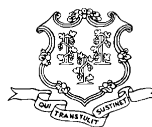
CONNECTICUT LAW JOURNAL



Published in Accordance with General Statutes Section 51-216a

VOL. LXXX No. 48 | May 28, 2019 | 145 Pages

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CASES ARGUED AND DETERMINED

IN THE

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OF THE

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JOHN P. TUOHY ET AL. *v.* TOWN OF GROTON ET AL. (SC 20019)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiffs, owners of certain properties located in a particular residential neighborhood in the town of Groton, appealed to the trial court pursuant to statute (§ 12-119), seeking a reduction in the assessments to their properties resulting from a townwide revaluation conducted by the defendants, the town and its assessor. The plaintiffs' properties are each located in a planned community with exclusive access to certain amenities including a beach and a restaurant. The town hired T Co., a certified mass appraisal vendor, to assist with the revaluation. In connection with the revaluation, T Co.'s employees went to each property to gather information. T Co. also sought to confirm the physical characteristics of each property through individualized mailings. Once the information collected was entered into a database used to generate property values, T Co. produced a preliminary property record and sent its employees to each property again to ensure accuracy. T Co. subsequently conducted a preliminary ratio test, which involved comparing the median sale price resulting from certain arm's-length transactions and the median total value for the properties in the plaintiffs' neighborhood, which already reflected an adjustment factor that had been applied in the preceding revaluation. T Co. determined that the resulting median assessment to sales ratio for the plaintiffs' neighborhood fell outside of the acceptable range, and, consequently, T Co. and the town concluded that an increase in the adjustment factor was appropriate and necessary to bring the assessed values of the properties in the plaintiffs' neighborhood closer to fair market values. In challenging the defendants' assessments, the plaintiffs claimed, inter alia, that the defendants' uniform application of the adjustment factor to increase the assessed values of all of the properties in their neighborhood without further individualized consideration of each property violated § 12-119. The trial court concluded that the defendants' uniform application of the adjustment factor to the properties in the plaintiffs' neighborhood did not violate § 12-199, rejected the plaintiffs' argument that the defendants had disregarded a legal duty by applying ratio testing standards to specific neighbor-

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Chief Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

hoods, and credited testimony from both the assessor and T Co.'s project supervisor that the purpose of the higher adjustment factor was to adjust the assessments in order to bring them closer to fair market values. The trial court accordingly rendered judgment in favor of the defendants, from which the plaintiffs appealed. *Held* that the plaintiffs could not prevail on their claim that they were entitled to tax relief under § 12-119, this court having concluded that the defendants' uniform application of the adjustment factor to the properties in the plaintiffs' neighborhood was not illegal: although the plaintiffs' correctly observed that townwide ratio testing is required by regulation (§ 12-62i-3) prior to finalizing a reevaluation, reading that regulation to preclude the use of ratio testing or the application of adjustment factors specific to particular neighborhoods during the mass appraisal process would require reading additional language into its text, would be inconsistent with text in related regulations, and would conflict with another regulatory provision (§ 12-62f-4 [d]) that specifically contemplates such testing by neighborhood; moreover, the defendants' use of a ratio study and direct equalization via an adjustment factor, as applied to a specific neighborhood, during the mass appraisal process was supported by appraisal standards set forth in various publications from professional associations, including the Appraisal Standards Board of the Appraisal Foundation and the International Association of Assessing Officers; furthermore, certain data presented at trial demonstrating a decrease in home sales prices in the plaintiffs' neighborhood in the years preceding the revaluation were insufficient to establish illegality in the absence of evidence of the defendants' misfeasance or malfeasance, and the plaintiffs failed to prove that the adjustment to the appraised value of their properties actually resulted in a manifest overvaluation of those properties relative to true and actual fair market values.

Argued November 16, 2018—officially released May 28, 2019

Procedural History

Appeal from tax assessments relating to certain residential property owned by the plaintiffs, brought to the Superior Court in the judicial district of New London, and transferred to the judicial district of New Britain, where the court, *Cohn, J.*, granted the plaintiffs' motion for class certification; thereafter, the case was transferred to the judicial district of Hartford and tried to the court, *Moll, J.*; judgment for the defendants, from which the plaintiffs appealed. *Affirmed.*

Linda L. Morkan, with whom was *John F.X. Peloso, Jr.*, for the appellants (plaintiffs).

Eileen Duggan, for the appellees (defendants).

Opinion

ROBINSON, C. J. In this appeal, we consider whether a municipality's assessor may apply a uniform adjustment factor to a neighborhood's appraised property values during the mass appraisal process for the revaluation of real property pursuant to General Statutes § 12-62 (b),[1] as a direct equalization measure in order to

[1] General Statutes § 12-62 (b) provides: "(1) Commencing October 1, 2006, each town shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's previous revaluation became effective, provided, a town that opted to defer a revaluation, pursuant to section 12-62*l*, shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's deferred revaluation became effective. The town shall use assessments derived from each such revaluation for the purpose of levying property taxes for the assessment year in which such revaluation is effective and for each assessment year that follows until the ensuing revaluation becomes effective.

"(2) When conducting a revaluation, an assessor shall use generally accepted mass appraisal methods which may include, but need not be limited to, the market sales comparison approach to value, the cost approach to value and the income approach to value. Prior to the completion of each revaluation, the assessor shall conduct a field review. Except in a town that has a single assessor, the members of the board of assessors shall approve, by majority vote, all valuations established for a revaluation.

"(3) An assessor, member of an assessor's staff or person designated by an assessor may, at any time, fully inspect any parcel of improved real property in order to ascertain or verify the accuracy of data listed on the assessor's property record for such parcel. Except as provided in subdivision (4) of this subsection, the assessor shall fully inspect each such parcel once in every ten assessment years, provided, if the full inspection of any such parcel occurred in an assessment year preceding that commencing October 1, 1996, the assessor shall fully inspect such parcel not later than the first day of October of 2009, and shall thereafter fully inspect such parcel in accordance with this section. Nothing in this subsection shall require the assessor to fully inspect all of a town's improved real property parcels in the same assessment year and in no case shall an assessor be required to fully inspect any such parcel more than once during every ten assessment years.

"(4) An assessor may, at any time during the period in which a full inspection of each improved parcel of real property is required, send a questionnaire to the owner of such parcel to (A) obtain information concerning the property's acquisition, and (B) obtain verification of the accuracy of data listed on the assessor's property record for such parcel. An assessor shall develop and institute a quality assurance program with respect to responses received to such questionnaires. If satisfied with the results of said program concerning such questionnaires, the assessor may fully inspect only those parcels of improved real property for which satisfactory verification of data listed on the assessor's property record has not been obtained and is otherwise unavailable. The full inspection requirement in subdivision

ensure that neighborhood is not undertaxed relative to others in the municipality. The plaintiffs, John P. Tuohy and numerous other owners of real property located in the Groton Long Point neighborhood,[2] brought this class action tax appeal pursuant to General Statutes § 12-119[3] against the defendants, the town of Groton (town) and Mary Gardner, its assessor, challenging the assessed value of their properties following the revaluation conducted by the town for its October 1, 2011 grand list (2011 revaluation). The plaintiffs now appeal[4] from the judgment in favor of the defendants, rendered after a trial to the court, upholding the legality of those assessments. On appeal, the plaintiffs claim that the trial court incorrectly determined that their assessments were not manifestly excessive because the defen-

(3) of this subsection shall not apply to any parcel of improved real property for which the assessor obtains satisfactory verification of data listed on the assessor's property record."

[2] The other original plaintiffs in the present case are Mary B. Tuohy, Robert Feery, Yola Feery, David W. Nickolenko, Sr., Charlene J. Nickolenko, James J. Falcone, Linda A. Falcone, Louise H. Fisher, and Betsey F. Amador. See also footnote 7 of this opinion.

[3] General Statutes § 12-119 provides: "When it is claimed that a tax has been laid on property not taxable in the town or city in whose tax list such property was set, or that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof or any lessee thereof whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation and shall be served and returned in the same manner as is required in the case of a summons in a civil action, and the pendency of such application shall not suspend action upon the tax against the applicant. In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court. If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

[4] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

dants violated § 12-62 and numerous provisions of the Regulations of Connecticut State Agencies (regulations) promulgated by the state Office of Policy and Management (OPM); see Regs., Conn. State Agencies § 12-62i-1 et seq.; when they applied a flat, undifferentiated adjustment factor that increased the assessed value of all properties in Groton Long Point by 35 percent without individualized consideration of the unique characteristics of each property. We conclude that the defendants properly applied an adjustment factor as a direct equalization measure in connection with an assessment to sales ratio study conducted pursuant to various standards promulgated by the International Association of Assessing Officers (international association) in order to ensure that Groton Long Point bore its fair share of the town's municipal tax burden relative to the town's other neighborhoods. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, as comprehensively found by the trial court, *Moll, J.*,[5] and procedural history. "The plaintiffs are residential property owners in the Groton Long Point . . . neighborhood[6] of [the town], who, on behalf of themselves and the certified class,[7] are challenging the [2011 revaluation]. [Groton Long Point] is a planned community and comprises approximately 600 properties. When someone owns

[5] Unless otherwise noted, all references herein to the trial court are to Judge Moll.

[6] "The town is divided into thirteen residential neighborhoods. The term 'neighborhood' is defined in the revaluation regulations as 'a geographic area of complementary real property parcels that share similar locational and market value characteristics, and may be defined by natural, man-made, or political boundaries . . . .' Regs., Conn. State Agencies § 12-62i-1 (13)."

[7] The trial court, *Cohn, J.*, granted the plaintiffs' motion for class certification to make them representatives of a class that includes "[a]ll owners of taxable residential real property with buildings thereon in . . . Groton Long Point . . . between October 1, 2011, and July 1, 2013, excluding those owners who individually appealed their real property tax assessments to the Superior Court and whose appeals have reached a final judgment."

property in [Groton Long Point], he or she pays into an association and has rights to use certain amenities within the community, including the beach, docks, piers, and association buildings, which include, among other things, a restaurant. In addition, parking in [Groton Long Point] requires a permit.

"The 2011 revaluation was a mass appraisal, defined as 'the process of valuing a universe of properties as of a given date using standard methodology, employing common data, and allowing for statistical testing. Methodology that is acceptable shall include, but is not limited to, automated valuation models, adaptive estimation procedure, multiple regression analysis, statistical analysis and other generally accepted techniques . . . .' Regs., Conn. State Agencies § 12-62i-1 (10). The 2011 revaluation was overseen by . . . Gardner . . . whose position as the town assessor began in June, 2011. Gardner first worked in the town's assessor office in 1986; she became a certified assessor in 1989. The 2011 revaluation was the first revaluation that Gardner conducted as an assessor.

"To assist it with the 2011 revaluation, the town hired Tyler Technologies (Tyler), a mass appraisal vendor certified by the state to do revaluations. [See General Statutes § 12-62 (e)]. The project supervisor from Tyler with respect to the 2011 revaluation was Debra Christy . . . who also is certified to do revaluations. Christy has been employed with Tyler, although not continuously, since 1980 and has been involved with revaluations in the state of Connecticut since around 1997. Christy had some responsibility in the 2006 revaluation of Groton but was not the manager. In the 2011 revaluation, Christy was responsible for the analysis for the residential property class.

"The 2011 revaluation commenced in earnest in April, 2010, at which time Gardner was the assistant assessor

for the town. In April, 2010, the town issued a press release informing the public that a revaluation would be underway and that data collectors would be going door to door to measure the exteriors of all properties and to attempt interior inspection, if allowed. Tyler conducted its data collection using data from the 2006 revaluation and updating it. Because the 2011 revaluation was a full measure revaluation, Tyler [employees] knocked on every door and did an exterior measurement of every property. To the extent access to the interior was not granted, Tyler sent the property owner a callback letter to inquire whether the owner would make a scheduled appointment for an interior inspection. Tyler then prepared and distributed data mailers for each property; such data mailers reflected the property's physical characteristics that would be used in the revaluation. Property owners were asked to contact Tyler if any information required correction. Any changes resulting from the data mailer process were inputted into the Computer Assisted Mass Appraisal (CAMA) software system, which the town uses for its revaluations to generate property values. CAMA is certified by the state of Connecticut and is an example of an 'automated valuation model,' as that phrase is used in § 12-62i-1 (10) [of the regulations], which sets forth the definition of '[m]ass appraisal.' In CAMA, with respect to each property, a value is assigned to the land,[8] and a value is assigned to any improvements or structures using the cost approach (i.e., the cost of replacement with an adjustment for depreciation). The improvements value comprises a dwelling value and an outbuilding value. One arrives at total value by adding land value and improvements value.

"Tyler then performed a prereview, which involved producing all of the property record cards that were in

[8] "With respect to [Groton Long Point], the land values were established using three vacant lot sales."

the system and having a certified field person go out to each property to conduct what Tyler called a 'windshield prereview check' to ensure that the information on the cards was accurate.

"After all data were collected and corrected during the eighteen-month period following the initial press release, Tyler engaged in preliminary ratio testing, which required compiling a validated sales set (i.e., sales involving actual warranty deeds) using a two year lookback period because of the number of sales.[9] With respect to [Groton Long Point], the sales set contained eighteen validated, arm's-length transactions. Tyler compared the median of the sales identified for each neighborhood against the median for the total value for the neighborhood. A 1:1 ratio, meaning the medians are equal, would be considered ideal. Tyler performed preliminary ratio testing for each of the thirteen neighborhoods within the town.[10] The same process was followed in 2006.

"On October 31 and November 1, 2011, Christy conducted four computer runs to create values for the [Groton Long Point] residential properties using the CAMA software. The 2006 revaluation had used an adjustment factor of 1.2 (i.e., a 20 percent increase in value) in setting the improvement values of the [Groton Long Point] properties. Those adjustments were already reflected in the CAMA database that Christy used in conducting her analyses. Because an adjustment factor of 1.2 was used in 2006 with respect to [Groton Long Point] improvement values, Christy used that adjustment factor as a starting point. Application of an adjustment factor of 1.2 yielded a median assessment to sales

[9] "As part of this work, Tyler sent sales verification documents to the town to determine whether there were any unknown features within the validated sales set."

[10] "Christy has conducted sales ratio studies by neighborhood, in addition to townwide, in every revaluation she has handled."

ratio (ASR)[11] of 88.31 percent for [Groton Long Point]. Christy found this ratio to be outside an acceptable range because it fell under 90 percent.[12] In this regard, Tyler and the town deemed [Groton Long Point] to be an outlier. Specifically, in reaching this conclusion, Christy relied on the [international association's][13] principle that, when looking at the level of assessment, if market value is 100 percent, the [median] ASR should be plus or minus 10 percent around market value. Applying an adjustment factor of 1.4 yielded a median ASR of 95.08 percent. Applying an adjustment factor of 1.4 with a waterfront adjustment yielded a median ASR of 97.56 percent. Finally, application of an adjustment factor of 1.35 yielded a median ASR of 92.03 percent.

"Tyler and the town concluded that applying an adjustment factor of 1.35 to the dwelling values within [Groton Long Point] was appropriate and necessary to reach fair market value. Christy reasoned that other variables, including a coefficient of dispersion, fell within a preferred range to reach uniformity. [Tyler did not physically reinspect any of the Groton Long Point properties prior to applying the 1.35 adjustment factor.][14]

[11] "An ASR results from the comparison between the assessed value that the CAMA program generates and the validated actual sale."

[12] "Christy even testified that, in her view, to adopt the 1.2 adjustment factor would have been unethical."

[13] "The [international association] is an international group that adopts standards that appraisers in revaluation use."

[14] We note that the trial court's memorandum of decision contains the following finding: "After changing the 1.2 factor to a 1.35 factor, Tyler did a 'field review' of all the values that resulted (*meaning they went out* and reviewed every property in [Groton Long Point] to ensure that the new computer generated values appeared to be full and fair market value for the whole sample)." (Emphasis added.) This finding is, however, inconsistent with the trial court's subsequent observation that, "at the time Tyler [and the] the town conducted the preliminary ratio tests that revealed a median ASR of 88.31 percent for [Groton Long Point], they were satisfied with the data collection concerning the [Groton Long Point] properties that had occurred over the [eighteen] month period prior thereto and believed that *there was no need to physically reinspect* each [Groton Long Point] prop-

"Christy conducted sales ratio studies with respect to each of the other twelve neighborhoods. Using a 1.0 factor, each neighborhood's median ASR landed above 90 percent (and below 100 percent market value). For each of the other neighborhoods, the resulting median ASRs were as follows:

1010—Center Groton 91.80 percent
1020—City of Groton 92.99 percent
1021—City of Groton—Eastern 96.43 percent
1030—Poquonock Bridge 96.28 percent
1040—Mystic 94.10 percent
1041—Mystic Village 94.37 percent
1050—Noank 95.08 percent
1051—Noank Village 94.69 percent
1060—Old Mystic 96.46 percent
1061—Old Mystic—River Road 95.14 percent
1080—West Pleasant Valley 95.73 percent
1090—Mumford Cove 94.78 percent

Because these median ASRs fell above 90 percent, and therefore were deemed acceptable, no adjustments were made.

"Thereafter, Tyler entered into what it called the final review phase. Because the town had elected to use ratio testing standards, and not procedural testing standards, Christy conducted ratio testing to residential property townwide to assure satisfaction of the requirements of § 12-62i-3 (b) [of the regulations]. Such testing to such property class on a townwide basis resulted in those criteria being met on the first try. Therefore, no further analysis was performed pursuant to § 12-62i-3 (c). The town subsequently submitted to [OPM] the statutorily required certification of compliance, which was signed

erty." (Emphasis added.) See footnote 18 of this opinion. We agree with the plaintiffs that the first finding on this point is clearly erroneous, in contrast to the second finding, which is supported by the record—namely, testimony from both Christy and Gardner indicating that no physical inspection of the subject properties was performed after Christy ran the various CAMA scenarios and changed the adjustment factor from 1.2 to 1.35.

by Christy and Gardner and which reflected that the town utilized ratio testing standards."[15] (Footnotes added and in original.)

The plaintiffs subsequently brought this class action pursuant to § 12-119, seeking reduction of the assessments on the relevant properties in Groton Long Point. The plaintiffs claimed, inter alia, that the "uniform application of the 1.35 adjustment factor to residential buildings" violated § 12-119 because (1) "the application of a fixed percentage factor to increase assessments without making any allowance for individual differences in properties has been widely condemned by the courts of this state," (2) "the basic deficiency of such a valuation procedure is the failure to consider all of the elements which may reasonably affect the value of the property," (3) "the assumption that residential buildings in Groton Long Point are worth 35 percent more than comparable structures elsewhere in the town, including but not limited to structures in the sections of town classified as Mumford Cove, Mystic Village, and Noank Village, is arbitrary, unreasonable, and without foundation in fact," and (4) "the application of the fixed percentage factor by the assessor to increase the assessments on properties in Groton Long Point cannot reasonably be found to fulfill her statutory duty to determine the true and actual valuation of each individual property, in violation of [General Statutes] § 12-64 . . . ."

Following certification of the class; see footnote 7 of this opinion; the case was tried to the court.[16] After

[15] "The parties stipulated that, had the town applied a 1.0 factor to [Groton Long Point], the resulting residential property class values would have passed the ratio testing standards set forth in the OPM regulations."

[16] The trial court, *Miller, J.*, previously had denied the parties' motions for summary judgment, concluding that the "opinions of dueling appraisal experts" presented a genuine issue of material fact with respect to the manifest excessiveness of the assessments and whether the application of the 1.35 factor to all of the properties in Groton Long Point disregarded statutory requirements to "determine the true and actual valuation of each individual property . . . ."

conducting a comprehensive review of the governing statutory and regulatory framework, and particularly the ratio testing standard set forth in § 12-62i-3 of the regulations[17] for evaluating the performance of the revaluation process, the trial court concluded that the "1.35 adjustment factor applied to the [Groton Long Point] dwelling values did not violate § 12-119." In so concluding, the trial court rejected the plaintiffs' argument that the defendants had disregarded a legal duty insofar as the ratio testing standards may be applied only on a townwide basis, rather than to specific neighborhoods on a preliminary basis. The trial court also rejected the plaintiffs' reliance on *Chamber of Commerce of Greater Waterbury, Inc.* v. *Waterbury*, 184

[17] OPM promulgated this regulation pursuant to General Statutes § 12-62 (g), which provides: "The secretary shall adopt regulations, in accordance with the provisions of chapter 54, which an assessor shall use when conducting a revaluation. Such regulations shall include (1) provisions governing the management of the revaluation process, including, but not limited to, the method of compiling and maintaining property records, documenting the assessment year during which a full inspection of each parcel of improved real property occurs, and the method of determining real property sales data in support of the mass appraisal process, and (2) provisions establishing criteria for measuring the level and uniformity of assessments generated from a revaluation, provided such criteria shall be applicable to different classes of real property with respect to which a sufficient number of property sales exist. Certification of compliance with not less than one of said regulatory provisions shall be required for each revaluation and the assessor shall, not later than the date on which the grand list reflecting assessments of real property derived from a revaluation is signed, certify to the secretary and the chief executive officer, in writing, that the revaluation was conducted in accordance with said regulatory requirement. Any town effecting a revaluation with respect to which an assessor is unable to certify such compliance shall be subject to the penalty provided in subsection (d) of this section. In the event the assessor designates a revaluation company to perform mass appraisal valuation or field review functions with respect to a revaluation, the assessor and the employee of said company responsible for such function or functions shall jointly sign such certification. The assessor shall retain a copy of such certification and any data in support thereof in the assessor's office. The provisions of subsection (c) of this section concerning the public inspection of criteria, guidelines, price schedules or statement of procedures used in a revaluation shall be applicable to such certification and supporting data."

Conn. 333, 439 A.2d 1047 (1981), for the "proposition that, in the revaluation context, the application of a fixed percentage without allowance for individual property differences is illegal pursuant to § 12-119"; the court distinguished that case factually with respect to the extensive, individualized data collection that took place in the present case. To this end, the trial court concluded that Tyler was not required to "physically [re]inspect the [Groton Long Point] residential properties" after it discovered that the initial "application of the original 1.2 adjustment factor yielded a median ASR of 88.31 percent . . . ."[18] Having credited the testimony of Gardner and Christy to the effect that the 1.35 adjustment factor "was used for the express purpose of increasing the [Groton Long Point] appraised values so that they would be closer to fair market value, instead of well below fair market value," the trial court rejected the plaintiffs' claim that "their assessments were manifestly excessive" and the "illegal" result of "disregard of the relevant statutes . . . ." Accordingly, the trial court rendered judgment for the defendants. This appeal followed.

On appeal, the plaintiffs claim that the trial court incorrectly concluded that the defendants' assessment of Groton Long Point in the 2011 revaluation was not illegal. The plaintiffs renew their reliance on *Chamber of Commerce of Greater Waterbury, Inc.*, and contend that the defendants' use of an undifferentiated adjustment factor of 1.35 disregarded the "individualized process" required by § 12-62, insofar as "[t]here is no provision in our state statutes or the pertinent regula-

[18] The trial court emphasized that the plaintiffs and their expert witness had failed to cite any statute or regulation requiring such reinspection, and credited Christy's testimony that the defendants were "satisfied with the data collection concerning the [Groton Long Point] properties that had occurred over the [eighteen] month period prior thereto and believed that there was no need to physically reinspect each [Groton Long Point] residential property."

tions that allows an assessor to apply a flat percentage to a group of properties simultaneously in order to 'adjust' their true and actual value." The plaintiffs further argue that the defendants' use of the adjustment factor was not authorized by § 12-62i-3 of the regulations, which contemplates the use of ratio testing for property classes, namely, residential, commercial, and vacant land, rather than "on much smaller groups, i.e., residential neighborhoods," and only to verify results, not "to actually set the assessed values themselves." The plaintiffs contend that any discrepancy resulting from the initial mass appraisal should have been addressed by "physically revisit[ing] those properties [to] verify the data collection and the information it produced," rather than arbitrarily "running calculations until the numbers (subjectively) seem to more closely approximate some ideal of fair market value in the assessor's mind . . . ."[19] Finally, the plaintiffs rely on *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 3 A.3d 56 (2010), and argue that the trial court improperly found that they had "failed to demonstrate that the 2011 [revaluation] resulted in assessments that are manifestly excessive," because that determination is "part and parcel of the stipulation that the defendants uniformly inflated the assessed value of the subject properties by 35 percent even though such an adjustment was not required in order to comply with the statutory standards."

In response, the defendants contend that they properly utilized the 1.35 adjustment factor to compensate for patterns of undervaluation of Groton Long Point properties relative to other neighborhoods in the town.

[19] The plaintiffs also posit that, to the extent that adjustment was required because of Groton Long Point's "unique" features and amenities, § 12-62 required the defendants to conduct individual assessments, particularly because access to the amenities runs with the land, and the defendants adjusted the value of the improvements, rather than the land.

The defendants argue that this methodology was consistent with the OPM regulations and the standards of the international association, and emphasize that OPM itself ultimately certified the results of the appraisal. Thus, the defendants also rely on *Redding Life Care, LLC* v. *Redding*, 308 Conn. 87, 61 A.3d 461 (2013), and contend that the plaintiffs have failed to prove a violation of § 12-119 because their complaint of "inadequate substantiation to support application of the 1.35 adjustment factor" pertains to insufficiency of data and a challenge to the appraisal methodology, rather than demonstrating illegality. The defendants further argue that *Chamber of Commerce of Greater Waterbury, Inc.* v. *Waterbury*, supra, 184 Conn. 333, is distinguishable from the present case because, in addition to engaging in a comprehensive preappraisal field data gathering as to every property in town, Tyler reanalyzed that field data subsequent to the adjustment to verify the consistency of the mass appraisal results with actual property values as determined by sales. Finally, the defendants contend that the plaintiffs failed to prove that the valuation of their properties was manifestly excessive because they did not present any credible evidence of the values of their properties. We agree with the defendants and conclude that their application of the 1.35 adjustment factor to the Groton Long Point residential properties during the 2011 revaluation was not illegal.

