BUSINESS LITIGATION: 2014 IN REVIEW

By William J. O'Sullivan

In 2014, Connecticut's appellate courts decided a score of noteworthy cases in the realms of foreclosure law, business torts, contract, and remedies and defenses pertinent to business cases. Following is a summary of those leading cases.

I. Foreclosure

Connecticut's 2014 appellate case law in the realm of business litigation includes a number of significant decisions in foreclosure cases. In *JP Morgan Chase Bank, N.A. v. Winthrop Properties, LLC*,[1] the Supreme Court debunked many years of conventional wisdom by holding that mortgage foreclosure deficiency proceedings do not apply to guarantors of the mortgage debt. Reversing the Appellate Court, the court ruled that guarantors should not be named in the counts of a complaint seeking foreclosure of the mortgage, and are not properly named in a motion for deficiency judgment under General Statutes Section 49-14.[2] Rather, the proper approach is to pursue them in separate counts of the complaint, on the guaranty. General Statutes Section 49-1, which provides that foreclosure of a mortgage "bar[s] any further action upon the mortgage debt" (except via deficiency motion), does not apply to guarantors. The court also noted, in the context of a discussion about the right of redemption, that a guarantor "has no interest in the property and is not an encumbrancer," thus clarifying that guarantors are not entitled to law days.[3]

In *Citimortgage, Inc. v. Rey*,[4] the Appellate Court held that the "transaction test" of Practice Book § 10-10 permitted the defendant in a residential foreclosure action to pursue a counterclaim based on breach of a forbearance agreement

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1 312 Conn. 662, 94 A.3d 622 (2014).
2 *Id*. at 682,683.
3 *Id*. at 682.
4 150 Conn. App. 595, 92 A.3d 278, *cert. denied*, 314 Conn. 905, 99 A.3d 635 (2014).

that had been reached in connection with the court's foreclosure mediation program. The trial court had stricken the counterclaim, citing case law that limits special defenses and counterclaims in foreclosure cases to those attacking the making, validity or enforcement of the note or mortgage. The Appellate Court applied a broader approach and reversed, holding that "such a counterclaim must simply have a sufficient relationship to the making, validity or enforcement of the subject note or mortgage in order to meet the transaction test as set forth in Practice Book § 10-10 and the policy considerations it reflects."[5] That rule requires a counterclaim to "[arise] out of the transaction or one of the transactions which is the subject of the plaintiff's complaint." The Appellate Court found a sufficient nexus between the counterclaim and the allegations of the foreclosure complaint to meet the "transaction test."

In *Deutsche Bank National Trust Co. v. Torres*,[6] the Appellate Court revisited the issue of standing to foreclose an assigned mortgage note. The defendant had executed a note to Long Beach Mortgage Company, secured by a mortgage on her property in East Hartford. The note and mortgage deed were assigned to the plaintiff. In the plaintiff's subsequent foreclosure complaint, the plaintiff alleged that it was the holder of the note and mortgage.

The defendant moved to dismiss, alleging among other things that the plaintiff lacked standing. At a hearing on that motion, the plaintiff's attorney produced the original note and mortgage, as well as the instrument of assignment from Long Beach Mortgage Company to the plaintiff. The trial court nevertheless granted the defendant's motion, on the grounds that the plaintiff had not produced "the documents that show how [the note] got into the hands of the plaintiff."

The Appellate Court reversed. The court noted that in the plaintiff's complaint, it had alleged that it was the holder of the note and mortgage, and as a matter of law there is a

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5 *Id*. at 605.
6 149 Conn. App. 25, 88 A.3d 570 (2014).

rebuttable presumption that the holder of a note is the owner of the debt.[7] The defendant did not offer any evidence to call the plaintiff's allegations into question, and thus failed to rebut the presumption. Based on the allegations in the complaint and the documents that the plaintiff had presented to the trial court, the plaintiff had established standing, and the trial court had erred in dismissing the case.[8]

In *Federal National Mortgage Association v. Bridgeport Portfolio, LLC*,[9] a foreclosure action against a sophisticated commercial party, the Appellate Court rejected the borrower's argument that it would be unconscionable to allow the lender to impose both default-rate interest and a prepayment penalty as provided in the loan documents. The court noted that at trial, the lender explained the economic rationale for the two provisions, and the borrower failed to establish that they resulted in a double recovery or a windfall to the plaintiff.[10]

