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Your corporate partners are committed to diversity. Are you? Connecticut's Lawyers Collaborative for Diversity aims to spread the message of inclusion.
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18 Connecticut Municipalities Sue Big Pharma Over Opioid Crisis

By CELIA AMPEL

Eighteen Connecticut municipalities filed a lawsuit Tuesday against several large pharmaceutical companies for allegedly concealing the risk of opioid addiction from the public.

"By virtue of their deceptive and fraudulent marketing campaign, defendants have given rise to a drug epidemic the likes of which the Connecticut municipalities, the state of Connecticut, and the nation have never before seen, resulting in substantial economic harm to plaintiffs," the complaint alleges.

The Waterbury Superior Court lawsuit comes on the heels of separate cases filed by New Haven, New Britain and Waterbury for the companies' alleged role in the prescription drug crisis. The defendants include Purdue Pharma, Teva Pharmaceuticals USA Inc., Johnson & Johnson, Endo Health Solutions Inc. and subsidiaries.

Tuesday's complaint was filed by Jim Hartley of Drubner, Hartley & Hellman, who also

Paul Hanly of Simmons Hanly Conroy.

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Day Pitney Names Managing Partner, Promotes New Partners

By Michael Marciano

Day Pitney has announced the promotion of veteran commercial litigator and partner Thomas D. Goldberg to managing partner of the nearly 300-strong firm, effective April 2.

"Tom is a natural leader who exemplifies the firm's core values," said Day Pitney's current managing partner, Stanley A. Twardy Jr. "Having worked with Tom on the executive committee for the past six years, I know that we are fortunate to have him in this role." Twardy will remain involved in the firm's strategic planning and will continue his practice.

The firm has also elected partner Gregory A. Hayes to serve on its executive committee, which includes Goldberg and current member Mary B. Rogers. Partner B. Dane Dudley will succeed Hayes as chairman of the firm's Individual Clients Department.

Goldberg will continue to represent clients in complex commercial litigation, including disputes involving shareholders and securities, contracts and bankruptcy and defending accountants' liability and legal malpractice claims. Goldberg is a former chairman of the board of Connecticut Legal Services, the largest provider of pro bono legal services to low-income people in the state. He also has been actively involved in the Federal Bar Council and has served on its board of trustees. Goldberg earned his law degree from Columbia Law School, where he was a member of the Columbia Law Review, and his undergraduate degree from Brown University.

"It is an honor and a privilege to have the opportunity to serve as Day Pitney's next managing partner," said Goldberg. "I look forward to building on the firm's successes and continuing to drive our deep commitment to client service on every level within the firm."

New Partners Named

Day Pitney also recently announced the promotion of lawyer **Susan R. Huntington** to transactional partner. Huntington works with health care providers and managed care companies in business management, regulation and forming accountable care organizations and clinical integration networks. A certified physician assistant, she has worked as in-house counsel at Aetna, general counsel at ProHealth Physicians and deputy general counsel at Hartford HealthCare.

Thomas D. Goldberg

Day Pitney has also promoted to partners **C. John DeSimone III** in the firm's Parsippany, New Jersey, office and **Amy R. Lonergan** in Boston.

Michael Marciano is the state bureau chief for the Connecticut Law Tribune, an America Lawyer Media publication. He can be reached by email at mmarciano@alm.com or call 646-957-3022.

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represents Waterbury, where his office is located. Also on the case is New York lawyer Paul Hanly of Simmons Hanly Conroy, who is co-lead counsel for about 180 government plaintiffs suing Big Pharma in multidistrict litigation consolidated in Ohio.

The judge there ordered the attorneys Tuesday to hold talks to find a way to settle the litigation, which includes nearly 200 plaintiffs.

Hartley and Hanly did not immediately respond to requests for comment. Their clients in this lawsuit are Bridgeport, Naugatuck, Southbury, Woodbury, Fairfield, Beacon Falls, Milford, Oxford, West Haven, North Haven, Thomaston, Torrington, Bristol, East Hartford, Southington, Newtown, Shelton and Tolland.

> **The Waterbury Superior Court lawsuit comes on the heels of separate cases filed by New Haven, New Britain and Waterbury for the companies' alleged role in the prescription drug crisis. The defendants include Purdue Pharma, Teva Pharmaceuticals USA Inc., Johnson & Johnson, Endo Health Solutions Inc. and subsidiaries.**

The 89-page complaint includes claims of violations of the Connecticut Unfair Trade Practices Act, public nuisance, fraud, negligent misrepresentation, innocent misrepresentation and unjust enrichment.

Connecticut had the 12th-highest number of opioid deaths in the country as of 2015, according to the U.S. Centers for Disease Control and Prevention.

Endo Health denies the allegations and intends to vigorously defend the case, the company said in a statement. The company has voluntarily stopped promoting opioids, eliminated its entire product salesforce and withdrew the drug Opana ER from the market.

"Endo is dedicated to providing safe, quality products to patients in need and we share the public concern regarding opioid abuse and misuse," the statement said. "We are committed to working collaboratively to develop and implement a comprehensive solution to the opioid crisis, which is a complex problem with several causes that are difficult to disentangle."

Teva said it is developing non-opioid treatments for choronic pain.

"Teva is committed to the appropriate use of opioid medicines, and we recognize the critical public health issues impacting communities across the U.S. as a result of illegal drug use as well as the misuse and abuse of opioids that are available legally by prescription," a company statement said. "To that end, we take a multi-faceted approach to this complex issue; we work to educate communities and health care providers on appropriate medicine use and prescribing, we comply closely with all relevant federal and state regulations regarding these medicines."

The other defendants did not respond to requests for comment by deadline.

The Scott + Scott firm represents New Haven and New Britain in their separate litigation. ■

Celia Ampel covers South Florida litigation. Contact her at campel@alm.com or on Twitter at @CeliaAmpel.

Conn. Firms Pushing for Diversity Have Robust Community Partner

By Michael Marciano

Connecticut law firms working to promote diversity have seen success with the support of nearby law schools, but are struggling to retain associates of color, who tend to migrate to larger markets in search of broader connections and opportunities.

That's one of the central messages of the Lawyers Collaborative for Diversity, a Connecticut-based coalition dedicated to advancing the careers of young attorneys from multicultural backgrounds. Formed in 2003, the group's first event of 2018 will be a best practices forum Feb. 8 at the Quinnipiack Club in New Haven.

LCD Executive Director Carolyn Golden Hebsgaard, who heads the Boston Lawyers Group and helped launch and began running the Connecticut organization in 2003, said she is pleased with the progress that the group has made, but there are still challenges ahead.

"One of the challenges, I would say, is retention," Hebsgaard said. "If we are able to identify and recruit and advance attorneys of color in the community, we also need to be able to keep them there long enough in order for the impact to happen. That is a real challenge because, as we sit between New York and Boston, somehow graduating lawyers don't recognize the value of the support they can get right here in Connecticut. They go off to New York or Boston, and it's kind of the same everywhere. Every community in the country is having an issue with retention."

In an effort to stem the tide, LCD's mission has been to develop a robust multicultural community in Connecticut to demonstrate to member attorneys and firms that an enriched, diverse network is also a stronger one that will last longer. "Many law firms are being pressed by their corporate partners to be more diverse," Hebsgaard said. "Corporate America is way ahead in terms of having those things in place, and they're passing it on to their vendors. They're saying, 'If you can't get on board,

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we'll find someone who will,' and that's created a good platform for firms who already have that commitment and would like to see more diversity happen."

At LCD's Feb. 8 best practices event, the facilitators will seek to move beyond acknowledging the reality that diversity is a widely shared objective and get down to teaching attorneys "what clients want" and "how to get there." Panelists from corporations dedicated to diversity will share their practices, and they will be joined by a minority business enterprise owner for an inside look at challenges faced by firms committed to workplace diversity.

> **"Many law firms are being pressed by their corporate partners to be more diverse, Corporate America is way ahead in terms of having those things in place, and they're passing it on to their vendors. They're saying, 'If you can't get on board, we'll find someone who will.'"**
> **- Carolyn Golden Hebsgaard**

Hebsgaard said LCD's mission includes a focus on mentoring, which involves more than connecting young attorneys of color with people from similar backgrounds.

"If you're a young person of color, it doesn't matter what the person looks like," Hebsgaard said. "Many of my mentors have been white males over the years. If you're a white male attorney and you're paired with a black female, here's an opportunity for you to really demonstrate what you're committed to as a firm."

That also means reaching out to veteran attorneys and partners who are willing to share their knowledge. "I have to say we have pretty good cross-generational involvement, which is nice," Hebsgaard said. "A lot of our older attorneys are coming and encouraging the younger associates at their firms to participate. If you want younger associates to get involved, they have to feel that spending time away from their desks is valued at the organization. Leadership becomes a messenger for that kind of support, because if an associate thinks they need to be billing time instead of being at UConn for an event, they think there is no value in it for them."

Last November at the Quinnipiack Club, LCD's annual "Judges of Color" reception drew a standing-room crowd to participate in candid conversation with 15 different Connecticut judges, who offered heartfelt advice and inspiration to attendees. During a round of questions, participating judges reflected on the most important lessons they had learned during their careers.

U.S. District Judge Alvin Thompson of the District of Connecticut, who has served since 1994, was among the honored guests. "One thing I tell attorneys is to make sure you treat everyone you come in contact with with respect," Thompson said. "You never know who knows who. You'll be surprised, and your reputation gets around. It's so much harder for me to believe a lawyer who has a bad reputation—even if they are making a legal argument that has merit. Keep your reputation pristine. The world is small and you don't know who knows who."

Superior Court Judge Sibyl V. Richards' comments echoed the spirit of the event, namely that judges are human too. Nominated in 2011 by Gov. Dannel Malloy, Richards said the position has been a lesson in time management. "As much as you try to treat people with dignity, respect and compassion, there is a time constraint. I don't always have the opportunity to do what's in the movies. Things are more rapid-fire. People who come before you have serious issues. No matter how silly or inconsequential it may sound to you, for them it's a serious matter. You need to really focus on the task at hand, pay attention to the litigants and really be prepared to treat each and every case individually."

Hebsgaard said anyone interested in the Feb. 8 best practices event, mentoring, joining or learning more about LCD can visit lcd-ne.org. A newsletter announcing future events is expected soon. ■

Michael Marciano is the state bureau chief for the Connecticut Law Tribune, an America Lawyer Media publication. He can be reached by email at mmarciano@alm.com or call 646-957-3022.

New London Man Alleging Priest Abuse Receives $900K Settlement

By Andrew Denney

The Diocese of Norwich, a Catholic church in Groton and a Vermont-based order of priests have agreed to pay a $900,000 settlement to a New London man who says a priest molested him when he was an altar boy at the church in the late 1970s and early 1980s.

Plaintiff Andrew Aspinwall says he was molested by Father Charles Many, who was assigned to the Sacred Heart Church in Groton by the Society of St. Edmund. The church is within the Diocese of Norwich.

Diocese of Norwich

Many was removed from parish service in 1986, according to a news release from Kelly Reardon of the Reardon Law Firm, which represented Aspinwall.

Reardon was able to obtain documents from the Society of St. Edmund's archives showing that church officials knew as early as 1976—two years before he was assigned to Sacred Heart—that Many was "receiving boys in his room."

> **Reardon was able to obtain documents from the Society of St. Edmund's archives showing that church officials knew as early as 1976—two years before he was assigned to Sacred Heart—that Many was "receiving boys in his room."**

In an interview, Reardon said Aspinwall's decision to make his name public in the case was both "brave" and unusual for an abuse victim, but that he did so after much thought to encourage other potential victims to come forward.

"He thought it was important for people not to hide after something horrible like this has happened to them," Reardon said.

Aspinwall filed suit in 2015 alleging nine counts against the defendants, which also included Bishop Daniel Reilly, accusing them of negligence, reckless and wanton conduct, conspiracy to commit fraud and other claims.