"In a tax appeal taken pursuant to § 12-119, the plaintiff must prove that the assessment was (a) manifestly excessive *and* (b) . . . could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the property. . . . [The plaintiff] must [set forth] allegations beyond the mere claim that the assessor overvalued the property. [The] plaintiff . . . must satisfy the trier that [a] far more exacting test has been met: either there was mis-

feasance or nonfeasance by the taxing authorities, or the assessment was arbitrary or so excessive or discriminatory as in itself to show a disregard of duty on their part. . . . Only if the plaintiff is able to meet this exacting test by establishing that the action of the assessors would result in illegality can the plaintiff prevail in an action under § 12-119. The focus of § 12-119 is whether the assessment is illegal. . . . The statute applies *only* to an assessment that establishes a disregard of duty by the assessors. . . .

"While an insufficiency of data or the selection of an inappropriate method of appraisal could serve as the basis for not crediting the appraisal report that resulted, it could not, *absent evidence of misfeasance or malfeasance*, serve as the basis for an application for relief from a wrongful assessment under § 12-119. . . . In short, when reviewing a claim raised under § 12-119, a court must determine whether the plaintiff has proven that the assessment was the result of illegal conduct."[20] (Emphasis in original; internal quotation marks omitted.) *Walgreen Eastern Co.* v. *West Hartford*, 329 Conn. 484, 513–14, 187 A.3d 388 (2018). Put differently, tax relief under § 12-119 is available only in an "extraordinary situation." *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, 220 Conn. 335, 343, 597 A.2d 326 (1991).

[20] "In *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, 220 Conn. 335, 339, 597 A.2d 326 (1991), we explained the distinction between municipal tax appeals brought pursuant to § 12-119 and those authorized by General Statutes § 12-117a, formerly codified at General Statutes § 12-118. While the latter statute provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property by an appeal to the board of [tax relief], and from it to the courts . . . § 12-119 allows a taxpayer to claim either that a town lacked authority to tax the subject property, or that the assessment was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of [the real] property . . . . In short, § 12-117a is concerned with overvaluation, while [t]he focus of § 12-119 is whether the assessment is illegal." (Citations omitted; internal quotation marks omitted.) *Griswold Airport, Inc.* v. *Madison*, 289 Conn. 723, 740, 961 A.2d 338 (2008).

Whether an assessment methodology violates the governing statutes and regulations for purposes of § 12-119 presents a question of law over which our review is plenary. See, e.g., *Griswold Airport, Inc.* v. *Madison*, 289 Conn. 723, 739, 961 A.2d 338 (2008); see also *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 101 ("[w]hen a tax appeal . . . raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary" [internal quotation marks omitted]); *Griswold Airport, Inc.* v. *Madison*, supra, 741–42 (applying plenary review to claim that assessor violated General Statutes § 12-504h by terminating property's open space classification and assessing it as condominium units).

Our review of the legality of the assessment begins with the OPM regulations, which were promulgated pursuant to § 12-62 (g); see footnote 17 of this opinion; for the purpose of guiding the revaluation process under § 12-62 (b) (2), which contemplates both a "field review" of the properties and the use of "generally accepted mass appraisal methods which may include, but need not be limited to, the market sales comparison approach to value, the cost approach to value and the income approach to value." Beyond the regulations, we also consider the extent to which the appraisal complied with the Uniform Standards of Professional Appraisal Practice, as promulgated by the Appraisal Standards Board of the Appraisal Foundation, which "[r]eal estate appraisers in Connecticut are required to follow" pursuant to General Statutes § 20-504. *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 107 n.18.

Section 12-62 (g) (2) mandates the promulgation of regulations "establishing criteria for measuring the level and uniformity of assessments generated from a revaluation," and provides that "such criteria shall be applicable to different classes of real property with respect to

which a sufficient number of property sales exist." The regulations promulgated by OPM in response to that mandate, in turn, provide that "[p]erformance-based revaluation standards shall consist of two acceptable methods as set forth in section[s] 12-62i-3 and 12-62i-4 of the [r]egulations . . . ." Regs., Conn. State Agencies § 12-62i-2. Ratio testing, one of the two acceptable methods, is governed by § 12-62i-3 of the regulations. That regulation requires an assessor conducting ratio testing to establish "[a] file of all real property sales transactions for the sales time period used"; Id., § 12-62i-3 (a) (1); and also provides that, "[p]rior to finalizing a revaluation, the assessor shall conduct the following tests regarding the assessments derived from such revaluation. The assessments resulting from the revaluation shall be deemed sufficient, provided the following criteria are met:

"(1) the overall level of assessment for all property classes shall be within plus or minus ten percent of the required seventy percent assessment ratio, as measured by the overall median ratio, and

"(2) the level of assessment for each property class with fifteen or more market sales shall be within plus or minus five percent of the median overall level of assessment for each property class, and

"(3) the coefficient of dispersion for each property class with fifteen or more market sales shall be equal to or less than fifteen percent for all property, equal to or less than fifteen percent for residential property, equal to or less than twenty percent for commercial property, and equal to or less than twenty percent for vacant land, and

"(4) the price related differential for all properties and for each property class for which there are fifteen or more market sales shall be within 0.98 and 1.03, and

"(5) the unsold property test result shall be between 0.95 and 1.05." Id., § 12-62i-3 (b).

The ratio testing regulation further provides that, if its criteria "are not met, the assessor shall, prior to the implementation of the revaluation, further analyze and refine the data elements or methods used in the revaluation. The assessor shall revalue the parcels of real property for which a deficiency in either the level of assessment or the uniformity of assessments has been identified." Id., § 12-62i-3 (c).

The plaintiffs correctly read the ratio testing regulation as *mandating* such evaluation following the completion of the appraisal by general " '[p]roperty class,' " which is defined as "any one of the following three major classifications of real property: (A) residential; (B) commercial including apartments, industrial and public utility; and (C) vacant land . . . ." Id., § 12-62i-1 (15). There are, however, two problems with the plaintiffs' interpretation of the ratio testing regulation. First, that regulation does not expressly preclude the use of ratio testing or adjustment factors *during* the mass appraisal process by " '[n]eighborhood,' " which is defined as "a geographic area of complementary real property parcels that share similar locational and market value characteristics, and may be defined by natural, man-made, or political boundaries . . . ." Id., § 12-62i-1 (13). Reading the ratio testing regulation in the manner urged by the plaintiffs would require us to add nonexistent language to its text, which is not how we read regulations. See, e.g., *Williams* v. *General Nutrition Centers, Inc.*, 326 Conn. 651, 657, 166 A.3d 625 (2017) ("because regulations have the same force and effect as statutes, we interpret both using the plain meaning rule"); *Mayer* v. *Historic District Commission*, 325 Conn. 765, 776, 160 A.3d 333 (2017) ("it is well settled that [w]e are not permitted to supply statutory language that the legislature may have chosen to omit" [internal quotation marks omitted]).

Second, the plaintiffs' reading of § 12-62i-3 of the regulations is inconsistent with the other regulatory text, which defines " '[r]evaluation' " as "the mass appraisal of property to determine the true and actual value of all real property in a town for assessment purposes in accordance with section 12-62 . . . ." Regs., Conn. State Agencies § 12-62i-1 (19). The very meaning of " '[m]ass appraisal' " contemplates some estimation, insofar as it is defined as "the process of valuing a universe of properties as of a given date using standard methodology, employing common data, and allowing for statistical testing. Methodology that is acceptable shall include, but is not limited to, automated valuation models, adaptive estimation procedure, multiple regression analysis, statistical analysis and other generally accepted techniques . . . ." Id., § 12-62i-1 (10). Indeed, § 12-62f-4 of the regulations, which governs the valuation module to be used for computer assisted mass appraisal, specifically anticipates such testing on a neighborhood basis, as such a valuation module must have "the capacity to calculate, print reports and output to standard analytical software programs the following measurements and sales/assessment ratios by property type *and neighborhood*: Sales prices; assessments; the mean sales/assessment ratio; the median sales/assessment ratio; the coefficient of dispersion; the standard deviation; the coefficient of variation; and the price-related differential." (Emphasis added.) Id., § 12-62f-4 (d). Thus, to read § 12-62i-3 of the regulations in a manner absolutely precluding ratio testing on a more granular level than property class *during* the mass appraisal process would make little sense, as that regulation simply furnishes a broad measure of quality control to be implemented "[p]rior to finalizing a revaluation . . . ." Id., § 12-62i-3 (b).

Beyond the lack of regulatory or statutory preclusion, the Uniform Standards of Professional Appraisal Prac-

tice support the defendants' use of a ratio study during the mass appraisal process at issue in the present case.[21] Specifically, rule 6-7 of the Uniform Standards of Professional Appraisal Practice provides that "[i]n reconciling a mass appraisal an appraiser must: (a) reconcile the quality and quantity of data available and analyzed within the approaches used and the applicability and relevance of the approaches, methods and techniques used; and (b) employ recognized mass appraisal testing procedures and techniques to ensure that standards of accuracy are maintained." Appraisal Standards Board, Appraisal Foundation, 2010-11 Uniform Standards of Professional Appraisal Practice (2010) p. U-51. The commentary to that rule observes that "[i]t is implicit in mass appraisal that, even when properly specified and calibrated mass appraisal models are used, some individual value conclusions will not meet standards of reasonableness, consistency, and accuracy. However, appraisers engaged in mass appraisal have a professional responsibility to ensure that, on an overall basis, models produce value conclusions that meet attainable standards of accuracy. *This responsibility requires appraisers to evaluate the performance of models, using techniques that may include* but are not limited to, goodness-of-fit statistics, and *model performance statistics such as appraisal-to-sale ratio studies*, evaluation of hold-out samples, or analysis of residuals." (Emphasis added.) Id.; see also id., p. U-53 (noting that written report of mass appraisal must "describe calibration methods considered and chosen," "identify the appraisal performance tests used and set forth the performance measures attained," and "describe the reconciliation performed [under rule] 6-7").

[21] The Uniform Standards of Professional Appraisal Practice was admitted into evidence at trial as plaintiffs' exhibit 17. We also note that the relevant portions of this publication were reproduced in part II of the plaintiffs' appendix to their brief filed in this appeal.

Consistent with the Uniform Standards of Professional Appraisal Practice, the use of ratio studies and "direct equalization" via the application of adjustment factors are an established component of mass appraisal practice, and are specifically embraced by the international association. See generally International Association of Assessing Officers, Standard on Ratio Studies (2013); International Association of Assessing Officers, Fundamentals of Mass Appraisal (2011).[22] The "assessment standards set forth" in the international association's standards "represent a consensus in the assessing profession," and the international association's executive board adopted them in order to "provide a systematic means by which concerned assessing officers can improve and standardize the operation of their offices." Standard on Ratio Studies, supra, p. 1. Those standards have been considered authoritative in this area by sister state high courts. See *Douglas* v. *Nebraska Tax Equalization & Review Commission*, 296 Neb. 501, 508, 894 N.W.2d 308 (2017) ("[g]enerally accepted mass appraisal techniques include the standards promulgated by the [international association]"); *Clifton* v. *Allegheny*, 600 Pa. 662, 694, 969 A.2d 1197 (2009) (noting that international association standards "are widely accepted as the best criteria for judging the adequacy of a property assessment"); see also *Thorsness* v. *Porter County Assessor*, 3 N.E.3d 49, 53 (Ind. Tax 2014) (noting that state "administrative agency charged with ensuring that . . . property assessments are uniform and equal—has provided guidance about how to compile and evaluate the data necessary for an assessment ratio study" by adopting international association's standards "through its duly promulgated administrative

[22] The Fundamentals of Mass Appraisal and the Standard on Ratio Studies were admitted into evidence, respectively, as defendants' exhibit 609 and plaintiffs' exhibit 16. We note that certain relevant portions of these publications were also reproduced in the appendices to the briefs submitted by the parties in this appeal.

regulations" [footnote omitted]). A separate publication by the international association, entitled Fundamentals of Mass Appraisal, complements their standards and serves as a more general "textbook [that] is intended to provide a basic understanding and overview of the many factors that shape mass appraisal theory and practice." Fundamentals of Mass Appraisal, supra, p. v.

Beyond their use in quality control by oversight agencies such as OPM, the international association's standards suggest specifically that ratio studies may be utilized internally to "help improve appraisal methods or identify areas within the jurisdiction that need attention." Standard on Ratio Studies, supra, p. 7. Ratio studies may be used to consider the accuracy of a mass appraisal, including with respect to "[u]niformity" or "the degree to which properties are appraised at equal percentages of market value."[23] Id.; see also id., p. 8 ("Local jurisdictions should use ratio studies as a primary mass appraisal testing procedure and their most important performance analysis tool. The ratio study can assist such jurisdictions in providing fair and equitable assessment of all property."). The "ratio study is a form of applied statistics, because the analyst draws

[23] The Fundamentals observe that "[r]atio studies measure two primary aspects of mass appraisal accuracy: level of valuation and uniformity of values. *Appraisal level* refers to the overall, or typical, ratio at which properties are appraised relative to market value. In mass appraisal, appraised values should not be expected always to equal independent indicators of market value (sale prices or independent appraisals), but high and low ratios should balance, so that the typical ratio is near 100 percent." (Emphasis in original.) Fundamentals of Mass Appraisal, supra, p. 198. In contrast, "[*a*]*ppraisal uniformity* relates to the extent to which appraisal procedures produce logical and consistent results across individual properties. Uniformity requires, first, that properties be appraised equitably within groups or categories (use classes, neighborhoods, and so forth); that is, how close are the individual ratios to the typical ratio (appraisal level)? Second, each group of properties should be appraised at approximately the same level or percentage of market value. In sum, appraisal uniformity requires equity *within* groups and *between* groups." Id. (Emphasis in original.)

conclusions about the appraisal of the population (the entire jurisdiction) of properties based only on those that have sold during a given time period. The sales ratios constitute the sample that will be used to draw conclusions or inferences about the population." Id., p. 8.

With respect to data collection and analysis, the international association's standards contemplate "[s]tratification [to divide] all the properties within the scope of the study into two or more groups or strata," which "facilitates a more complete and detailed picture of appraisal performance and can enhance sample representativeness." Id., p. 9. In observing that stratification can "help identify differences in level of appraisal between property groups," those standards specifically suggest that "neighborhood" is an appropriate stratum, in addition to "[e]ach type of property subject to a distinct level of assessment," with "stratification by geographic areas . . . generally more appropriate for residential properties . . . ." Id. Once appropriate sales are identified during the collection of market data, the statistical analysis takes place, as those sales are "matched against assessed values, ratios computed, and outliers identified and removed if appropriate, measures of appraisal level, uniformity, and reliability for the entire jurisdiction and each group or stratum should be computed." Id.

The international association allows for a 10 percent "window . . . about the market value standard [as] a reasonable range in which measures of central tendency should fall in ad valorem mass appraisal." Fundamentals of Mass Appraisal, supra, p. 243. This "standard provides a reasonable, constructive, and cost-effective basis for ensuring that appraisals approximate market values." Id. With respect to uniformity among the various strata, "[e]ach major stratum should be appraised within 5 percent of the overall level of appraisal for the jurisdiction. Thus, if the overall level is 0.900, each

property class and area should be appraised between 0.855 and 0.945 . . . ." Id.; see also Standard on Ratio Studies, supra, pp. 18–19.

Most significantly, the international association's standards contemplate the "common" use of "[e]qualization . . . to address problems associated with appraisal level," while also observing that "[r]eappraisal orders can be used to correct uniformity problems." Standard on Ratio Studies, supra, p. 21. "Equalization," in general, is the "process by which an appropriate governmental body attempts to ensure that property under its jurisdiction is assessed at the same assessment ratio or at the ratio or ratios required by law. Equalization can be undertaken at many different levels. Equalization among use classes (such as agricultural and industrial property) can be undertaken at the local level . . . ." Id., p. 40. "Direct equalization"[24] is the "process of converting ratio study results into adjustment factors (trends) and changing locally determined appraised or assessed values to more nearly reflect market value or the legally required level of assessment."[25] Id.

[24] "Direct equalization involves use of adjustment factors, which produce effects mathematically identical to those derived through the application of 'trending' or 'index' factors, which are commonly used for value updating by local assessing jurisdictions. The most significant differences typically are the level of the jurisdiction originating the adjustments and the stratification of property to which the factors are applied. Local jurisdictions with primary assessment responsibility can develop value adjustment factors as an interim step between complete reappraisals. Such factors commonly are applied to properties by property type, location, size, age and other characteristics . . . . It is rare for equalization factors developed by oversight agencies to be applied to strata more specific than property class or broad geographic area. Often such factors are applied [jurisdiction wide]." (Citation omitted.) Standard on Ratio Studies, supra, p. 21.

[25] In contrast to direct equalization, "[w]hen indirect equalization is used, appraisals are not adjusted. Instead, indirect equalization involves an oversight agency estimating total taxable value, given the legally required level of assessment or market value. Indirect equalization allows proper distribution of intergovernmental transfer payments between state or provincial and local governments despite different levels of appraisal among jurisdictions or property classes." Standard on Ratio Studies, supra, p. 21.

Although the international association's standards caution that "[e]qualization is not an appraisal or a substitute for reappraisal," they nevertheless counsel that the advantage of direct equalization is that it "can be applied to specified strata, such as property classes, *geographic areas, and political subdivisions* that fail to meet appraisal level performance standards . . . . Direct equalization also produces results that are generally more visible to the taxpayer and more clearly reduces perceived inequities between classes . . . ." (Citations omitted; emphasis added.) Id., p. 21; see also id., p. 23 ("[o]ther property groups, such as market areas, school districts and tax units, could constitute additional strata"). Indeed, when "applied at the stratum level [direct equalization] improves equality in effective tax rates between strata and lessens the effect of assessment practices that improperly favor one stratum over another."[26] Id., p. 22. Those standards note that "[s]tratification can help identify differences in level of appraisal between property groups. In large jurisdictions, stratification by market areas is generally more appropriate for residential properties, while stratifica-

[26] The international association's standards provide, for example, that "assuming that all classes of property are to be assessed at 100 [percent] of market value, without such equalization, in a case [in which] residential property is assessed at a median of 80 [percent] of market value, while commercial property is assessed at a median of 90 [percent] of market value, residential property will pay 80 [percent] of its proper tax share and commercial property will pay 90 [percent] of its proper tax share. Other classes that may be assessed at 100 [percent] will pay more than their proper tax shares. Direct equalization mitigates this problem. However, such equalization cannot improve uniformity between properties within a given stratum. So, in the previous example, the median level of assessment for residential property can be adjusted from 80 [percent] to 100 [percent] of market value, assessment disparities between individual residential properties will not be addressed. For this reason, reappraisal orders should be considered as the primary corrective tool for uniformity problems, and direct equalization should be considered appropriate only if time or other constraints preclude such an approach." Standard on Ratio Studies, supra, p. 22.

tion of commercial properties by either geographic area or property subtypes (e.g., office, retail, and warehouse/industrial) can be more effective." Id., p. 24. Such "[s]tratification facilitates a more complete and detailed picture of appraisal performance and can enhance sample representativeness." Id., p. 23.

"If noncompliance with either direct or indirect equalization standards is indicated, the appropriate point estimate (statistic) measuring appraisal level should be used to calculate adjustment factors, by dividing it into 100 percent." Id., p. 35. Accordingly, we conclude that the record demonstrates that the use of ratio studies and direct equalization via adjustment factors as applied to a neighborhood stratum is a valid component of mass appraisal practice under the standards adopted by the international association.

Having determined that the defendants validly incorporated ratio studies and direct equalization via adjustment factors to neighborhood strata into the 2011 revaluation, we further conclude that the trial court properly rejected the plaintiffs' challenge to their use in this specific case. The trial court credited Gardner's testimony that the application of the 1.35 percent adjustment factor to the dwellings in Groton Long Point was necessary to bring the median ASR for that neighborhood in line with the other neighborhoods in the town, and to keep the properties in Groton Long Point from being undervalued—and therefore undertaxed—relative to the rest of the town. Gardner testified that stratification by neighborhood was necessary because Groton has thirteen neighborhoods, each "unique to itself," with five on the water and others with "interior cookie cutter homes." Although the amenities available to Groton Long Point residents, such as the private beaches and dock, run with the land, Gardner elected to adjust the building values as a component of the total value, rather than the land values, because she had high confidence in the underlying land values based

on a comparison to three valid vacant lot sales. "[T]his court has held that [t]he process of estimating the value of property for taxation is, at best, one of approximation and judgment, and there is a margin for a difference of opinion. . . . There may be more ways than one for estimating the value of such . . . [property] for taxation. . . . Many factors may enter into the determination of the value of a piece of property. Its value is, in the final analysis, a matter of opinion." (Citation omitted; internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 110.

This court's decision in *Chamber of Commerce of Greater Waterbury, Inc.* v. *Waterbury*, supra, 184 Conn. 333, on which the plaintiffs rely heavily, is distinguishable and does not invalidate the town's 2011 revaluation as a matter of law. In that case, we considered a challenge to Waterbury's revised grand list for October 1, 1979, which "consisted of adjustments made in the assessments of about 300 commercial and industrial properties, which [the assessor] and his staff inspected and analyzed individually, and a 28 percent increase 'across the board' in the assessments of the remaining commercial and industrial properties in Waterbury, approximately 2500 in number." Id., 334–35. This court affirmed the judgment of the trial court enjoining the fixed 28 percent increase, determining that the "application of a fixed percentage factor to increase assessments without making any allowance for individual differences in properties has been widely condemned. . . . The basic deficiency of such a valuation procedure is the failure to consider all of the elements which may reasonably affect the value of the property." (Citations omitted.) Id., 336–37.

In concluding that the fixed 28 percent increase without consideration of the properties' individual characteristics was illegal, this court observed that, under §§ 12-64 (a) and 12-62 (a), "[t]axable property is subject to taxation at a uniform percentage of 'its present true

and actual valuation.' . . . In establishing assessments the assessors are required to 'view all of the real estate of their respective municipalities.' . . . These statutes contemplate assessments based upon a consideration of the individual characteristics of each property listed." (Citations omitted.) Id., 337. The court concluded that the "28 percent increase in the valuations of the 2500 commercial and industrial properties which [the assessor] did not examine individually was a projection from the conclusion he reached from his analysis of 300 such properties upon an individual basis. His conclusion of a minimum 28 percent undervaluation of those properties could not fairly be applied to all other business properties in Waterbury without some showing that the undervaluation had occurred for reasons affecting all business properties alike. We cannot assume that the 300 properties studied by the assessor are *sufficiently similar in character or location* to allow a reasonable inference that the remaining 2500 properties have been uniformly undervalued by 28 percent."[27] (Emphasis added.) Id., 337. Accordingly, the court concluded "that the application of the fixed percentage factor by the assessor to increase the assessments on the properties of the plaintiffs cannot reasonably be found to fulfill his statutory duty to determine the 'true and actual valuation' of each individual property."[28] Id., 338.

[27] The court also observed that the assessor's study itself revealed a wide variety of undervaluation, from 28 to 45 percent, making it "clear that the application of the 28 percent factor would not reflect the value of a particular property based upon its individual characteristics as the statutes require. Even for properties falling within the normal range of undervaluation, there would be a substantial disproportion in the tax burden imposed on those at the lower part of the range, which presumably would carry their full share by application of the 28 percent factor, and those at the higher part of the range which would not." *Chamber of Commerce of Greater Waterbury, Inc.* v. *Waterbury*, supra, 184 Conn. 338.

[28] We note that the court rejected Waterbury's argument that "even after the application of the fixed percentage increase each of the affected properties has been valued at a figure not exceeding its fair market value." *Chamber of Commerce of Greater Waterbury, Inc.* v. *Waterbury*, supra, 184 Conn.

Chamber of Commerce of Greater Waterbury, Inc., is readily distinguishable from the present case. First, the record in the present case reveals that Gardner and the assessment team from Tyler made an individual assessment of every property in the town—including field visits, requests for inspections, and communications with each homeowner prior to the finalization of the assessment in accordance with § 12-62 (b) and § 12-62i-3 of the regulations. The trial court reasonably credited the testimony of Gardner and Christy that additional visits were not necessary prior to the application of the adjustment because they had gained all relevant information about the properties. See footnote 14 of this opinion and accompanying text. Second, in contrast to *Chamber of Commerce of Greater Waterbury, Inc.*, the adjustment in this case was not applied townwide, but rather, only to a narrow strata of properties in a unique neighborhood in connection with a computer assisted mass appraisal that was conducted in accordance with both the OPM regulations and widely accepted appraisal standards. Accordingly, we conclude that *Chamber of Commerce of Greater Waterbury, Inc.*, does not render the assessment in the present case illegal.[29]

336. The court stated that "valuation of property in excess of fair market value is not the only ground upon which a taxpayer may be entitled to relief. . . . Any circumstances indicating that a disproportionate share of the tax burden is being thrust upon a taxpayer would warrant judicial intervention. . . . The plaintiffs claim that an illegal method of establishing assessments for their properties has been followed, which has not been applied to other taxpayers. If the challenged procedure is illegal, the plaintiffs must prevail." (Citations omitted.) Id. *Chamber of Commerce of Greater Waterbury, Inc.*, is not expressly a § 12-119 case, and does not even cite that statute. As such, this portion of the analysis in that case is inconsistent with the well established conjunctive test governing § 12-119, which requires proof of both an illegal assessment and that the valuation is manifestly excessive. See, e.g., *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 513–14.