In *Wells Fargo Bank, N.A., Trustee v. Melahn*,[11] the Appellate Court found "rare and exceptional circumstances"[12] that gave the court continuing jurisdiction to open a judgment of strict foreclosure after the final law day had elapsed and title to the subject property had passed to the plaintiff. The trial court had entered a judgment of strict foreclosure following default of the named defendant for failure to appear. Pursuant to the judgment and the court's uniform foreclosure standing orders, the plaintiff was required to send to the defendant, within ten days following the entry of judgment, a notice containing certain prescribed information, including the terms of the judgment. The plaintiff sent the defendant a notice that was both deficient and untimely, but falsely certified to the court that it had complied with the notice requirement.[13]

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7 *Id*. at 31, citing *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224, 231-32, 32 A.3d 307, 314 (2011).

8 *Id*. at 32.

9 150 Conn. App. 610, 92 A.3d 966, *cert. denied*, 312 Conn. 926, 95 A.3d 523 (2014).

10 *Id*. at 622.

11 148 Conn. App. 1, 85 A.3d 1 (2014).

12 *Id*. at 12.

13 *Id*. at 4-5.

More than a month after the final law day had passed and title to the property had passed, the defendant retained counsel, who moved to open the judgment and dismiss the case, citing the plaintiff's noncompliance with the notice requirement. The trial court denied the motion, concluding that it lacked jurisdiction to open the judgment following the vesting of title in the plaintiff.[14]

The Appellate Court reversed. Acknowledging that General Statutes Section 49-15 provides that no judgment of strict foreclosure "shall be opened after the title has become absolute in any encumbrancer," the Appellate Court nevertheless held that pursuant to the court's inherent equitable authority, it "retained the jurisdiction and authority to effectuate its judgment when the plaintiff failed to adhere to the terms of the judgment rendered in its favor and then falsely certified to the court that it had complied."[15] As for the jurisdictional aspect of General Statutes Section 49-15, the court thought it "likely" that the statute implicates personal jurisdiction, not subject matter jurisdiction, and is therefore waivable.[16]

In *Bombero v. Trumbull on the Green, LLC*,[17] the Appellate Court reversed a judgment of foreclosure in favor of a former second mortgagee who had been omitted from an earlier foreclosure action brought by the then first mortgagee. In the prior case, the first mortgagee established a debt of more than $2 million, and the mortgaged property had a value of $1,075,000. Thus the second mortgage clearly had no value.

In the separate foreclosure action subsequently brought by the omitted former second mortgagee, the trial court rejected the defendant's special defense that foreclosure should be denied because the mortgage lacked value and would have been foreclosed out in the prior action, and entered judgment for the plaintiff. The Appellate Court

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14 *Id*. at 5-6.
15 *Id*. at 8.
16 *Id*. at 8, n.8.
17 152 Conn. App. 365, 98 A.3d 115 (2014).

reversed, based entirely on "notions of equity and common sense,"[18] and directed judgment for the defendant.

II. Business Torts

In *Dinardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corporation*,[19] the Appellate Court revisited the issue of what does and what does not constitute a defendant's "trade or commerce" for purposes of a claim under the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA). That act creates a cause of action for "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

The plaintiff, which had leased industrial real estate to the defendant, brought suit following the conclusion of the lease for various damage caused to the property, claiming breach of the lease and violations of CUTPA. The trial court directed a verdict for the defendant on the CUTPA claim. The court noted that a CUTPA claim must be based on conduct that occurs in the defendant's primary trade or business, and that leasing property is incidental to the defendant's primary business of manufacturing and servicing aviation equipment. When the plaintiff challenged this proposition, the Appellate Court reviewed its own case law, and affirmed.[20]

In *Iacurci v. Sax*,[21] the Supreme Court ruled that, as a matter of law, a CPA tax preparer did not owe a fiduciary duty to his client of 17 years. In his complaint, the plaintiff claimed that the defendant's improper classification of capital-gains income as ordinary income in certain of his tax returns had caused him damage. The defendant asserted the statute of limitations as a special defense. The plaintiff replied that because the defendant was a fiduciary, he had an affirmative duty to disclose the facts giving rise to the

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18 *Id*. at 373.