Reardon said her firm has handled at least 20 cases involving victims of sexual abuse at the hands of clergy members.

Bradford Babbitt of Robinson & Cole appeared for the diocese and Philip Newbury Jr. of Howd & Ludorf appeared for the Society of St. Edmund. They could not be reached for comment. ■

Andrew Denney is a New York-based reporter covering litigation and other news from the federal and state courts. He can be reached at adenney@alm.com. Twitter: @messagetime

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Conn. High Court: Convicted Father's Denial of Abuse Is Grounds for Removing Children

By Tom McParland

In a 4-1 decision, the Connecticut Supreme Court on Wednesday ruled that parents' refusal for three years to acknowledge their role in the abuse of their infant daughter justified the termination of their parental rights to the girl's younger sister, who was physically unharmed in the initial incident.

A majority of the high court upheld a Superior Court ruling that the failure caused the little girl's prolonged separation from her home and thus fell under the broad scope of a statute, which provides ground for termination based on parental acts that deny children "care, guidance or control necessary for their physical, educational, moral or emotional well-being."

The parents, identified in court papers as Morsy E. and Natasha E., had argued that the language in Connecticut's General Statutes Section 17a-112 (j) (3) (C) only included harm that had already occurred, and there was no evidence that they had caused their daughter Egypt to suffer before she was removed from the home.

In a 21-page opinion, the justices agreed that the statute does not allow for a child's removal on the grounds of "predictive" harm, but noted that the "unusual procedural circumstances" of the case warranted the Superior Court's decision.

"There was sufficient evidence presented to establish that these omissions were harmful to Egypt who, although physically uninjured, nevertheless suffered the emotional and psychological trauma attendant to a sudden removal from her biological parents' home, followed by years of foster placement during which she lacked the care, guidance or control of her biological parents and the stability and permanence necessary for a young child's healthy development," Chief Justice Chase T. Rogers wrote for the court.

According to the opinion, Egypt was less than 1 year old when her sister Mariam was hospitalized with multiple bone fractures throughout her body. The father, Morsey, later pleaded guilty to causing the injuries, but has since denied responsibility for Mariam's injuries. Natasha, meanwhile, has also denied her husband's culpability during counseling sessions aimed at reunifying the parents with their children, the opinion said.

On procedural grounds, the Supreme Court in 2016 reversed an initial Superior Court ruling terminating Morsey and Natasha's parental rights. The case came back a second time after the Department of Children and Families amended its petition to include a new basis for termination—the parents' failure to rehabilitate.

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The Superior Court again ruled to revoke parental rights last January, specifically citing the parents' failure to make progress toward developing a plan to keep Egypt safe under Section 17a-112 (j) (3) (C). On appeal, Morsey and Natasha contended that the lower court's ruling was improperly predicated on prospective harm, which they argued fell outside the statute's scope.

But Rogers said the first reversal in the case extended the adjudicatory date of the termination petition, allowing the court to take into account post-removal denials of responsibility by the parents. As a result, she said, the parents' failure to acknowledge Mariam's abuse fell under the purview of the statute in Egypt's case.

> **According to the opinion, Egypt was less than 1 year old when her sister Mariam was hospitalized with multiple bone fractures throughout her body. The father, Morsey, later pleaded guilty to causing the injuries, but has since denied responsibility for Mariam's injuries.**

"In light of the foregoing, we conclude that the respondents' omissions in this case, namely, their continuing failures, over the course of three years, truly to acknowledge the cause of Mariam's injuries and to take the therapeutic steps that would prevent a similar tragedy from occurring in the future, clearly fell within the purview of Section 17a-112 (j) (3) (C)," Rogers said.

The ruling came over the sole dissent of Justice Andrew J. McDonald, who faulted the court's analysis for conflating two separate causes for termination of parental rights. The majority, he said, failed to identify any acts, specific to Egypt, that justify the decision.

"The majority cannot point to any direct act or omission by the respondents that is specific to Egypt, but, rather, point only to the respondents' failure to accept responsibility for their respective roles in causing harm to Mariam," he wrote in a four-page dissent.

"It is only by focusing on the consequence of that failure, namely, the respondents' continued separation from Egypt, that allows the majority to avoid the fatal flaw of terminating the respondents' parental rights with respect to Egypt based on predictive harm."

Stein M. Helmrich of SMH Law represented the mother. The father was represented by Dana M. Hrelic, Brendon P. Levesque and Scott T. Garosshen of Horton, Dowd, Bartschi & Levesque.

Michael Besso, George Jepsen and Benjamin Zivyon of the Office of the Attorney General represented the Department of Children and Families.

The case was captioned *In re Egypt E.* ■

Tom McParland of Delaware Law Weekly can be contacted at 215-557-2485 or at tmcparland@alm.com. Follow him on Twitter @TMcParlandTLI.

PROFESSIONAL ANNOUNCEMENT

LAW OFFICES OF

Cowdery & Murphy, LLC

is pleased to announce its two new partners

JAMES J. HEALY, ESQ.

James represents clients in civil and criminal matters in state and federal court and conducts internal investigations for clients. In addition to trial work, including personal injury matters, he regularly argues appeals in the Connecticut Supreme and Appellate Courts and the Second Circuit. A graduate of Cornell University and the Duke University School of Law, Mr. Healy previously served as a law clerk to the Honorable Christopher F. Droney in the District of Connecticut (2009-10) and the Second Circuit (2012).

JOHN P. D'AMBROSIO, ESQ.

John's practice focuses on health care, civil fraud, and white-collar criminal matters. He represents clients in complex enforcement matters involving various federal and state agencies, and in litigation involving RICO, federal securities laws, and business torts. He advises individuals and businesses in the health care, financial services, defense, and transportation industries facing liability under the False Claims Act and related laws, including attendant licensure, exclusion, and debarment proceedings.

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Best Lawyers' BEST LAW FIRMS U.S.News 2016

Legal Sector Posts Modest Job Gains in December

By Scott Flaherty

The U.S. legal services industry added 600 jobs in the final month of 2017 as the country's overall economy posted employment gains, the U.S. Department of Labor reported Friday.

The agency's Bureau of Labor Statistics issued its monthly look at the employment situation in the United States, showing that 1,128,200 people were employed in legal services during December. The data released on Friday is provisional and could be revised in the future. The BLS includes lawyers, paralegals, secretaries and other law-related professions in the legal services employment report.

The jobs numbers for December mark an increase over BLS's revised figure for November, when the legal sector employed 1,127,600 people, according to Friday's provisional data. Initially, BLS had reported a higher number for November's employment results.

The legal services industry's job figures in December remain within a range that has, for the most part, prevailed in the sector for several years. Since June 2013, the number of people employed in legal services has generally hovered somewhere between about 1.12 million and 1.13 million, roughly 50,000 jobs fewer than the industry's high point in 2007, before the recession and global financial crisis.

Looking back over 2017 as a whole, there have been slight fluctuations in the legal industry's jobs figures. March, in which 1,123,300 people were employed in the legal sector, marked a low point, while June marked a high, with the industry employing 1,130,700 in that month, according to historical BLS data.

Those statistics came as some law firms underwent staff shake-ups in 2017. Notably, Sedgwick decided to close its doors at the end of the year, sending lawyers off to new locales and shutting down a back office operations center in Kansas City, Missouri—a move that eliminated 75 jobs.

Friday's data release from BLS also reports on the employment situation in the United States overall. The economy added 148,000 jobs in December, according to the data, a number that reportedly fell short of economists' expectations but which still more than keeps pace with population growth among working-age Americans. The country's unemployment rate remained flat at 4.1 percent, which is down from 4.8 percent at the beginning of 2017. For the U.S. economy overall, December marked the 87th consecutive month of job growth. ■

Scott Flaherty, based in New York, covers the business of law with a focus on plaintiffs lawyers and litigation involving law firms. He can be reached at sflaherty@alm.com. On Twitter: @sflaherty18

John Nazzaro Rejoins The Reardon Law Firm After 10 Years on the Bench

By Robert Storace

After a decade on the bench, John Nazzaro said he decided to leave the judiciary and return to the courtroom as a trial lawyer because it's where he feels most comfortable.

Nazzaro said he enjoyed his time on the bench, but was frustrated by many in the legal community who appeared before him. Nazzaro, who often butted heads with lawyers and prosecutors as a judge, was critical of what he saw as a system that's too eager to incarcerate people.

Nazzarro, who was a trial lawyer for 23 years, rejoined The Reardon Law Firm Jan. 1 in a move he had contemplated since being assigned to the New Haven Superior Court last year.

"It seemed to me that I would be presiding in civil matters as a judge and I found the work uninspiring and thought I'd be more suited as a lawyer back in the courtroom," said the 59-year-old Pawcatuck resident.

Nazzaro first worked for The Reardon Law Firm in New London from 1988 to 1997.

Robert Reardon Jr., a partner with the firm, said he interviewed Nazzaro for his first stint there. Nazzaro was working for the Office of the Chief State's Attorney at the time, and was eager to get into private practice.

Reardon said he was impressed with Nazzaro's experience handling criminal matters for the state.

"I thought he had the potential to be a top trial lawyer," Reardon said Friday. "And he was just that. He is able to present himself to a jury in a persuasive manner.

"I've been hiring trial lawyers for many years and I can recognize the personality traits that are likely to develop into a top trial lawyer," Reardon added. "It is hard to pinpoint, but it is a combination of being articulate, bright and enthusiastic."

While he presided over interesting cases and enjoyed working with courthouse staff, Nazzaro said there was often friction between himself and attorneys in the courtroom. That was evident when Nazzaro was in his second stint as a judge in Hartford Superior Court.

John Nazzaro

"I went back to Hartford criminal court in 2015-2016 and it was, in my view, worse than the first time I was there," Nazzaro said. "I had many conflicts [with attorneys and prosecutors] as there was a constant parade for incarceration. It was not working and I told them so. I was reluctant to sentence people charged with simple possession and misdemeanors and people with a mental health history to incarceration. It made no sense whatsoever."

Nazzaro said he made it known to prosecutors that he did not agree with how sentences were being handed out. Nazzaro wanted alternative solutions, such as getting drug addicts and individuals with

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mental health issues treatment instead of prison or jail time. In other cases, there were violent people in the system who needed to be separated from society, he added.

Nazzaro said that while he was often vocal with attorneys, "there were time when I had to shut my mouth on many issues. I am not good at shutting my mouth. I am not a go-along, get-along kind of guy."

Nazzaro, who earned $167,000 annually as a Superior Court judge, declined to discuss his new salary.

Nazzaro also worked as a judge in Windham and Norwich and as chief civil judge for the New London Judicial District.

Proloy Das, a partner with Murtha Cullina, worked with Nazzaro when they were both at Rome McGuigan. Nazzaro worked at the firm from 2005-07.

"One of the things that made him effective as a trial judge was that he was an effective trial lawyer," Das said. "He was very familiar with the rules of practice and evidence, and how a case needs to be presented in the courtroom."

Reardon said Nazzaro will be busy handling negligence and malpractice claims at the firm, which has five attorneys.

> **Nazzaro said that while he was often vocal with attorneys, "there were time when I had to shut my mouth on many issues. I am not good at shutting my mouth. I am not a go-along, get-along kind of guy."**

"We are a very busy firm," Reardon said. "We have many negligence and malpractice cases underway. We look forward to him taking over some of those files and taking the cases to trial. We have a long list of trials upcoming and his skills and expertise will be great help to the firm."

Kelly Reardon, Robert Reardon's daughter and a partner at firm, said she has already heard from people in the southeast corner of the state interested in bringing their cases over because Nazzaro joined.

"He has tremendous contacts in the community," Kelly Reardon said. "People are contacting us because of his reputation. He has been around so long and will be a great asset to our clients."