[29] Accordingly, we also find distinguishable the Superior Court cases on which the plaintiffs rely, both of which were not mass appraisal cases conducted under the international association's standards. See *Rand-Whitney Containerboard L.P.* v. *Montville*, Superior Court, judicial district of

The plaintiffs contend, however, that the application of the 1.35 adjustment factor was invalid because it was arbitrarily chosen by Christy, "had no mathematical or technical connection to the initial assessments made by the CAMA program, and was not intended to remedy some specific defect." They argue that it is "completely unrelated to the true and actual value of each home in Groton Long Point." To this end, the plaintiffs rely on certain data presented through the testimony of Edward Bogdan, a member of the certified class in the present case; see footnote 7 of this opinion; in support of the proposition that Groton Long Point experienced a 25 percent decrease in home sale prices between 2009 and 2011. Specifically, the plaintiffs posit that this information undermines the sales set utilized by Christy in performing her assessments. This evidence is insufficient, however, to establish illegality, insofar as "[w]hile an insufficiency of data or the selection of an inappropriate method of appraisal could serve as the basis for not crediting the appraisal report that resulted, it could not, absent evidence of misfeasance or malfeasance, serve as the basis for an application for relief from a wrongful assessment under § 12-119." *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, supra, 220 Conn. 343; see also *Redding Life Care, LLC* v. *Redding*, supra, 308 Conn. 111 ("although the plaintiff may disagree that the hypothetical condition was *necessary* to reach the valuation, it has failed to demonstrate that the town assessor's reliance on the condition was *illegal*, and, accordingly, the plaintiff cannot prevail on its claim under § 12-119" [emphasis in original]). Moreover, the plaintiffs have failed to introduce evidence to prove

New London, Docket No. CV-01-0559167-S (October 30, 2006) (application of lower depreciation rate solely to plaintiff's property and no other taxpayers); *Yankee Gas Co.* v. *Meriden*, Superior Court, judicial district of Tolland, Complex Litigation Docket, Docket No. X07-CV-96-0072560-S (April 20, 2001) (29 Conn. L. Rptr. 285, 291) (creation of unique methodology aimed solely at plaintiff's property was equal protection violation actionable under § 12-119).

that the adjustment to the appraised value—even by 35 percent—actually resulted in a manifest overvaluation of their properties relative to true and actual fair market value.[30] See *Walgreen Eastern Co.* v. *West Hartford*, supra, 329 Conn. 513 ("[m]ere overvaluation, without more, in an assessment of property is not enough to make out a case under § 12-119" [internal quotation marks omitted]); see also id., 513–14 ($120,000 valuation error on approximately $5 million property, which was 2.4 percent, was not manifestly excessive for purposes of relief under § 12-119); cf. *Griswold Airport, Inc.* v. *Madison*, supra, 289 Conn. 741–42 (because improper removal of airport's open space classification in violation of § 12-504h "caused its assessed value to grow more than eightfold," this court concluded that "the trial court's determination . . . necessarily incorporated an implicit finding that the resultant assessment was manifestly excessive"). Accordingly, "we conclude that the circumstances presented here do not rise to the level of the extraordinary situation that would warrant tax relief under the provisions of § 12-119." (Internal quotation marks omitted.) *Walgreen Eastern Co.* v. *West Hartford*, supra, 514.

The judgment is affirmed.

In this opinion the other justices concurred.

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[30] We emphasize that our analysis in this appeal is limited to the legality of the mass appraisal methodology and does not determine the validity of any individual property owners' claims of overassessment pursuant to General Statutes § 12-117a as a result of the application of an adjustment factor during direct equalization. See footnote 20 of this opinion.

ORDERS

CONNECTICUT REPORTS

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STATE OF CONNECTICUT *v.*
GREGORY L. WEATHERS

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 600 (AC 41291), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the trial court's rejection of the defense of mental disease or defect when the only two expert witnesses testified at trial that the defendant, as the result of a mental disease, lacked substantial capacity to control his conduct within the requirements of the law?"

ROBINSON, C. J., and MULLINS, J., did not participate in the consideration of or decision on this petition.

Dina S. Fisher, assigned counsel, in support of the petition.

Timothy F. Costello, assistant state's attorney, in opposition.

Decided May 15, 2019

MICHAEL HOLBROOK *v.* COMMISSIONER OF CORRECTION

The petitioner Michael Holbrook's petition for certification to appeal from the Appellate Court, 189 Conn. App. 108 (AC 41165), is denied.

Vishal K. Garg, assigned counsel, in support of the petition.

C. Robert Satti, Jr., supervisory assistant state's attorney, in opposition.

Decided May 15, 2019

STATE OF CONNECTICUT *v.* ANGELA C. GRASSO

The defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 186 (AC 41167), is denied.

Alice Osedach, senior assistant public defender, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided May 15, 2019

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE *v.* FREDERICK B. CORNELIUS ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 42458) is denied.

Frederick B. Cornelius, self-represented, in support of the petition.

Christopher J. Picard, in opposition.

Decided May 15, 2019

ESTEBEN HERNAIZ *v.* COMMISSIONER OF CORRECTION

The petitioner Esteben Hernaiz' petition for certification to appeal from the Appellate Court's decision on the petitioner's motion (AC 183721) is dismissed.

Vishal K. Garg, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided May 15, 2019

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Vol. 190

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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VIKING CONSTRUCTION, INC. *v.* 777 RESIDENTIAL, LLC, ET AL.
(AC 41450)

Alvord, Keller and Eveleigh, Js.

Syllabus

The cross claim defendant insurance company, L Co., appealed to this court from the summary judgment rendered by the trial court against it in favor of the cross claim plaintiffs, who had alleged breach of contract against L Co. on the basis of its refusal to cover a claimed loss under a builder's risk insurance policy. The cross claim plaintiffs hired V Co., a general contractor, for the renovation of a high-rise building that they owned. The subcontractor, A Co., cleaned the building's concrete facade and inadvertently damaged the building's windows, which had to be replaced. Thereafter, V Co. brought an action for breach of contract

against the cross claim plaintiffs, which in turn filed their cross claim after L Co. denied their claim for coverage of the loss under the policy. L Co. filed a motion for summary judgment on the cross claim, which the trial court denied, explaining that its conclusion was based on a reading of the policy's defects, errors, and omissions exclusion in conjunction with the resulting loss clause in the policy, which was an exception to that exclusion. The cross claim plaintiffs then filed a motion for summary judgment on their cross claim, which the court granted. On appeal, L Co. claimed that because the policy's defects, errors, and omissions exclusion barred coverage and the resulting loss clause did not reinstate coverage, the trial court erred in granting the motion for summary judgment filed by the cross claim plaintiffs and in denying L Co.'s motion for summary judgment. *Held*:

1. The trial court erred in rendering summary judgment in favor of the cross claim plaintiffs on their cross claim because the defects, errors and omissions exclusion of the policy unambiguously barred coverage: although the cross claim plaintiffs claimed that the defects, errors and omissions exclusion did not bar recovery because the windows were not part of the renovation, the plain meaning of the policy's exclusion, which provided, inter alia, that L Co. would not pay for loss or damage caused by an act, defect, error, or omission relating to renovation, indicated that the cleaning of the building's facade was part of the renovation and, thus, the damage to the windows, which was a direct result of that cleaning, was related to the renovation, and that conclusion was further supported by the fact that A Co.'s contractual obligations in the performance of its renovation work included avoiding harm to the windows; moreover, the claim of the cross claim plaintiffs that the defects, errors and omissions exclusion applied only to the finished product, not to the process implemented by A Co., was unavailing, as that reading of the exclusion would have rendered most of the exclusion's language superfluous by giving effect only to the portion of the exclusion that addressed the quality of the finished product and by ignoring certain other language in the exclusion; furthermore, there was no merit to the claim of the cross claim plaintiffs that the renovation endorsement would have been rendered meaningless if the exclusion applied, as the main policy form expressly limited coverage to new construction and, therefore, if the cross claim plaintiffs failed to purchase the endorsement, they would have been unable to recover for damage caused by a covered peril to the existing building they were renovating, and because the renovation endorsement was incorporated by reference into the main policy, all of the provisions of the main policy applied with equal effect.
2. The trial court incorrectly interpreted the resulting loss clause as entitling the cross claim plaintiffs to coverage: on the basis of the plain language of the resulting loss clause, which provided that, if an act, defect, error, or omission in the exclusion resulted in a covered peril, then L Co. must cover the loss or damage caused by that covered peril, a loss caused by an act during a renovation was covered if the act caused a covered

peril and that latter peril damaged the building, but, in the present case, there was only one cause of the cross claim plaintiffs' loss—A Co.'s spraying of the building, which caused damage to the windows—and that was not a covered peril; accordingly, the resulting loss clause did not apply.

Argued February 14—officially released May 28, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket, where the court, *Moukawsher, J.*, granted the plaintiff's motion to cite in 777 Main Street, LLC, et al. as defendants; thereafter, the named defendant et al. filed a counterclaim and filed a cross claim against the defendant Liberty Mutual Fire Insurance Company et al.; subsequently, the named defendant et al. withdrew the counterclaim and withdrew the cross claim in part; thereafter, the plaintiff withdrew the complaint; subsequently, the court denied the motion for summary judgment on the cross claim filed by the defendant Liberty Mutual Fire Insurance Company; thereafter, the court granted the motion for summary judgment on the cross claim as to liability filed by the named defendant et al.; subsequently, the court granted the motion for judgment in accordance with the parties' stipulation filed by the named defendant et al. and rendered judgment for the named defendant et al., from which the defendant Liberty Mutual Fire Insurance Company appealed to this court. *Reversed*; *judgment directed*.

Stephen E. Goldman, with whom was *Wystan M. Ackerman*, for the appellant (defendant Liberty Mutual Fire Insurance Company).

Jeffrey J. Vita, with whom was *Theresa A. Guertin*, for the appellees (named defendant et al.).

Opinion

EVELEIGH, J. The cross claim defendant, Liberty Mutual Fire Insurance Company (Liberty Mutual),[1] appeals from the summary judgment rendered against it in favor of the cross claim plaintiffs, 777 Main Street, LLC (777 Main) and 777 Residential, LLC (777 Residential).[2] On appeal, Liberty Mutual argues that the trial court erred in granting the 777 entities' motion for summary judgment on their cross claim and in denying Liberty Mutual's motion for summary judgment, on the basis of its interpretation of the insurance policy issued by Liberty Mutual to the 777 entities. Specifically, Liberty Mutual argues that (1) the defects, errors, and omissions exclusion in the insurance policy bars coverage, and (2) the resulting loss clause in the policy does not reinstate coverage. We agree with Liberty Mutual and reverse the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. The 777 entities are the owners of a high-rise building at 777 Main Street in Hartford (building), which they planned to renovate and convert from an office building into a 285 unit apartment complex. On March 27, 2014, the 777 entities hired Viking Construction, Inc. (Viking), as the general contractor for the renovation. Viking's work on the renovation included cleaning the concrete facade of the building. On October 2, 2014, Viking subcontracted with Armani Restoration, Inc. (Armani), to clean the concrete facade of the building.

From September to December, 2014, Armani cleaned the building's facade using a crushed glass cleaner

[1] Although the complaint in the underlying action was filed by Viking Construction, Inc., against Liberty Mutual and 777 Residential, LLC, Viking Construction, Inc., withdrew from the case and is not a party to this appeal. This appeal arises out of a cross claim filed by 777 Main Street, LLC, and 777 Residential, LLC, against their insurer, Liberty Mutual, and other entities which are not parties to this appeal.

[2] Hereinafter, we refer to 777 Main and 777 Residential collectively as the 777 entities, and individually by name where appropriate.

that was sprayed onto the building using power washers. The cleaning inadvertently damaged the building's approximately 1800 windows, all of which had to be replaced at a cost of over $4 million.

In July, 2015, the 777 entities claimed coverage of the loss under a builder's risk insurance policy (policy) that they had purchased from Liberty Mutual. This policy, which was in effect when the damage occurred, provides: "[Liberty Mutual] cover[s] direct physical loss or damage caused by a covered peril[3] to 'buildings or structures' while in the course of construction, erection, or fabrication." (Footnote added.) The policy contains several exclusions, including a "Defects, Errors, And Omissions" exclusion, which provides that Liberty Mutual is not responsible for "loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to: a) design, specifications, construction, materials, or workmanship; b) planning, zoning, development, siting, surveying, grading, or compaction; or c) maintenance, installation, renovation, remodeling, or repair." The exclusion, however, contains an exception, also known as a "resulting loss" clause, which provides: "[I]f an act, defect, error, or omission as described [in the exclusion] results in a covered peril, [Liberty Mutual] do[es] cover the loss or damage caused by that covered peril."

The policy also includes an optional renovation endorsement, which the 777 entities added to the policy because the project involved the renovation of an

[3] The policy does not expressly define "covered peril," however, under the heading "PERILS COVERED," it provides: "[Liberty Mutual] cover[s] risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded." For specific examples of the kinds of "covered perils" contemplated by the policy, it is helpful to look to the definition section of the policy, which provides in relevant part: "Specified perils means aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; lightning; riot; sinkhole collapse; smoke; sonic boom; vandalism; vehicles; volcanic action; water damage; weight of ice, snow, or sleet; and windstorm." (Internal quotation marks omitted.)

existing building rather than the construction of a new structure. The renovation endorsement provides: "[Liberty Mutual] cover[s] direct physical loss or damage caused by a covered peril to 'building materials' and 'existing buildings' that are part of [the 777 entities'] 'rehabilitation or renovation project.' "

On August 12, 2015, after investigating the 777 entities' claimed loss under the policy, Liberty Mutual denied coverage. On December 24, 2015, Viking filed an action against 777 Residential, alleging breach of contract on the basis of 777 Residential's alleged refusal "to remit the outstanding contract balance . . . for work Viking performed on the [renovation]." On May 12, 2016, Viking filed a motion to cite in as defendants, inter alia, 777 Main, Liberty Mutual, and Armani, which the court subsequently granted. On August 19, 2016, the 777 entities filed a cross claim, alleging a breach of contract on the basis of Liberty Mutual's refusal to cover the claimed loss under the policy. In March, 2017, the 777 entities settled their case with Viking and Armani for $1.6 million. The 777 entities continue to seek the remaining balance of the cost to replace the windows from Liberty Mutual.

On November 6, 2017, after the close of discovery, Liberty Mutual filed a motion for summary judgment on the cross claim. On January 11, 2018, following oral argument on the motion, the trial court denied Liberty Mutual's motion for summary judgment. In its memorandum of decision on the motion, the court explained that its conclusion was based on a reading of the policy's exclusion in conjunction with the loss peril clause.[4]

[4] Specifically, in its January 11, 2018 memorandum of decision denying Liberty Mutual's motion for summary judgment, the trial court stated: "The decisive question for this summary judgment motion is what it means when a builder's risk insurance policy with a renovation endorsement excludes damage 'resulting from an act . . . relating to . . . construction, workmanship, [or] renovation.' . . .

"Everyone agrees that the 'renovations' exclusion . . . excludes insurance coverage for things done to the building that amount to nothing more

On January 31, 2018, the 777 entities filed a motion for summary judgment on their cross claim, which the court subsequently granted on February 14, 2018 "[f]or the reasons stated in the court's memorandum of decision on Liberty Mutual's motion for summary judgment . . . ." On February 16, 2018, the parties filed a stipulation as to the amount of damages. On February 20, 2018, the 777 entities filed a motion for judgment in accordance with the stipulation and Liberty Mutual filed an objection to the motion. On February 22, 2018, the court granted the motion for judgment and rendered judgment on the cross claim in the amount of $1,950,000 in favor of the 777 entities "for the reasons set forth in the court's January 11, 2018, February 14, 2018, and February 22, 2018 memoranda of decision."[5]

than a bad job of renovating the thing intended to be renovated. But it's less clear whether there is coverage when a careless worker renovating one part of the building damages another part of the building.

"The answer lies in the policy's additional language. It says that if an act of renovation 'results in a covered peril,' damage from that covered peril is covered. . . . In this context, the language reasonably appears to mean that if the renovation 'results' in damage that isn't a renovation, the latter damage is covered despite being triggered by the former. The [777 entities] reasonably [take] this to mean that damage to a part of the building not being renovated by the worker—a window—is covered. . . .

"But Liberty Mutual says the language is intended to provide coverage only where there are two independent perils: one excluded peril causing an independent peril that causes the damage. A contractor cleaning the facade drops a wrench that breaks a wire that ultimately causes a fire that damages the building. The second peril—the covered one—is the fire. A facade cleaner leaves open a window that lets in rain that damages a carpet. The second peril—the covered one—is the rain. . . .

"The important thing for the special clause here—often called a 'resulting loss' clause—is that the worker wasn't renovating the window but damaged it. The only point of getting this extra renovations policy would be to protect against collateral damage to the building during the renovations. It doesn't cover any other kind of damage—to people or other property, for instance." (Emphasis omitted; footnotes omitted.)

[5] The court's January 11, 2018 memorandum of decision denying Liberty Mutual's motion for summary judgment, which the court referenced in its subsequent memoranda of decision, provides the only detailed explanation of the court's rationale for its decision to render summary judgment in favor of the 777 entities.

Thereafter, Liberty Mutual filed the present appeal. Additional facts and procedural history will be set forth as necessary.

"We begin our analysis with the standard of review applicable to a trial court's decision to grant a motion for summary judgment. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy [its] burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Anderson* v. *Dike*, 187 Conn. App. 405, 409–10, 202 A.3d 448, cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019).

"The general principles that guide our review of insurance contract interpretations are well settled. . . . An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract. . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result . . . .

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *New London County Mutual Ins. Co.* v. *Zachem*, 145 Conn. App. 160, 164–65, 74 A.3d 525 (2013).

"[I]n the event that an insurance policy term is deemed to be ambiguous, the parties are entitled to present extrinsic evidence regarding the mutual intent

of the insured and the insurer as to the scope of coverage, and the trial court must consider that evidence before applying the rule of contra proferentem to resolve the ambiguity in favor of the insured. In other words, the rule should be applied as a tie breaker only when all other avenues to determining the parties' intent have been exhausted. See *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 107–108, 84 A.3d 828 (2014); see, e.g., *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 59 n.20, 84 A.3d 1167 (2014); *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 788–89, 900 A.2d 18 (2006); *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 255 Conn. 295, 306, 765 A.2d 891 (2001) . . . ." (Citations omitted; footnote omitted.) *Connecticut Ins. Guaranty Assn.* v. *Drown*, 314 Conn. 161, 195–96, 101 A.3d 200 (2014) (*Rogers, C. J.*, concurring).

I

On appeal, Liberty Mutual first claims that the court erred in rendering summary judgment in favor of the 777 entities on their cross claim because the policy's "Defects, Errors, And Omissions" exclusion (exclusion) unambiguously bars coverage.[6] The 777 entities claim that the court did not err because Liberty Mutual failed to satisfy "its heavy burden of proving that [the exclusion] bars coverage for the losses."[7] We agree with Liberty Mutual.

[6] In its January 11, 2018 memorandum of decision denying Liberty Mutual's motion for summary judgment, the trial court did not indicate whether coverage was barred by the exclusion; instead, it based its conclusion that the 777 entities were entitled to coverage upon its reading of the exclusion in conjunction with the resulting loss clause. The resulting loss clause, however, only may be considered when coverage is barred by the exclusion. For the purposes of our analysis, therefore, we must infer that the court found that the exclusion barred coverage.

[7] Specifically, the 777 entities argue that the exclusion does not apply because (1) the windows were not part of the renovation; (2) the exclusion only applies to workmanship; (3) the application of the exclusion would obviate the renovation endorsement; (4) the exclusion is not incorporated into the renovation endorsement; and (5) the exclusion is ambiguous and

"In an insurance policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed." (Internal quotation marks omitted.) *Hammer* v. *Lumberman's Mutual Casualty Co.*, 214 Conn. 573, 588, 573 A.2d 699 (1990). "The burden of proving that an exclusion applies is on the insurer . . . ." *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 788 n.24, 67 A.3d 961 (2013). When policy exclusions are ambiguous, they "are strictly construed in favor of the insured . . . ." (Internal quotation marks omitted.) *Connecticut Ins. Guaranty Assn.* v. *Drown*, supra, 314 Conn. 188.

The 777 entities first argue that the exclusion does not bar recovery because the windows were not part of the renovation. On the basis of a close reading of the exclusion and its terms, we are unpersuaded.

The exclusion at issue in the present case provides: "[Liberty Mutual] do[es] not pay for loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to: a) design, specifications, construction, materials, or workmanship; b) planning, zoning, development, siting, surveying, grading, or compaction; or c) maintenance, installation, renovation, remodeling, or repair."

Although the policy contains a definition section, many of the terms used in the provision at issue are undefined. We, therefore, look to the dictionary definition of these words to ascertain their meaning. *New London County Mutual Ins. Co.* v. *Zachem*, supra, 145 Conn. App. 166 ("[t]o determine the common, natural, and ordinary meaning of an undefined term, it is proper to turn to the definition found in a dictionary"). One such undefined word is "renovate." The verb "renovate" is defined as "to restore to a former better state (as

should be construed in their favor. We address each of these arguments in turn.

by cleaning, repairing, or rebuilding) . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). In the present case, the purpose of Armani's work was to restore the building to a better state by cleaning its facade. In fact, the 777 entities admitted as much in their brief, stating: "Armani was working on the facade (the *renovation* work) . . . ." (Emphasis added.) On the basis of the plain meaning of the policy, therefore, the cleaning of the building's facade was part of the renovation.

Having concluded that the cleaning of the building's facade was part of the renovation, we must next determine whether the damage to the windows, which was a direct result of this cleaning, was related to the renovation, thereby triggering the exclusion. The policy also fails to define "relating to"; therefore, we must again turn to available dictionary definitions to determine the meaning of the term. "Related" is defined as "connected by reason of an established or discoverable relation . . . ." Merriam-Webster's Collegiate Dictionary, supra. Additionally, our courts have consistently given the term "relating to" a broad meaning that comports with the dictionary definition of the term. See, e.g., *Brennan* v. *Brennan Associates*, 293 Conn. 60, 79 n.12, 977 A.2d 107 (2009) (defining "relating to" as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with" [internal quotation marks omitted]). In the present case, the damage to the windows was not merely connected to the cleaning of the building's facade, it was a direct result of the cleaning. The 777 entities admitted this fact when they stated that "there simply are not two concurrent causes [of the loss]: Armani accidentally sprayed the cleaning media onto the windows, causing damage." Thus, the damage to the windows was related to the renovation, as is required for the exclusion to apply.

Additionally, the parties' actions support our conclusion that the windows were part of the renovation. In their renovation plans, the 777 entities contemplated avoiding harm to the windows because the windows were not to be replaced or removed. The specifications of the contract between Viking and the 777 entities set forth Viking's and Armani's obligation to protect adjacent surfaces, which would include the windows, providing that Viking was to "[p]rotect . . . surrounding surfaces of building being restored . . . from harm resulting from concrete restoration work." Although these specifications were drafted in contemplation of the use of a chemical cleaning media, Armani had a general obligation to avoid damage to adjacent surfaces, as set forth in the "General Conditions" provision of Viking's contract with the 777 entities, which provided: "[Viking] . . . shall provide reasonable protection to prevent damage, injury or loss to . . . other property at the site or adjacent thereto, such as . . . structures and utilities not designated for removal, relocation or replacement . . . ." Because Armani's obligations in the performance of its renovation work included avoiding harm to the windows, structures not designated for removal, relocation or replacement, it is difficult to see how the windows and the damage to them is not connected or related to the renovation.

In support of its argument, Liberty Mutual cites extensively to cases from other jurisdictions. Although the majority of these cases are unpersuasive, one case, *Golan Management, LLC* v. *Hartford Ins. Co.*, United States District Court, Docket No. CIV-11-0036-C (RJC) (W.D. Okla. May 3, 2012), is instructive because it is factually similar to the present case. In *Golan Management, LLC*, the owner of a commercial building filed an insurance claim when the windows of the building were damaged as a result of exterior cleaning. Id. The insurance company denied the claim, and the building

owner sued for, inter alia, breach of contract. Id. The policy in *Golan Management, LLC*, contained an exclusion that is similar to the exclusion at issue in the present case. The exclusion in *Golan Management, LLC*, provided: "[The insurer] will not pay for the cost of correcting defects in Covered Property, or loss or damage to Covered Property that was caused by, resulting from, or arising out of work done on Covered Property by [the insured], [the insured's] employees, or others working on [the insured's] behalf." (Internal quotation marks omitted.) Id. Like the 777 entities, the building owner in *Golan Management, LLC*, argued that the exclusion did not apply because "the damage was not caused by work being done to the glass, but by work being done to the building . . . ." Id. The court, however, rejected this argument and granted the insurance company's motion for summary judgment. Id. Like the court in *Golan Management, LLC*, we are unpersuaded by the 777 entities' argument to the effect that the exclusion is applicable to the cleaning of the building's facade but not to the windows. We conclude that the ordinary meaning of the terms in the policy indicates that the exclusion applies to the windows.

The 777 entities next argue that the damage to the windows is not barred by the exclusion because the exclusion only applies to the finished product, not to the process implemented by Armani. This reading of the exclusion would render most of the exclusion's language utterly superfluous, contrary to the principle that "[an insurance] policy should not be interpreted so as to render any part of it superfluous." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 468, 870 A.2d 1048 (2005). This interpretation of the exclusion would ignore subsections (b) and (c) of the exclusion and only give effect to subsection (a) of the exclusion, which addresses the quality of the finished product, stating:

"[Liberty Mutual] do[es] not pay for loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to . . . design, specifications, construction, materials, or workmanship . . . ." Subsections (b) and (c) of the exclusion provide: "[Liberty Mutual] do[es] not pay for loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to . . . b) planning, zoning, development, siting, surveying, grading, or compaction; or c) maintenance, installation, renovation, remodeling, or repair." We conclude, therefore, that the 777 entities' argument to the effect that the exclusion applies only to the finished product of Armani's work is untenable.