19 153 Conn. App. 10, 100 A.3d 413, *cert. denied*, 314 Conn. 947, 103 A.3d 976 (2014).

20 *Id*. at 23-27.

21 313 Conn. 786, 99 A.3d 1145 (2014).

claim, and by failing to do so, had equitably tolled the running of the statute of limitations due to fraudulent concealment.[22]

Treating the existence of a fiduciary relationship as an issue of law, not fact,[23] the court concluded that none existed. While a fiduciary relationship is often characterized by one party's dependence upon another's superior knowledge and expertise, "not all business relationships implicate the duty of a fiduciary. … The *unique* element that inheres a fiduciary duty to one party is an elevated risk that the other party could be taken advantage of – and usually unilaterally. That is, the imposition of a fiduciary duty counterbalances opportunities for self-dealing that may arise from one party's easy access to, or heightened influence regarding, another party's moneys, property or other valuable resources."[24]

The court found no such facts in the case before it. The court suggested that a fiduciary duty could arise "when the tax return preparer or accountant acts as an investment advisor or manages the client's funds,"[25] but noted the absence of evidence to that effect. The court affirmed the trial court's entry of summary judgment for the defendant.

The court did not address the issue of whether or not, if a fiduciary duty had been established, the defendant's nondisclosure (as opposed to active concealment) of the operative facts could have constituted fraudulent concealment sufficient to toll the statute of limitations. The court noted that this proposition "has gained general acceptance in federal cases applying Connecticut law," but declined to weigh in on the issue.[26]

The Supreme Court's decision in *Meyers v. Livingston, Adler, Pulda, Meiklejohn and Kelly, P.C.*,[27] addressed the

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[22] *Id.* at 790-792.
[23] *Id.* at 795. (Emphasis in original.)
[24] *Id.* at 800-02.
[25] *Id.* at 804.
[26] *Id.* at 792, n. 8.
[27] 311 Conn. 282, 87 A.3d 534 (2014).

issue of whether a client's "breach of contract" claim against her attorney was actually a poorly disguised tort claim, framed as a contract case solely to take advantage of the longer statute of limitations that applies to contract cases.

The plaintiff in *Meyers* had engaged the defendant (firm) to bring suit against certain third parties. 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. 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.[28]

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 in a way that benefitted the other client, and contrary to her interests. 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; and was untimely under that statute. The trial court granted the firm's motion, and a divided panel of the Appellate Court affirmed.[29]

Following a grant of certification, the Supreme Court affirmed. The court noted prior case law holding that allegations that an attorney violated a client's specific instructions may support a claim for breach of contract, while claims that an attorney "had performed the required tasks but in a deficient manner" sounded in tort rather than contract.[30] The allegations here, although couched in the language of contract, did not identify any specific contract provisions that the firm had supposedly breached, and made reference to the firm's "duty of undivided loyalty and a duty to pursue

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[28] *Id*. at 284-286.
[29] *Id*. at 286-89.
[30] *Id*. at 292-95.

and follow the plaintiff's interests."[31] The court found that the plaintiff's allegations sounded in tort rather than contract, and that her claims were therefore subject to the statute of limitations that applies to tort claims.[32]

In *Vazquez v. Buhl*,[33] the Appellate Court examined the potential liability of website operators for libelous content linked to their sites. The defendant NBCUniversal Media, LLC (NBC) posted an article on its cnbc.com website, in which it urged viewers to read a hyperlinked article written by an independent financial reporter. The plaintiff, the subject of that article, sued both the author and NBC for defamation. NBC successfully moved to strike the counts of the complaint directed to it, citing the Communications Decency Act of 1996 (Act),[34] and obtained judgment on the stricken complaint.