Nazzaro grew up in southeastern Connecticut. He graduated from the University of Bridgeport Law School in 1984, which later merged with Quinnipiac University's law school. ■

Robert Storace covers legal trends, lawsuits and analysis for the Connecticut Law Tribune. Follow him on Twitter @RobertSCTLaw or reach him at 203-437-5950.

Apple Faces Spreading Legal Woes Over Slowed iPhones

By Ross Todd

Apple Inc. faces transcontinental legal woes over software changes which slowed the performance of certain iPhone models.

According to Bloomberg, the Cupertino-based technology giant faces a preliminary French criminal probe for "programmed obsolescence" and "deceit" after consumer groups accused the company of deliberately shortening the life span of older iPhones.

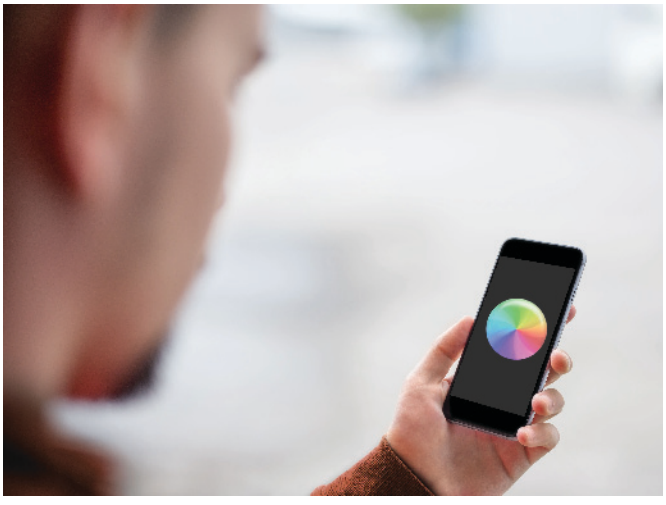
Back stateside, plaintiffs lawyers have asked the Judicial Panel for Multidistrict Litigation to coordinate at least 30 federal lawsuits targeting the company with a variety of consumer protection, fraud and trespass claims related to the performance woes of older smartphone models.

The moves come as Apple officials released a rare public apology on Dec. 28 over how the company handled performance issues for iPhones with older batteries and how it communicated that process to customers. The company announced it will drop the price of replacing the battery for out-of-warranty iPhones by $50 to $29 and updated its software to alert consumers whether battery issues were affecting their phones' performance.

But Apple's mea culpa came after online chatter about performance issues in older iPhones had reached a fever pitch. Conversations on Reddit sparked a Dec. 18 post from the founder of the company behind Geekbench processor testing software—Primate Labs founder John Poole—who found iPhones with older batteries exhibited "lower-than-expected" performance in tests.

Poole concluded that Apple's fix to the sudden shutdown problem in older phones would "cause users to think, 'My phone is slow so I should replace it,' not, 'My phone is slow so I should replace its battery.'"

In the wake of Poole's post, Apple officials initially told tech website TechCrunch the company installed



"a feature" on older iPhone models with batteries that are unable to meet the peak electrical demands needed to operate in cold conditions or when phone batteries have a low charge. The company said its aim was to "smooth out the instantaneous peaks only when needed" to avoid unexpected shutdowns of the older phones.

In the Dec. 28 statement, Apple said that the company now believes "the continued chemical aging of the batteries in older iPhone 6 and iPhone 6s devices" contributes to user problems.

Reached by phone Monday, James Vlahakis of Sulaiman Law Group, lead counsel in one of the initial cases targeting Apple on the issue, said that the company's delayed—and changing—disclosure speaks volumes.

"Even if they are doing it to help people, they should have" said so, Vlahakis said. "What did you have to hide if you were doing something good?" ■

Ross Todd is bureau chief of The Recorder in San Francisco. He writes about litigation in the Bay Area and around California. Contact Ross at rtodd@alm.com. On Twitter: @Ross_Todd.

Could Gaming Help Close the Access to Justice Gap?

By Gabrielle Orum Hernández

As the legal industry writ large continues to consider opportunities to close the access to justice gap, four state legal aid groups have proposed an unconventional approach: gaming.

Legal aid organizations in Maine, Connecticut, Massachusetts and New Hampshire a few weeks ago launched "RePresent," an interactive online game to familiarize pro se litigants with court proceedings. The game, available both online and as a free downloadable game on mobile devices, walks players through the process of preparing for and representing oneself in small claims court.

Game players are responsible for helping the game's main character prepare for his hearing, breaking the process into small steps that help build his confidence for his hearing. Gameplay reveals a surprisingly large number of tasks pro se litigants must complete to prepare adequately, from the information they must file with the court clerk's office down to just printing directions and parking instructions for their courthouse they must appear at.

The game, now in its second iteration, was originally launched in 2016 as part of a partnership between Statewide Legal Services of Connecticut and Northeastern University's NuLaw Lab. The groups, funded by a Legal Services Corporation (LSC) Technology Initiative Grant, aimed to see whether game play could help prepare pro se litigants for small claims hearings.

Kathy Daniels, IT administrator for the Statewide Legal Services of Connecticut, helped put together the original game. She said the idea for the game came from a staff brainstorm about how to familiarize pro se litigants with what tends to be a wildly confusing court experience for the uninitiated.

"We wanted to expose them to the experience in a safe environment where they could practice," Daniels said.

Dan Jackson, executive director of Northeastern's NuLawLab, explained that the game draws on research around "serious games," games typically designed for training and skill building.

"There is a body of work that demonstrates that game play is in fact one of the most effective ways for humans to learn. It's how we began to learn things as children, which is how we learn a lot of things like social interactions, but also a lot of actual skill building as well. I think often we make the mistake of thinking that after we move to adulthood that the game part, the play part, is actually no longer important," Jackson said.

"The goal is to create a gameplay experience that will help people who have to go to court to represent themselves without a lawyer get some basic foundational knowledge, and also some basic foundational skillbuilding they wouldn't otherwise get," Jackson added.

Nearby states saw a lot of value in the platform. Statewide Legal Services of Connecticut, Pine Tree Legal Assistance in Maine, Massachusetts Law Reform Institute (MLRI) and Legal Advice and Referral Center each tailored the game to their specific state law for the recent launch of the second iteration.

"Having the opportunity to do something like this that is way more interactive than our educational materials have ever had a chance to be in the past was really exciting," Jack Haycock, client focused technology innovator at Pine Tree Legal Services, told LTN. "Having a chance to do something I think really innovative like this will work, for people maybe in a way that our text materials or even videos might not work. Being able to interact with the learning process can be a really powerful and different medium for people to learn," he later added.

Legal aid organizations in Maine, Connecticut, Massachusetts and New Hampshire a few weeks ago launched "RePresent," an interactive online game to familiarize pro se litigants with court proceedings. The game, available both online and as a free downloadable game on mobile devices, walks players through the process of preparing for and representing oneself in small claims court.

The groups are excited about the game's mobile accessibility, a new feature in the recent launch. Both Daniels and Haycock noted that about 70 percent of the traffic on their respective websites come from mobile devices. The migration to mobile also featured heavily in an LSC report released last year examining the online presence of legal aid organizations.

Jackson expects that the mobile component will help far more users access the game. "Not very many people spend time on browsers anymore," he said.

Both the Statewide Legal Services of Connecticut and Pine Tree Legal Assistance Groups plan to release a version of the game that provides information to renters looking to avoid eviction shortly.

"Our goal is really to demystify just going to court and who the players are and what to do, and those tips really transcend for areas of civil litigation. Our goal is to identify what the pitfalls are, then help pro se litigants prepare for those in advance and know what they are," Helen Meyer, development director at Pine Tree Legal Services, said. ■

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Ethics Compliance: Sticking to the Rules is No Longer Good Enough

By Angela Turturro

Ethics. If you look hard enough, news sources are brimming with companies exhibiting unethical behavior. Whether it be Uber's controversial post-riding tracking or their surge pricing that some believe took advantage of a New York Taxi Workers Alliance immigration protest. It might be Wells Fargo CEO John Stumpf continuing to defend the bogus accounts created by 5,000 of his employees in order to hit their sales targets. Or possibly, Google's recent fine for preferential advertising.

As scrutiny for bad behavior gets stronger, we should look to the processes businesses have created to prevent it.

There has been an astonishing investment in compliance in the last decade. Compliance jobs saw the third highest salary increase in the UK last year. 89 percent of banking professionals report that spending on compliance has increased exponentially in the last five years.

Yet, despite this tsunami of expenditure, we still find that misdemeanors are as great as ever before. Global research shows that the level of observed misconduct has remained relatively stable at 14 percent since 2008, falling a mere 0.2 percent. In a recent event, we asked a group of Chief Compliance Officers from 20 banks whether they had seen a healthy return on their compliance investment. The answer was a resounding no.

The problem seems to be that decisions about how to solve the conduct crisis have been made by economists. Economists make claims based on how people *should* behave: If you fine people they'll behave better; if you give clear rules, people will behave well; if you encourage whistleblowing, you'll create an ethical climate.

But ask a behavioral scientist, and they'll ditch the 'should', and make suggestions based on how people *actually* behave.

If you fine people, they don't always behave better. A recent study looked at the impact of giving a fine to parents who were late picking up their child from school. To everyone's surprise, the fine actually increased the number of parents being late. The addition of the penalty (in this case, around £30) turned the decision from a moral one ('is it right for me to keep the teachers here after the day ends?') into an economic one ('is it worth £30?').

If you give clear rules, good behavior does not necessarily follow. There is no correlation (let alone causation) between publishing a code of conduct and either ethical behavior, or even *intention* to behave ethically. True, you may need to have a code of conduct for legal reasons, but as with many things, it is necessary but by no means sufficient.

If you encourage whistleblowing, you won't create an ethical climate. From childhood we're imbued with words like sneak, snitch, tell-tale, super grass. At least 50 percent of whistle-blowing is done for reasons of pure self-interest – research indicates people wouldn't do it otherwise. Many admit that they would never blow the whistle for two reasons: fear of the negative personal consequences, and futility – that nothing will be done.

And if, like many organizations have tried to do, you go one step further and provide ethical dilemma training, sadly people will not magically do the right thing when that scenario arises in real life. Like the divers who died fixing oil rigs in the North Sea, and Chesley Sullenberger who landed his plane in the Hudson River, no matter what the training and handbooks tells us we should do, how we respond in a 'cold' state bears no resemblance to how we'd act in a 'hot' one.

So, sticking to the rules is not good enough. People are now expected to do the right thing. But when all the things businesses have tried to encourage good behavior are failing, what's the answer?

Our research has pointed to clear actions which create an ethical climate.

> **As scrutiny for bad behavior gets stronger, we should look to the processes businesses have created to prevent it.**

No, it's not about ensuring executives are beacons of moral standards. Research consistently shows that we all think we're much more ethical than the average person (and we're better drivers, with a better sense of humour, etc. etc.). This puts the benchmark for what it means for someone else be considered 'ethical' off the scale. Even if the senior team were relative angels, it probably still wouldn't do the trick.

Broadly, we end up behaving as well as we predict the 'average' person will but our delusion comes down to the strength of our moral identity. The vast majority of us want to look in the mirror and think of ourselves as a good person. When examiners swapped 'please don't cheat' with 'please don't be a cheater' on the top of test papers, incidences of cheating halved.

Getting people to behave ethically therefore comes down to understanding why, when we consider ourselves to be such 'good' people, do we do 'bad' things?

The answer is that we need ethics to be front of mind, or at least somewhere in our decision-making repertoire, for us to do the right thing. Often, other motivations push ethics out. Research shows that if we feel excluded, unfairly treated, tired and emotional or socially pressured, ethics somehow gets lost. Most forgeries (in art, wine, archaeology), were not done to make any money – they were done to fit in. Judges tend to be more lenient after lunch, when they've had a renewal of physical energy.

