at 245.
[166] *Id.* at 253-54.
[167] 309 Conn. 307, 71 A.3d 492 (2013).

holders.[168] Rather, an instrument may be enforced by a transferee, provided that "the transferor must intend to vest in the transferee the right to enforce the instrument [and] the transferor must deliver the instrument to the transferee so that the transferee has either actual or constructive possession."[169]

The court added as a cautionary note that under these circumstances, the foreclosing plaintiff has an additional evidentiary burden. "A nonholder in possession … cannot rely on possession of the instrument alone as a basis to enforce it. … [I]n cases in which a nonholder transferee seeks to enforce a note in foreclosure proceedings, if the defendants dispute the plaintiff's right to enforce the note, the plaintiff must prove that right."[170] Here, the plaintiff met that burden by placing into evidence the agreement that designated the plaintiff as the servicer of the mortgage in question. That document specifically addressed the plaintiff's right to enforce the mortgage by foreclosure.[171]

The Appellate Court's decision in *Sojitz America Capital Corporation v. Kaufman*[172] contains the Connecticut judiciary's first appellate-level examination of General Statutes Section 33-724 (statute), which governs the dismissal of shareholder derivative actions upon motion of the corporation.[173] The plaintiff, a shareholder of nominal defendant Keystone Equipment Finance Corporation (Keystone), brought suit on behalf of Keystone against Todd Kaufman, a director and employee of Keystone. The plaintiff alleged

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[168] *Id.* at 319-20 (citing General Statutes § 42a-3-301, which provides in relevant part: "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument." The official comment adds that "a person entitled to enforce an instrument … is not limited to holders."

[169] *Id.* at 320 (citing General Statutes § 42a-3-203(a)).

[170] *Id.* at 325-26, n. 18 (citations omitted).

[171] *Id.* at 329.

[172] 141 Conn. App. 486, 61 A.3d 566 (2013).

[173] General Statutes § 33-724 reads in relevant part as follows:
"(a) A derivative proceeding shall be dismissed by the court on motion by the corporation if one of the groups specified in subsection (b) or (e) of this section has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the corporation. … (1) A majority vote of qualified directors present at a meeting of the board of directors…."

that Kaufman had falsely attested to Keystone's lenders that Keystone's board had formally and properly authorized Keystone to enter into lending relationships with them. The plaintiff claimed that in so doing, Kaufman had exposed Keystone to potential liability to the banks and rescission of existing credit lines, in breach of Kaufman's fiduciary duty to Keystone.[174]

The plaintiff sent a demand letter to Keystone's board of directors, demanding that it remove Kaufman as a director, terminate his employment, and bring suit against him. The plaintiff further demanded that the board appoint an independent committee to investigate its allegations. The board replied with a letter rejecting the plaintiff's demands.[175]

The defendants moved to dismiss the lawsuit, asserting that a qualified majority of Keystone's directors, following a thorough inquiry, had determined in good faith that maintenance of the suit was not in the company's best interests. The statute provides that when this is so, a derivative proceeding "shall be dismissed by the court on motion by the corporation."[176] The trial court granted the motion and entered judgment for the defendants, from which the plaintiff appealed.[177]

Applying plenary review to the judgment below,[178] the Appellate Court first considered the threshold issue of whether the plaintiff's complaint sufficiently "allege[d] with particularity," as required by the statute,[179] that a majority of the board did not consist of "qualified directors"[180] at the

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[174] *Id.* at 488-89.

[175] *Id.* at 489.

[176] CONN. GEN. STAT. § 33-724(a).

[177] *Sojitz,* 141 Conn. App. at 490.

[178] *Id.* at 495. The Appellate Court concluded that a dismissal pursuant to General Statutes § 33-724 should be reviewed as a mixed question of fact and law, making plenary review appropriate.

[179] The heightened pleading requirement is prescribed by General Statutes § 33-724(c).

[180] *Id.* at 496-98. General Statutes § 33-605(a)(1) provides that, for purposes of General Statutes § 33-724, a "qualified director" is one who does not have "(A) a material interest in the outcome of the proceeding, or (B) a material relationship with a person who has such an interest. . . ." Section 33-605(b)(2) further provides that "Material interest" means an "actual or potential benefit or detriment, other than one which would devolve on the corporation or the shareholders generally,

time the board decided to terminate the litigation.[181] The plaintiff had alleged that two of Keystone's four directors "had full knowledge, or acted in reckless disregard of the actions taken by [Kaufman] addressed in this Complaint, and are not in a position to dispassionately determine whether the instant litigation is in the best interests of Keystone."[182] The Appellate Court agreed with the trial court that these allegations were insufficient to meet the statute's heightened pleading requirement, and that for present purposes, the directors were "qualified" for purposes of the statute.[183]

The court then turned to the issue of whether or not the plaintiff had established, as required by the statute, that the board did not reach its decision "in good faith after conducting a reasonable inquiry upon which its conclusions were based."[184] The court reviewed the affidavits and exhibits filed in connection with the motion to dismiss, including a board report describing the board's inquiry and conclusions.