The Act shields "interactive computer services," such as websites, from liability for defamation, by providing that they shall not be treated as "the publisher or speaker of any information provided by another information content provider."[35] But that shield will not protect a website that is responsible for "the creation or development" of posted content, and thus is itself an "information content provider."[36]

The plaintiff in Vazquez claimed that NBC helped to "develop" the content, and thus became an "information content provider" liable for defamation, by actively seeking out and linking to the offending article, and through comments in its own article that "endorsed and adopted the defamatory statements."[37] But the Appellate Court rejected that argument, finding it "immaterial whether the defendant amplified, endorsed, or adopted the defamatory statements,

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31 *Id*. at 298.
32 *Id*. at 301.
33 150 Conn. App. 117, 90 A.3d 331 (2014).
34 47 U.S.C. § 230.
35 47 U.S.C. § 230(c)(1).
36 47 U.S.C. § 230(c)(1), (f)(3).
37 *Vasquez*, 150 Conn. App. at 134.

because the defendant played no role in their composition."[38] The plaintiff had not alleged that NBC "edited, altered or wrote any of the defamatory statements," or supervised or communicated with the author in connection with her article.[39] NBC's role thus fell short of helping to "develop" the content, allowing it to avoid potential liability as an "information content provider."

In *Cammarota v. Guerrera*,[40] the plaintiff brought suit against the defendant, an attorney, for claims of professional negligence and breach of fiduciary duty. The plaintiff and his brother were equal owners of a limited liability company that owned property to be developed as a small condominium complex, and the defendant performed legal work for that entity. Following sale of some of the units, the defendant, or someone in his law firm, handed to the brother a check, payable to the plaintiff, representing the plaintiff's share of the sale proceeds. After the brother misappropriated those funds, the plaintiff brought suit against the defendant.[41]

The trial court granted the defendant's motion for directed verdict on both counts of the complaint.[42] As to the negligence count, the court ruled that the plaintiff could not prove his claim of legal malpractice without introducing expert testimony, which the plaintiff had not done, and also that as a matter of law the plaintiff had not established proximate cause.[43] As to the fiduciary duty count, the court held that the plaintiff could not prevail absent a showing of fraud, self-dealing or conflict of interest.[44]

Following the plaintiff's appeal, the Appellate Court reversed the judgment as to the negligence count, and

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38 *Id*. at 139.

39 *Id*. Indeed, a website operator can edit third-party content for spelling, removal of obscenity, length and otherwise in ways "unrelated to the illegality" without waiving its immunity. *Id*. at 136.

40 148 Conn. App. 743, 87 A.3d 1134, *cert. denied*, 311 Conn. 944, 90 A.3d 975 (2014).

41 *Id*. at 745-46.

42 *Id*. at 747.

43 *Id*. at 748.

44 *Id*. at 756.

affirmed it as to the fiduciary duty count. As to the negligence count, the nature of the negligence alleged was within the ken of the average layperson, making expert testimony unnecessary.[45] The court further found that sufficient evidence had been adduced on the issue of proximate cause to warrant submission to the jury.[46]

As to the claim for breach of fiduciary duty, the plaintiff's unelaborated allegation of "conflict of interest" on the part of the defendant, apparently a reference to his dual representation of the plaintiff and his brother, did not support a claim for breach of fiduciary duty. There was no evidence that the defendant had given the plaintiff's check to the brother with the intent of benefitting the brother at the plaintiff's expense. Noting that "[p]rofessional negligence alone …does not give rise automatically to a claim for breach of fiduciary duty,"[47] the court found that the duty of loyalty and honesty was not implicated by the facts that the plaintiff had alleged, and thus as a matter of law those facts did not support a claim for breach of fiduciary duty.[48]

III. Contract

In *Cruz v. Visual Perceptions, LLC*,[49] the plaintiff had entered into a written employment agreement with the defendant that by its terms "will cover the [thirty-six] month period starting April 1, 2007 and ending March 31, 2010."[50] Following her termination on October 16, 2008, the plaintiff brought suit, claiming that her contract had been for a fixed term of 36 months, and that her termination had breached that contract. The trial court held that under the "definite and certain" terms of the contract,[51] the agreement had been for a fixed term, and in the absence of a showing that the defendant had terminated her employment for good

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45 *Id*. at 749-753.
46 *Id*. at 755-56.
47 *Id*. at 759.
48 *Id*. at 759-60.
49 311 Conn. 93, 84 A.3d 828 (2014).
50 *Id*. at 96, n. 3.
51 *Id*. at 98.

or just cause, entered judgment for the plaintiff.[52] The Appellate Court agreed that the plain language of the contract unambiguously created a contract for a 36-month term, and affirmed the judgment below.[53]

The Supreme Court reversed. Applying plenary review to the threshold question of whether or not the contract language was ambiguous,[54] the court found that the language at issue "reasonably may be interpreted as evincing *either* an intent to create a definite term of employment *or* an intent to set the terms and conditions of an at-will employment contract."[55] Accordingly, the trial court should have considered extrinsic evidence to ascertain the parties' intent and resolve the ambiguity.[56] The Supreme Court remanded the case to the trial court for that purpose.