The 777 entities also argue that the exclusion does not bar coverage because such a reading would render the renovation endorsement meaningless. Liberty Mutual counters that, even if coverage is excluded for the damage to the windows, the endorsement has meaning because the main policy that the 777 entities purchased covered only new construction and, therefore, "without the renovation endorsement the policy wouldn't have covered *any* damage to the existing building . . . ." (Emphasis added.) Indeed, at oral argument before this court, the 777 entities stated that they purchased the endorsement to extend coverage to the existing building because the policy only covered new construction.

Although some jurisdictions assume that builder's risk policies exclusively apply to new construction; see, e.g., *Ajax Building Corp.* v. *Hartford Fire Ins. Co.*, 358 F.3d 795, 799 (11th Cir. 2004) ("The very purpose of a builder's risk policy is to provide protection for the building under construction. . . . Just as there are standard forms of property insurance used to insure existing buildings, builder's risk policies are used to insure the building while it is in the process of being

built." [Citations omitted; internal quotation marks omitted.]); in Connecticut, "[t]he scope of coverage depends on the language of the policy." D. Rosengren, 13 Connecticut Practice Series: Construction Law (2005) § 12:3, p. 245. In the present case, the main policy form expressly limits coverage to new construction. The main policy form provides: "[Liberty Mutual] cover[s] direct physical loss or damage caused by a covered peril to 'buildings or structures' while *in the course of construction*, erection, or fabrication." (Emphasis added.) It then goes on to state: "[Liberty Mutual] only cover[s] . . . 'buildings or structures' *in the course of construction* . . . ." (Emphasis added.) Thus, the 777 entities' argument that the endorsement would be rendered meaningless if the exclusion applies is without merit because, if they had failed to purchase the endorsement, they would have been unable to recover for damage caused by a covered peril to the existing building they were renovating, such as fire.

Relatedly, the 777 entities argue that the exclusion is not applicable in the present case because the renovation endorsement does not contain a copy of the exclusion. "A rider or endorsement is a writing added to or attached to a policy or certificate of insurance that expands or restricts its benefits or excludes certain conditions from coverage. . . . When properly incorporated into the policy, the policy and the rider together constitute the contract of insurance and are to be read together to determine the contract actually intended by the parties." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 806, 967 A.2d 1 (2009); see also *Schultz* v. *Hartford Fire Ins. Co.*, 213 Conn. 696, 705, 569 A.2d 1131 (1990) ("[i]n construing an endorsement to an insurance policy, the endorsement and policy must be read together, and the policy remains in full force and effect except as altered by the words of the endorsement" [internal quotation marks omitted]).

The 777 entities point out that "typically, endorsements to insurance policies include language incorporating the terms and conditions of the endorsement into the main policy form (or vice versa)"; however, contrary to the 777 entities' argument that the endorsement does not incorporate the terms of the main policy, the endorsement, in fact, contains the following language: "This endorsement changes the Builders' Risk Coverage." Because the renovation endorsement in the present case is incorporated by reference into the main policy, all of the provisions of the main policy apply to the endorsement with equal effect.[8] We, therefore, conclude that the exclusion unambiguously bars coverage.

II

Liberty Mutual also claims that the trial court incorrectly interpreted the resulting loss clause as entitling the 777 entities to coverage. Specifically, Liberty Mutual claims that the clause does not apply because the "cause of the loss (Armani's negligent spraying) did not result in any second cause of loss . . . ." The 777 entities claim that, even if the exclusion applies, the court correctly interpreted the resulting loss clause as restoring coverage. Specifically, the 777 entities argue that "if Armani's acts related to facade cleaning are considered excluded, but resulted in damage to the windows, then [Liberty Mutual] should be obligated to provide coverage." We agree with Liberty Mutual.

[8] Finally, the 777 entities argue that, at a minimum, the exclusion is ambiguous and, therefore, must be construed in their favor. Because we conclude that the exclusion unambiguously bars coverage, we need not address this argument. See, e.g., *Amica Mutual Ins. Co.* v. *Piquette*, 176 Conn. App. 559, 565, 168 A.3d 623 (2017) ("[A]ny ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. . . . This rule of construction may not be applied, however, unless the policy terms are indeed ambiguous." [Internal quotation marks omitted.]).

A resulting loss clause, also known as an ensuing loss clause,[9] is an exception to a policy exclusion that "ensure[s] that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the property insurance policy will remain covered; the uncovered event itself, however, is never covered." 11 S. Plitt et al., Couch on Insurance (3d Ed. Rev. 2017) § 153:2, p. 153-11 n.8. "[T]he insured has the burden of proving that an exception to an exclusion reinstates coverage." *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 788 n.24.

In order to analyze whether the resulting loss clause reinstates coverage, we must again closely examine the language of the policy. The resulting loss clause in this contract immediately follows the exclusion and provides: "But if an act, defect, error, or omission as described above results in a covered peril, [Liberty Mutual] do[es] cover the loss or damage caused by that covered peril."

Although the term "covered peril" is not defined in the policy, the provision titled "PERILS COVERED" provides: "[Liberty Mutual] cover[s] risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded." As this provision indicates, perils, in the context of insurance, are "[t]he *cause* of a risk of loss to person or property; [especially], the cause of a risk such as fire, accident, theft, forgery, earthquake, flood, or illness . . . ." (Emphasis added.) Black's Law Dictionary (9th Ed. 2009); see also 11 S. Plitt et al., supra, p. 153-11 n.8 ("[i]n property insurance

[9] Although the exception at issue in the present case does not use the term "ensuing loss," courts in other jurisdictions have stated that resulting loss clauses and ensuing loss clauses are one and the same. See, e.g., *Erie Ins. Property & Casualty Co.* v. *Chaber*, 239 W. Va. 329, 337 n.8, 801 S.E.2d 207 (2017) ("Whether an insurance policy uses the term ensuing loss or resulting loss is of no moment. Resulting loss clauses are sometimes denominated ensuing loss clauses. The distinction is simply a matter of different wording among insurance policies. There is no legal significance to using one phrase over the other." [Internal quotation marks omitted.]).

parlance, 'perils' refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the loss"). On the basis of the plain language of the resulting loss clause in the present case, a loss caused by an act during a renovation will be covered if the act causes a covered peril, such as a fire, and that latter peril damages the building. In the present case, there was only one cause of the 777 entities' loss—the spraying of the building, which caused damage to the windows—and because that was not a covered peril, the resulting loss clause does not apply.

Our reading of the policy comports with this court's interpretation of ensuing loss clauses in *Sansone* v. *Nationwide Mutual Fire Ins. Co.*, 62 Conn. App. 526, 771 A.2d 243 (2001), and *New London County Mutual Ins. Co.* v. *Zachem*, supra, 145 Conn. App. 160. In those cases, this court concluded that ensuing loss clauses apply only when there is more than one peril.

In *Sansone*, this court affirmed the judgment of the trial court and adopted its decision granting an insurer's motion for summary judgment on the basis of its conclusion that an ensuing loss clause in the insured's homeowners policy did not reinstate coverage for a loss caused by an insect infestation. *Sansone* v. *Nationwide Mutual Fire Ins. Co.*, supra, 62 Conn. App. 527–28. The policy at issue provided: "[The insurer] cover[s] direct physical loss to property . . . except that caused by . . . deterioration . . . wet or dry rot . . . birds, vermin, rodents, insects or domestic animals. . . . [A]ny ensuing loss not excluded is covered." (Internal quotation marks omitted.) *Sansone* v. *Nationwide Mutual Fire Ins. Co.*, 47 Conn. Supp. 35, 38, 770 A.2d 500 (1999), aff'd, 62 Conn. App. 526, 771 A.2d 243 (2001). The trial court concluded that the ensuing loss clause in the policy did not apply because the loss was caused by a single, excluded peril—insect infestation—and "[t]here was . . . *no aggravating activity* or event that caused

[the insured's] additional losses . . . ." (Emphasis added.) Id., 39.

In *New London County Mutual Ins. Co.* v. *Zachem*, supra, 145 Conn. App. 161–63, this court was asked to interpret an ensuing loss clause in a homeowners insurance policy when the insureds claimed coverage for a loss proximately caused by vandalism. The homeowners policy at issue in *Zachem* contained a vandalism exclusion and an ensuing loss clause that limited the exclusion. Id., 162. Specifically, the ensuing loss clause provided in relevant part: "[A]ny ensuing loss to property . . . not excluded or excepted in this policy is covered." (Internal quotation marks omitted.) Id. In *Zachem*, this court concluded that the ensuing loss clause did not apply because the loss was proximately caused by an excluded peril—vandalism—and there was not a "separate and independent hazard . . . ." (Internal quotation marks omitted.) Id., 173.

Indeed, the approach to ensuing loss clauses adopted by this court is in line with the rulings of many other courts throughout the country, which hold that ensuing loss clauses apply only when a loss is caused by a separate and independent peril. See *Taja Investments, LLC* v. *Peerless Ins. Co.*, 717 Fed. Appx. 190, 192 (4th Cir. 2017) ("an ensuing loss provision . . . applies only to distinct, separable, and ensuing losses" [internal quotation marks omitted]); *Travelers Indemnity Co.* v. *Board of County Commissioners*, 508 Fed. Appx. 733, 734–35 (10th Cir. 2013) ("exception provides for coverage only when the excluded cause . . . becomes a new causal agent that itself causes resultant property damage" [internal quotation marks omitted]); *Sapiro* v. *Encompass Ins.*, 221 F.R.D. 513, 522 (N.D. Cal. 2004) ("courts have long defined an ensuing loss as a loss separate and independent from [an] original peril" [internal quotation marks omitted]); *H.P. Hood, LLC* v. *Allianz Global Risks US Ins. Co.*, 88 Mass. App. 613, 619,

39 N.E.3d 769 (2015) (resulting loss clause inapplicable because cause of loss was "not one where an excluded occurrence involving initial property damage led to other property damage of a different kind"), review denied, 473 Mass. 1111, 44 N.E.3d 862 (2016); *Weeks* v. *Co-Operative Ins. Cos.*, 149 N.H. 174, 177, 817 A.2d 292 (2003) (concluding that cause of loss separate and independent from initial excluded loss is required for ensuing loss clause to apply); see also *Acme Galvanizing Co.* v. *Fireman's Fund Ins. Co.*, 221 Cal. App. 3d 170, 179–80, 270 Cal. Rptr. 405 (1990) (same), review denied, California Supreme Court, Docket No. S016534 (Cal. October 11, 1990).

The New Hampshire Supreme Court's decision in *Weeks* v. *Co-Operative Ins. Cos.*, supra, 149 N.H. 174, and the decision of the California Court of Appeal in *Acme Galvanizing Co.* v. *Fireman's Fund Ins. Co.*, supra, 221 Cal. App. 3d 170, are illustrative of the circumstances in which, as here, ensuing loss clauses are inapplicable. In *Weeks*, a brick veneer wall was damaged when it separated from an asphalt shingle wall because of faulty workmanship. *Weeks* v. *Co-Operative Ins. Cos.*, supra, 174. The insurance policy that covered the building excluded losses that were a result of faulty workmanship, but contained a resulting loss clause under which the building owner sought coverage. Id., 174–75. The court in *Weeks* concluded that the resulting loss clause did not apply because "there was no subsequent ensuing cause of loss separate and independent" from the faulty workmanship. Id., 177–78. In reaching this conclusion, the court in *Weeks* cited the decision of the California Court of Appeal in *Acme Galvanizing Co.* Id., 177.

In *Acme Galvanizing Co.* v. *Fireman's Fund Ins. Co.*, supra, 221 Cal. App. 3d 173, an improperly welded steel kettle filled with several tons of molten zinc ruptured, thereby spilling the zinc onto nearby equipment

in the plaintiff's galvanizing plant. The rupture was a result of a latent defect in the kettle, and the plaintiff's insurance policy excluded from coverage losses caused by such defects. Id., 179. The plaintiff argued, however, that the damage caused by the welding failure should be covered under the policy's ensuing loss clause. Id. The court disagreed and concluded: "[T]here was no peril separate from and in addition to the initial excluded peril of the welding failure and kettle rupture. The spillage of molten zinc was part of the loss directly caused by such peril, not a new hazard or phenomenon. If the molten zinc had ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a new covered peril with the ensuing loss covered. That did not occur." Id., 180. Just as in *Weeks* and *Acme Galvanizing Co.*, the loss in the present case was caused by a single, excluded peril, and, therefore, the ensuing loss clause similarly does not reinstate coverage.

The 777 entities argue, however, that *Sansone* and *Zachem* are distinguishable and that, therefore, the independent peril approach to ensuing loss clauses that they set forth is inapplicable to the present case. In an effort to distinguish these cases, the 777 entities rely on the fact that the ensuing loss clause provisions in those cases contained different language than the resulting loss clause in the present case. Although the policies in *Sansone* and *Zachem* use the term "ensuing loss," while the policy in the present case uses the language "results in a covered peril," this difference is immaterial. It is undisputed that the clause in the present case is a "resulting loss" provision and, as discussed previously in this opinion; see footnote 9 of this opinion; ensuing loss and resulting loss clauses are substantively indistinguishable. The clauses in *Sansone* and *Zachem* and the clause in the present case all serve

the same purpose—reinstating coverage if an excluded peril causes a covered peril, which, in turn, results in a loss.

The 777 entities also attempt to distinguish *Sansone* and *Zachem* by pointing out that those cases involved multiple, concurrent causes of the claimed loss, while the present case only involves one peril. Contrary to the 777 entities' argument, the fact that the loss in the present case was the result of a single, uncovered peril does not make the reasoning of *Sansone* and *Zachem* inapplicable. In both of those cases, the court made clear that an ensuing loss clause will only reinstate coverage when a hazard *other* than the excluded peril causes the loss. These cases clearly indicate that, as in the present case, where an excluded peril—the cleaning of the building's facade as part of the renovation—was the sole and direct cause of the damage to the windows, the ensuing loss clause does not reinstate coverage.[10]

The judgment is reversed and the case is remanded with direction to deny the 777 entities' motion for summary judgment on the cross claim, to grant Liberty Mutual's motion for summary judgment and to render judgment on the cross claim for Liberty Mutual.

In this opinion the other judges concurred.

[10] Alternatively, the 777 entities argue that, even if this court does not interpret the ensuing loss clause as reinstating coverage, "it should deny Liberty Mutual's motion [for summary judgment] and leave it to the trier of fact to determine whether the ensuing loss provision applies in this case [because wind, which would be considered a covered peril, might have caused the loss]." In support of their argument, the 777 entities cite the self-serving deposition testimony of employees of Viking and Armani that the damage to the windows *might* have been caused by wind because they sometimes noticed that it seemed windy while they were cleaning the building. The 777 entities, however, admitted that there was only one cause of the damage—the faulty spraying of the building's facade. Thus, we conclude that this argument is without merit.

MICHAEL D. REINER ET AL. *v.* JEFFREY A. REINER ET AL.
(AC 41010)

DiPentima, C. J., and Prescott and Bright, Js.

Syllabus

The plaintiff, who was a beneficiary of certain irrevocable trusts, sought to recover damages from the defendant, the sole trustee to and another beneficiary of the trusts, for his alleged tortious mismanagement of certain real properties owned by the trusts, which were encumbered by mortgages. Prior to trial, the parties, in an effort to settle the tort action, signed a release and settlement agreement, which included a provision that provided that following the death of the settlor of the trusts, E, the plaintiff would buy out the defendant's interests in certain of the trust properties, and the buyout amount of each property was to be calculated on the basis of the fair market value of the property, multiplied by the plaintiff's interests in the property and reduced by 10 percent. That provision did not refer to the mortgages associated with the properties. The agreement also provided that E would immediately transfer by warranty deed two properties to the plaintiff and the defendant, and upon E's death, the defendant would purchase the plaintiff's interests in those two properties under the same fair market valuation, but reduced by 4 percent rather than 10 percent. In accordance with the settlement agreement, the plaintiff withdrew the tort action in 2012. The buyout provisions of the settlement agreement were triggered in 2017 following E's death. After the case was restored to the docket, the defendant filed a motion to enforce the settlement agreement. Thereafter, the trial court held an evidentiary hearing on the motion pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.* (225 Conn. 804). At the hearing, the defendant maintained that the settlement agreement was clear and unambiguous that the buyout amount of the properties was to be calculated as the plaintiff's proportionate interest in the equity in the properties, after deducting the debt secured by any mortgages, less the percentage discounts, while the plaintiff insisted that the settlement agreement was clear and unambiguous that the buyout amount was to be based solely on the fair market value of the properties, without regard to the mortgages on the properties. The trial court accepted the plaintiff's interpretation and concluded that the agreement was clear and unambiguous that the buyout amount was to be calculated as the fair market value of the properties regardless of any debt associated with the properties. The trial court then denied the defendant's motion to enforce the settlement agreement, and the defendant appealed to this court. *Held* that although the trial court incorrectly concluded that the settlement agreement was clear and

unambiguous with respect to the method for calculating the buyout price of the plaintiff's interests in the properties, as the language of the agreement was susceptible to more than one reasonable interpretation, the court properly denied the defendant's motion to enforce the settlement agreement: the agreement did not define the term interest, which was used inconsistently therein, the common meaning of the term interest did not provide certainty, and the buyout provision reasonably could have been interpreted as meaning either that the plaintiff's interest in the properties was the fair market value without consideration of the mortgages on the properties, as found by the trial court, or that the plaintiff's interests in the properties were to be limited to his equitable share of the value of the properties after deducting the underlying debt as secured by any mortgages, as argued by the defendant; nevertheless, although the trial court incorrectly concluded that the buyout provisions of the settlement agreement were clear and unambiguous, this court affirmed the trial court's denial of the motion to enforce the settlement agreement on the alternative ground that the agreement was not clear and unambiguous and, therefore, could not be enforced summarily pursuant to *Audubon Parking Associates Ltd. Partnership*.

Argued February 14–officially released May 28, 2019

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Hartford; thereafter, the plaintiffs withdrew the action in accordance with the parties' settlement agreement; subsequently, the trial court, *Robaina, J.*, granted the named defendant's motion to restore the case to the docket; thereafter, the court denied the named defendant's motion to enforce the parties' settlement agreement, and the named defendant appealed to this court. *Affirmed.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant (named defendant).

Gary J. Greene, for the appellee (named plaintiff).

Opinion

BRIGHT, J. The present appeal stems from a dispute over the interpretation of a settlement agreement

between, among others, the plaintiff Michael D. Reiner[1] and the defendant Jeffrey A. Reiner.[2] The defendant appeals from the judgment of the trial court, rendered after a hearing pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811–12, 626 A.2d 288 (2010) (*Audubon*),[3] denying his motion to enforce the agreement. On appeal, the defendant claims that the court improperly concluded that the settlement agreement is clear and unambiguous, as construed by the plaintiff.[4] We conclude that the contested sections of the agreement are not clear and unambiguous and, accordingly, we affirm the judgment of the trial court denying the defendant's motion to enforce the agreement on the alternative ground that a settlement agreement that is not clear and unambiguous cannot be enforced through an *Audubon* hearing.[5]

The following procedural history and undisputed facts are relevant to this appeal. The plaintiff and the

[1] The Sheila Reiner Trust for Her Children, The Michael D. Reiner Trust for His Children, and Connecticut LLC Irrevocable Trust also were named as plaintiffs in this action. For clarity, we refer to Michael D. Reiner individually as the plaintiff.

[2] Although Jeffrey A. Reiner is one of twenty-two defendants in this action, he is the only defendant who appealed; therefore, we refer to him individually as the defendant.

[3] "A hearing pursuant to *Audubon* [supra, 225 Conn. 811–12], is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law." *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 499 n.5, 4 A.3d 288 (2010).

[4] The defendant also claims on appeal that the court improperly considered extrinsic evidence in connection with the *Audubon* hearing. In light of our conclusion that it was improper for the court to have concluded that the language of the settlement agreement was clear and unambiguous, we need not reach the defendant's other claim.

[5] "Where the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record." (Internal quotation marks omitted.) *Heisinger* v. *Cleary*, 323 Conn. 765, 776 n.12, 150 A.3d 1136 (2016).

defendant are brothers who were two of the three primary beneficiaries of four irrevocable trusts (Reiner Trusts) that were established by their parents, Eleanore Reiner and Leo P. Reiner.[6] The defendant was the sole trustee of the Reiner Trusts. The Reiner Trusts owned several parcels of real property (Reiner Trusts properties) that had a substantial value; however, a majority of the properties were encumbered by mortgages. Eleanore Reiner also was the sole member of 711 Farmington, LLC, and Canton Gateway, LLC. 711 Farmington, LLC, and Canton Gateway, LLC, each owned a single parcel of real property, both of which were encumbered by a mortgage. After a dispute arose regarding the Reiner Trusts properties, the plaintiff, in 2011, commenced the present action and several other parallel actions against the defendant alleging that he tortiously had mismanaged the Reiner Trusts properties. On July 5, 2012, the plaintiff, the defendant, and several other individuals and entities associated with the Reiner Trusts executed a settlement agreement to resolve the present action, the parallel actions, and other disputes. In the agreement, the plaintiff agreed to withdraw with prejudice the then pending actions, and all parties to the agreement agreed to a comprehensive mutual release. The agreement contained several provisions in which the defendant agreed to buy out the plaintiff's interests in certain properties after the death of Eleanore Reiner. The following buyout provisions are directly at issue in this appeal.

Section 1 (a) of the agreement provides: "[The defendant] shall buyout [the plaintiff's] interests in the Reiner Trusts and the Reiner Trusts Properties by paying cash to [the plaintiff] in proportion to his interests therein no later than 280 days following Eleanore Reiner's death. The buy-out amount payable to [the plaintiff] for

[6] Nancy Brooks, the sister of the plaintiff and the defendant, was the third primary beneficiary of the trusts.

his interests in the Reiner Trusts will be based on the fair market value of each of the Reiner Trusts Properties at the time of Eleanore Reiner's death, multiplied by [the plaintiff's] interests in each Trust Property with a deduction of ten (10%) percent to compensate for a minority discount and for the fact that there is no real estate brokerage commission." Section 1 (b) of the agreement detailed the manner in which the fair market value for each of the Reiner Trusts properties was to be determined. The parties also agreed that the parties' "interests" in the Reiner Trusts properties accurately were set forth in the " 'Trust Property Schedule,' " which was attached to the agreement. That attachment, prepared on June 27, 2012, individually detailed the percentage of the Reiner Trusts properties owned by each party, but not the then-existing value of the properties or the amount of any equity in the properties in light of any mortgages on them.

Section 2 of the agreement provides in relevant part: "In connection with the execution and delivery of this Agreement, Eleanore Reiner will immediately transfer, by Warranty Deeds (i) her interests (as sole member of 711 Farmington, LLC) in 711 Farmington as follows: two thirds (2/3) to [the defendant] and one-third (1/3) to [the plaintiff] in the form of warranty deed attached to this Agreement . . . and (ii) her interests (as sole member of Canton Gateway, LLC) in Canton Gateway as follows: three fourths (3/4) to [the defendant] and one-fourth (1/4) to [the plaintiff] in the form of warranty deed attached to this Agreement . . . . Such transfers are being made upon the following conditions . . . .

"[The defendant] shall buy out [the plaintiff's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the plaintiff] no later than 280 days following Eleanore Reiner's death. The determination of the fair market value of 711 Farmington and Canton Gateway will be based on the same formula and terms

used to determine the fair market value of the Reiner Trust Properties provided for in [§] 1 (a) of this Agreement above except that the valuation shall be subject only to a four percent (4%) discount, not ten percent (10%). [The defendant] will have 280 days from the date of Eleanore Reiner's death, to obtain financing and consummate the buyout."

On July 11 and 13, 2012, the plaintiff withdrew the present action with prejudice in accordance with the agreement. Nevertheless, on July 25, 2012, the defendant filed a motion in which he requested that the court set aside the withdrawal and reinstate the action on the ground that the plaintiff had violated the agreement by soliciting a "side deal" with Eleanore Reiner to permit him to lease a property owned by her in Florida, which property was governed by § 10 of the agreement. On July 27, 2012, the plaintiff also filed a motion to restore the case to the docket. On September 10, 2012, the court restored the case to the docket. Over the course of the next four and one-half years, the parties engaged in litigation concerning the Florida property and other collateral issues stemming from the agreement. None of those issues are the subject of this appeal.

On April 7, 2017, the defendant filed the motion to enforce the agreement that is the subject of this appeal. Therein, he argued that certain buyout provisions of the agreement had been triggered as a result of the recent death of Eleanore Reiner, and that a dispute existed between himself and the plaintiff as to the interpretation of those provisions. In particular, Eleanore Reiner's death triggered the defendant's obligation, under § 2 of the agreement, to buy out the plaintiff's one-third interest in 711 Farmington and his one-quarter interest in Canton Gateway. Her death also triggered the defendant's obligation, under § 1 of the agreement, to buy out the plaintiff's interest in the Reiner Trusts

properties, including 603 Farmington Avenue in Hartford.[7] The plaintiff and the defendant were unable to reach an agreement on how to determine the price that the defendant was to pay the plaintiff for his interests in the properties. The defendant claimed that the buyout price of the plaintiff's interests is intended to be calculated as the plaintiff's proportionate interest in the equity in the properties, after deducting the debt secured by any mortgages, less the percentage discounts. The defendant requested that the court adjudicate the dispute by enforcing the agreement in accordance with his interpretation.

On April 17, 2017, the plaintiff filed an objection to the defendant's motion to enforce the agreement.[8] Therein, the plaintiff disagreed with the defendant's interpretation and advanced his own contrary interpretation of the agreement. The plaintiff maintained that the settlement agreement clearly and unambiguously provides that the buyout amount is to be " 'based on the fair market value' of each of the properties," which amount did not include consideration of the existing mortgages on the properties.

On August 10, 2017, the defendant filed a supplemental memorandum in support of his motion to enforce the agreement. In his supplemental memorandum, the

[7] Although the defendant's initial appellate brief does not mention 603 Farmington Avenue, he subsequently filed an errata sheet in which he maintains that 603 Farmington Avenue is the only property at issue under § 1. The plaintiff does not dispute that the buyout of 603 Farmington Avenue also is at issue in this appeal.