The answer, then, is to acknowledge these universal human tendencies, and help people keep ethics front of mind. That way, they at least stand a chance of doing the right thing.

A study showed that simply asking participants to recall the 10 commandments ahead of a test more than halved the level of cheating, no matter their religious beliefs. Using prompts and nudges to remind ourselves of our moral identity is a strong start. Similarly, encouraging regular conversations about moral issues that avoid moralizing will mean ethics features more prominently in our consciousness. And helping people to see when they're at risk of succumbing to other pressures, and what they can do to overcome them, is a sure fire way to help.

To learn more about our ethics point-of-view, or to download our full white paper The Only Way is Ethics, please visit our website: www.themindgym.com ■

Angela Turturro is the Sections editor for the New York Law Journal and head of the Contributed Content desk for ALM.

A 2018 Resolution for Legal Departments: Ensure Wellness Apps Meet Privacy Standards

By Caroline Spiezio

With the start of 2018, workers across the United States are revitalizing efforts to lead healthier lives. For some, that means diving into employer-sponsored wellness programs, many of which utilize apps. But there's still serious, growing concern that workplace wellness apps could violate privacy rules around users' health data— a risk that in-house teams can help mitigate.

Wellness programs became popular under the Affordable Care Act, which allowed employers to offer seriously discounted health insurance premiums to workers who participated. The data collected varies depending on the app used, but it ranges from vital signs, to hours of sleep, to step counts. Many wellness apps and programs also require a health questionnaire to sign up, one that asks employees for information they may not otherwise share.

An app that monitors the details of an employee's health may sound creepy—but what's more alarming is where this data can end up.

"A lot of the data in the apps or programs can be sold to third parties [whose identities] don't have to be disclosed by the wellness program vendor or the app," said Dr. Ifeoma Ajunwa, an assistant professor at Cornell University's School of Industrial and Labor Relations and a faculty associate member of Cornell Law School.

These third parties include drug developers and others in the health industry, and can lead to targeted, unsolicited ads. The data could also wind up in employer's hands, and while it's theoretically aggregated and anonymous, some apps make it easier for employers to identify the user by breaking employees down into small groups.

Employers can't legally fire someone for health information they uncover from wellness plans, but if they do, it's often hard to prove, according to Ajunwa.

"The problem right now is that there are no set government standards to anonymize data," she said. "So companies will say the data is anonymized, its disaggregated, but how did they do that? Because there are many different ways to do that, some of which are more effective."

If employees are concerned (or employers, many of whom may not know the extent to which data is being sold and shared), in-house legal departments can act as the front line of defense. One of the easiest ways to prevent the sale of employee data is by using legal contracts to stipulate upfront what wellness apps can and can't store or sell, Ajunwa explained. Companies should also have a clear plan for how to manage a breach of employee health information.

"The first thing is actual contractual stipulations with the wellness vendor in regards to how the data will be used and how the data will be secured," Ajunwa said. "I find that a lot of companies don't necessarily have these conversations and they just assume the wellness vendor is taking all the steps."

Without a contract and specific stipulations in place, the collection of this data is legal in the United States, so long as the wellness program complies with the ACA. While there's been pushback from proponents of the Americans With Disabilities Act, which prohibits employers from forcing workers to disclose their medical history, wellness program supporters have said there's no obligation for employees to sign up.

But some argue that voluntary wellness programs aren't really voluntary as employers can legally incentivize workers with massively discounted premiums or up health care costs for those who don't participate. There may also be social pressure from colleagues at play.

"When there's an environment, [talking] at the water cooler or sharing on Facebook, it's hard on an employee to not participate," said Pam Dixon, executive director of the World Privacy Forum, a nonprofit public interest research group that focuses on data privacy. "They may feel compelled to participate in a program in order to maintain a good office working relationship. Companies are going to have to look at their culture and say, do we want a policy about making Facebook pages for our wellness program?"

> **Third parties include drug developers and others in the health industry, and can lead to targeted, unsolicited ads. The data could also wind up in employer's hands, and while it's theoretically aggregated and anonymous, some apps make it easier for employers to identify the user by breaking employees down into small groups.**

Proposed legislative changes could also affect employers' and employees' rights regarding wellness plan data. The Preserving Employee Wellness Programs Act would allow wellness programs to ask about employees' family medical history or genetic data, which is currently prohibited under the Genetic Information Nondiscrimination Act (GINA), while keeping financial incentives for wellness program participation in place.

On the international scale, the European Union's General Data Protection Regulation, effective in May 2018, will require increased transparency around wellness programs in EU countries, according to Ajunwa. In post-GDPR Europe, she said, it could be harder for a situation to arise in which people don't know whether their data's been sold or kept for years after its initial collection, because data processing will now require "freely given, specific, informed and unambiguous" consent.

So as employees across the company focus on health-related New Year's resolutions, it may be high time for legal departments to focus on a resolution of their own: giving wellness apps a checkup. ■

Caroline covers the intersection of tech and law for Corporate Counsel. She's based in San Francisco.

VERDICTS & SETTLEMENTS

Indian Mountain School Settles Abuse Suits by 2 Former Students

By Charles Toutant

Indian Mountain School has settled two federal lawsuits by former students who said they were sexually abused by a teacher while attending the school in the 1980s.

The school reached settlements, with terms remaining confidential, in suits brought in U.S. District Court by Matthew Bernstein, who claimed he was abused from 1980-83, and with William Brewster Brownville, who said he was abused from 1983-87. Both plaintiffs said the abuse began when they enrolled at the school at age 12 and continued until they were 15, according to court documents.

The settlements were announced jointly by Antonio Ponvert III, of Koskoff Koskoff & Bieder in Bridgeport, who represented the plaintiffs, and Jeffrey White of Robinson & Cole in Hartford, who represented the school. Brownville's case was closed in November and Bernstein's was closed the following month, according to court documents.

Both plaintiffs asserted that they were sexually abused by Christopher Simonds, an English teacher. They also asserted that Simonds sexually abused dozens of boys at the school over the course of a decade. Their suits also said headmaster Peter Carleton and other faculty members knew Simonds was a pedophile and that he had abused students, but Simonds remained on the school's faculty. Simonds and Carleton are both deceased.

Bernstein's suit said Simonds sexually abused dozens of boys at the school and that he took photographs of them to blackmail them into silence. School staff witnessed boys entering Simonds' apartment after "lights out" and saw Simonds visiting the dormitories late at night. The school instituted a policy prohibiting faculty from visiting the boys after lights out, specifically to address Simonds' after-hours crimes, the suit claimed, but he flouted the rule and continued his visits. Bernstein's suit also asserted that Simonds drove him to New York to buy

cocaine and heroin and that he showed his victims pornography and gave them marijuana, alcohol, cigarettes and LSD.

No one was prosecuted for the abuse at the school, according to court documents.

Brownville claimed that he and three other boys were forced to live in the basement of Carleton's on-campus home.

Ponvert said in a joint statement that the settlement "is in the best interest of all involved, and goes a long way toward ending this tragic chapter." Defense lawyer White said in the same statement that "the school is committed to educating future generations of students and providing a safe and healthy environment for students to grow to their full potential.

> **The school reached settlements, with terms remaining confidential, in suits brought in U.S. District Court by Matthew Bernstein, who claimed he was abused from 1980-83, and with William Brewster Brownville, who said he was abused from 1983-87. Both plaintiffs said the abuse began when they enrolled at the school at age 12 and continued until they were 15.**

The school also remains steadfast in its commitment to prevent a recurrence of the misconduct on its campus in the 1970s and '80s."

Indian Mountain, in Lakeville, is a private boarding and day school for students in prekindergarten through 9th grade.

The latest settlements bring to three the number of suits Indian Mountain has settled with students who claimed they were abused by Simonds. Court documents indicate another plaintiff, Peter Buck Jr., who claimed he was abused from 1982-84 starting when he was 14 years old, reached a confidential settlement with the school last March. ■

Charles Toutant is a litigation writer for the New Jersey Law Journal.

Connecticut Opinions

SUPREME COURT

FAMILY LAW • IMMIGRATION LAW

Probate court did not lose jurisdiction to rule on pending petition for juvenile status findings when minor turned 18

CASE: In re Henrry P. B.-P.
COURT: Connecticut Supreme Court
DOC. NO.: SC 19907
COURT OPINION BY: Robinson, J.
DATE: December 14, 2017 • **PAGES:** 18

The probate court did not lose jurisdiction to rule on an immigrant minor's petition for juvenile status findings merely because the minor turned 18 while the petition was pending. The court reversed the contrary ruling of the appellate court. Following the murders of her husband and father-in-law, Reyna B.P. fled her native Honduras, fearing for her life. She left her two young children in the care of their grandmother. As the children grew into teenagers, their lives were threatened also. Unbeknownst to relatives, they too fled to the United States. There, they were apprehended by immigration officials and eventually released to their mother in Connecticut. They were seventeen and sixteen years old at that time. Their mother filed a probate court petition on their behalf for juvenile status findings under General Statutes §45a-608n(b), to be used in connection with a petition for special immigrant juvenile status under 8 U.S.C. §1101(a)(27)(J). The elder child, Henrry P. B.-P., turned 18 while the probate court petition was pending. The probate court denied the petition. The superior court dismissed Henrry's appeal, stating that it lacked jurisdiction because Henrry was no longer a minor. The appellate court also denied relief, finding the probate court lost jurisdiction to rule on Henrry's petition once he reached the age of majority. The Supreme Court reversed, holding that the lower courts erred in finding that the probate court lost jurisdiction to rule on Henrry's pending petition when he reached the age of 18. The purpose of §45a-608n is to facilitate access to the state court findings needed to apply for special immigrant juvenile status. Notably, federal juvenile status remains available to an immigrant child so long as the application is submitted before his or her 21st birthday. Authorizing the Probate Court to make juvenile status findings with respect to a minor child who has turned eighteen years old during the pendency of the petition is entirely consistent with the overarching purpose of §45a-608n(b). In the absence of clear and unambiguous statutory language to the contrary, the court accordingly declined to construe §45a-608n as divesting the probate court of jurisdiction when Henrry turned 18 during the pendency of the petition. The court remanded the case to the appellate court with directions to reverse the judgments of the superior court and to remand the case to that court for further proceedings according to law.

APPELLATE COURT

CRIMINAL LAW • EVIDENCE

Admission of Evidence of Past Drug Sales Harmless Error

CASE: State v. Grant
COURT: Connecticut Appellate Court
DOC. NO.: AC 39921
COURT OPINION BY: Elgo, J.
DATE: January 02, 2018 • **PAGES:** 11

Admission of evidence that an accused killer was also a drug dealer was harmless error. The court affirmed the judgment of conviction. Following a nightclub shooting in which one person was killed and another injured, defendant was charged with one count of manslaughter and one count of assault. At his jury trial, a prosecution witness testified regarding defendant's involvement in the sale of drugs. Defendant was convicted. On appeal, he argued the trial court erred in admitting evidence that he sold drugs, given the absence of any evidence at trial that the shootings were drug-related. The appellate court affirmed, holding that any error was harmless. The evidence that defendant sold drugs was not a prominent part of the state's case. Moreover, the trial court provided the jury with a limiting instruction regarding prior misconduct evidence immediately after that witness' testimony concluded. Finally, the evidence of defendant's guilt was overwhelming, and included defendant's own written and recorded statements confessing his involvement in the shooting. On this record, defendant could not demonstrate that the admission of the evidence that he sold drugs had a significant impact on the jury's verdict. Judgment affirmed.