For purposes of the remand, the court weighed in on the plaintiff's argument that, under the rule of *contra proferentem*, the agreement should be construed against the defendant, the drafter of the document. The Supreme Court cautioned that the court should invoke that rule "only as a last resort if it is unable to resolve the ambiguity in the letter agreement by considering the extrinsic evidence."[57]

Justice McDonald dissented, agreeing with the courts below that the language in question clearly and unambiguously created a contract with a fixed term of 36 months.[58]

In *Meadowbrook Center, Inc. v. Buchman*,[59] the Appellate Court focused on "causation" as a necessary element of proof in actions for breach of contract. The defendant's mother was admitted into the care of the plaintiff, a skilled nursing facility, and the defendant signed an admission agreement

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52 *Id*. at 98, 99.
53 *Id*. at 99. The Appellate Court decision is reported at 136 Conn. App. 330, 46 A.3d 209 (2012).
54 *Id*. at 101-102.
55 *Id*. at 103. (Emphasis in original.)
56 *Id*. at 106.
57 *Id*. at 108.
58 *Id*. at 108-112.
59 149 Conn. App. 177, 90 A.3d 219 (2014).

as "responsible party." As such, the defendant agreed to cooperate with the process of obtaining his mother's eligibility for Medicaid assistance, which would facilitate payments to the plaintiff.[60]

The mother's assets were exhausted about twenty months into her stay, upon which a Medicaid assistance application was filed on her behalf with the Department of Social Services. However, the defendant did not cooperate with the application process, and his mother's Medicaid application was denied due to lack of eligibility information. The plaintiff was left with an unpaid bill for services provided during the last ten months of the mother's life.[61]

It was undisputed that, if the defendant's mother had been granted Medicaid benefits, benefits totaling $47,561.18 would have been paid to the plaintiff. The plaintiff sued the defendant for breach of contract, and following a courtside trial, obtained a judgment in this amount.[62]

The Appellate Court reversed. The court noted that the often-stated elements of a breach of contract action in Connecticut – formation of an agreement, performance by one party, breach by the other party and damages – do not explicitly include "causation," but "proof of causation is …part and parcel of a party's claim for breach of contract damages."[63] Here, while it was clear the defendant had failed to cooperate with the Medicaid application process, the plaintiff failed to establish that, if such cooperation had been provided, the application would have been granted. Because the plaintiff's damages claim was "predicated on an unresolved contingency," the judgment could not stand.[64]

The court added an intriguing commentary relating to the necessary quantum of proof. While proof of damages

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60 *Id*. at 179-80.
61 *Id*. at 181.
62 *Id*. at 181-184. The actual judgment, apparently due to a scrivener's error by the court, was three cents short.
63 *Id*. at 186.
64 *Id*. at 193.

ordinarily must be established with "reasonable certainty … the quantum of proof required is relaxed in instances involving the wrongful breach of a contract by the defendant. … A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts."[65]

In *Pack 2000, Inc. v. Cushman*,[66] the Connecticut Supreme Court reversed the Appellate Court's ruling[67] that the holder of two option contracts for the purchase of real estate needed to establish strict compliance with all provisions of those contracts in order to enforce the exercise of the option. Those contracts, which involved the lease and operation of Midas muffler shops, allowed the plaintiff to purchase the properties so long as it complied with certain leases and a management agreement. It was undisputed that, before seeking to exercise the purchase option, the plaintiff had rendered numerous late payments pursuant to those agreements.[68]

The Appellate Court ruled against the plaintiff, holding it to a "strict compliance" standard, but the Supreme Court disagreed, holding that substantial compliance would suffice. That was subject to several caveats: no contract language requiring strict compliance as a condition of exercising the option; no material default by the holder of the option at the time of exercising the option; and no previous declaration of default on the part of the holder of the option.[69] The Court also emphasized that while "substantial compliance" applied to the terms of the contract in general, the optionor could require "strict compliance" with the particular terms that prescribe the way and manner that the option is exercised, including the tender of a timely notice and any

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65 *Id*. at 189, 190-91.