[8] In that filing, the plaintiff principally requested that the court deny the defendant's motion, but also sought enforcement of the agreement in accordance with his own interpretation. Despite the contradictory language used in the plaintiff's April 17, 2017 filing, we treat it as an objection. See *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, 325 Conn. 198, 217, 157 A.3d 70 (2017) (*Robinson, J.*, concurring) (interpretation of pleadings is question of law); see also *Farren* v. *Farren*, 142 Conn. App. 145, 156, 64 A.3d 352 (substance of relief sought by motion, not form, is controlling), cert. denied, 309 Conn. 903, 68 A.3d 658 (2013).

defendant argued that the agreement clearly and unambiguously provides that the amount of the buyout must take into consideration the mortgages on the properties. The defendant argued that a contrary interpretation would be in conflict with Connecticut mortgage jurisprudence, and would result in an absurd result in the form of a substantial unintended windfall for the plaintiff.[9]

On October 23, 2017, following an *Audubon* hearing, the court issued a memorandum of decision in which it denied the defendant's motion to enforce the agreement and concluded that the agreement was clear and unambiguous in conformance with the plaintiff's interpretation.[10] In particular, even though it heard extrinsic evidence regarding what the parties intended by the buyout provisions, the court expressly constrained its analysis to the four corners of the agreement and reasoned that "the terms of the agreement are clear and unambiguous and that the parties did enter into a valid agreement. The agreement, negotiated extensively by and between sophisticated parties, does not refer to

[9] For instance, if the parties equally shared a property that had a fair market value of $1 million and that was encumbered by $900,000 of underlying debt, the buyout amount, pursuant to the plaintiff's construction, would be $500,000. As a result, the defendant would be obligated to pay the plaintiff five times the amount of the actual equity in the property.

[10] The judgment file is inconsistent with the court's memorandum of decision. The judgment file states "that the parties' settlement agreement [is to] be enforced as set forth in the memorandum of decision [regarding the defendant's] motion to enforce settlement agreement issued on October 23, 2017." In the memorandum of decision, the court denied the defendant's motion to enforce the agreement and, despite its conclusion that the agreement was clear and unambiguous in accordance with the plaintiff's interpretation, the court did not enforce the agreement. The court's memorandum of decision is controlling. See *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 529 n.1, 893 A.2d 389 (2006) ("[w]hen there is an inconsistency between the judgment file and the oral or written decision of the trial court, it is the order of the court that controls because the judgment file is merely a clerical document, and the pronouncement by the court . . . is the judgment" [internal quotation marks omitted]).

'equity' as a basis for valuation. The agreement clearly and unambiguously states that the buyout amount will be based on the fair market value of each property and the proportionate interests of the parties being taken into consideration refer to the agreed upon percentage interests [as] listed in the Trust Property Schedule. . . .

"The contract provision as to buying out the plaintiff's interest requires determining the fair market value of the property by the method described in the contract itself. By comparison, [§] 3 of the agreement (160 Farmington) makes specific reference to mortgages and prohibits financing or modification of existing mortgages without the consent of the plaintiff. Similarly, references to mortgages are found in [§] 9 (White Pine), and [§] 10 (Florida property). Further, the listing of the trust properties, which is entitled 'Trust Property Schedule– Date Prepared 6/27/2012,' lists the properties with the percentage of ownership in each the plaintiff, the defendant, and their sibling, without reference to mortgages. Finally, the term 'equity,' commonly understood to mean the difference between the fair market value and the encumbrances on a property, does not appear in any relevant portion of the agreement." (Citation omitted.) This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the relevant standard of review and legal principles that govern our review. "A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit." (Citations omitted; internal quotation marks omitted.) *Audubon*, supra, 225 Conn. 811. "Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity

of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively contracting for the right to avoid a trial." (Emphasis omitted.) Id., 812. Nevertheless, the right to enforce summarily a settlement agreement is not unbounded. "The key element with regard to the settlement agreement in *Audubon* . . . [was] that there [was] no factual dispute as to the terms of the accord. Generally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement." (Internal quotation marks omitted.) *Reid & Riege, P.C.* v. *Bulakites*, 132 Conn. App. 209, 216, 31 A.3d 406 (2011), cert. denied, 303 Conn. 926, 35 A.3d 1076 (2012). "The rule of *Audubon* effects a delicate balance between concerns of judicial economy on the one hand and a party's constitutional rights to a jury and to a trial on the other hand. See [*Audubon*], supra, [810–12]; see also *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 534–35, 4 A.3d 288 (2010). To use the *Audubon* power outside of its proper context is to deny a party these fundamental rights and would work a manifest injustice." *Matos* v. *Ortiz*, 166 Conn. App. 775, 792, 144 A.3d 425 (2016); see *DAP Financial Management Co.* v. *Mor-Fam Electric, Inc.*, 59 Conn. App. 92, 97–98, 755 A.2d 925 (2000) ("The test of disputation . . . must be applied to the parties at the time they entered into the alleged settlement. To hold otherwise would prevent any motion to enforce a settlement from ever being granted.").

"A settlement agreement, or accord, is a contract among the parties." *Ackerman* v. *Sobol Family Partnership, LLP*, supra, 298 Conn. 532. "When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected

with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 341, 152 A.3d 1230 (2016).

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) Id., 341–42. "[T]he determination as to whether contractual language is plain and unambiguous is . . . a question of law subject to plenary review." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 325 Conn. 146, 157–58, 156 A.3d 477 (2017).[11]

On appeal, there is no dispute between the parties that the agreement is valid and enforceable, and that

[11] We emphasize that the scope of our review is narrow and requires us to determine only whether the language of the buyout provision is ambiguous. We do not decide which party has the better interpretation, only whether there is more than one reasonable interpretation of the contract language at issue. See *Salce* v. *Wolczek*, 314 Conn. 675, 683, 104 A.3d 694 (2014).

§§ 1 and 2 of the agreement mandate that the defendant buy out the plaintiff's interests in certain properties. Instead, the parties' views diverge as to the method by which the buyout amount is to be calculated. The defendant claims that the court improperly concluded that the agreement clearly and unambiguously provides that the buyout amount is the fair market value of the properties. He argues that the clear and unambiguous language of the agreement specifies that the buyout amount is the plaintiff's equitable interest in the properties, namely, the fair market value of the properties less the amount of any mortgage encumbrances. In response, the plaintiff argues that the court properly determined that the agreement clearly and unambiguously provides that the buyout amount is the fair market value of the properties without regard to any debt associated with the properties. We disagree with both parties and conclude that the agreement is ambiguous with respect to the calculation of the buyout of the plaintiff's interests in the properties.

As noted previously, § 1 (a) of the agreement provides: "[The defendant] shall buyout [the plaintiff's] interests in the Reiner Trusts and the Reiner Trusts Properties by paying cash to [the plaintiff] in proportion to his interests therein no later than 280 days following Eleanore Reiner's death. The buy-out amount payable to [the plaintiff] for his interests in the Reiner Trusts will be based on the fair market value of each of the Reiner Trusts Properties at the time of Eleanore Reiner's death, multiplied by [the plaintiff's] interests in each Trust Property with a deduction of ten (10%) percent to compensate for a minority discount and for the fact that there is no real estate brokerage commission." Section 2 (b) of the agreement provides in relevant part that "[the defendant] shall buy out [the plaintiff's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the plaintiff] no later than 280 days following Eleanore Reiner's death. The determination of the fair market value of 711 Farmington and

Canton Gateway will be based on the same formula and terms used to determine the fair market value of the Reiner Trust Properties provided for in [§] 1 (a) of this Agreement above except that the valuation shall be subject only to a four percent (4%) discount, not ten percent (10%). . . .''

Section 1 applies to the defendant's buyout of the plaintiff's interests in the Reiner Trusts properties, including 603 Farmington Avenue. With respect to 603 Farmington Avenue, the language of § 1 provides that the buyout amount will be determined on the basis of the fair market value multiplied by the plaintiff's *interest*, less a percentage discount. For the following reasons, we conclude that it is neither clear nor certain whether the word ''interest'' was intended, as the defendant contends, to mean the plaintiff's percentage interest in the equity in the properties, or, as the plaintiff contends, to mean the plaintiff's ownership percentage of the fair market value of the properties.

First, the agreement does not define ''interest,'' and that term has no talismanic meaning as utilized throughout the agreement. For example, the parties agreed that the Trust Property Schedule attached to the agreement set forth their and Nancy Brooks' interests in the Reiner Trusts properties. That attachment lists the parties' respective percentage ownership in each of the Reiner Trusts properties and is devoid of the then-existing mortgage valuation for each property. Conversely, § 1, upon which the plaintiff and the court relied, provides that, if the defendant refinances one or more of the Reiner Trusts properties to fund his buyout of the plaintiff's interests in other properties, the interest of the third beneficiary of the Reiner Trusts, Nancy Brooks, in the refinanced properties cannot be diminished. The defendant is required to provide her with value in other properties or cash sufficient to offset any reduction in the value of her interest as a result of the refinancing.

This language suggests that the parties agreed that a beneficiary's interest in a property is determined by taking into account any outstanding debt associated with the property. Accordingly, the inconsistent use of the term "interest" makes it unclear whether that term was intended to include or to exclude outstanding debt on the properties.

Second, the common meaning of the term "interest" provides no certainty. As applicable here, interest is defined as "[a] legal share in something; all or part of a legal or equitable claim to or right in property . . . ." Black's Law Dictionary (10th Ed. 2014); see Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) (defining "interest" to mean "right, title, or legal share in something"). In real estate transactions, interest could be intended to mean, among other things, equitable or legal ownership. See generally *Salce* v. *Wolczek*, 314 Conn. 675, 683–96, 104 A.3d 694 (2014) (determining that phrase "any ownership interest . . . is transferred" encompassed transfers of both legal and equitable interests). As the defendant properly emphasizes, "Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property." (Internal quotation marks omitted.) *Mortgage Electronic Registration Systems, Inc.* v. *White*, 278 Conn. 219, 231, 896 A.2d 797 (2006). Accordingly, because the plaintiff did not have legal title to certain properties as they were still encumbered by mortgages, it is a reasonable interpretation that his interest was equitable, and the buyout amount was limited to his share of the worth of the properties after deducting the underlying debt on the properties as secured by any mortgages. Furthermore, such an interpretation would avoid what might be viewed as an absurd result of the buyout amount being substantially greater than the entire net value of

the property. See footnote 9 of this opinion; see also *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 198–99, 118 A.3d 675 (recognizing principle that "[w]e will not construe a contract's language in such a way that it would lead to an absurd result" and that "contractual documents are to be read as a whole and bizarre results are to be avoided" [internal quotation marks omitted]), cert. denied, 318 Conn. 905, 122 A.3d 634 (2015).

In contrast, as the plaintiff and the court recognize, the agreement does not specify that the plaintiff's interest was equal to his equity, and § 1 does not make reference to mortgages.[12] On the basis of the foregoing, we conclude that § 1 is subject to two reasonable interpretations as it relates to the defendant's obligation to purchase the plaintiff's interest in the Reiner Trusts properties, including 603 Farmington Avenue.

[12] The plaintiff and the court also rely on the references to mortgages in §§ 3, 9, and 10 of the agreement to conclude that the parties intentionally omitted consideration of the mortgages from § 1. We are unpersuaded that these collateral references establish that § 1 is clear and unambiguous. In § 3, the defendant agreed to buy out Connecticut LLC Trust's interest in another parcel of real property "by paying . . . the sum equal to (i) $700,000 plus (ii) forty-nine [percent] (49%) of any principal pay down on the mortgage on" that property. This language sets forth a precise mathematical formula to produce a number "*equal to*" the buyout price for the property at issue. (Emphasis added.) By contrast, § 1 states that the buyout of the plaintiff's interests in the Reiner Trusts properties "will be *based on*" the fair market value of each of the properties. (Emphasis added.) "Based on" and "equal to" may have been intended by the parties to have the same meaning, but that is not necessarily so. As the defendant points out in his brief, " 'based on' typically notes that something is a first step and more will be done in addition. . . . [The] [d]efendant argues that this additional step was calculating the equity in the properties to determine the value of the plaintiff's interest in them." We do not express a view as to which argument regarding the impact of § 3 on the interpretation of § 1 is more reasonable. See footnote 11 of this opinion. We simply note that the court's reliance on § 3 to support its conclusion that § 1 is clear and unambiguous was misplaced. Further, we do not view §§ 9 and 10 as in anyway helpful to a determination of the meaning of § 1. Sections 9 and 10 are not buyout provisions but, rather, govern the transfer of properties through Eleanore Reiner's will. The fact that the sole beneficiary of §§ 9 and 10 received the property as encumbered upon Eleanore Reiner's death provides no insight as to how the plaintiff and the defendant intended the buyout provisions between them to work.

We, therefore, disagree with the court's conclusion that the language is clear and unambiguous.

We reach the same conclusion as to the defendant's obligation under § 2 to purchase the plaintiff's interests in 711 Farmington and Canton Gateway. Section 2 applies to the defendant's buyout of the plaintiff's interests in 711 Farmington and Canton Gateway. As noted previously, § 2 (b) incorporates the formula for determining fair market value from § 1 (a). Nevertheless, § 2 (b), unlike § 1 (a), does not state that the purchase of the plaintiff's interests in the two properties is to be based on fair market value. Instead, § 2 (b) merely provides, in relevant part, that "[the defendant] shall buy out [the plaintiff's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the plaintiff] . . . . The determination of the fair market value of 711 Farmington and Canton Gateway will be based on the same formula and terms used to determine the fair market value of the Reiner Trust Properties provided for in [§] 1 (a) of this Agreement above . . . ." Although it can be argued that the reference to fair market value in § 2 (b) implies that it must be the basis for valuing the plaintiff's interests, the language is certainly not clear and unambiguous. The language of § 2 (b) simply does not state how the price for the plaintiff's interests in the two properties is to be determined. Furthermore, to the extent that this language is understood to adopt the buyout amount formula in § 1 (a), it does not clarify the ambiguity in that section as to whether the plaintiff's interest is to be determined after consideration of the debt associated with the properties.

In sum, each party has set forth a reasonable interpretation of the buyout provisions, with both interpretations having bases in the language used in the agreement. We conclude, therefore, that the agreement is ambiguous with respect to the method of calculation of the buyout amounts because the intent of the parties is not clear and certain from the language of the agreement. As noted previously, settlement agreements can

be enforced summarily pursuant to *Audubon* only when they are clear and unambiguous. That is not the case here. Consequently, although the court properly denied the defendant's motion to enforce the agreement, it incorrectly determined that the agreement is clear and unambiguous, and, thus, the court's declaration of the meaning of the contract has no legal effect. We affirm the court's denial of the defendant's motion on the alternative ground that the buyout provisions of the agreement at issue are not clear and unambiguous.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

ROSENTHAL LAW FIRM, LLC *v.* JAMES COHEN (AC 41028)

Lavine, Elgo and Bear, Js.

Syllabus

The plaintiff law firm sought to recover damages from the defendant, its former client, for breach of a retainer agreement for legal services in connection with a fee dispute with the defendant that had been resolved in the plaintiff's favor during arbitration proceedings. The plaintiff had filed an application to confirm the arbitration award with the trial court, which rendered judgment granting the application. Thereafter, this court affirmed the trial court's judgment, and our Supreme Court denied the defendant's petition for certification to appeal. R, the sole member of the plaintiff, represented the plaintiff throughout the arbitration proceedings and in the trial and appellate courts. The plaintiff subsequently brought the present action, claiming that the defendant, by refusing to pay for the legal services that it had rendered, had breached the parties' retainer agreement, pursuant to which the parties had agreed that if the defendant failed to pay the plaintiff its agreed on fee or expenses, he would be

[13] Although we conclude that this aspect of the agreement cannot be enforced pursuant to *Audubon*, this does not foreclose the parties' ability, if they are unable to reach an extrajudicial resolution of their dispute, to seek other avenues of recovery on the basis of the agreement. See *Matos* v. *Ortiz*, supra, 166 Conn. App. 809 ("while [a settlement agreement] may still be enforceable through ordinary procedural channels, these are hardly the circumstances that give rise to a right to summary enforcement under *Audubon*").

liable for all costs related to a collection action, including the plaintiff's attorney's fees and interest. The plaintiff claimed that it had incurred $59,600 in legal fees in connection with R's representation of it in the arbitration and related court proceedings. The trial court rendered judgment in favor of the defendant, concluding that the plaintiff was not entitled to recover attorney's fees under the retainer agreement because it had effectively represented itself throughout the subject proceedings. In reaching its decision, the court relied on *Jones* v. *Ippoliti* (52 Conn. App. 199), in which this court extended to self-represented attorney litigants the rule adopted in *Lev* v. *Lev* (10 Conn. App. 570) barring self-represented litigants generally from recovering attorney's fees. On appeal to this court, the plaintiff claimed that the trial court erred in concluding that the plaintiff, as a self-represented law firm, was precluded from recovering attorney's fees, which was based on its claim that because the portion of *Jones* on which the court relied was dictum, the court improperly treated it as binding precedent. *Held* that the trial court did not err in determining that the law barring self-represented nonattorney litigants from recovering statutory attorney's fees also precludes a self-represented law firm from recovering contractual attorney's fees; this court's conclusion in *Jones* that self-represented attorney litigants cannot recover attorney's fees constituted an alternative holding and not dictum, as that conclusion could not reasonably be characterized as a merely casual, passing comment made without analysis or due consideration of conflicting authorities, and it was clear that this court made a deliberate decision to resolve the issue and that it undeniably decided it, and this court declined the plaintiff's request to overrule the portion of *Jones* at issue, which the plaintiff claimed was based on a misinterpretation of *Lev*, as this court was not at liberty to do so because it is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding.

Argued January 2—officially released May 28, 2019

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Shapiro, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Edward Rosenthal, with whom, on the brief, was *Daniel J. Klau*, for the appellant (plaintiff).

James D. Cohen, self-represented, the appellee (defendant).

Opinion

BEAR, J. This action between the plaintiff, Rosenthal Law Firm, LLC, and its former client, the defendant,

James Cohen, arises out of a fee dispute that had been resolved in the plaintiff's favor during a prior arbitration proceeding. Following the confirmation of the arbitration award, the plaintiff commenced the present action seeking attorney's fees, pursuant to a contract between it and the defendant, for its prosecution of the fee dispute. After a trial to the court, the trial court rendered judgment in the defendant's favor, from which the plaintiff now appeals. The plaintiff claims on appeal that the court erred in concluding that it was not entitled to attorney's fees because it had represented itself, through its sole member, in the arbitration and award confirmation proceedings. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's claim. On December 1, 2011, the parties entered into an agreement for legal services (retainer agreement) whereby they agreed, in paragraph 12, that in the event the defendant failed to pay the plaintiff its agreed on fee or expenses, he would be liable for "all costs related to a collection action including [the plaintiff's] attorney's fees and interest at the annual rate of ten percent . . . ." On March 3, 2014, the plaintiff petitioned the legal fee resolution board of the Connecticut Bar Association (board) to resolve a fee dispute that had arisen between the parties. On December 24, 2014, a panel of three arbitrators found that the plaintiff was owed $109,683 in fees for its representation of the defendant. The plaintiff subsequently filed an application to confirm the arbitration award in the Superior Court, which the court, *Scholl, J.*, granted on March 17, 2015. The defendant appealed to this court, which affirmed the trial court's judgment confirming the arbitration award, and our Supreme Court denied the defendant's petition for certification to appeal. See *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 473, 139 A.3d 774, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016). Attorney

Edward Rosenthal, the sole member of the plaintiff, represented the plaintiff throughout the proceedings before the board and in the trial and appellate courts.

On April 1, 2016, the plaintiff commenced the present action alleging, inter alia, that the defendant breached the retainer agreement by failing and refusing to pay for the legal services it had rendered and that, as a result, it suffered damages in the form of "considerable time [spent] in collecting its fees from the defendant" in arbitration and the related court proceedings. As clarified in its trial brief, the plaintiff sought to recover the attorney's fees and interest prescribed by paragraph 12 of the retainer agreement. More specifically, the plaintiff claimed that it had incurred $59,600 in "legal fees" in connection with the arbitration and related court proceedings, which reflected the time spent by Rosenthal on these matters.

On October 18, 2017, following a trial to the court, the trial court, *Shapiro, J.*, issued a memorandum of decision in which it concluded that the plaintiff was not entitled to recover attorney's fees under paragraph 12 of the retainer agreement because it had effectively represented itself throughout the proceedings at issue, and "[t]he law of this state is that pro se litigants are not entitled to attorney's fees." (Internal quotation marks omitted.) In so concluding, the trial court relied on *Jones* v. *Ippoliti*, 52 Conn. App. 199, 212, 727 A.2d 713 (1999), in which this court extended the rule adopted in *Lev* v. *Lev*, 10 Conn. App. 570, 575, 524 A.2d 674 (1987)—barring self-represented litigants generally from recovering attorney's fees—to self-represented *attorney* litigants. Accordingly, the trial court rendered judgment in favor of the defendant. This appeal followed.

The plaintiff's sole claim on appeal is that the trial court erred in determining that the law barring self-represented nonattorney litigants from recovering statutory attorney's fees also precludes a self-represented

law firm from recovering contractual attorney's fees. The plaintiff argues that the portion of *Jones* relied on by the trial court is mere dictum. The plaintiff alternatively argues that we should overrule this portion of *Jones* because it is based on a "serious misinterpretation" of *Lev*.[1] We disagree that the statement in *Jones* concerning self-represented attorney litigants is dictum and decline the plaintiff's invitation to revisit the issue.

Preliminarily, we note that, because the plaintiff's appeal concerns the trial court's interpretation and application of the law to the undisputed facts of this case, our standard of review is plenary. See *Thompson* v. *Orcutt*, 257 Conn. 301, 308–309, 777 A.2d 670 (2001); *Steroco, Inc.* v. *Szymanski*, 166 Conn. App. 75, 87, 140 A.3d 1014 (2016). We now turn to an examination of this court's decision in *Jones*.

Jones involved an action by the partners of a law firm against former clients to collect unpaid fees for services previously rendered. *Jones* v. *Ippoliti*, supra, 52 Conn. App. 200 n.2, 203. The plaintiffs alleged, inter alia, failure to pay a promissory note, and they sought attorney's fees for the prosecution of the collection action pursuant to a provision in the note that provided for "any costs and expenses, including reasonable attorney's . . . fees incurred in the collection of [the note] or in any litigation or controversy arising from or connected with [the note]." (Internal quotation marks

[1] The plaintiff also appears to argue that it is entitled to attorney's fees under the plain language of paragraph 12 of the retainer agreement. The plaintiff's discussion of this issue, however, is limited to a single conclusory statement in its appellate brief without any citation to authority. Accordingly, to the extent the plaintiff claims that the contract language is dispositive of this appeal, we conclude that such claim is inadequately briefed and, therefore, decline to review it. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." [Internal quotation marks omitted.]).

omitted.) Id., 202 n.5, 203. The trial court rendered judgment in favor of the plaintiffs on their complaint and awarded them attorney's fees pursuant to the promissory note for the services of their trial counsel, who had been retained by the plaintiffs. Id., 203 and n.7, 208. The court, however, denied their claim for attorney's fees based on the services rendered by the attorneys and paralegals employed by the plaintiffs' law firm in assisting their trial counsel in the prosecution of the collection action. Id., 208.

On appeal, the plaintiffs in *Jones* claimed that they were entitled "to recover 'in-house' counsel fees for the services they performed to assist their trial counsel." Id. In support of this claim, "[t]he plaintiffs urge[d] [this court] to adopt what they claim[ed] to be a trend in other jurisdictions to award reasonable attorney's fees for both outside counsel, as well as in-house counsel, who participate in the prosecution of a claim in which attorney's fees can be awarded." (Footnote omitted.) Id. According to the plaintiffs, "an award to the successful litigant of reasonable attorney's fees for the services [the plaintiffs' law firm] provided [was] appropriate because the time devoted to this case was time not available for other work." Id., 210.

Citing a number of out-of-state cases in which courts denied an award of attorney's fees to attorney litigants appearing on their own behalf,[2] the defendants countered that, "if plaintiff-attorneys representing themselves are not entitled to an award of attorney's fees, then, a fortiori, plaintiff-attorneys who merely assist their trial counsel, for whose services they have received an award of attorney's fees, are not entitled to an award of attorney's fees for their own services." Id. The court deemed this distinction to be significant. Id.

[2] See *Connor* v. *Cal-Az Properties, Inc.*, 137 Ariz. 53, 55–56, 668 P.2d 896 (App. 1983); *O'Connell* v. *Zimmerman*, 157 Cal. App. 2d 330, 336–37, 321 P.2d 161 (1958); *Sessions, Fishman, Rosenson, Boisfontaine & Nathan* v. *Taddonio*, 490 So. 2d 526, 527 (La. App. 1986).

The court in *Jones* began its analysis of the plaintiffs' claim by first considering "whether [the plaintiffs' law firm] and in-house counsel [were] synonymous." Id. The court determined that, "[b]y definition, the plaintiffs [were] not in-house counsel because they [were] not employees of a business whose function is to advise the business on day-to-day matters." Id., 211. The court therefore concluded that "the cases cited by the plaintiffs in support of their claim that the trial court should have awarded them attorney's fees for the services performed by [the plaintiffs' law firm were] factually distinguishable in that attorney's fees in those cases [had been] awarded for the work done by in-house counsel in businesses such as insurance companies." Id.[3]

The court next considered "whether [the plaintiffs' law firm had] functioned as an attorney in [the collection action]."[4] Id. "To begin with, [the court] note[d] that [the plaintiffs' law firm had] not enter[ed] an appearance on behalf of the plaintiffs" and that, accordingly, "it did not represent them in this action." Id., 211–12; see Practice Book § 3-7 (a) ("[e]xcept by leave of the judicial authority, no attorney shall be permitted to appear in court or to be heard on behalf of a party until the attorney's appearance has been entered"). The court further determined that "[e]ven if

[3] The court left for another day the issue of whether, in the appropriate circumstances, a plaintiff may be entitled to attorney's fees for the services that in-house counsel provides to outside counsel during the course of litigation. *Jones* v. *Ippoliti*, supra, 52 Conn. App. 211 n.17.