The report indicated that the board had reviewed, inter alia, the plaintiff's writ and complaint; minutes from relevant shareholder and board meetings; relevant certifications delivered to Keystone's lenders; and correspondence from the plaintiff's counsel.[185] It further indicated that the board had concluded that maintenance of the derivative action was not in the company's best interests, for a variety of reasons: small likelihood of success, given the lack of provable damages; legal expense; disruption to the company's operations if Kaufman's employment were terminated; and negative impact on Keystone's lending relationships.[186]

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that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken." Section 33-605(c)(3) provides that "status as a named defendant, as a director against whom action is demanded or as a director who approved the conduct being challenged" shall not, by itself, deprive a director of status as a 'qualified director.'"

[181] 141 Conn. App. at 496-98.

[182] *Id.* at 500.

[183] *Id.* at 501.

[184] *Id.* at 502.

[185] *Id.* at 502, n. 17.

[186] *Id.* at 503.

The Appellate Court determined that its review of the board's decision-making was limited by operation of the business judgment rule. Under this deferential standard, the court concluded that "the plaintiff has not met its burden of proving that the board's inquiry was unreasonable."[187] The court added that it "may conduct a limited review into the board's conclusions to determine that they follow logically from the inquiry, but may not scrutinize the reasonableness of its determination."[188] The court affirmed the judgment below.[189]

The Appellate Court's decision in *Fradianni v. Protective Life Insurance Company*[190] contains a useful discussion about the "continuing course of conduct" tolling doctrine for purposes of statutes of limitation. The plaintiff, the owner of a universal life insurance contract written in 1992 with a predecessor of the defendant, alleged that he had been overcharged at the inception of the contract and annually thereafter, upon the payment of each premium. The defendant asserted that the claim was time-barred by the applicable statute of limitations, General Statutes Section 52-576, which imposes a six-year limitations period upon contract claims. The plaintiff responded that the limitation period had been tolled, under the continuing course of conduct doctrine.[191]

The Appellate Court disagreed. The court ruled that the continuing course of conduct doctrine applies in "cases where it is the cumulative effect of the defendant's behavior that gives rise to the injury."[192] The case at hand, by contrast, involved "a series of repeated breaches over a period of years," each of which caused damages that "were readily calculable and actionable at the time of the breach."[193] The doctrine therefore did not apply. However, the court further found that the separate and discrete breaches that occurred within the limitation period were actionable.[194]

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[187] *Id.* at 508.
[188] *Id.* at 509.
[189] *Id.* at 510.
[190] 145 Conn. App. 90, 73 A.3d 896, *cert. denied,* 310 Conn. 934, 79 A.3d 888 (2013).
[191] *Id.* at 92-97.
[192] *Id.* at 100.
[193] *Id.*
[194] *Id.* at 103.

For the fourth time in four years,[195] the limited liability company known as 418 Meadow Street Associates, LLC, has generated appellate caselaw on the issue of when, in the face of dissension among the members, an LLC has authority to file suit. In *418 Meadow Street Associates, LLC v. One Solution Services, LLC,*[196] two members of the plaintiff landlord, who collectively owned a fifty percent interest in the company, brought suit against a tenant without the consent of the plaintiff's third member, Barbara Levine, who owned the remaining fifty percent. The defendant claimed that the plaintiff had brought suit without proper authority, and therefore lacked standing to do so.[197]

The LLC's operating agreement and the relevant provision of the Limited Liability Companies Act (act) required the suit to be approved by a majority of the plaintiff's membership.[198] The act further provides that in determining the necessary vote, "the vote of any member … who has an interest in the outcome of the suit that is adverse to that of the limited liability company shall be excluded."[199]

The trial court found that Ms. Levine had "an adverse interest in the outcome of [the] suit," as a result of which her vote was properly excluded, allowing the suit to continue.[200] The court made this finding based in large part on the history of contentious relations between Ms. Levine and the other members.[201]

The Appellate Court disagreed. The court held that the trial court erred when it "focused on the animosity between Barbara Levine and the other members of 418 Meadow Street, rather than on whether Barbara Levine's interest was adverse to the interest of 418 Meadow Street."[202] The

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[195] *See* 418 Meadow Street Assocs., LLC v. One Solution Servs., LLC, 127 Conn. App. 711, 15 A.3d 1140 (2011); 418 Meadow Street Assocs., LLC v. Clean Air Partners, LLC, 123 Conn. App. 416, 1 A.3d 1194 (2010), *rev'd*, 304 Conn. 820, 43 A.3d 607 (2012).

[196] 144 Conn. App. 380, 73 A.3d 780 (2013).

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

[198] *Id.* at 384 (citing CONN. GEN. STAT. § 34-142(a)).

[199] *Id.* (citing CONN. GEN. STAT. § 34-187(b)).