REAL ESTATE

Record Supported Finding of Easement by Implication

CASE: Deane v. Kahn
COURT: Connecticut Appellate Court
DOC. NO.: AC 39006
COURT OPINION BY: Prescott, J.
DATE: January 02, 2018 • **PAGES:** 16

The evidence supported the trial court's finding of an easement by implication over a neighboring property. The court affirmed the trial court judgment in favor of the owner of the dominant parcel. The parties owned adjacent parcels of property situated west to east along the Connecticut River in Lyme. The parcels were once commonly owned and had access from both a road to the west and a road to the north. When the original owner transferred away the west parcel in the early 1900s, she reserved a right-of-way to preserve the remaining parcels access to the road to the west. When the center and east parcels were later separated in 1960, the deed for the center parcel did not include a reservation of a right-of-way, but the owners of the east parcel continued to traverse both the west and center parcels to access their property from the road to the west, although they also remained able to access their parcel from the road to the north. In 2001, plaintiff, who now owned the east parcel, sued the owners of the west and center parcels to quiet title to his alleged right-of-way across their parcels and to enjoin them from interfering with his quiet enjoyment and use of the right-of-way. The trial court ruled in favor of plaintiff, finding an easement by deed over the west parcel and an easement by necessity over the center parcel. The Appellate Court reversed. The Supreme Court reversed in part the Appellate Court judgment, holding the evidence was sufficient to support the trial court's finding of an easement by deed over the west parcel. The court rejected the trial court's finding of an easement of necessity over the center parcel, however, finding such an easement could not be imposed absent a finding that plaintiff's parcel was landlocked, which it was not. The court remanded for consideration of plaintiff's alternate claim of an easement by implication. On remand, the trial court ruled in favor of plaintiff, finding an implied easement over the center parcel. The Appellate Court affirmed, finding that plaintiff met his burden of establishing by a preponderance of the evidence that an easement over the center parcel was both implicitly intended by the parties to the 1960

conveyance and reasonably necessary for the use and normal enjoyment of plaintiff's east parcel. The record supported the trial court's finding that the parties to the 1960 conveyance were aware of the historic right-of-way and intended that use to continue in the future. Judgment affirmed.

SUPERIOR COURT

ATTORNEY COMPENSATION • CONTRACTUAL DISPUTES

No Meeting of Minds Where Second, Superseding Contract Contained Written Alterations Not Agreed to by Both Parties

CASE: Finocchio Bros Carting of Greenwich, Inc. v. Fairview Health of Greenwich, LLC
COURT: Stamford/Norwalk J.D., at Norwalk
DOC. NO.: FST-CV-16-602-8385-S
COURT OPINION BY: Jacobs, J.
DATE: December 11, 2017 • **PAGES:** 7

Evidence did not support the formation of a contract where one party made written alterations to an agreement that had not previously been discussed between the parties and had not been approved by both parties. The Superior Court entered judgment for damages in favor of the plaintiff. In 2014, plaintiff, a provider of refuse hauling and recycling services, entered into a five-year agreement with defendant, a nursing home owner/operator. The agreement included an automatic renewal provision. The initial, five-year term would be automatically extended unless one party gave written notice at least 90 days in advance of the end of the term. In 2016, plaintiff proposed a superseding contract that modified the service and accompanying charges. Defendant returned the contract with handwritten changes altering the stated notice requirements, stating, "Customer can cancel at anytime [sic], for any reason with 30 day notice" and "no auto removal." A representative of plaintiff later testified that there had been no discussion of any of the alterations and that he had been unsuccessful in attempting to phone defendant to discuss the handwritten alterations. Defendant later faxed a 30-day termination note to plaintiff. The notice did not conform to the 90-day notice requirement in the 2014 agreement but did conform to the purported modification. Plaintiff sued for breach of contract, alleging premature termination of services. Plaintiff sought damages and attorney costs. At trial, defendant asserted that the 2014 agreement was no longer in effect, having been superseded by the 2016 contract. The Superior Court entered judgment in plaintiff's favor. No evidence was presented to support a conclusion that authorized representatives of the parties came to a meeting of the minds or even discussed modifying the 2014 agreement's terms of the duration of the initial term of service, cancellation of the contract, or the procedure for renewal of the contract. Thus, the 2014 agreement was controlling. Defendant breached that agreement by faxing a 30-day notice of cancellation to plaintiff. The court awarded damages. However, plaintiff did not present evidence of attorney costs during trial. Having failed to meet its burden of proof, plaintiff's post-trial motion for fees had to be denied.

BUSINESS TORTS • CORPORATE ENTITIES • CORPORATE GOVERNANCE

Shareholder's Suit to Dissolve Closely Held Family Corporations Was Personal Action, Not Derivative

CASE: Walka v. High Point Inv. and Dev. Co., Inc.
COURT: New London J.D., at New London
DOC. NO.: CV15-6025586-S
COURT OPINION BY: Knox, J.
DATE: December 13, 2017 • **PAGES:** 7

A shareholder's suit against a closely held family corporation seeking judicial dissolution of the corporation and alleging several tort claims was properly framed as a personal, not a derivative, action. The Superior Court denied a motion to dismiss. Plaintiff, an individual, sued her mother, her brother, and several closely held family corporations in which she owned minority interests.

She alleged that her brother had demanded she withdraw from participation in the corporations and that, later she was wrongfully terminated from her employment in family enterprises, was denied salary she was owed, and was denied a payout of her interests in the corporations. Defendants moved to dismiss, alleging the court lacked standing because plaintiff's claims were derivative in nature, not personal. The Superior Court denied the motion. The court observed at the outset that there is nothing in the pertinent statutes, G.S. §§33-896 and -898, regarding what type of action a plaintiff must bring to seek judicial dissolution. In particular, there is no requirement that a shareholder allege a derivative cause of action. A fair reading of plaintiff's complaint demonstrated that she set forth specific allegations under §33-896. Nothing in the statutes precludes a shareholder from bringing a dissolution action under §33-896 or seeking appointment of a receivership under §33-897. Cases cited by defendants did not involve situations where a shareholder brought such actions. The court also noted that one of the counts only brought a cause of action against her mother and brother. It was immaterial whether the court had jurisdiction over the count for the corporate defendants. The court also rejected contentions that plaintiff's employment claims were legally insufficient. Challenges to claims based on legal sufficiency are not properly raised on a motion to dismiss. Further, defendants did not adequately brief their contentions as to why the court lacked subject matter jurisdiction over those counts.

CIVIL APPEALS • CIVIL PROCEDURE • MEDICAL MALPRACTICE

Sua Sponte Stay Was Warranted For Medical Malpractice Action Similar to Earlier Action Still Pending on Appeal

CASE: Labissoniere v. Gaylord Hosp., Inc.
COURT: New Haven, J.D., at New Haven
DOC. NO.: HHD CV17-6074253
COURT OPINION BY: Dubay, J.
DATE: December 06, 2017 • **PAGES:** 5

A sua sponte stay of a current medical malpractice action was appropriate where an earlier medical malpractice, one between the same parties and raising the same or similar issues, was still pending on appeal. The Superior Court issued a sua sponte order staying an action. In 2015, plaintiffs filed a medical malpractice action against defendants, a hospital and several individuals. A motion to dismiss was granted, based on defects found in the opinion letter that was filed with the suit. Plaintiffs appealed. While that appeal was still pending, plaintiffs filed another, substantially identical action pursuant to the accidental failure of suit statute. The second suit was based on essentially the same facts and allegations, and against the same defendants and an additional defendant. Defendants moved to dismiss. Neither side sought a stay of the current action. The Superior Court, acting sua sponte, stayed the current action, pending resolution of the appeal of the earlier actions. The court explained that, in the present case, the balancing of the competing interests weighed in favor of imposing a stay because a stay would promote judicial economy by avoiding unnecessary and repetitive litigation. A stay would limit the expenditure of litigation expenses because it would prevent both parties from needlessly litigating two simultaneous cases that are essentially identical. Further, a stay would eliminate the possibility of conflicting decisions, which could create a confused and unsettled state of the law. In particular, the grounds raised in support of defendants' motions to dismiss would require the court to undertake a review of the decision on the motions to dismiss in the earlier action, which would unavoidably implicates the impending disposition of the appeal. Thus, this court's potential denial of the motions to dismiss based, even partially, upon an affirmation of the trial court's decision in the earlier case would be rendered inconsistent and erroneous if the plaintiffs lose on appeal. Also, a stay would avoid the necessary expenditure of judicial resources because this action would

be wholly superfluous if the plaintiffs were to prevail on appeal. Finally, the court found, interests of public policy and judicial economy outweighed any potential detriment to the plaintiffs.

CIVIL PROCEDURE

Suit Brought Solely on Behalf of Trade Name Could Not Confer Jurisdiction on Court

CASE: Fred's Masonry, LLC v. Guro Machan, LLC
COURT: New Haven J.D., at New Haven
DOC. NO.: CV16-6009629-S
COURT OPINION BY: McNamara, J.
DATE: December 12, 2017 • **PAGES:** 6

A suit brought solely on behalf of an unregistered trade name could not confer jurisdiction on the trial court to hear the purported plaintiff's claims. The Superior Court granted summary judgment in favor of the defendant. Alfred Lalaj was in the business of performing masonry work, which he did under the trade name "Fred's Masonry, LLC." That trade name was not a legal entity, never having been registered as such with Connecticut's Secretary of State. Alleging he was not paid for work he performed, Lalaj sued Guru Bachan, LLC, seeking to collect on a mechanic's lien. The suit was instituted solely in the name of the unregistered trade name Lalaj used. The defendant moved for summary judgment, arguing the trial court lacked jurisdiction over an action that had been initiated in the name of a plaintiff with no legal existence. Plaintiff responded that use of the trade name was merely a scrivener's error that the court should overlook, since Lalaj's situation as the real party was clear from the mechanic's lien. Or, alternatively, the court should allow Lalalj to amend the complaint. To this, defendant responded that the complaint could not be amended because the suit was itself a nullity, having been initiated in the name of an entity with no legal existence. The Superior Court granted the motion. The court noted that, under G.S. §52-109, plaintiff could have moved to substitute or add a plaintiff with standing. But he failed to do that. Lalaj never availed himself of the opportunity to become a party to the complaint. Regarding his scrivener's error claim, the court explained that the identification of the plaintiff as an entity with no legal existence was not the type of misspelling or inadvertent slip of the pen that could be addressed as mere scrivener's error. Lalaj should have addressed this error through the remedy available to him under §52-109.

CIVIL PROCEDURE • CREDITORS' AND DEBTORS' RIGHTS • PERSONAL INJURY

Law Firm Immune From Liability for Alleged Infliction of Emotional Distress on Unrepresented Adversary

CASE: Klaneski v. Law Offices of Howard Lee Schiff, P.C.
COURT: Hartford J.D., at Hartford
DOC. NO.: CV16-5043246
COURT OPINION BY: Shapiro, J.
DATE: December 08, 2017 • **PAGES:** 8

Based on the litigation privilege, a law firm was absolutely immune from liability for its alleged intentional infliction of emotional distress on an unrepresented adversary in a legal proceeding. The trial court granted summary judgment in favor of the law firm. Defendant law firm represented a third party in a collection action against plaintiff. After the collection action was allegedly withdrawn, plaintiff sued defendant for intentional infliction of emotion distress, alleging that defendant's actions in the collection action were meant to frighten and coerce her. Plaintiff also stated a claim for CUTPA violation, alleging that defendant regularly enters unauthenticated documents in legal proceedings as part of a pattern of behavior that constitutes a general business practice. Defendant moved for summary judgment. The trial court granted the motion, finding that plaintiff's first claim was barred by the litigation privilege. Because all of the alleged conduct occurred within the scope of judicial proceedings, defendant was absolutely immune from liability. Further, because plaintiff's allegation of CUTPA violation related to legal representation provided by defendant, and

not to the entrepreneurial aspect of practice law, CUTPA did not apply. Defendant's motion for summary judgment granted.