[4] It would appear at first blush that the court's determination in *Jones* that the plaintiffs did not constitute "in-house counsel" entirely disposed of the plaintiffs' claim on appeal. A review of the plaintiffs' principal appellate brief, however, reveals that they had argued more generally that they should have been awarded attorney's fees for the reasonable value of their time because "[t]here is no meaningful distinction between the time spent by [outside counsel] and the time spent by attorneys and paralegals at [the plaintiffs' law firm]." In support of this argument, the plaintiffs cited to a number of decisions from other jurisdictions holding that self-represented attorney litigants and law firm litigants represented by their own attorneys may recover attorney's fees. See, e.g., *Winer* v. *Jonal Corp.*, 169 Mont. 247, 251, 545 P.2d 1094 (1976); *Hinkle, Cox, Eaton, Coffield & Hensley* v. *Cadle Co. of Ohio, Inc.*, 115 N.M. 152, 158, 848 P.2d 1079 (1993). Consequently, the court's conclusion in *Jones* that the plaintiffs were not in-house counsel did not fully dispose of the appeal.

[it] were to conclude otherwise, i.e., that [the plaintiffs' law firm had] represented the plaintiffs, such representation would have been of a pro se nature. The law of this state is that pro se litigants are not entitled to attorney's fees." *Jones* v. *Ippoliti*, supra, 52 Conn. 212, citing *Lev* v. *Lev*, supra, 10 Conn. App. 575. The court therefore held that "the plaintiffs [had] not [been] entitled to attorney's fees for the services provided by [the plaintiffs' law firm] and the trial court [had] properly denied the plaintiffs' request for them." Id.

The plaintiff in the present case appears to contend that, because the court in *Jones* determined that the plaintiffs had not been represented by their law firm, it was unnecessary for the court to consider whether the pro se nature of such representation would have precluded an award of attorney's fees pursuant to the general rule adopted in *Lev*. Thus, the plaintiff argues that this portion of *Jones* is dictum, and the trial court, therefore, erred in treating it as binding precedent. We disagree.

"[D]ictum is an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . . Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case . . . are obiter dicta, and lack the force of an adjudication." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Morawska*, 165 Conn. App. 421, 427 n.4, 139 A.3d 747 (2016). The overwhelming weight of authority, however, recognizes a distinction between dicta and alternative holdings in an opinion. As the United States Supreme Court has explained, "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter [dictum], but each is the judgment of the court, and of equal validity with the

other." (Internal quotation marks omitted.) *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486, 44 S. Ct. 621, 68 L. Ed. 1110 (1924).[5] Cf. *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 420–21, 35 A.3d 188 (2012) ("Once it becomes clear that the trial court lacked subject matter jurisdiction to hear the plaintiffs' complaint, any further discussion of the merits is pure dict[um]. . . . When the trial court concluded . . . that subject matter jurisdiction was missing, the remainder of its [ruling was] merely advisory . . . ." [Internal quotation marks omitted.]).

Although an alternative holding, by its very nature, is not strictly necessary to the disposition of the case, this does not render it dictum. On this point, we find the Utah Supreme Court's opinion in *State* v. *Robertson*, 438 P.3d. 491 (Utah 2017), persuasive. "When we say that a holding is binding only when it is necessary, we do not mean that the holding must be the singular basis for our ultimate decision. Courts often confront cases

[5] See, e.g., *Boogaard* v. *National Hockey League*, 891 F.3d 289, 295 (7th Cir. 2008) ("[i]t is blackletter law that where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum" [internal quotation marks omitted]), cert. denied, U.S. , 139 S. Ct. 601, 202 L. Ed. 2d 430 (2018); *Gestamp South Carolina, L.L.C.* v. *National Labor Relations Board*, 769 F.3d 254, 263 n.4 (4th Cir. 2014) ("alternative holdings are not dicta"); *Pyett* v. *Pennsylvania Building Co.*, 498 F.3d 88, 93 (2d Cir. 2007) ("[a]n alternative conclusion in an earlier case that is directly relevant to a later case is not dicta; it is an entirely appropriate basis for a holding in the later case"), rev'd on other grounds, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009); *Sturdivant* v. *State*, 84 So. 3d 1053, 1060 (Fla. App. 2010) ("A ruling in a case fully considered and decided by an appellate court is not dictum merely because it was not necessary, on account of one conclusion reached upon one question, to consider another question the decision of which would have controlled the judgment. Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would dispose of the entire case upon its merits, and neither holding is a dictum, so long as it is properly raised, considered, and determined." [Internal quotation marks omitted.]); *QOS Networks Ltd.* v. *Warburg, Pincus & Co.*, 294 Ga. App. 528, 532–33, 669 S.E.2d 536 (2008) ("A ruling is not dictum merely because the disposition of the case is or might have been made on some other ground. Where a case presents two or more points, any one of which is sufficient to determine the ultimate issue, but the court actually decides all such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of a dictum." [Internal quotation marks omitted.]).

raising multiple issues that could be dispositive, yet they find it appropriate to resolve several, in order to avoid repetition of errors on remand or provide guidance for future cases. Or, [courts] will occasionally find it appropriate to offer alternative rationales for the results they reach. Were we to require that a holding must be necessary in some strict, logical sense before it becomes binding precedent, then every time we articulated alternative bases for a decision we would convert our opinion into dicta, for none of the alternative bases are strictly necessary for the outcome. . . . Instead, necessary means only that the court undeniably decided the issue, not that it was unavoidable for it [to] do so. . . .

"Of course, not every statement of law in every opinion is binding . . . . Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the [court's] full attention, it may be appropriate to re-visit the issue in a later case. . . . Where, on the other hand, it is clear that a majority of the [court] has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law . . . ." (Footnotes omitted; internal quotation marks omitted.) Id., 502–503, quoting *United States* v. *Johnson*, 256 F.3d 895, 914–16 (9th Cir. 2001).

We now turn to the statement at issue in the present case. In *Jones*, both parties had raised and discussed in their appellate briefs the question of whether self-represented attorneys may recover attorney's fees for the time spent litigating their own causes and had directed the court's attention to the conflicting authorities on the subject. See footnotes 2 and 4 of this opinion. The court intentionally took up and analyzed the issue and concluded that the general rule announced in *Lev* would bar the plaintiff attorneys in *Jones* from recovering attorney's fees. Although the court discussed the

issue only briefly, there is nothing in its opinion or the record to suggest that its conclusion was less carefully reasoned than it might otherwise have been. In sum, the court's conclusion cannot reasonably be characterized as a merely casual, passing comment made without analysis or due consideration of conflicting authorities. It is clear that the court made a deliberate decision to resolve this issue and that it undeniably decided it. Accordingly, the court's conclusion that self-represented attorney litigants cannot recover attorney's fees constitutes an alternative holding, not dictum.

We, therefore, disagree with the plaintiff that the trial court in the present case improperly treated this portion of *Jones* as binding precedent. Furthermore, although the plaintiff requests, in the alternative, that this panel revisit such precedent, we are not at liberty to do so.[6] See *In re Zoey H.*, 183 Conn. App. 327, 340 n.5, 192 A.3d 522 ("[I]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . This court often has stated that this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." [Internal quotation marks omitted.]), cert. denied, 330 Conn. 906, 192 A.3d 426 (2018).[7]

The plaintiff does not otherwise challenge the application of *Jones* to the present case, and, therefore, we need not address the propriety of the trial court's characterization of the plaintiff law firm—a legal entity distinct from Rosenthal—as a self-represented party. Indeed, when asked during oral argument before this court whether the plaintiff's status as a limited liability company affects the analysis of the issue raised in this

[6] The plaintiff also appears to contend that *Jones* is inapplicable to the present case because the present case involves a claim for contractual, rather than statutory, attorney's fees. In addition to being inadequately briefed, this claim clearly lacks merit given that the plaintiffs in *Jones* had likewise sought attorney's fees pursuant to a contractual provision. See *Jones* v. *Ippoliti*, supra, 52 Conn. App. 202 n.5.

[7] Moreover, the plaintiff has not presented to this court any persuasive reason for revisiting *Jones*.

appeal, Rosenthal replied, "I don't think so." Similarly, we need not determine whether the plaintiff's status as a *law firm* litigant renders this case materially distinguishable from *Jones*, which involved *attorney* litigants. We note, however, that among the courts that have considered these issues in jurisdictions in which self-represented attorney litigants are barred from recovering attorney's fees, the majority agree that there is no meaningful distinction between solo practitioners who represent themselves and law firms that are represented by their own attorneys.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

[8] See, e.g., *Munger Chadwick, P.L.C.* v. *Farwest Development & Construction of the Southwest, LLC*, 235 Ariz. 125, 128, 329 P.3d 229 (App. 2014) ("We . . . can find no logical reason to draw any distinction between a law firm that represents itself and a sole practitioner that does so. . . . In applying the rule [against awarding attorney's fees to self-represented attorneys], our courts have expressed a core concern that all parties to litigation be treated equally in their ability to secure compensation for attorney fees. . . . This court has specifically reasoned that an attorney ought not be entitled to compensation for her time in representing herself when a lay person would not be able to do so. . . . We likewise conclude it would be inequitable for a law firm to be able to obtain its fees through an arrangement that amounts to self-representation when a sole practitioner would be unable to do so." [Citations omitted.]); *Witte* v. *Kaufman*, 141 Cal. App. 4th 1201, 1211, 46 Cal. Rptr. 3d 845 (2006) (Court held that prevailing law firm litigant was not entitled to attorney's fees where it was represented by its own members; "[t]he attorneys of [the firm] are the law firm's product. When they represent the law firm, they are representing their own interests. As such, they are comparable to a sole practitioner representing himself or herself."); *Swanson & Setzke, Chtd.* v. *Henning*, 116 Idaho 199, 203 n.3, 774 P.2d 909 (App. 1989) ("When a rule of law is enunciated on whether pro se lawyer litigants are entitled to attorney fee awards, that rule should be applied consistently. It should not turn on distinctions among proprietorships, partnerships, corporations or other modes of law practice."); *State ex rel. Schad, Diamond & Shedden, P.C.* v. *My Pillow, Inc.*, 115 N.E.3d 923, 930–31 (Ill. 2018) (holding that, "[t]o the extent that [the plaintiff law firm] prosecuted its own claim using its own lawyers, the law firm was proceeding pro se," and, therefore, "the same considerations were at work here as with any other pro se litigant, and Illinois's long-standing bar against awards of attorney fees to lawyers who represent themselves was fully applicable"); *Fraser Trebilcock Davis & Dunlap PC* v. *Boyce Trust 2350*, 497 Mich. 265, 275–76, 870 N.W.2d 494 (2015) (holding that plaintiff law firm that used its own member lawyers to litigate firm's interests could not recover attorney's fees; "while we acknowledge that [the plaintiff] is a legally distinct corporate entity, we do not find that status sufficient to distinguish the representation it provided to itself through its member lawyers from the self-representation [of an individual attorney litigant], such that [the plaintiff] may recover a reasonable attorney fee" [internal quotation marks omitted]).

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

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MEMORANDUM DECISIONS

KEVIN JACKSON *v.* COMMISSIONER OF CORRECTION (AC 41281)

Elgo, Moll and Norcott, Js.

Argued May 13—officially released May 28, 2019

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza*, *J.*

Per Curiam. The appeal is dismissed.

CREATIVE MASONRY AND CHIMNEY, LLC *v.* NEAL R. JOHNSON ET AL. (AC 41534)

Elgo, Moll and Norcott, Js.

Argued May 13—officially released May 28, 2019

Named defendant's appeal from the Superior Court in the judicial district of Tolland, *Farley*, *J.*

Per Curiam. The judgment is affirmed. The named defendant's claims on appeal are inadequately briefed, and, thus, we decline to review them. See *Pryor* v. *Pryor*, 162 Conn. App. 451, 458, 133 A.3d 463 (2016).

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Debt collection; action to collect debt, pursuant to statute (§ 46b-37 [b]), for medical services that plaintiff hospital rendered to defendants' minor child; special defenses; accord and satisfaction; reviewability of claims; whether record supported findings of attorney trial referee and trial court that defendants were indebted to plaintiff and that they exhibited bad faith throughout litigation; credibility of witnesses; whether referee acted within his authority to find by preponderance of evidence that defendants were untruthful; whether trial court's decision to award plaintiff attorney's fees was legally and logically correct.

State *v.* Irizarry. 40

Assault in second degree; breach of peace in second degree; whether evidence was sufficient to support conviction of assault in second degree in violation of statute (§ 53a-60 [a] [1]); claim that state did not establish that defendant caused victim serious physical injury as defined by statute (§ 53a-3 [4]); claim that improper statement by prosecutor during closing argument to jury deprived defendant of constitutional right to fair trial; harmfulness of improper statement by prosecutor during closing argument to jury.

State *v.* Riley 1

Murder; whether resentencing court improperly denied motion for recusal where resentencing court was same court that presided over defendant's trial and imposed initial sentence; claim that recusal of resentencing court was required by statute (§ 51-183c), rule of practice (§ 1-22 [a]) Code of Judicial Conduct (rule 2.11 [a] [1]), and due process clauses of fifth and fourteenth amendments to United States constitution; claim that Practice Book § 1-22 provided ground for recusal independent of that provided by § 51-183c; claim that rule 2.11 (a) (1) of Code of Judicial Conduct required recusal on ground that resentencing

court was biased in favor of justifying defendant's initial sentence; claim that defendant's initial sentence had anchoring effect that prevented resentencing court from approaching resentencing hearing with fully open mind that would allow it to fully consider requirement under Miller *v.* Alabama *(567 U.S. 460) that it give mitigating weight to defendant's youth and its hallmark features when considering whether to impose functional equivalent of life imprisonment without parole; claim that resentencing court considered seventy year sentence to be inappropriate but nevertheless imposed it because defendant would be eligible for parole pursuant to legislative amendments (P.A. 15-84) to statutes applicable to sentencing of children convicted of certain felonies (§ 54-91g) and parole eligibility (§ 54-125a); claim that resentencing court was required under Supreme Court's reversal of defendant's initial sentence and remand order to find that defendant was incorrigible, irreparably corrupt or irretrievably depraved before resentencing him to life without possibility of parole; whether discussion by Supreme Court in decision reversing defendant's initial sentence about presumption against life sentence without parole that must be overcome by evidence of unusual circumstances was rendered inapplicable by enactment of P.A. 15-84; claim that* Miller, *Supreme Court's decision reversing defendant's sentence and P.A. 15-84 limited resentencing court's discretion by creating presumption against imposition of life sentence that could be imposed only after finding that juvenile was permanently incorrigible, irreparably corrupt or irretrievable depraved.*

U.S. Bank Trust, N.A. *v.* Giblen 221

Foreclosure; motion for approval of committee sale; annulment of automatic stay by Bankruptcy Court; claim that trial court's approval of sale was void ab initio because it exceeded scope of Bankruptcy Court's order annulling bankruptcy stay; whether Bankruptcy Court's order annulling stay was intended only to permit committee to recover fees and expenses; whether trial court abused its discretion in granting committee's motion for approval of sale; reviewability of claim that certain irregularities with motion for approval of sale prevented defendants from realizing substantial amount of equity in subject property; whether defendants failed to show any injury resulting specifically from five claimed irregularities with motion for approval of sale.

Viking Construction, Inc. *v.* 777 Residential, LLC 245

Contracts; whether trial court erred in rendering summary judgment in favor of cross claim plaintiffs; whether defects, errors and omissions exclusion of builder's risk policy unambiguously barred coverage; claim that defects, errors and omissions exclusion of builder's risk policy did not bar recovery because damaged windows were not part of renovation; claim that recovery for damage to windows was not barred by defects, errors and omissions exclusion of builder's risk policy because exclusion applied only to finished product, not to process implemented by subcontractor who damaged windows; claim that renovation endorsement would have been rendered meaningless if exclusion applied; whether trial court incorrectly interpreted resulting loss clause as entitling cross claim plaintiffs to coverage.

Wells Fargo Bank, N.A. *v.* Fitzpatrick. 231

Foreclosure; notice requirements of mortgage; whether trial court properly determined that certain two letters together substantially complied with notice requirements in mortgage deed; whether trial court's finding that defendants did not prove special defense of laches was clearly erroneous; whether defendants established that any alleged delay by plaintiff resulted in prejudice to them; whether trial court's reduction in interest that accrued while first of two foreclosure actions was pending equitably addressed any delay in first foreclosure action.

NOTICE

Public Hearing on Practice Book Revisions To the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On June 20, 2019, at 10 a.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) in the Supreme Court courtroom in Hartford for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure that are being considered by the Justices and Judges as well as any proposed new rule or any change in an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the May 21, 2019 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Comments may be forwarded to the co-chairs of the Advisory Committee on Appellate Rules by e-mail to Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov or may be forwarded to the co-chairs at the following address and should be received by June 14, 2019.

Co-Chairs of the Advisory Committee on Appellate Rules
Attn: Attorney Jill Begemann
Connecticut Appellate Court
75 Elm Street
Hartford, CT 06106

Each speaker at the public hearing will be limited to five minutes. Anyone who believes that they cannot cover their remarks within that time period may submit written comments to the Committee. If written comments are submitted, ten copies should be provided.

Wheelchair access is located in the rear of the Supreme Court building, and may be reached from the staff parking lot between Lafayette and Oak Streets. There are a limited number of accessible parking spaces in the gated staff lot, which may be entered from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please e-mail Carl Cicchetti at Carl.Cicchetti@connapp.jud.ct.gov before June 14, 2019.

Hon. Richard N. Palmer
Hon. Alexandra D. DiPentima
Co-Chairs, Advisory Committee on Appellate Rules

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-V: Nursing Facility Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare and Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Based on the information that is available at the time this notice is being submitted for publication, including, but not limited to, a recent public announcement by the administration and the most recent versions of the draft state budget for State Fiscal Years (SFY) 2020 and 2021 and actions to date by the General Assembly, it is anticipated that SPA 19-V will amend Attachment 4.19-D of the Medicaid State Plan effective on or after July 1, 2019, as follows.

For the fiscal year ending June 20, 2020, and June 30, 2021, the department shall determine facility rates based upon the 2018 cost report filings subject to the provisions of this section and applicable regulations, but no facility shall receive a rate that is higher than the rate in effect on November 1, 2018, and no facility shall receive a rate that is more than 2% lower than the rate in effect on November 1, 2018, except any facility with occupancy lower than 70% or a most recently published five-star rating of less than two stars will not receive a limit on the rate decrease.

Effective on or after July 1, 2019, this SPA will amend Attachment 4.19-D of the Medicaid State Plan to provide Chronic and Convalescent Nursing Home (CCNH) and Rest Home with Nursing Supervision (RHNS) nursing homes a 2% Medicaid rate increase. The increases are specifically intended to support a permanent increase of no less than 2% in aggregate to the compensation of employees working at the nursing home. Funding from this 2% rate increase program should be used for the following purposes: increases to employee wages or salaries, increases to the health/dental benefit or retirement plans and/or a combination of all three.

Effective on or after October 1, 2020, this SPA will amend Attachment 4.19-D of the Medicaid State Plan to provide Chronic and Convalescent Nursing Home (CCNH) and Rest Home with Nursing Supervision (RHNS) nursing homes a 1% Medicaid rate increase. The increases are specifically intended to support a permanent increase of no less than 1% in aggregate to the compensation of employees working at the nursing home. Funding from this 1% rate increase program should be used for the following purposes: increases to employee wages or salaries, increases to the health/dental benefit or retirement plans and/or a combination of all three.

Effective on or after January 1, 2021, this SPA will amend Attachment 4.19-D of the Medicaid State Plan to provide Chronic and Convalescent Nursing Home (CCNH) and Rest Home with Nursing Supervision (RHNS) nursing homes a 1% Medicaid rate increase. The increases are specifically intended to support a permanent increase of no less than 1% in aggregate to the compensation of employees working at the nursing home. Funding from this 1% rate increase program should be used for the following purposes: increases to employee wages or salaries, increases to the health/dental benefit or retirement plans and/or a combination of all three.

Although budget proposals and implementing legislation are still pending in the General Assembly at the time this notice is being prepared and this proposal may be modified in whole or in part before adoption of the final state budget for SFY 2020 and 2021, federal regulations require DSS to submit public notice at this time. Accordingly, this SPA is subject to change, in whole or in part, as necessary to comply with the final approved state budget and implementing legislation for SFY 2020 and 2021.

Fiscal Impact

Based on estimates utilizing the most recent information that is available at this time, this SPA is anticipated to increase annual aggregate Medicaid expenditures by approximately $15.9 million in State Fiscal Year (SFY) 2020 and $27.3 million in SFY 2021.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS website at the following link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates''. Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference: ''SPA 19-V: Nursing Facility Reimbursement''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than June 28, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-W: Private Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Based on the most recent versions of the draft state budget for State Fiscal Years (SFY) 2020 and 2021 and actions to date by the General Assembly, it is anticipated that SPA 19-W will amend Attachment 4.19-D of the Medicaid State Plan effective on or after July 1, 2019, as follows.

For the fiscal years ending June 30, 2020 and June 30, 2021, there will be no rate increases, except if the Commissioner of the Department of Social Services provides, within available appropriations, pro rata fair rent increases for private ICF/IIDs which have undergone a material change in circumstances related to fair rent additions placed in service in cost report years ending September 30, 2018 and September 30, 2019 for fiscal years ending June 30, 2020 and June 30, 2021 respectively.

Although budget proposals and implementing legislation are still pending in the General Assembly at the time this notice is being prepared and this proposal may be modified in whole or in part before adoption of the final state budget for SFY 2020 and 2021, federal regulations require DSS to submit public notice at this time. Accordingly, this SPA is subject to change, in whole or in part, as necessary to comply with the final approved state budget and implementing legislation for SFY 2020 and 2021.

Fiscal Impact

Based upon preliminary estimates using the information that is available at this time, with the exception of normal allowable fair rent pass-through adjustments, it is anticipated that annual aggregate expenditures for payments to private ICF/IIDs will remain unchanged for State Fiscal Years 2020 and 2021.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference: ''SPA 19-W: Private ICF/IID Reimbursement''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than June 28, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-X: Inpatient Hospital Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Based on the Governor's proposed budget and the most recent versions of the draft state budget and implementing legislation for State Fiscal Years (SFY) 2020 and 2021 and actions to date by the General Assembly, including the Appropriations Committee version of the draft state budget and the current version of House Bill 7164, it is anticipated that SPA 19-X will amend Attachment 4.19-A of the Medicaid State Plan effective on or after July 1, 2019 to make the following changes to inpatient hospital reimbursement.

(1) Implement one or more pools of inpatient supplemental payments to specified acute care hospitals.

(2) Implement one or more value-based payment methodologies in order to improve health outcomes and reduce unnecessary costs.

(3) Reduce inpatient rate payments by 15% for each readmission, defined as admission for the same or similar diagnosis within 30 days of the initial discharge.

Although budget proposals and implementing legislation are still pending in the General Assembly at the time this notice is being prepared and this proposal may be modified in whole or in part before adoption of the final state budget for SFY 2020 and 2021, federal regulations require DSS to submit public notice at this time. Accordingly, this SPA is subject to change, in whole or in part, as necessary to comply with the final approved state budget and implementing legislation for SFY 2020 and 2021.

Fiscal Impact

Based on preliminary estimates using the information that is available at this time, DSS estimates that this SPA will change annual aggregate expenditures compared to the levels currently specified in the Medicaid State Plan for SFY 2020 and 2021 as follows:

(1) Increase annual aggregate expenditures in an approximate range of between $131.5 million and $354.5 million annually for SFY 2020 and SFY 2021 for supplemental payments. Because the effective date of the current Medicaid State Plan language regarding inpatient hospital supplemental payments ends as of June 30, 2019, any supplemental payment amounts in SFY 2020 and 2021 reflect an increase compared to the current language.

(2) Increase of $13.0 million in SFY 2020 and $39.1 million in SFY 2021, to be allocated for value-based supplemental payments.

(3) Decrease of $6.1 million in SFY 2020 and $7.3 million in SFY 2021 for reduction in payment for readmissions.

Compliance with Federal Access Regulations

As described above, this SPA proposes to change inpatient hospital reimbursement in various ways, including a proposal to reduce payment for readmissions by 15%. In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced or where payment rates or methodologies are being restructured in a manner that may affect access to services. Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to inpatient hospital services as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-X: Inpatient Hospital Reimbursement''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than June 28, 2019.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 19-Y: Outpatient Hospital Reimbursement

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Based on the Governor's proposed budget and the most recent versions of the draft state budget and implementing legislation for State Fiscal Years (SFY) 2020 and 2021 and actions to date by the General Assembly, including the Appropriations Committee version of the draft state budget and the current version of House Bill 7164, it is anticipated that SPA 19-Y will amend Attachment 4.19-B of the Medicaid State Plan effective on or after July 1, 2019 to make the following changes to outpatient hospital reimbursement.

(1) Implement one or more pools of outpatient supplemental payments to specified acute care hospitals.

(2) Implement one or more value-based payment methodologies in order to improve health outcomes and reduce unnecessary costs.

(3) For each outpatient hospital observation stay that is defined as a readmission, reduce outpatient hospital rate payments by 15% for each such observation stay and related outpatient hospital services. An observation stay is defined as a readmission if it occurs within 30 days of an inpatient hospital discharge for the same or similar diagnosis as the observation stay.