66 311 Conn. 662, 89 A.3d 869 (2014).

67 The Appellate Court's decision is reported at 126 Conn. App. 339, 11 A.3d 181 (2011).

68 311 Conn. at 665-68, 89 A.3d at 873-75.

69 *Id*. at 680.

required payment. But the latter was not at issue in the case before the court.[70]

In *Thoma v. Oxford Performance Materials, Inc.*,[71] the Appellate Court held that continued employment did not constitute sufficient consideration to support a non-compete signed by an established employee. On the surface, the decision would appear to resolve the longstanding split of authority in the Superior Court on that issue. However, the breadth of the *Thoma* decision is debatable, given the unique facts of the case.

The plaintiff, who had commenced employment with the defendant in 2003, signed an employment agreement on June 12, 2006. That agreement boosted her annual salary by $13,000; created a fixed term of employment (initially 24 months, followed by renewal terms of 12 months); provided that upon termination without cause, she would be entitled to her base pay for the balance of her employment term, plus six months; and imposed a six-month non-compete term following the termination of her employment.[72]

Eight days later, the plaintiff was prevailed upon to sign a new employment agreement, which provided that it superseded any prior agreements. The second agreement converted the plaintiff to an at-will employee; eliminated mention of her salary or compensation upon termination of employment; and imposed a non-compete of undefined duration.[73] The plaintiff's employment was terminated the following year, upon which she brought suit for breach of the first agreement.

The defendant countered that it could not have breached the first agreement because the second agreement superseded it. The Appellate Court agreed with the trial court that above and beyond other infirmities with the second agreement, it was a nullity because "the plaintiff's continued

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70 *Id.* at 681-684.
71 153 Conn. App. 50, 100 A.3d 917 (2014).
72 *Id.* at 52-53.
73 *Id.* at 53-54.

employment did not constitute consideration."[74]

The latter sentence, standing alone, would be a tempting quote for the typical employee at will who seeks to challenge a non-compete grudgingly signed as a condition of continued employment. However, given that the *Thoma* case involved an employee who previously had a fixed term of employment, the "lack of consideration" analysis is different enough to make the case potentially useful but probably far from dispositive.

In *Yellow Book Sales & Distribution Co. v. Valle*,[75] the Supreme Court addressed the issue of whether or not the defendant, who had signed a contract with the plaintiff as "David Valle, President" of Moving America of CT, Inc. (company), had nonetheless personally obligated himself to pay for the services rendered by the plaintiff.

In a contract that identified the company as "customer," the plaintiff agreed to publish advertising in its directories and/or provide internet services for the company, and the company agreed to pay for those services.[76] But the contract further provided at section 15(F) "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."[77] Furthermore, language below the signature line read "Authorized Signature Individually and for the Company (Read clause 15F on reverse side)."[78] Finally, language immediately above the signature block stated "This is an advertising contract between Yellow Book and [printed company name] and [signature]."[79]

The trial court entered summary judgment for the defendant, finding the contract "ambiguous as to whether the

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74 *Id*. at 66.
75 311 Conn. 112, 84 A.3d 1196 (2014).
76 *Id*. at 114.
77 *Id*.
78 *Id*. at 115, n. 4.
79 *Id*. at 117.

defendant was party to the contract in his individual capacity and … therefore … unenforceable, as a matter of law, pursuant to the statute of frauds."[80] The Appellate Court agreed, and affirmed the judgment below.[81]

The Supreme Court reversed, finding that "the language appearing immediately below the defendant's signature and the language contained in clause 15(F) state clearly that the defendant was individually and personally responsible for the obligations set forth in the contract."[82] The handwritten term "president" after the defendant's signature was insufficient to create an ambiguity.[83] By signing the contract as a co-obligor, the defendant had incurred a primary obligation, not a collateral one, making the statute of frauds irrelevant to the case.[84] The court remanded the case for further proceedings.[85]