CIVIL PROCEDURE • INSURANCE LAW

Connecticut Was Inconvenient Forum Where Witnesses, Documents and Underlying Dispute Were in Massachusetts

CASE: Stratford 31 Condominium Trust v. Middlesex Mutual Assurance Company
COURT: Judicial District of Middlesex at Middletown
DOC. NO.: MMX-CV17-6018280
COURT OPINION BY: Aurigemma, J.
DATE: December 12, 2017 • **PAGES:** 8

Stratford, an organization of condominium owners located in Boston, and Middlesex, its property and casualty insurer, were previously involved in an arbitration over whether Middlesex paid for all of the covered damages caused by a seven-alarm fire. Middlesex claimed that it fully satisfied the arbitration award, while Stratford maintained there was a balance outstanding on the award. Stratford sued Middlesex, alleging a breach of contract and seeking a declaratory judgment. Middlesex moved to dismiss the complaint on the basis of forum non conveniens. The record showed that the real property, witnesses and documents were all located in Massachusetts; the dispute would be governed by Massachusetts law; the arbitration proceeding was held in Massachusetts; and a Massachusetts court would have jurisdiction over the case. On the other hand, Middlesex would be unable to subpoena certain Massachusetts witnesses to testify in Connecticut, and would likely incur additional costs to obtain the testimony of Massachusetts witnesses. Although Stratford argued that its Connecticut choice of forum was entitled to significant weight, the court held that this factor was mitigated by the fact that Stratford was not located in Connecticut, and had provided no reason why it was suing in Connecticut. The court accordingly granted Middlesex's motion to dismiss the complaint.

CONTRACTS • INSURANCE LITIGATION

Insureds Materially Breached Policy by Refusing to Submit to Examination Under Oath

CASE: Preka v. Vermont Mutual Insurance Co.
COURT: New London J.D., at New London
DOC. NO.: CV15-6024492
COURT OPINION BY: Cole-Chu, J.
DATE: December 08, 2017 • **PAGES:** 19

Insureds' failure to comply with the terms of their policy relieved their insurer of any duty to pay their claim following a loss. The court granted the insurer's motion for summary judgment on the insureds' claims. Plaintiffs' home was burglarized. They submitted a claim to defendant, their homeowners' insurer. Defendant advised plaintiffs that they were required to submit to examination under oath regarding their claimed losses. Plaintiffs refused. Defendant denied their claim. Plaintiffs filed suit, alleging claims, among others, for breach of contract and unjust enrichment. The court granted defendant's motion for summary judgment on all of plaintiffs' claims against it, finding that plaintiffs' insurance policy clearly stated that, in the event of a loss, defendant could require them to submit to examination under oath as a precondition to payment of any claim. By refusing to submit to examination, plaintiffs materially breached their policy. They further failed to provide a valid excuse for their noncompliance. Under these circumstances, defendant had no duty to pay their claim. Defendant's motion for summary judgment granted.

CONTRACTUAL DISPUTES • GOVERNMENT

Agency's Enhanced Ability to Maintain Sewer System Did Not Support Construction Company's Unjust Enrichment Claim

CASE: KBE Building Corp. v. Simon Konover Dev. Corp.
COURT: Hartford, J.D., at Hartford
DOC. NO.: X07 HHD-CV16-6067455-S
COURT OPINION BY: Mousawsher, J.
DATE: December 13, 2017 • **PAGES:** 4

A construction company's claim that a governmental agency's ability to more easily operate a well-managed, easy to maintain public sewer system could not, as a matter of law, support the company's unjust enrichment claim against the agency. The Superior Court granted summary judgment to the defendant agency. Plaintiff sued several defendants, including Hartford's Metropolitan District Commission, following a dispute over a troubled housing contract job. Plaintiff understood its remedies were limited by the limited governmental immunity granted to municipalities under G.S. §52-557n. That statute shielded the MDC from suits challenging its discretion related to the awarding of sewer permits at construction projects. But the company contended it could assert an unjust enrichment claim. MDC moved for summary judgment. The Superior Court granted the motion. The court pointed out that, under case authority, it is unclear whether or not unjust enrichment claims can be made against municipalities with respect to contracts they might or might not choose to enter into. But even assuming that the MDC could be sued for unjust enrichment, KBE lacked a triable issue of material fact on its unjust enrichment claim. Plaintiff was apparently relying on speculative benefits that, in the court's view, the MDC should not have to pay for. Plaintiff contended that the benefit the MDC realized was an enhanced enhanced ability to operate a well-managed, easy to maintain public sewer system. The court did not agree. The materials submitted by the parties on the summary judgment motion revealed, at best, that the MDC was exercising its permitting authority in ways that cost plaintiff money. But that was no different than alleging the agency could be liable for discretionary decisions that plaintiff knew the agency was not liable for under §52-557n . Plaintiff complained the MDC ordered changes when it should not have and, without pointing to evidence to support it, claimed the MDC contrived to get the Hartford housing authority to impose on plaintiff further burdensome requirements. That was no more than a claim of municipal malpractice forbidden under §52-557n.

DISCOVERY

Noncompliance With Discovery Request Warranted Sanctions

CASE: The Writers Workshop, Inc. v. Elwell
COURT: Stamford/Norwalk J.D., at Stamford
DOC. NO.: CV15-6026560
COURT OPINION BY: Tobin, J.T.R.
DATE: December 07, 2017 • **PAGES:** 8

Counsel's failure to comply with a discovery request in his notice of deposition warranted the imposition of sanctions for discovery abuse. The court granted in part defendant's motion for sanctions. Plaintiff filed a mortgage foreclosure action against defendants. Defendant Lisa Elwell moved for an order of compliance, alleging various acts of discovery abuse by plaintiff and plaintiff's former counsel, F. Bradley Kellogg. Those abuses included Attorney Kellogg's failure to produce emails described in the notice of his deposition. The trial court granted in part and denied in part Elwell's request s for sanctions, finding Elwell was entitled to sanctions for Kellogg's failure to comply with the discovery request included in his notice of deposition. The court declined, however, to award sanctions for plaintiff's failure to comply with Elwell's requests for production, finding the requests were not sufficiently clear to warrant the imposition of sanctions for non-compliance with discovery. The court directed that further hearing would be held to determine the extent of the award to Elwell for Kellogg's failure to comply with the discovery request in his notice of deposition.

EMPLOYMENT LITIGATION

Prospective Employer Provided Legitimate Explanation for Rejecting Employment Application

CASE: Salvatore v. State of Connecticut Dept. of Emergency Services
COURT: Hartford J.D., at Hartford
DOC. NO.: CV15-6059334
COURT OPINION BY: Peck, J.T.R.
DATE: December 04, 2017 • **PAGES:** 17

A prospective employer provided a legitimate reason for failing to hire plaintiff, and she was unable to rebut that explanation. On plaintiff's claim of retaliation, the court rendered judgment in favor of defendant. In 2006, plaintiff filed an employment application with defendant, seeking to become a state trooper. When defendant denied her application, plaintiff filed a complaint with the Commission on Human Rights and Opportunities, alleging age, sex, and disability discrimination. After hearing, the commission dismissed plaintiff's complaint. In 2012, plaintiff again applied to become a state trooper. Her application was again denied. Plaintiff filed suit, alleging that defendant had retaliated against her for her prior complaint by rejecting her renewed employment application. The court rendered judgment in favor of defendant, finding that defendant establish a legitimate, non-retaliatory basis for rejecting plaintiff's renewed application. According to defendant, following an extensive evaluation, plaintiff was deemed not psychologically suitable for law enforcement work. Defendant provided extensive evidence to support this claim, and plaintiff failed to provide evidence showing that defendant's explanation was pretextual. Accordingly, plaintiff failed to establish a prima facie case of retaliation.

EVIDENCE

Report of Successful Fax Transmission Not Admissible to Establish Successful Receipt

CASE: State of Connecticut v. Dressler Strickland, LLC
COURT: Hartford J.D., at Hartford
DOC. NO.: CV16-6071027
COURT OPINION BY: Shapiro, J.
DATE: December 13, 2017 • **PAGES:** 11

A sender's fax transmission report is insufficient to establish that the recipient's fax machine actually printed out the faxed data in legible form. The court accordingly denied plaintiff's motion for summary judgment based on defendant's alleged receipt of a faxed notification. Defendant law firm represented a plaintiff in a personal injury action. The plaintiff had previously received public assistance. The Department of Administrative Services (DAS) sent defendant, by fax, a notice of lien letter and a lien amount letter, notifying defendant that DAS was entitled to 50 percent of his client's net settlement proceeds. Defendant settled the case for his client and disbursed the full net settlement proceeds to her. DAS sued defendant for failing to honor a statutory lien. DAS moved for summary judgment, arguing that it was undisputed that defendant received the notice of lien. In support of that claim, DAS offered its own record of the fax transmission, which indicated that the fax was sent successfully. Defendant opposed, arguing that it never received notice of the lien. Defendant offered expert testimony that the successful transmission of a fax does not necessarily means only that the fax data was received by the recipient's fax machine. It does not guarantee that the data was printed out for the recipient in legible form. The expert explained that printing is a separate function from transmission. The court denied DAS's motion for summary judgment, finding a triable issue of material fact as to whether defendant received actual notice of the lien. The court concluded that DAS's printed report of a successful fax transmission was not admissible to establish defendant's successful receipt of the fax. Plaintiff's motion for summary judgment denied.

LAND USE AND PLANNING

Plaintiff Failed to Exhaust Administrative Remedies Before Challenging Denial of Special Permit Application

CASE: Farmington-Girard, LLC v. Planning and Zoning Commission of the City of Hartford
COURT: Hartford J.D.
DOC. NO.: CV15-6057526
COURT OPINION BY: Berger, J.
DATE: September 11, 2017 • **PAGES:** 23

Plaintiff's failure to exhaust administrative remedies barred its appeal from an adverse decision of the local zoning board. The court

dismissed plaintiff's appeal. In 2012, plaintiff filed an application for a special permit to operate a drive-through fast food restaurant on its premises. Plaintiff was advised that its application was incomplete and additional information was needed. Two years later, on October 20, 2014, plaintiff submitted the additional information. Khara Dodds, the director of the planning division, notified plaintiff that its 2012 application had been declared void as incomplete, and plaintiff needed to submit a new application. At about the same time, defendant planning and zoning commission held hearings regarding amendments to the town maps. Those amendments were subsequently approved and adopted. The amendments changed the zoning of plaintiff's property so as to preclude its use as a fast food drive-through restaurant. Plaintiff appealed the amendments and zoning map changes, as well as the ruling that its 2012 special permit application was void. The court found the amendments and zoning map changes were invalid due to defendant's failure to comply with statutory notice requirements. This left the question of whether plaintiff had a valid special permit application pending on October 20, 2014. According to Dodds, the application was void, and the court found she had the authority to make that decision. She was, the court found, the individual charged with enforcement of the applicable regulations. If plaintiff disagreed with that decision, or with Dodds' authority to make that decision, it needed to file a timely appeal with the zoning board of appeals. It had not done so. Accordingly, its appeal to the court had to be dismissed for failure to exhaust administrative remedies.

No Error in Zoning Boards Approval of Business Application

CASE: One Elmcroft Stamford, LLC v. Zoning Board of Appeals of the City of Stamford
COURT: Stamford/Norwalk J.D., at Stamford
DOC. NO.: CV16-6030359
COURT OPINION BY: Adams, J.T.R.
DATE: December 13, 2017 • **PAGES:** 9

A local zoning board of appeals did not apply an erroneous standard in granting an application to operate a business at a certain location, despite neighbors' objections. The court dismissed plaintiff's appeal from the zoning board's decision. Defendant zoning board approved a business owner's application to operate a used car business at a location in Stamford. Plaintiff, a neighboring property owner, appealed that decision, arguing that the zoning board had erred in approving the application despite the planning board's unanimous recommendation that it be denied because the business was not in keeping with the character of the neighborhood. Plaintiff also argued that defendant failed to consider the fact that the applicant intended to use the property primarily for car repairs, rather than sales. The court dismissed the appeal, finding that the zoning board properly considered the entirety of the record in granting the application. The applicant did not hide his intention to use the property primarily for car repairs. To the contrary, he openly acknowledged that fact, and stated that used car sales were only a small part of his business. The zoning board took this fact into consideration in making its decision. Appeal dismissed.