Although budget proposals and implementing legislation are still pending in the General Assembly at the time this notice is being prepared and this proposal may be modified in whole or in part before adoption of the final state budget for SFY 2020 and 2021, federal regulations require DSS to submit public notice at this time. Accordingly, this SPA is subject to change, in whole or in part, as necessary to comply with the final approved state budget and implementing legislation for SFY 2020 and 2021.

Fiscal Impact

Based on preliminary estimates using the information that is available at this time, DSS estimates that this SPA will change annual aggregate expenditures compared to the levels currently specified in the Medicaid State Plan for SFY 2020 and 2021 as follows:

(1) Increase annual aggregate expenditures in an approximate range of between $20.0 million and $57.8 million for supplemental payments in SFY 2020 and between $16.0 million and $53.8 million for SFY 2021. Because the effective date of the current Medicaid State Plan language regarding outpatient hospital supplemental payments ends as of June 30, 2019, any supplemental payment amounts in SFY 2020 and 2021 reflect an increase compared to the current language.

(2) Increase of $2.0 million in SFY 2020 and $5.9 million in SFY 2021, to be allocated for value-based supplemental payments.

(3) Decrease of approximately $1 million in SFY 2020 and $1 million in SFY 2021 for reduction in payment for observation stays that are defined as readmissions, as described above.

Compliance with Federal Access Regulations

As described above, this SPA proposes to change outpatient hospital reimbursement in various ways, including a proposal to reduce payment by 15% for observation stays that are defined as readmissions, as described above. In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced or where payment rates or methodologies are being restructured in a manner that may affect access to services. Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to outpatient hospital services as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office or the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-Y: Outpatient Hospital Reimbursement''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than June 28, 2019.

STATE ELECTIONS ENFORCEMENT COMMISSION

State Elections Enforcement Commission advisory opinions are published herein pursuant to General Statutes Section 9-7b (14) and are printed exactly as submitted to the Commission on Official Legal Publications.

PROPOSED DECLARATORY RULING 2019-03:

Secondary Payees and Polling Expenditures

On February 26, 2019, the State Elections Enforcement Commission (the ''Commission'' or ''SEEC'') received a request for a Declaratory Ruling from Attorney Derek E. Donnelly (the ''Petitioner'') regarding the reporting of expenditures when a campaign is paying a provider for campaign services and the campaign knows that the provider is paying a subvendor on behalf of the committee. These subvendors are referred to as secondary payees.

Campaign finance laws entrust the control of committee funds to the treasurer and require effective and accurate disclosure by treasurers of both monies raised and monies spent. The Petitioner focuses on the language in General Statutes § 9-608 (c) (l) (B) which includes a requirement for the treasurer to report ''***an itemized accounting of each expenditure***, if any, including the full name and complete address of each payee***, <u>including secondary payees</u> whenever the primary or principal payee is known to include charges which the primary payee has already paid or will pay directly to another person, vendor or entity***, ***the amount and the purpose of the expenditure*** . . . .''

On March 20, 2019, the Commission voted to initiate a declaratory ruling proceeding responsive to this Petition. This Declaratory Ruling answers the Petitioner's questions and advises treasurers and committees regarding disclosure of secondary payee information.

Issues Addressed and Brief Answers:

1. Does the use of a call center (a subcontractor, subvendor, or entity) not owned by the primary payee (polling company) require disclosure by the treasurer in the listing of secondary payee?

To the extent there is knowledge that a subvendor has been hired on behalf of the committee, disclosure is required. If the treasurer is not sure whether a subvendor was hired on the committee's behalf, she has a duty to inquire.

2. How is the phrase ''known to include'' [as used in General Statutes § 9-608 (c) (l) (B)] defined? Does it include common knowledge?

The Commission has interpreted the language ''known to include'' to mean ''known or should have known.'' For the purposes of this declaratory ruling request, the Commission would consider the term ''common knowledge'' to be synonymous with the phrase ''known or should have known.''

3. Does a treasurer have an affirmative obligation to determine whether secondary payees exist? If so, what are the requirements to do so?

The treasurer is required to make a good faith effort to obtain secondary payee information. Treasurers should perform appropriate due diligence considering the circumstances surrounding the expenditure. The Commission is reasonable and applies common sense to these situations. The amount of inquiry that is necessary depends on the particular set of circumstances. Such considerations may include:

- If the amount being paid to the campaign services provider, relative to overall campaign expenditures, is substantial;
- If the treasurer or candidate can gain the information easily due to a close relationship with the campaign services provider or its employees, such as when former colleagues or family members of the treasurer or candidate are involved with the campaign service provider being hired;
- If the treasurer can find the information or should know to ask for it based on other reports that the treasurer had filed or other invoices that the treasurer has received;
- If the treasurer has been put on notice of problems as a result of media coverage questioning their committee's prior filings, advice given as part of the Commission's post-election review of a previous committee of which he was treasurer, or via an enforcement action involving that campaign service provider; and
- If there are indications in the campaign service provider's contracts or documentation that they are likely using secondary payees.

4. Is a primary payee such as a pollster required by law to disclose a secondary payee such as a call center, when asked by a treasurer?

The treasurer is required by law to disclose secondary payees and it is currently the treasurer that bears liability for failure to do so. While a campaign services provider who does not accurately disclose secondary payees may not be directly liable for penalties under the campaign finance law, such provider may subject its clients to increased liability or lose clients whose due diligence reveals that the treasurer cannot both comply with campaign finance statutes and continue to approve payments to the provider due to the provider's refusal to accurately disclose secondary payee information.

Pertinent Law and Precedent:

Only a treasurer may authorize committee expenditures. General Statutes § 9-607 (a). Furthermore, payments by committees must be made in accord with that authorization. General Statutes § 9-607 (d). Treasurers are charged with certain duties including making and reporting expenditures and keeping certain internal records for four years, including, but not limited to, contemporaneous invoices, receipts, bills, statements, itineraries, or other written or documentary evidence showing the campaign or other lawful purpose of the expenditure. General Statutes §§ 9-606 (a) & 9-607 (f).

In addition, the law strictly forbids siphoning campaign funds for personal use. General Statutes § 9-607 (g) (4); Regs. Conn. State Agencies §§ 9-706-2 (b) (1) &

(2) (prohibiting Citizens' Election Program (''CEP'') grant recipients from using campaign funds for personal use as well as the candidate's ''personal support or expenses . . . even if such personal items . . . are used for campaign related purposes'').

Treasurers of CEP candidates whose committees are approved for a grant have stricter limitations, and may only spend their funds ''for campaign-related expenditures made to directly further the participating candidate's nomination for election or election.'' Regs. Conn. State Agencies § 9-706-1 (a). Moreover, for CEP grant recipients: ''The absence of contemporaneous detailed documentation indicating that an expenditure was made to directly further the participating candidate's nomination for election or election shall mean that the expenditure was not made to directly further the participating candidate's nomination for election or election, and thus was an impermissible expenditure.'' Regs. Conn. State Agencies § 9-706-1 (b). An expenditure is also impermissible if it is in excess of the usual and normal charge for such goods and services. Regs. Conn. State Agencies § 9-706-2 (b) (6). If a consultant or vendor provides goods or services for free or at a special discount, this would result in an impermissible contribution. General Statutes §§ 9-601a (a) (1) & 9-613 (a).

Candidate committees may spend campaign funds to pay for campaign workers and professional services. General Statutes § 9-607 (g) (2) (P); *see also* Regs., Conn. State Agencies § 9-706-2 (a) (4). This includes services of pollsters, graphic or web designers, strategists, consultants providing campaign management services such as selecting and managing vendors, attorneys, accountants, or other professional persons assisting with campaign activities. Agreements with campaign service providers are required to be made in writing, ahead of time and spell out the amount to be paid, as well as the nature, scope and duration of the duties to be performed. Regs. Conn. State Agencies § 9-607-1.

Treasurers must report all expenditures, including those for campaign service providers such as pollsters or consultants with ''an itemized accounting of each expenditure, if any, including the full name and complete address of each payee, including secondary payees whenever the primary or principal payee is known to include charges which the primary payee has already paid or will pay directly to another person, vendor or entity, the amount and the purpose of the expenditure, the candidate supported or opposed by the expenditure, whether the expenditure is made independently of the candidate supported or is an in-kind contribution to the candidate, and a statement of the balance on hand or deficit, as the case may be . . . .'' General Statutes § 9-608 (c) (l) (B).

These laws all work together to not only require treasurers to perform a duty but also to assist them in doing so. For example, gathering the back-up documentation such as receipts allows a treasurer to confirm that a payment to a campaign worker or consultant is for a permissible purpose. Obtaining information about secondary payees serves a similar purpose in some situations and in others allows the treasurer to confirm that the committee is being charged market value or that costs are not being defrayed through improper discounts.

The Commission has had cases involving failure to itemize expenditures and disclose secondary payees and to provide the proper expenditure code for a poll. *See In the Matter of a Complaint by Karen Solich*, File No. 2006-264, Agreement Containing Consent Order and Payment of a Civil Penalty (November 15, 2006)

(henceforth order for failure to report secondary payees involving a poll paid for by a committee worker). Pollsters are merely one sort of campaign services provider and the disclosure rules are not limited to pollsters. *See e.g., In the Matter of a Complaint by Wilm Donath and Carola Cammann*, Stamford, File No. 2013-008, Agreement Containing Consent Order (July 17, 2013) (finding violation where treasurer paid $4,000 to a direct mail vendor but failed to include secondary payee reporting). The guidance offered by the Commission therefore applies to reporting of ***all*** secondary and primary payees.

Responses to Petitioner's Questions:

With this initial background in mind, we turn to the Petitioner's questions.

(1) Does the use of a call center (a subcontractor, subvendor, or entity) not owned by the primary payee (polling company) require disclosure by the treasurer in the listing of secondary payee?

If a political polling company contracts with a call center on behalf of the committee to perform data collection for their polls, the call center would be a secondary payee. If, on the other hand, the polling company utilizes its own employees to gather data then it would not have secondary payees.

The Commission has long advised of the necessity of disclosing secondary payees. Even before the legislature codified the secondary payee disclosure requirement in Public Act 04-91, the SEEC and the Secretary of the State both interpreted the expenditure disclosure language requiring a treasurer to itemize each expenditure and to attribute the appropriate expenditure code to mean that the treasurer must disclose the underlying purpose and ultimate beneficiary, or secondary payee, as the case may be, of the expenditure.[1] In the 1990s, the SEEC guidebooks began explicitly stating that secondary payee disclosure is required where a committee pays a consultant who makes payments to other vendors on behalf of the committee. *See e.g., A Guide for Ongoing Political Committees Established by a Business Entity, Organization, or Two or More Individuals for Political Activities)* (rev. July 1996) (''If a consultant is paid by the committee to provide services, the disclosure of each payment to the consultant must also include an attached itemized schedule of the payments the consultant has made to other vendors on behalf of the committee.''). The 1997 SEEC versions of *A Guide for Candidates for State Office, General Assembly, Sheriff and Judge of Probate* (rev. July 1997) and *A Guide for Municipal Candidates* (rev. June 1997) contained the same language, and added the term ''secondary payee.'' The 1998 SEEC guide, *A Guide for Party Committees* (rev. June 1998), contained this same language.

Starting in 1998, the Secretary of the State's Form ED-45 (disclosure statement for candidate, party, and political committees) mirrored this interpretation.[2] The forms contained a column for secondary payee disclosure, and provided clear instructions for secondary payee disclosure and purpose codes (so that the ultimate campaign

[1] At this time, the language required disclosure including: ''an itemized accounting of each expenditure, if any, including the full name and complete address of each payee, the amount and the purpose of the expenditure . . . '' General Statutes § 9-333j (c) (l) (C) (rev. 1995).

[2] Prior to December 31, 2006, the Office of the Secretary of the State (''SOTS'') was in charge of promulgating disclosure forms and was the filing repository for certain types of committees.

purpose of each expenditure is transparent).[3] Also in 1998, SEEC staff issued an opinion of counsel to a state central party chair opining that disclosure of secondary payees is required when committees utilize consultants who pay subvendors:

> The secondary payee requirements typically apply to reimbursements made by any committee to a committee worker, reimbursements made by a candidate or exploratory committee to the candidate who established the committee, committee payments to credit card companies and to expenditures by any committee to a professional consultant or similar person where the consultant has paid a third party for goods or services which benefited the committee and which comprised the original expenditure made by the committee. For example, if Connecticut Republicans paid a consultant who, in turn, paid the Hartford Courant for an advertisement in the course of rendering services to the State Central Committee (and the cost was $100 or more), the treasurer would be required to disclose both the payment to the consultant, and the payment to the Hartford Courant as a secondary payee to comply with Section 9-333j.

SEEC Opinion of Counsel 1998-31 (June 25, 1998)*; see also In a Matter of a Complaint by Tim Wrightington*, West Haven, File No. 2001-107, Agreement Containing Consent Order to Henceforth Comply with General Statutes *§ 9-333j(c)(1)(D) and 9-333j(c)(1)(C)* (Apr. 27, 2001) (finding violation of requirement to itemize expenditures and use the ultimate underlying purpose code where treasurer failed to disclose secondary payees/beneficiaries related to disclosure of primary credit card payment and reimbursement to committee worker); *In the Matter of a Complaint by Henry J. Zuella*, Oxford, File No. 2003-171, Agreement Containing Consent Order and Payment of a Civil Penalty (Oct. 29, 2003) (assessing civil penalty relating to numerous violations of the statutes, including failure to disclosure secondary payees for reimbursements to committee workers).

In 2004, the legislature codified the interpretation that requires treasurers to disclose secondary payees where the principal or primary payee pays another person or entity (a secondary payee) for committee goods or services. *See* Public Act 04-91, *An Act Prohibiting Personal Use of Campaign Funds and Concerning Retention of Internal Records and Reporting Requirements Regarding Party-Building Activities.* This amendment to the law stemmed, in part, from a SEEC investigation, in which it was found that Governor Rowland charged approximately $6,000 worth

[3] The 1998 Secretary of State disclosure form contained the following instructions:

> PC PROFESSIONAL CONSULTANTS. Use ''PC'' for salaries, fees, and commissions to professional consultants, including attorneys, accountants, advertising similar professionals. If the payment to the professional consultant includes known charges which the professional consultant has already made or will make to a secondary payee, that is, to another vendor (such as a pollster or commercial advertiser), following completion of all of the information contained in this horizontal row, go immediately to the next and succeeding horizontal row(s) and follow the instructions for a secondary payee ''SP'' (see below).
>
> SP-SECONDARY PAYEE OR BENEFICIARY. Use ''SP'' as a coded purpose for an expenditure whenever the reported expenditure to the primary or principal payee is known to include charges which the primary payee has already paid or will pay directly to another person, vendor or entity. . . . For example, if a professional consultant made a payment to the Hartford Courant for a full page ad, the Hartford Courant, Broad Street, Hartford will be set forth in the name & address column, and the purpose of the expenditure column will be ''SP-A'' (reflecting the fact that a payment was made by the professional consulting firm to the Hartford Courant for an advertisement) . . . .

of personal expenses on the State Republican Party committee credit card. *See* House Tr. April 22, 2004 (comments of Rep. O'Rourke) at 287; *see Complaint of Tom Swan*, Coventry, File Nos. 2003-147 & 2003-147.1, Stipulated Agreements and Orders to Resolve Complaint Concerning the Use of the State Republican Party Credit Card by Party Officials (Aug. 27, 2003) (finding violations where state central committee provided committee credit card to Governor Rowland because, although the itemization on the monthly credit card statements was sufficient for secondary payee disclosure purposes, lack of adequate backup documentation to substantiate the lawful purpose of each expenditure, for travel hotel, food and beverage and entertainment expenses, was missing or inadequate). The legislative history indicates that one core purpose of this codification was to require treasurers to obtain and maintain internal records to substantiate the lawful purpose of expenditures made via a primary payee to a secondary payee. *See* House Tr. April 22, 2004 (comments of Rep. O'Rourke) at 288.[4]

Thus, to the extent there is knowledge that a subvendor has been hired on behalf of the committee, secondary payee disclosure is required. If the treasurer is not sure whether a subvendor was hired on the committee's behalf, she should inquire, as further discussed in the response to Question 3. *See e.g. In the Matter of a Complaint by Dana D'Angelo Moreira*, File No. 2005-279, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (July 19, 2006) (assessing a penalty for, among other things, failing to disclose the secondary payee information or reflect the ''original purpose'' of the expenditures for gas and cell phones that resulted in reimbursements to candidates).

(2) How is the phrase ''known to include'' defined under General Statutes § 9-608 (c) (l) (B)? Does it include common knowledge?

The Commission has interpreted the language ''known to include'' in General Statutes § 9-608 (c) (1) (B) to mean ''known or should have known.'' *See, e.g., In re: SEEC Initiated Investigation of the Working Families Campaign Committee, et al.*, File No. 2013-094, Agreement Containing a Consent Order (Feb. 19, 2014) (''The [Respondent] agrees and understands that, for purposes of the reporting requirements of General Statutes '' 9-608 (c) (1) (B), known secondary payees shall include, but not be limited to: . . . any and all persons known or that should be known by [committee] officers or agents to be secondary payees . . . .''); *In the*

[4] The legislature also strengthened the requirements for receiving and preserving internal records to substantiate the lawful purpose of each expenditure:

> (f) The campaign treasurer shall preserve all internal records of transactions required to be entered in reports filed pursuant to section 9-333j, as amended by this act, for four years from the date of the report in which the transactions were entered. Internal records required to be maintained in order for any permissible expenditure to be paid from committee funds include, but are not limited to, contemporaneous invoices, receipts, bills, statements, itineraries, or other written or documentary evidence showing the campaign or other lawful purpose of the expenditure. If a committee incurs expenses by credit card, the campaign treasurer shall preserve all credit card statements and receipts for four years from the date of the report in which the transaction was required to be entered.

Section 1 of Public Act 04-94 amending General Statutes § 9-607 (f) (formerly § 9-333i (f) (the underlined language indicates the language added in the Public Act). This requirement means that a treasurer is required to obtain sufficient documentation from a primary payee, such as a consultant, to substantiate any payments made by the primary payee to a third party vendor or entity items or services purchased on behalf of the committee.

Matter of Government Action Fund, File Nos. 2008-003 & File 2008-003.1, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (May 6, 2009) (finding violations for failure to disclose secondary payees, and that based on previous newspaper articles questioning the committee's substantial credit card bills, as well as post-election reviews of previous committees on which the treasurer served put the respondents on notice that they ''knew or should have known'' the requirements to disclose expenditures, including secondary payees, for credit card expenditures).

There is similar language in General Statutes § 9-608 (c) (1) (F) which provides: ''Each statement filed under subsection (a), (e) or (f) of this section shall include, but not be limited to: . . . (F) for each individual who contributes in excess of one hundred dollars but not more than one thousand dollars, in the aggregate, ***to the extent known***, the principal occupation of such individual and the name of the individual's employer, if any . . . .'' The Commission and staff have also interpreted this language to have a ''knew or should have known'' element as well. *See, e.g.,* SEEC Opinion of Counsel 1998-31 (June 25, 1998); *In the Matter of a Complaint by Dana D'Angelo Moreira*, File No. 2005-279, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (July 19, 2006).

Treasurers are therefore required to make a good faith effort or best effort to obtain secondary payee information.[5]

For the purposes of this declaratory ruling request, the Commission would consider the phrase ''common knowledge'' (which is the language used by the Petitioner in his request) to be synonymous with the phrase ''known or should have known''.

(3) Does a treasurer have an affirmative obligation to determine whether secondary payees exist? If so, what are the requirements to do so?

As just discussed, General Statutes § 9-608 (c) (1) (B) requires the treasurer to disclose secondary payees when she knew or should have known that the primary payee made or will make such secondary payments. To that end, the treasurer is required to make a good faith effort to obtain secondary payee information. In other words, treasurers should perform reasonable due diligence to determine whether a campaign service provider has hired secondary payees on behalf of their committee. In order to comply with the disclosure requirements regarding the purpose of the expenditure and payments to secondary payees, treasurers cannot just hand off funds to the campaign service provider, disclose a single lump sum expenditure to the

[5] Other jurisdictions with subvendor/secondary payee disclosure provisions apply similar standards. *See* California Fair Political Practices *Advice Letter* File No. I-90-107 (instructing treasurers must use reasonable diligence to obtain and disclose subvendor information, and that merely sending a letter to a consultant requesting subvendor information does not satisfy this duty if the consultant fails to reply or provide the requested information, and that subvendor disclosure is not required for payments made by a printer for items such ink, paper, or staff to produce the printing because such items are part of the printer's normal operating expenses); Massachusetts Office of Campaign and Political Finance, *Interpretive Bulletin OCPF-IB-10-04* (instructing that if consultant does not provide subvendor information, the committee must contact the consultant in writing to inquire whether the consultant has used subvendors, and the consultant must either provide subvendor information or provide a written statement to the committee stating that no subvendors were used); New York City Campaign Finance Board, *Summary of Final Board Determination re: Catherine Guerriero* (2013 election cycle) (assessing fines for various violations, including failure to provide documentation from two consultants confirming whether or not the vendors used subcontractors, and, if so, to identify the subcontractors, the services provided, and cost of such services).

provider, and be done. Rather, treasurers must exercise care to make sure that all committee funds are being spent for the committee's lawful purpose, market value is being paid, and that they receive the required backup documentation to substantiate such payments made on behalf of the committee and confirm the proper expenditure code.

The Commission is reasonable and applies common sense to these situations and the resolution of cases involving these provisions. By way of comparison, a homeowner hiring a contractor for a $100,000 renovation might talk with a building inspector who will know which home renovation contractors routinely meet code requirements, check in with their state's consumer protection agency and local Better Business Bureau to make sure the contractor does not have a history of disputes with clients, and visit a current job site to see how the contractor works and verify that the job site is neat and safe and workers are courteous and careful with the homeowner's property.[6] That same homeowner would be justified in simply paying $20 to a passing student to shovel the driveway on a snowy afternoon with no further inquiry but a quick conversation.

So too would the level of inquiry necessary for a treasurer approving the payment of a single $1,000 poll be significantly different from that expected of a treasurer paying a majority of a CEP grant to a single service provider. The amount of inquiry that is necessary depends on the situation.[7]

First and foremost, if the amount being paid to a campaign services provider, relative to the campaign's overall expenditures, is high, and there has been no mention of secondary payees from the campaign services provider, the treasurer would want to inquire further.

If a treasurer or candidate should be able to obtain the information easily due to a close relationship with the campaign services provider or its employees, such as when former colleagues or family members of the treasurer or candidate are involved with the campaign service provider being hired, then it is expected that the treasurer will have the information necessary to report accurately. *See e.g. In the Matter of a Complaint by Dana D'Angelo Moreira*, File No. 2005-279, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (July 19, 2006) (assessing fines and forfeitures for violations including failure to report employer and occupation to the extent known when the information was held by candidates and their own relatives).

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[6] https://www.thisoldhouse.com/ideas/top-8-pro-tips-how-to-hire-contractor.

[7] *Cf. In the Matter of a Complaint by Steven Sheinberg*, File No. 2016-077B. Agreement Containing a Consent Order (December 20, 2017) (henceforth but no penalties where failure to report secondary payees was honest mistake due to fact that expense made before he took over from very ill treasurer), *In the Matter of a Complaint by Elizabeth Rhoades*, Stafford Springs, File No. 2009-051, Findings and Conclusions (September 22, 2010) (taking no further action where the treasurer failed to report secondary payees for reimbursements to committee workers but investigation showed every expenditure was for permissible purpose and the treasurer had documents supporting the payment); *In the Matter of a Complaint by Carl Ruggerio*, East Haven, File No. 2007-368, Agreement Containing Consent Order (May 14, 2008) (assessing penalties where treasurer reported nine mailers as approximately $25,000 lump sum and failed to report $22,500 to printer as secondary payee with the expenditure code appropriate to the ultimate underlying purpose for each separate mailing); *Complaints of Tom Kelly*, Bridgeport, File Nos. 2011-090 and 097, Agreement Containing Consent Order (Feb. 15, 2012) (assessing fines and forfeitures for failure to disclose secondary payees where over 50% of the committee expenditures involved inconsistent and often missing secondary payee reporting).

Similarly, if the treasurer should have known to ask for the information based on other reports that the treasurer has filed or other invoices that the treasurer has received, then the treasurer would be expected to marshal the information available to them and follow up to ensure accurate reporting. *Id.* (noting the treasurer could also have found some of the information necessary to report employer and occupation when the information for some contributors could be found on other reports).

Other facts that might indicate that greater diligence in compliance is required include when a treasurer has been put on notice of problems. For example, the Commission has found that a treasurer should have known to correct disclosure issues, including the reporting of secondary payees, as a result of media coverage questioning their committee's prior filings. *See In the Matter of Government Action Fund*, File No. 2008-003, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty re: Ceneviva (May 6, 2009) (newspaper article questioning prior 2003 late reporting of credit card bills put the Respondent on notice that he ''knew or should have known to be more attentive to the expenditures and reporting requirements'').

Similarly, if the campaign services provider being considered was given advice as part of the Commission's post-election review of the candidate's prior campaign or that of another campaign which used the same provider and with which the candidate or treasurer was involved, that would provide the treasurer with notice that she ought to have a heightened level of diligence with respect to those reporting issues. *See In the Matter of Government Action Fund*, File No. 2008-003, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty re: Ceneviva (May 6, 2009) (finding significant penalties warranted when treasurer failed to show good faith in attempting to comply after receiving two post-election reviews citing many of the violations repeated in the campaign under investigation); *In the Matter of a Complaint by Joseph Pinto III*, File No. 2006-190, Agreement Containing Consent Order (April 11, 2007) (assessing penalties for reporting errors including failure to disclose secondary payees when earlier municipal audit program findings had instructed treasurer on secondary payee requirements).