IV. Remedies And Defenses

The Connecticut Supreme Court's decision in *Fairchild Heights Residents Association, Inc. v. Fairchild Heights, Inc.*[86] contains a detailed discussion of the exhaustion of administrative remedies doctrine. The plaintiff, an association of mobile home owners at the Fairchild Heights Mobile Home Park, in Shelton, brought suit against the owner/operator of the park.[87] In the first two counts of its three-count complaint, the plaintiff alleged per se negligence for violations of state statutes and municipal ordinances, respectively, governing the maintenance of mobile home parks, and in the third, violations of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a et seq. (CUTPA).[88] The association sought declaratory relief, as

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[80] *Id.* at 116.
[81] *Id.* The Appellate Court decision is reported at 133 Conn. App. 75, 35 A.3d 1082 (2012).
[82] *Id.* at 121.
[83] *Id.* at 120.
[84] *Id.* at 123.
[85] *Id.*
[86] 310 Conn. 797, 82 A.2d 602 (2014).
[87] *Id.* at 800.
[88] *Id.* at 801.

well as injunctive relief, punitive damages and attorneys' fees pursuant to CUTPA.[89]

Two months after filing suit, the association filed a letter of complaint with the Office of the Attorney General, which in turn forwarded the complaint to the Department of Consumer Protection (department).[90] Following a series of department inspections, an informal compliance hearing, and ongoing remediation efforts by the defendant, the department ultimately sent a letter to the defendant's attorney, in which the department declared the park to be in compliance with state law, and advised that no further action was warranted.[91]

The lawsuit was subsequently tried to the court, which rendered judgment for the defendant on all counts of the complaint.[92] The trial court found that, absent an administrative appeal, the department's findings of compliance on the part of the defendant should be accorded preclusive effect.[93]

The Supreme Court agreed with the defendant that the exhaustion doctrine barred the association's request for declaratory relief on its claims of negligence per se.[94] The statutory scheme that governs mobile home parks, Chapter 412 of the General Statutes, permits a mobile home owner to request a declaratory ruling from the department that the owner is violating one or more of the statutes,[95] and if aggrieved by the department's decision, to file an administrative appeal.[96] In this instance, the department had adopted an informal compliance procedure in response to the association's demand for an investigation, but this did not excuse the association's failure to formally request a

89 *Id*.
90 *Id*. at 801-02.
91 *Id*. at 802-03.
92 *Id*. at 803.
93 *Id*. at 803-04.
94 *Id*. at 806-13.
95 CONN. GEN. STAT. § 21-83e(a).
96 CONN. GEN. STAT. § 21-72.

declaratory ruling, from which the association could have appealed to the court if it was not satisfied with the outcome.[97]

But the Supreme Court further held that the exhaustion doctrine did not bar the association's claim under CUTPA. The court noted that CUTPA provides for two general enforcement mechanisms – administrative proceedings initiated by the department, and civil actions initiated by private parties – but the statute does not require private parties to exhaust administrative remedies before commencing suit.[98] Furthermore, CUTPA provides a range of remedies, including punitive damages and attorneys' fees, that the department does not have the power to award. Because "there was no administrative remedy that the association could have exhausted to obtain such relief before bringing its CUTPA claim," the exhaustion doctrine did not apply to that claim.[99]

In *Sean O'Kane A.I.A. Architect, P.C. v. Puljic*,[100] the plaintiff architect brought suit in 2010 against the defendant homeowners, a married couple, claiming breach of contract and unjust enrichment arising out of work performed in 2002. The trial court entered judgment for the defendants, finding that the contract claim was barred by the statute of limitations, and rejecting the plaintiff's assertion that the limitation period had been equitably and contractually tolled. The court further ruled that the unjust enrichment claim was barred by the doctrine of laches.[101]

The Appellate Court affirmed the judgment below with respect to the contract claim.[102] As for the unjust enrichment claim, the court noted that the equitable defense of laches requires proof of not only unreasonable delay in bringing suit, but also resulting prejudice to the defendant. In finding such prejudice, the trial court had relied upon

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97 *Fairchild Heights Residents Association, Inc.*, 310 Conn. at 813.
98 *Id.* at 817.
99 *Id.* at 819.
100 148 Conn. App. 728, 87 A.3d 1124 (2014).
101 *Id.* at 732.
102 *Id.* at 732-40.