LAND USE AND PLANNING • REGULATIONS

Zoning Board Properly Denied Permit to Operate Off-Site Enterprise From Business Owners Home

CASE: Watson v. Zoning Board of Appeals of the Town of Glastonbury
COURT: Hartford J.D., at Hartford
DOC. NO.: CV16-6067623
COURT OPINION BY: Domnarski, J.
DATE: September 12, 2017 • **PAGES:** 18

Plaintiff failed to show that running a large, off-site enterprise from her home was a "customary home occupation" for which she was entitled to a permit. The court denied plaintiff's appeal from her local zoning board's decision to deny her permit application. Plaintiff owns and operates a transportation service. The service has 41 vehicles and 49 employees and is based in a facility in East Hartford. Plaintiff resides in Glastonbury, and runs the business from her home. Prior to November 2015, vehicles from the

service arrived at and departed from plaintiff's home at frequent intervals throughout the day. On several occasions, plaintiff's employees visited plaintiff's home for social activities, parking their company vehicles on her street. Plaintiff's neighbors complained to the city about the traffic and parking congestion. The zoning officer issued a cease and desist order against plaintiff. Plaintiff thereafter changed her business practices to eliminate the traffic and parking issues. She directed that business vehicles no longer come to her home, and she restricted visits by employees. Plaintiff applied for a permit to conduct a customary home occupation at her residence. The zoning officer denied the application, not the past complaints and the likelihood that the previous issues would continue. Plaintiff appealed the zoning officer's decision to defendant zoning board, without success. She thereafter appealed to the court, arguing that her application was improperly denied based on past conditions that she had since remedied. The court dismissed plaintiff's appeal, finding that the zoning board had properly denied plaintiff's application based on her failure to show that the occupation in which she sought to engage qualified as a "customary home occupation," that is, an occupation that was traditionally or historically engaged in by home entrepreneurs. Notably, plaintiff was not running a small business that was located within the confines of her home. Rather, she was running a business with almost 50 employees and a significant off-site presence. Because plaintiff failed to show that this was a typical home occupation, the zoning board acted within its authority in denying her application. Appeal dismissed.

LITIGATION

Plaintiff Enjoined from Commencing Litigation Without Prior Court Approval

CASE: Sims v. Horneck
COURT: Hartford J.D., at Hartford
DOC. NO.: CV17-5043786
COURT OPINION BY: Peck, J.T.R.
DATE: November 29, 2017 • **PAGES:** 8

Plaintiff's litigious conduct warranted enjoining her from commencing new litigation without the prior approval of a superior court judge. The court granted defendant's motion for an injunction. After filing a successful motion to strike a complaint filed against her by plaintiff, defendant moved for an injunction to preclude plaintiff from commencing any future litigation without the prior permission of a superior court judge. In support of her motion defendant provided a list of 35 small claims actions filed by plaintiff since 2005 against 78 defendants. Thirty-two of those lawsuits had been commenced since 2015. Of the 35 lawsuits, 17 had been removed to superior court, 19 had been dismissed, seven had resulted n judgment for the defendants, and two had been nonsuited. Of the six cases still pending, motions to dismiss had been filed in five of them. many of the actions were related to actions previously filed against plaintiff in the Harford Housing Court. The defendants in plaintiff's small claims actions included housing court clerks, marshals, judges, and the housing court itself. The court granted defendant's motion for an injunction, finding, under the circumstances, that no lesser sanction was likely to be effective. The court found plaintiff's litigation to be incessant, harassing, and duplicative. Further, plaintiff's pleadings were routinely illegible and incomprehensible. Plaintiff demonstrated neither the willingness nor the ability to abide by rules of practice, state law, or orders of the court. Motion for injunction granted.

MEDICAL MALPRACTICE

Prescribing of Birth Control Involved Exercise of Medical Judgment

CASE: Williams-Coleman v. Yale Medical Group
COURT: New Haven J.D., at New Haven
DOC. NO.: CV61-6066087
COURT OPINION BY: Wilson, J.
DATE: December 04, 2017 • **PAGES:** 13

A medical practitioner's alleged negligence in deciding which form of birth control to prescribe to a patient involved the exercise of medical judgment; the complaint against her

accordingly sounded in medical malpractice. The court dismissed the complaint for lack of jurisdiction due to plaintiffs' failure to provide a medical opinion letter. Plaintiff Kachainy Williams-Coleman suffered from developmental delays and cognitive challenges. When she became old enough to become sexually active, defendant Denise Wagner, a nurse practitioner, prescribed and administered Depo-Provera, an injectable form of birth control. When 21-year old Kachainy later refused her quarterly Depo-Provera injunction, Wagner switched her to an oral contraceptive, despite Kachainy's history of noncompliance with taking medications. Wagner allegedly knew that Kachainy was having unprotected sex, thought babies were "cute," and wanted to have a baby to make her boyfriend happy. Not long thereafter, Kachainy became pregnant. She and her guardian sued defendants for negligence, alleging Wagner should have known that Kachainy was unlikely to take the oral contraceptives prescribed by Wagner. Defendants moved to dismiss, arguing that plaintiffs' claim sounded in medical malpractice and thus needed to be supported by a medical opinion letter. The court agreed and granted defendants' motion to dismiss. The negligence alleged was substantially related to Wagner's medical treatment of Kachainy and involved the exercise of Wagner's medical judgment. State law thus required that the complaint be supported by a medical opinion letter. Because plaintiffs' failure to produce such a letter deprive the court of jurisdiction.

MOTOR VEHICLE TORTS • PERSONAL INJURY

Driver Who Failed to Exit Intersection Before Another Driver Entered on Green Light Was Liable For Collision

CASE: Echevarria v. Cavanaugh
COURT: Waterbury J.D., at Waterbury
DOC. NO.: UWY-CV-16-6031654-S
COURT OPINION BY: Agati, J.
DATE: December 13, 2017 • **PAGES:** 5

A driver who had entered an intersection on a green light but who then failed to exit the intersection before another driver entered the intersection on a green light was liable for a collision that occurred when the first driver collided with the second driver while the first driver was attempting to exit the intersection. The Superior Court entered judgment in favor of plaintiff, the second driver. Defendant entered a traffic intersection on a green light. She stopped in the middle of the intersection, under the light, while she waited for another vehicle to make a left-hand turn. While defendant was still in the intersection, plaintiff entered the intersection at a right angle when the traffic light facing him turned green. As plaintiff drove through the intersection, plaintiff's car was struck by defendant's car. Plaintiff sued defendant, alleging negligence. At a court trial, the parties disagreed as to who was negligent. The court heard testimony from a city traffic engineer. According to the traffic engineers, the traffic light had no arrows; motorists faced lights that were either all red or all green. He also testified that there was a three-second delay to yellow and then a one-second delay to red when the traffic light changed. The Superior Court found defendant liable. The court based its decision on defendant's testimony that she in fact did move into the plaintiff's lane of travel at a time when 1) plaintiff had the green light (which was not disputed) and 2) plaintiff was proceeding through the intersection. Thus, the court concluded, defendant's action in proceeding into plaintiff's lane of travel was negligent. On the damages issue, the court took notice of plaintiff's medical treatment and expenses. He received treatment for cervical sprain, and his chiropractor rated him with a permanent partial disability to his cervical spine. Plaintiff also described limitations on his ability to enjoy some of his life's activities as a result of this injury. He was able to continue to work through his rehabilitation. The court awarded $5,979.84 in medical bills and noneconomic damages of $6,600.00, for a total of $12,579.84.

PUBLIC RECORDS

Judicial Branch Records Pertaining to Non-Administrative Matters Not Public Records

CASE: Sargent v. Freedom of Information Commission
COURT: New Britain J.D., at New Britain
DOC. NO.: CV16-5018092
COURT OPINION BY: Shortall, J.T.R.
DATE: December 13, 2017 • **PAGES:** 15

The judicial branch records sought by plaintiff were not subject to disclosure under the Freedom of Information Act. The court dismissed plaintiff's appeal from the Freedom of Information Commission's decision denying him access to the records. Plaintiff filed a complaint with defendant Freedom of Information Commission regarding the judicial branch's refusal to provide him with, among other things, documents pertaining to branch policies to protect families from sexual abuse by family court appointees, as well as notices, agendas, and minutes of meetings of the branch's family re-engineering committee and guardian ad litem subcommittee. The commission found that the documents requested by plaintiff did not pertain to an administrative function of the branch and thus were not "public record" subject to disclosure under the Freedom of Information Act. Plaintiff appealed that ruling. The court dismissed plaintiff's appeal, finding that the records at issue related to the adjudicatory function of the courts and thus were categorically exempt from the provisions of the Act. Further, whether or not the records were related to the branch's adjudicatory function, they were unrelated to any of the branch's administrative functions and thus were exempt from disclosure under the Act. Appeal dismissed.

REAL ESTATE • TAX

Court's Own Application of Income and Sales Approaches to Property Valuation Generated Values Midway Beween Parties' Valuations

CASE: Stone Realty Assocs., LLC v. City of Norwalk
COURT: New Britain J.D., at New Britain
DOC. NO.: HHB CV 15603021785
COURT OPINION BY: Aronson, J.T.R.
DATE: December 08, 2017 • **PAGES:** 8

A trial court referee's own application of the income approach and sales approach to property valuations generated a value midway betwen the valuations reached and advocated by the opposing parties' experts. The Superior Court entered judgment in favor of the plaintiff. Defendant City of Norwalk assessed two real estate parcels at a rated fair market value that plaintiff, the properties' owner, disputed. Plaintiff appealed. George Sherwood, plaintiff's appraiser, opined that the the fair market value (FMV) was $1.7 million. Peter Vimini, the city's appraiser, arrived at a FMV of $2.9 million. Sherwood's valuation was based on a price per square foot (SF) of $90/gross building area (GBA); Vimini's valuation was based on a price/SF of $151/SF of GBA. The Superior Court granted judgment in plaintiff's favor, but at a valuation of $2.3 million, based on its own application of the two valuation approaches. First, based on all of the comparable sales selected by the parties' experts, the court made its own determination that $116/SF of GBA was a fair compromise. That valuation recognized that the properties consisted of two detached buildings including a large warehouse with high ceilings and a loading dock, generating a final value of almost $2.3 million. Turning to the income approach, the court rejected Vimini's use of gross rentable area in favor of Sherwood's use of net rather than gross. In the court's view, Sherwood's approach was more in line with the market for property where the subject properties were located. Sherwood based his valuation on a 15 percent vacancy rate, while Vimini's used a 5 percent vacancy rate. The court expressed doubt regarding Vimini's use of rates prevailing throughout the Norwalk region. The court used Sherwood's estimate of potential gross income and deducted the vacancy factor to get an effective gross income, from which it deducted Sherwood's operating expense to generate a net operating income (NOI). The court then divided that NOI by the effective capitalization rate to reach a FMV value of a little more than $2.3 million. The

fact that both approaches generated the same FMV supported the court's conclusion that its valuation was in line with the market for comparable properties.