[200] *Id.*

[201] *Id.*

[202] *Id.* at 385.

proper inquiry is an adverse interest in the outcome of the litigation, not general contentiousness among the members. The Appellate Court remanded the case to the trial court to make a finding on the issue of "adverseness" under the proper standard.[203]

In *Little Mountains Enterprises, Inc. v. Groom,*[204] the Appellate Court considered the measure of damages that applies when a piece of real estate proves to have less value than promised. The defendants sold the plaintiff a parcel of land in Weston for the sum of $1.25 million. In the contract, the defendants "represent[ed] and warrant[ed] that the [p]remises consists of two building lots each approved for a five bedroom single family dwelling."[205]

Five months after closing, the town's zoning enforcement officer notified the plaintiff that in point of fact, the property did not have subdivision approval. The plaintiff did not notify the defendants about the issue, but instead proceeded to incur considerable expenses obtaining the necessary approval. The plaintiff then filed suit, claiming breach of contract and misrepresentation. Following a courtside trial, the trial court rendered judgment for the plaintiff in the amount of $77,741.60, including compensation for the plaintiff's surveying fees, engineering fees, real estate taxes, and interest paid on bank loans.[206]

The Appellate Court reversed the damage award. The court noted the rule that "limit[s] the damages award to the diminished value of the building whenever the cost of repairs is dramatically larger than the difference in value."[207] Here, the trial court noted that the plaintiff "did not provide the defendants with an opportunity to cure the defect in a 'cost effective manner,' that the plaintiff 'underwent costly measures' to obtain subdivision approval and that it had accrued 'large amounts of damages' to remedy the breach."[208] Such language seemingly hints at the possi-

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[203] *Id.* at 386.
[204] 141 Conn. App. 804, 64 A.3d 781 (2013).
[205] *Id.* at 806.
[206] *Id.* at 806-08.
[207] *Id.* at 811 (citing Levesque v. D & M Builders, Inc., 170 Conn. 177, 365 A.2d 1216 (1976), and Johnson v. Healy, 176 Conn. 97, 105, 405 A.2d 54 (1978)).
[208] *Id.*

bility that the plaintiff's measures had been economically wasteful, and perhaps disproportionate to diminution in value. But the plaintiff presented "no evidence as to the difference in the values of the premises as warranted and as sold,"[209] meaning the trial court had lacked the necessary information to compare "diminished value" with "cost of repairs." The Appellate Court remanded the case for further proceedings as to the measure of damages only.[210]

The Appellate Court's decision in *Moran v. Morneau*[211] illustrates the principle that if a complaint is not well pled, a plaintiff is not entitled to judgment even against a defaulted defendant. In July of 2003, the plaintiff recorded a land records notice against the defendant's property, claiming an interest in the property under the doctrine of constructive trust. In 2004, she obtained a prejudgment remedy of attachment against the property, and sued the defendant. In the meantime, in August 2003, the defendant had mortgaged the property, which mortgage was ultimately owned by Chase Home Finance, LLC (Chase).[212]

The plaintiff obtained judgment against the defendant, recorded a judgment lien against his property, and sued to foreclose the judgment lien. Claiming that both her attachment and judgment lien related back to her constructive trust notice, the plaintiff named Chase as a defendant and obtained a default against Chase for failure to appear. Following the entry of a foreclosure judgment, Chase moved to set aside the default judgment and sought a judicial determination of the respective lien priorities. The plaintiff claimed that, because she had alleged the superiority of her lien in her complaint, and because Chase had been defaulted, the lien priority issue had been conclusively established as to Chase, barring judicial review of the issue.[213]

The Appellate Court disagreed. Drawing on earlier precedent, the court observed that a default does not auto-

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[209] *Id.*
[210] *Id.* at 813.
[211] 140 Conn. App. 219, 57 A.3d 872 (2013).
[212] *Id.* at 222-23.
[213] *Id.* at 223-35

matically trigger judgment, or entitle the plaintiff to the relief requested. Rather, default leads to judgment "only when the allegations in the well pleaded filing are sufficient on their face to make out a claim for judgment or relief."[214] Exercising plenary review over the legal sufficiency of the complaint, the court found an absence of legal authority for the proposition that the plaintiff's attachment or judgment lien could relate back to her constructive trust notice.[215] The default against Chase "did not obligate the court to accept this incorrect legal position in determining the priority order of the parties' lien interests."[216]

VI. Conclusion

Connecticut's 2013 appellate caselaw provides many cautionary tales about the importance of care in contract drafting and review. Many outcomes were influenced or dictated by standard contract language regarding warranties, merger, forms of notice, amendment, and the like. Whether drafting an agreement or mapping out a litigation strategy, counsel are reminded that language in the "miscellaneous" section of a contract may prove to be the most important language of all.

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[214] *Id.* at 225-26 (quoting Commissioner of Social Services v. Smith, 265 Conn. 723, 736-737, 830 A.2d 228 (2003)).

[215] *Id.* at 226-27.

[216] *Id.* at 229.