contract terms imposing service charges and interest, and found that the plaintiff's delay of seven and a half years in bringing suit, leading to a considerable accumulation of those charges, supported the "prejudice" prong of a laches defense.[103]

The record was unclear as to whether or not the husband was a party to the contract with the plaintiff; while the contract identified both husband and wife as parties, the wife but not the husband had signed it. The Appellate Court noted that except when a statute requires a signature, a party may be bound by an unsigned contract if, through his conduct, he manifests assent to it.[104] In the present case, if the husband was a party to the contract, then as a matter of law the plaintiff could not obtain a judgment against him for unjust enrichment, since the latter remedy can be provided only in the absence of an enforceable contract. If on the other hand the husband was not a party to the contract, the trial court could not properly use contract-based charges to support a finding of prejudice as part of his laches defense to the unjust enrichment claim. The Appellate Court reversed the judgment below with respect to the unjust enrichment claim, and remanded the case to the trial court for further proceedings.[105]

The Supreme Court's decision in *Robbins v. Physicians for Women's Health, LLC*,[106] established that in some contexts, a covenant not to sue may have the same effect as a release, even when the drafting attorneys have taken pains to reserve rights against the non-settling parties.

The plaintiff brought a medical malpractice suit against several defendants actively involved in her care, including Shoreline Obstetrics and Gynecology, P.C. (Shoreline), as well as two entities that subsequently acquired Shoreline's assets, Physicians for Women's Health, LLC and Women's

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[103] *Id*. at 741.
[104] *Id*. at 742.
[105] *Id*. at 743.
[106] 311 Conn. 707, 90 A.3d 925 (2014).

Health USA, Inc. (successors), the latter two on a theory of successor liability. The plaintiff settled with Shoreline and executed a covenant not to sue that entity, specifically reserving her rights against the successors.[107] The successors thereupon moved for summary judgment, arguing that the covenant not to sue had discharged their liability. The trial court agreed with the defendants, and granted their summary judgment motion, but a divided panel of the Appellate Court reversed, holding that a covenant not to sue, unlike a release, does not discharge the underlying cause of action.[108]

Following a grant of certiorari, the Supreme Court reversed the decision of the Appellate Court. The court noted that "successor liability does not create a new cause of action against the purchaser so much as it transfers the liability of the predecessor to the purchaser."[109] In this context, because the plaintiff had "relinquished her right to bring a legal action against Shoreline, there remained no right of action that could be transferred to the defendants as successors."[110] The covenant not to sue therefore operated identically to a release.

The court distinguished successor liability cases from cases involving joint tortfeasors or respondeat superior, in which reservations of rights against non-settling parties are honored. The court noted that successors warrant special protection because successors, "unlike joint tortfeasors or employers, have no connection to the harm that gave rise to the liability."[111]

In *Saint Bernard School of Montville, Inc. v. Bank of America*,[112] a case in which the owner of a checking account sued its bank for honoring checks diverted by an embezzling employee, the Supreme Court ruled that the "continuing

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[107] *Id.* at 711.
[108] *Id.* at 712-13.
[109] *Id.* at 716.
[110] *Id.* at 718.
[111] *Id.* at 722.
[112] 312 Conn. 811, 95 A.3d 1063 (2014).

course of conduct" doctrine did not toll the statute of limitations. For that doctrine to apply, there must be evidence of "either a special relationship between the parties giving rise to … a continuing duty or some later wrongful conduct of a defendant related to the prior act."[113]

The court found that neither of these elements was established. As for the "special relationship" prong, the relationship between the parties was not a fiduciary one, nor one that gave rise to a unique degree of trust and confidence. As for the "wrongful later conduct" prong, the court distinguished between "the case in which a continuous series of events gives rise to a cumulative injury," in which the doctrine may apply, and the case involving "repeated events giv[ing] rise to discrete injuries," in which it does not.[114] Here, "[e]ach check so deposited or paid constituted a discrete violation of the UCC. There is no difficulty in identifying each wrongful act or assigning a remedy for that wrong."[115]

V. CONCLUSION

In the realm of business law, in 2014 Connecticut's appellate courts focused more on elucidating existing law than on breaking new legal ground. For a business community that values predictability in ordering its legal affairs, that was surely a welcome development.

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[113] *Id*. at 835.
[114] *Id*. at 838.
[115] *Id*. at 839.