U.S. DISTRICT COURT

CIVIL PROCEDURE

Court Allows Amendment of Complaint to Clean Up Venue

CASE: United States ex rel Chorches v. American Medical Response, Inc.
COURT: U.S. District Court for Connecticut
DOC. NO.: 3:12-cv-921
COURT OPINION BY: Shea, J.
DATE: January 03, 2018 • **PAGES:** 5

Paul Fabula initially sued American Medical under the False Claims Act, both as a relator on behalf of the United States and on his own behalf, asserting a claim for FCA retaliation. When Fabula filed for bankruptcy protection, the trustee (Chorches) continued to pursue the case. The district court dismissed both claims, but the Second Circuit reversed. On remand, Chorches and Fabula moved to file an amended complaint. They proposed substituting Fabula for Chorches as relator on the FCA claim (because the bankruptcy proceeding had concluded and the claim had reverted to Fabula), joining the retaliation claim and the FCA claim in a single pleading, and making some other non-substantive "clean-up" changes. American Medical opposed the "clean up" changes, arguing that, by changing the basis for venue from "AMR's wrongful acts occurred in Connecticut" to "a substantial part of the proscribed events or omissions" occurred in Connecticut, Fabula was expanding the geographic scope of the case, which would prejudice American Medical. The court rejected American Medical's argument. It held that the proposed change simply mirrored the venue language in 28 USC §1391 and corrected an error in the prior pleading, which cited to the wrong federal statute. Moreover, the court explained, even under the language in the prior pleading, there were factual allegations that would have entitled plaintiffs to discovery beyond Connecticut. Finally, the court rejected American Medical's argument that the proposed change did not satisfy Rule 9(b)'s heightened pleading standard, holding that this requirement did not apply to allegations forming the basis for venue.

CIVIL RIGHTS • GOVERNMENT

Allegations of Anxiety and Loss of Sleep Sufficient to Assert Claim for Negligent Infliction of Emotional Distress

CASE: Boccanfuso v. Zygmant
COURT: U.S. District Court for Connecticut
DOC. NO.: 3:17-cv-00162
COURT OPINION BY: Bryant, J.
DATE: December 28, 2017 • **PAGES:** 8

Boccanfuso sued two Town of Westport officials and a Westport police officer under §1983 and for reckless infliction of emotional distress, negligent infliction of emotional distress, false imprisonment and malicious prosecution. The suit came after Boccanfuso was arrested, prosecuted and acquitted for reckless endangerment and failure to abate a fire hazard. The defendants moved to dismiss the reckless infliction of emotional distress and negligent infliction of emotional distress counts. Boccanfuso did not object to dismissal of the reckless infliction of emotional distress claim. With respect to the negligent infliction of emotional distress claim, the defendants argued that the complaint did not allege facts showing that the alleged emotional distress was severe enough that it might result in illness or bodily harm. The court disagreed. It held that the allegations of anxiety and loss of sleep, even without a claim of attendant physical injury, were sufficient to avoid dismissal, citing other Connecticut decisions. The court distinguished the decisions cited by the defendants on the basis that they were decided at summary judgment, and were thus analyzed under a different (and

higher) standard. The court also rejected New York infliction of emotional distress decisions cited by the defendants because the case was subject to Connecticut, and not New York, law.

CIVIL RIGHTS • REGULATIONS

Plaintiffs Attack on City Ordinance Largely Dismissed by Court

CASE: 62-64 Kenyon Street, Hartford LLC v. City of Hartford
COURT: U.S. District Court for Connecticut
DOC. NO.: 3:16-cv-617
COURT OPINION BY: Bolden, J.
DATE: December 29, 2017 • **PAGES:** 21

Plaintiffs sued the City of Hartford, alleging that it specifically enacted an ordinance, which required a rooming house owner to reside at the residence, to target plaintiff, who did not reside in Hartford. The defendants moved for summary judgment. The court first held that the individual member of the LLC lacked standing to claim damages because the alleged damages (diminution to the value of the property caused by the city's allegedly unconstitutional ordinance) were suffered by the LLC, which was a separate and distinct legal entity. The court next held that the ordinance survived the rational basis review and that the LLC had failed to meet its burden to demonstrate that it was treated differently from other similarly situated entities. The court also rejected the LLC's equal protection/selective enforcement argument, finding that the LLC had adduced no evidence about comparators. The court next held that the LLC failed to adequately oppose the city's motion for summary judgment on the takings, commerce clause, vagueness and due process claims alleged in the complaint, and instead appeared to rest on the allegations in the complaint, which was insufficient at summary judgment. Next, the court granted the defendants' motion on the fair housing act claim, finding that there was no competent evidence in support of this claim. Finally, having dismissed all of the federal claims, the court declined to exercise supplemental jurisdiction over the remaining state-law claim, alleging a violation of the Connecticut Fair Housing Act. It accordingly dismissed this claim, without prejudice to it being refiled in the state court.

CONTRACTS • DISCOVERY

Court Resolves Discovery Dispute over Plaintiffs Inspection of Vehicle

CASE: Laber v. Long View R.V., Inc.
COURT: U.S. District Court for Connecticut
DOC. NO.: 3:17-cv-542
COURT OPINION BY: Merriam, J.
DATE: December 28, 2017 • **PAGES:** 10

Laber alleged that a new recreational vehicle he purchased from the defendants was delivered with defects. After he allegedly notified defendants about the defects, they took possession of the RV and attempted to repair it. Laber alleged that these repairs were inadequate, so that he refused to retake possession of the RV, and instead revoked his acceptance and filed suit. During discovery, Laber moved to compel the defendants to produce the RV to Laber's expert for inspection and so that the expert could conduct a road test. The defendants moved for a protective order, asking the court to order a joint inspection, because they feared Laber's expert might attempt to contrive other defects during the inspection. The court denied the defendants' request, concluding that their concerns could be addressed by allowing them to monitor the inspection, in person or via videotape, to which Laber did not object. The court also denied defendants' motion to restrict the inspection to the "slide-out" system in the RV, which was Laber's major complaint, finding that they did not show a full inspection would subject them to annoyance, embarrassment, oppression, or undue burden or expense. Finally, although the defendants argued that they should not be required to provide temporary dealer license plates for the road test, because it was not clear they owned the vehicle, the court held that these concerns regarding registration of the RV did not constitute good cause to prohibit the road test.

GOVERNMENT • LABOR LAW • WRONGFUL DEATH

Suit Foreclosed by Sovereign Immunity

CASE: Estate of Skyler Justice Anderson-Coughlin v. United States of America
COURT: U.S. District Court for Connecticut
DOC. NO.: 3:16-cv-01492
COURT OPINION BY: Meyer, J.
DATE: December 28, 2017 • **PAGES:** 13

On November 10, 2013, Skylar Anderson-Coughlin was fatally killed when his car was struck in the rear by a tractor trailer that was hauling US mail. The driver worked for Stepanov Trucking, a subcontractor for Beam Brothers, which contracted with the US Postal Service to haul bulk mail along specified routes. Anderson-Coughlin's parents sued the United States under the Federal Tort Claims Act, alleging that it was vicariously liable for the driver's conduct and that it was independently negligent in selecting Beam and screening the driver. The United States moved to dismiss the suit for lack of jurisdiction, arguing that the plaintiffs had not alleged a claim that fell within the jurisdiction of the FTCA. The court held that the driver was an independent contractor, and not an employee of the government, because the USPS did not exercise the degree of control necessary to render him an employee. As such, it held that the United States could not be vicariously liable for the driver's conduct. With respect to the direct negligence claim, the court agreed that the USPS' alleged negligence fell within the scope of the discretionary function exception to FTCA liability, which provides that the government has sovereign immunity for claims based upon the exercise or failure to exercise a discretionary function or duty. The court held that the USPS' selection and retention of Beam was a discretionary choice, as was the USPS's supervision of Beam's compliance with safety requirements and its approval of the driver. As a result, the court granted the defendants' motion.

INSURANCE LITIGATION

Defective Concrete Property Damage Claim To be Decided by Jury

CASE: Gabriel v. Liberty Mutual Fire Insurance Co.
COURT: U.S. District Court for Connecticut
DOC. NO.: 3:14-cv-1435
COURT OPINION BY: Bolden, J.
DATE: December 29, 2017 • **PAGES:** 20

Several years after moving into their house, the plaintiffs noticed significant cracking in the basement walls. They consulted with a contractor, who advised them the cracking was likely due to defective concrete, which affected many other homes in the area. The plaintiffs made a claim on their homeowners' carrier, Liberty Mutual. After visiting the property and documenting the damage, Liberty Mutual denied the claim, citing policy exclusions. The plaintiffs sued Liberty Mutual for breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Connecticut Unfair Insurance Practices Act and Unfair Trade Practices Act. After discovery, Liberty Mutual moved for summary judgment on all counts. The court rejected Liberty Mutual's argument that there needed to be "imminent" collapse to come within the policy, holding this interpretation had been rejected by the Connecticut Supreme Court. Because that court had already decided the issue, the court held, there was no need to certify the question to that court. The court next held that there were disputed issues of material fact on whether substantial impairment of the walls had occurred, and when any such impairment occurred, that made summary judgment inappropriate. The court held, however, that there was insufficient evidence to allow a jury to conclude that Liberty Mutual denied the claim in bad faith, so that Liberty Mutual was entitled to summary judgment on the implied covenant claim. Finally, the court granted Liberty Mutual's summary judgment motion regarding the CUTPA/CUIPA claims, holding there was insufficient evidence to allow them to proceed to a jury.

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EDITORIAL BOARD

Danger of Normalized Malignancy: Attorneys Must Speak Out

On Jan. 3, Dan Rather denounced President Donald Trump's tweet regarding North Korea boasting that his nuclear button was bigger than Kim Jong Un's button as "so far beyond any norm of advisable presidential behavior as to defy reason."

This comment harkens back to April 2017 when, after meeting at Yale University, a group of 27 psychiatrists, psychologists and mental health experts opined that as "witnessing professionals" they had an ethical duty to warn people about the danger of Trump.

The danger to which they referred has been coined "malignant normality" by psychiatrist Dr. Robert J. Lifton, one of the 27 and a researcher into the psychological effects of war and political violence. This term grew out of Lifton's work on Nazi war crimes in which he identified the principle that when ordinary people are continuously exposed to evil ideologies over a period of time—and even though they believe they are resisting the evil ideas, they become socialized to them—resulting in a climate that makes such behavior socially acceptable and perceived as normal.

Through this process, these destructive influences can then be inculcated into an otherwise reasonable society and can lead that society to do things it would otherwise never do. Through this socialization process, Nazi doctors and other professionals were "reduced to being automatic servants of the existing regime as opposed to people with special knowledge balanced by a moral baseline as well as the scientific information to make judgments."

According to Lifton, Trump's presidency is earmarked by a level of behavior that has been unthinkable for presidents in the past and is little by little morphing into expected conduct for

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the president. Many people who were once shocked by Trump's behavior are slowly becoming accustomed to it. This has resulted in a "gradual begrudging acceptance of his crude and belligerent treatment of others from foreign leaders to fellow Americans which has resulted as the new normal in American politics," in other words, a state of malignant normality is being created.

Lifton describes the current political climate as normalizing Trump's behavior when members of both parties fail to explicitly criticize each of his aberrant behaviors.

> **The danger to which they referred has been coined "malignant normality" by psychiatrist Dr. Robert J. Lifton, one of the 27 and a researcher into the psychological effects of war and political violence.**

With the president's problematic behavior escalating, one would expect people to be speaking out more than ever. His incessant and continuous extreme communication and behavior, however, have seemingly worn people down and perhaps makes protest seems fruitless. But speaking out is more important now than ever to halt the further normalizing and acceptance of his behaviors.

As Lifton asserts, like the mental health professionals who have a duty to warn about the danger of this presidency, all professionals, including lawyers, as "witnessing professionals," also have an obligation to contest the president's problematic behavior "rather than being servants of the powers responsible for the malignant normality … we must be people with a conscience in a very fundamental way."

We, as lawyers, trained in the law, including on issues of justice and constitutionality which are the bedrock of our democracy, have a heightened duty to speak out about aberrant presidential behavior that threatens to erode that very democracy. ■

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