In addition, irregularities in paperwork, such as late billing, may also indicate the need for an increased inquiry, as that may indicate a lag time as the primary campaign services provider waits to be billed by the secondary payee so that he can add his own charges and pass on the costs. A refusal to quote prices of certain items to be provided ahead of time or an odd structuring or layering of contracts so that the amount to be paid for some services is clear but the amount to be paid for other services is not may also indicate that the contracting primary provider is going out to market to identify secondary subvendors.

Treasurers should seek the information necessary to make the required reports accurately. In some cases, more than a written request for the information may be required. *See In the Matter of a Complaint by James W. Bruno*, File No. 2006-153, Agreement Containing Consent Order and Payment of a Civil Penalty (August 6, 2008) (penalties assessed where treasurer claimed he had made written requests for information but there were multiple and repeated failures to provide employer and occupation information to the extent known). Sometimes, as with consultants providing strategy and communications advice and receiving a large portion of the overall funds spent, a heightened level of care may be necessary to assure accurate disclosure. For example, Commission staff has provided sample contract language to assist treasurers in obtaining secondary payee information from consultants, particularly when the consultant is being paid a majority of the campaign funds to

essentially function as a campaign manager designing and implementing communications strategies.

As with the aforementioned homeowner hiring a contractor for a $100,000 renovation who talks with building inspectors, checks for complaints with the state's consumer protection agency and local Better Business Bureau, or visits a current job site to see how the contractor works, a treasurer preparing to pay a large percentage of the campaign's funds to one campaign services provider may look at reports on file with eCRIS to see if the provider is reported as using secondary payees, check with SEEC for complaints against the provider, and/or visit the provider's offices.

At other times, as when a treasurer approves a single expenditure to a polling company for a relatively small amount, a simple inquiry as to whether they will be hiring a call center on the committee's behalf would be enough.

(4) Is a primary payee such as a pollster required by law to disclose a secondary payee such as a call center, when asked by a treasurer?

The treasurer is required by law to disclose secondary payees and it is currently the treasurer that bears liability for failure to do so.[8] It would, however, be an aggravating circumstance in assessing penalties if a treasurer continues to approve payments to a campaign services provider after such treasurer knew or should have known that the campaign services provider intentionally lied or misrepresented information in response to inquiries as to secondary payee information. Thus, while a campaign services provider who does not disclose accurately secondary payees may not be directly liable for penalties under the campaign finance law, such provider may subject its clients to increased liability or lose clients whose due diligence reveals that the treasurer cannot both comply with campaign finance statutes and continue to approve payment to the consultant due to the consultant's refusal to disclose secondary payee information.

While there may not be direct liability on the part of a campaign services provider providing false information regarding secondary payees to a treasurer, there are other campaign finance violations that may apply to a given set of facts. For example, in one instance involving a poll, the Commission found the poll provider liable for defraying the costs of a polling effort on behalf of a candidate. *See Complaints of Jonathan Pelto*, File No. 2009-104, Agreement Containing Consent Order and Payment of a Civil Penalty (January 26, 2011) (penalty issued for pollster utilizing his graduate students who were being paid with public funds without informing the treasurer of his defrayal). An honest discussion regarding secondary payees to be used and services being provided might have prevented this violation. The Commission has also indicated that in some circumstances, there could be liability if the treasurer delegates his duties to approve expenditures to another person to such an extent that the other person is acting as treasurer. *See In the Matter of Government Action Fund*, File No. 2008-003, Agreement Containing Consent Order, Forfeiture and Payment of a Civil Penalty (May 6, 2009) (noting that it was improper for the treasurer to delegate storage responsibilities (of backup documentation) to a political committee chair (the Respondent), noting that the only delegation allowed is to a

[8] The Commission realizes that it is the campaign services provider who ultimately knows for certain whether secondary payees were hired on behalf of a committee, and in response to an escalating problem revealed by post-election reviews since the passage of the Citizens' Election Program, the Commission has asked the legislature to make certain campaign services providers directly liable for failure to disclose to treasurers the secondary payee information that treasurers need to fulfill their reporting requirements.

candidate of a candidate committee); *Complaints of Tom Kelly*, Bridgeport, File Nos. 2011-090 and 097, Agreement Containing Consent Order (Feb. 15, 2012) (finding violations of secondary payee disclosure relating to committee worker reimbursements and noting that someone other than the treasurer was substantially involved in authorizing committee expenditures).

This constitutes a declaratory ruling pursuant to General Statutes § 4-176. A declaratory ruling has the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of General Statutes § 4-183, pursuant to General Statutes § 4-176 (h). Notice has been given to all persons who have requested notice of declaratory rulings on this subject matter. This declaratory ruling is only meant to provide general guidance and addresses only the issues raised.

Adopted this __th day of ____ 2019 at Hartford, Connecticut by a vote of the Commission.

Anthony J. Castagno, Chairman

STATE OF CONNECTICUT

STATE ELECTIONS ENFORCEMENT COMMISSION

Resolution and Order Setting Forth Specified Proceedings for Pending Declaratory Ruling Petition

Pursuant to General Statutes § 4-176 (e) and Connecticut Agency Regulations § 9-7b-65 (c), it is hereby resolved and ordered that the following proceedings are set regarding a Declaratory Ruling Petition on behalf of Derek Donnelly, regarding Secondary Payees and Polling Expenditures, received by the Commission on February 26, 2019:

1) The Commission votes to approve for comment the Proposed Declaratory Ruling 2019-03: Secondary Payees and Polling Expenditures; and

2) The Commission directs staff to post the Proposed Declaratory Ruling on the SEEC website, and to circulate the Proposed Declaratory Ruling via email to the list on file of all persons who have requested notice of declaratory rulings, and to the chairperson and treasurer of all state central committees, legislative leadership committees, and legislative caucus committees currently registered with the Commission, with a comment period to close at 11:59 p.m. on Wednesday, July 10, 2019, with consideration of any received comments at the Wednesday, July 17, 2019 Commission meeting.

Salvatore Bramante - Vice Chair   Date
By Order of the Commission

NOTICES

Notice of Reinstatement to the Bar

Pursuant to Practice Book § 2-54(b), notice is hereby given that on March 28, 2019 in docket number FBT-CV12-603-01-31s the application for reinstatement to the practice of law in Connecticut of Joseph Colbert, juris number 407611, of Wilton, CT was GRANTED.

The Court (Bellis, J.)

Notice of Disbarment of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on April 24, 2019, in Docket Number HHD-CV-18-6095358, Dale James Morgado, juris number 427675, was ordered disbarred for a period of seven years effective November 29, 2018 and subject to any further orders of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York.

Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys). Should respondent seek reinstatement to the Connecticut bar he must do so pursuant to Practice Book Section 2-53 but shall not be eligible to do so until he is eligible for reinstatement to the bar of the State of New York.

David Sheridan
Presiding Judge

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on April 24, 2019, in Docket Number HHD-CV-18-6094442, Seth T. Carey, juris number 424757, was ordered suspended for a period of three years effective December 20, 2018 and subject to any further orders of the Maine Supreme Judicial Court

Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys). Should respondent seek reinstatement to the Connecticut bar he must do so pursuant to Practice Book Section 2-53 but shall not be eligible to do so until he is eligible for reinstatement to the bar of the State of Maine.

David Sheridan
Presiding Judge

Notice of Suspension of Attorney

DOCKET NO. CV-19-6089704-S. DISCIPLINARY COUNSEL VS. KAREN SOUZA. SUPERIOR COURT, JUDICIAL DISTRICT OF NEW HAVEN, MAY 2, 2019.

ORDER: Respondent, Karen Souza, juris number 308197, is suspended, effective immediately, from the practice of law in Connecticut for 42 months.

The court will not appoint a trustee as the respondent has no active files and no IOLTA account.

The Respondent shall comply with all terms and conditions of Practice Book Section 2-47B; Restrictions on the Activities of Deactivated Attorneys.

Should the respondent seek reinstatement following her term of suspension she must do so pursuant to Practice Book Section 2-53.

Approved and so ordered,

Abrams, J

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2019-2, May 16, 2019

Question Presented: **The petitioner's inquiry, as set forth in five specific questions discussed herein, is whether Governor Lamont and his wife have taken adequate steps concerning their businesses and financial assets in order to be in compliance with the Code of Ethics for Public Officials.**

Brief Answer: **We conclude that the steps taken by Governor Lamont and his wife (or to be taken promptly upon the issuance of this opinion), as described in this opinion, are adequate to better ensure compliance.**

At its March 21, 2019 regular meeting, the Citizen's Ethics Advisory Board (Board) granted the petition for an advisory opinion submitted by Robert W. Clark, General Counsel of the Office of the Governor, on behalf of Governor Ned Lamont (Governor Lamont).[1] The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (Code).[2]

BACKGROUND

The following background information, as set forth by the petitioner, is relevant to this opinion:

A. MRS. LAMONT'S BUSINESS ACTIVITIES

Governor Lamont's wife, Ann H. Lamont (Mrs. Lamont) is the co-founder and the executive managing member of Oak HC/FT Management Company, LLC (Oak HC/FT) and certain general partnerships for private investment funds managed by Oak HC/FT (the General Partners). These funds invest in various portfolio companies, primarily in the health care and financial technology business sectors. Currently, funds managed by Oak HC/FT are invested in approximately thirty portfolio companies. Mrs. Lamont has a greater than five percent (5%) financial interest in Oak HC/FT and in each of the General Partners. Accordingly, Oak HC/FT and each of the General Partners falls within the definition of ''associated business'' [pursuant to General Statutes § 1-79 (2)] because Mrs. Lamont is an officer and owner holding a greater than five

[1] On May 1, 2019, Attorney Clark filed an amended petition for an advisory opinion by adding three questions regarding the financial assets currently held by Governor Lamont and his wife Ann H. Lamont. The background information concerning these additional questions has been provided in the amended petition.

[2] General Statutes § 1-79 *et. seq.*

percent interest in Oak HC/FT. Each of those Oak HC/FT portfolio companies in which Mrs. Lamont serves as a director also is an ''associated business''.[3]

In addition to her involvement with Oak HC/FT, Mrs. Lamont serves in similar capacities with Oak Management Corporation, its related general partners and the Oak Investment Partners' funds managed by them (OIP). OIP similarly invests in portfolio companies in various industry sectors, including in the health care and financial technology sectors. Mrs. Lamont is not making any new investments through OIP, but there currently are three OIP portfolio companies that constitute associated businesses because Mrs. Lamont serves on their Boards of Directors.

The petitioner anticipates two possible scenarios in which a ''substantial conflict of interest'' regarding Oak HC/FT, OIP or a related ''associated business'' might arise. The first would be if one of these entities engaged in negotiations for a State contract or entered into such a contract. A search of the State's public contracting portal indicates that none of Oak HC/FT, OIP or any of the portfolio companies has a current contract with the State. There is, however, the possibility that during Governor Lamont's tenure, a fund managed by Oak HC/FT, OIP or a current (or future) Oak HC/FT or OIP portfolio company might negotiate for or enter into such a contract. In the ordinary course of State business, neither the Governor nor Mrs. Lamont would be involved in such contract negotiations, enter into any contracts on behalf of the State, nor be responsible for their implementation or oversight. Such responsibilities are generally managed by agency commissioners and their staff. In such instances, neither a ''substantial conflict of interest'' for the Governor or Mrs. Lamont or any of their associated businesses, nor a ''potential conflict of interest'' for Mrs. Lamont, would arise because neither the Governor nor Mrs. Lamont would take any official action in connection with awarding such a contract.

Second, a ''substantial'' conflict might arise if the State were to pass legislation, issue a regulation or alter its policies in some way that benefited Oak HC/FT, OIP or a related ''associated business'' but only if such entity was affected to a comparatively greater degree than others in the class affected by such act. Conn. Gen. Stat § 1-85 makes clear that such a conflict does *not* exist if the benefit or detriment resulting from such official action accrues equally to all ''member[s] of such profession, occupation or group.''

***

The Governor and Mrs. Lamont intend to take proactive measures to eliminate any possibility of a ''substantial conflict of interest'' or a ''potential conflict of interest'' in the case of Mrs. Lamont. Specifically, Governor Lamont and Mrs. Lamont intend to proactively recuse themselves from taking any official action that directly and specifically involves Oak HC/FT, OIP or any of their respective portfolio companies. To facilitate this recusal process, Oak HC/FT will provide the Governor's Office with a list of all its portfolio companies and timely update the list as additional companies are added to or withdrawn

[3] The remaining Oak HC/FT and OIP portfolio companies, *i.e.,* those where Mrs. Lamont is not a director or officer, are not themselves ''associated businesses,'' as Mrs. Lamont and Governor Lamont would never directly own five percent or more of the stock of these companies nor would they otherwise be ''associated'' with the companies in any of the other ways that are identified under § 1-79 (2). Further, [under General Statutes § 1-85] any financial benefit to Governor Lamont, Mrs. Lamont, Oak HC/FT or OIP resulting from an official act relating to a related portfolio company would most likely not be direct, but rather indirect and require the intervention of an event.

from the portfolio (such list, a ''Recusal List''). Mrs. Lamont will likewise provide a list of all OIP portfolio companies, and update that list accordingly. Governor and Mrs. Lamont will agree to take no official action that directly and specifically relates to Oak HC/FT, OIP or any of their respective portfolio companies, exercise no oversight responsibilities for matters relating to any of these companies, and take no steps to attempt to influence the outcome of any actions regarding any of them. This recusal arrangement would be documented in a letter from the Governor and Mrs. Lamont to the Governor's General Counsel and Chief of Staff.

Governor Lamont, Mrs. Lamont, their immediate family and associated businesses are barred from entering into any State contracts ''unless the contract has been awarded through an open and public process, including prior public offer and subsequent public disclosure of all proposals considered and the contract awarded.'' Conn. Gen. Stat. § l-84 (i)(l). . . . The Governor will direct OPM to not approve any sole source contracts with any business on the Recusal List. Furthermore, because some State sole source contracts may not require OPM approval, Mrs. Lamont will also notify Oak HC/FT, OIP and those related portfolio companies that constitute ''associated businesses'' *(i.e.* those on which she serves as a director) that they should abstain from entering into such sole source contracts with the State because of the prohibitions contained in Conn. Gen. Stat. § l-84 (i)(l).

B. RECUSALS

The Governor and Mrs. Lamont would commit to recusing themselves from taking any official action that could reasonably be expected to result in a direct financial benefit or harm to themselves, or to an associated business, to a degree that is different from or greater than the universe of individuals or businesses that would be affected generally by such official action. *See, e.g.,* Conn. Agencies Regs. 1-81-28(a)-(b). Such recusal would include both refraining from exercising oversight responsibilities for governmental matters relating to any of the investments of the Governor, Mrs. Lamont or any associated business that have not been made subject to the control of an independent intermediary (as described below) and taking no steps to attempt to influence the outcome of any governmental actions regarding any of such investments. It would apply to such matters as participating in any decision to award a state contract, to issue or reject a state license or certificate of need, to adopt any regulations or to influence the adoption of any legislation in any case where the conditions described above were present.

To better identify the need for any necessary recusal, the Governor would periodically arrange to provide his office with a list of individual investments held by himself, Mrs. Lamont or any associated business that have not already been made-subject to the exclusive control of an independent intermediary. The Governor's office would use that list as a checklist on a case-by-case basis to assist in identifying instances where recusal by the Governor or Mrs. Lamont would be necessary.

C. USE OF AN INDEPENDENT INTERMEDIARY TO MANAGE ASSETS

To minimize the need for any such recusals, each of the Governor and Mrs. Lamont (each a ''Grantor'' and, collectively, the ''Grantors'') intends to grant a durable power of attorney for the duration of the Governor's time in office to an independent intermediary. The intermediary would be granted, with certain limited exceptions further described herein, the exclusive right to manage the

interests of each Grantor in the majority of the Grantor's investments, investment funds, hedge funds, real estate funds, fixed income funds, directly owned domestic and foreign equities, private equity funds, limited liability companies and partnerships (each a ''Managed Investment'' and, collectively, the ''Managed Investments''), in each case without any Grantor's knowledge regarding or control over such Managed Investments. (For the avoidance of doubt, Oak HC/FT, OIP, their portfolio companies and other entities addressed in Section A above would not be Managed Investments and are not covered by this Section C.) By this means, neither the Governor nor Mrs. Lamont would be required to recuse themselves from any official action regarding such Managed Investments, since neither would be aware of what investments were, in fact, under the control of the intermediary. Such an approach would be similar to those taken by Governor Bruce Rauner in Illinois and Mayor Michael Bloomberg in New York City and would be structured so that neither Grantor would have any knowledge regarding or control over any such Managed Investment, much as if such Managed Investments were placed in a blind trust but without the delays and administrative and legal complications of formally transferring legal title to such investments into a trust and without triggering possible premature taxation of such investments.

In line with those approaches, the independent intermediary would be granted full discretionary authority to make all investment decisions with respect to all such Managed Investments in its care as a fiduciary for the Grantors, including without limitation the power to dispose of all or any part of such Managed Investment(s) and to substitute any other Managed Investment(s) therefor. The intermediary would act as a principal with respect to all such Managed Investments and would not report to any Grantor any information regarding any such Managed Investment, including information regarding the operations of such Managed Investment and whether or not such Managed Investment is being disposed of, replaced or retained for the benefit of the Grantor. The only exceptions are that (i) a Grantor would be allowed to advise the intermediary from time to time as to that Grantor's general investment parameters such as income vs. growth, risk tolerance, classes of prohibited investments, etc., (ii) each Grantor would be allowed to obtain from the intermediary out of the Managed Investments distributions of cash from time to time upon the Grantor's request, including without limitation for the purpose of making gifts, and (iii) the intermediary could provide the Grantors with anonymized and aggregated results for purposes of reporting on the overall performance of all Managed Investments under the intermediary's control; filing tax returns and paying taxes; complying with applicable requirements for filing financial statements; and conforming to similar legal obligations.

The intermediary would inform the broker, manager or general partner of each account, fund or partnership holding Managed Investments for which such intermediary is responsible that all communications regarding the investments (or future investments by such broker, partnerships or funds in Managed Investments) should be exchanged solely with the intermediary or the intermediary's designee (other than a Grantor), that the intermediary has plenary authority to act with respect to any investments in such account, fund or partnership and that, for the duration of the power of attorney, the Grantor would have no such communications or authority. For such purpose the intermediary would be authorized to disclose to such broker, manager or general partner the power of attorney (or relevant portions thereof). Lastly, the intermediary would be substituted for Governor or Mrs. Lamont, as applicable, as the investment advisor, manager or trustee, as applicable, of each limited liability company

and trust established solely for the benefit of the descendants of Governor and Mrs. Lamont.

D. NEW INVESTMENTS

The independent intermediary would be free to invest in any type of security or other property during the Governor's time in office (to the extent consistent with the general guidelines provided at any time and from time to time by the Grantor regarding asset allocation, risk tolerance and classes of investments prohibited by the Grantors as part of the Grantors' general investment parameters discussed above), provided that the intermediary does so without any Grantor's knowledge or control. Any such investment would become a Managed Investment. Should any Grantor make any new investments themselves during this period, such investments would be limited to Exchange-Traded Funds (''ETFs'') and broad-based mutual funds.

E. RESIGNATIONS

Other than the arrangements described in Part A, above, with respect to Mrs. Lamont's continued involvement in Oak HC/FT and OIP, both the Governor and Mrs. Lamont would resign from any board memberships and trusteeships they currently hold. In addition, Mrs. Lamont would resign as a trustee of any Oak HC/FT or OIP pension fund for the duration of the Governor's time in office.

F. EXCEPTIONS TO DIVESTITURE OF CONTROL AND KNOWLEDGE OF ASSETS

As noted above in Section B, the Governor and Mrs. Lamont wish to retain direct ownership and control of a handful of investments as to which they have special knowledge and background. All such investments would be listed on the schedule delivered to a designated official in the Governor's office, which schedule would be periodically updated as necessary, in order that the Governor and his staff may better ''police'' whether any official action that either the Governor or Mrs. Lamont may contemplate could reasonably be expected to result in a direct financial benefit or harm to themselves or to an associated business to a degree that is different from or greater than the universe of individuals or businesses that would be affected generally by such official action and, therefore, require recusal by the Governor and Mrs. Lamont.

G. STATEMENT OF FINANCIAL INTERESTS

Governor and Mrs. Lamont are aware of the requirements set forth in General Statutes § 1-83 that he file with the Office of State Ethics an annual Statement of Financial Interests (the ''Statement'') with respect to himself and Mrs. Lamont. His first report was filed on May 1, 2019, providing the required information for the calendar year 2018. Further, the Governor and Mrs. Lamont are aware that a similar Statement will be due on or prior to May 1, 2020 with respect to (a) similar information for the period in 2019 prior to the grant to the intermediary of a durable Power of Attorney over Managed Investments as described in this letter, and (b) for the balance of 2019 as to those securities and other property not included within the category of Managed Investments placed under the control of the intermediary. The Governor interprets the applicable regulations such that, during the period when Managed Investments are under the control of an intermediary, they need not be individually reported on future Statements since the Power of Attorney arrangements proposed above are the functional equivalent of a blind trust under relevant statutes.

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Those Statements filed with respect to any period when the Power of Attorney is in force must identify the existence of the Power of Attorney and name the intermediary just as it would have to identify any blind trust and the trustee thereof. However, the Governor and Mrs. Lamont need not identify any specific investments under the control of the intermediary holding the Power of Attorney since, by definition, they will be without knowledge of or control over such holdings.

H. CONFIDENTIALITY

The Governor and Mrs. Lamont also are aware of the ''use of office'' prohibition set out in General Statutes § 1-84(c) and Declaratory Ruling 2011-A, and will not use his or her office or any confidential information acquired by his or her office for the financial benefit of either of them, their covered family members or any associated business. Further, the Governor and Mrs. Lamont will instruct each other, each covered member of their family, any fiduciary handling any of such members' investments and the senior executives of any associated business not to reveal to the Governor or Mrs. Lamont, directly or indirectly, information regarding any investments held by or for the benefit of such family member or any transaction or contemplated transactions therein.

QUESTIONS PRESENTED

1. Whether Governor Lamont and Mrs. Lamont's recusal as outlined above constitutes a sufficient basis to establish that the Governor and Mrs. Lamont will have taken no ''official acts'' with respect to Oak HC/FT, OIP or any of their respective portfolio companies, and thereby avoid the creation of any ''substantial'' or ''potential'' conflicts of interest with these companies, as those terms are defined in the Code of Ethics?

2. Whether the Governor's instruction to OPM not to approve any sole source contracts with Oak HC/FT, OIP or any of the respective portfolio companies, combined with Mrs. Lamont's similar notification to Oak HC/FT, OIP, and any associated businesses, constitute sufficient and adequate steps to ensure compliance with General Statutes § l-84 (i) (1)?

3. Whether the Governor's and Mrs. Lamont's plans to relinquish knowledge and control over the bulk of their own financial assets and those of any associated business and to recuse themselves from matters that could result in a direct and disproportionate financial benefit or harm with respect to the few assets over which they do retain control, as outlined above, are adequate to ensure that the Governor and Mrs. Lamont will avoid ''substantial'' or ''potential'' conflicts of interest, as those terms are used in the Code of Ethics?

4. Whether the Governor's and Mrs. Lamont's proposed manner of filing any Statements filed during the Governor's term are appropriate and sufficient under the Code of Ethics?

5. Whether the Governor's and Mrs. Lamont's plans for avoiding the misuse of confidential information obtained by reason of his or her office are adequate for compliance with the Code of Ethics?

RESPONSE TO QUESTION 1

As ''Public official[s]'', as that term is defined in General Statutes § 1-79 (11), both the Governor and Mrs. Lamont[4] are subject to the ''substantial'' conflicts of interest provision, set forth in General Statutes § 1-85.

Under that provision, ''[a] public official, including an elected state official . . . has an interest which is in substantial conflict with the proper discharge of his duties . . . if he has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a *direct* monetary gain or suffer a *direct* monetary loss, as the case may be, by reason of his official activity. A public official, including an elected state official . . . does not have an interest which is in substantial conflict with the proper discharge of his duties . . . if any benefit or detriment accrues to him . . . or a business with which he . . . is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group. A public official . . . who has a substantial conflict may not take official action on the matter.'' (Emphasis added.)

For purposes of § 1-85, a public official ''has reason to believe or expect,'' ''when there is a written contract, agreement, or other specific information available to the individual which would clearly indicate to a reasonable person that such a direct benefit or detriment would accrue or when the language of the legislation, regulation or matter in question would so indicate.'' Regs., Conn. State Agencies § 1-81-28 (c). In addition, the term ''direct,'' as used in § 1-85, has been defined to mean ''absolute, immediate, or without intervening conditions.'' Declaratory Ruling 92-C. ''Direct'' financial impact has been illustrated by the following two examples in § 1-81-28 (a) of the Regulations of Connecticut State Agencies: First, ''a state employee required, in the course of his or her official duties, to determine whether a consulting contract should be awarded to his or her spouse . . . .'' Second, a legislator who is called upon to vote on the ''specific bonding request'' of a ''for-profit corporation'' on whose board of directors the legislator sits.

Finally, the term ''a business with which he is associated'' applies to ''any sole proprietorship, partnership, firm, corporation, trust or other entity through which business for profit or not for profit is conducted in which the public official . . . or member of his or her immediate family is a director, officer, owner, limited or general partner, beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of any class, provided, a public official . . . or member of his or her immediate family, shall not be deemed to be associated with a not for profit entity solely by virtue of the fact that the public official . . . or member of his or her immediate family is an unpaid director or officer of the not for profit entity. 'Officer' refers only to the president, executive or senior vice president or treasurer of such business.'' General Statutes § 1-79 (2).

[4] '' 'Public official' means any state-wide elected officer, any member or member-elect of the General Assembly, any person appointed to any office of the legislative, judicial or executive branch of state government by the Governor or an appointee of the Governor . . . and *the spouse of the Governor*.'' (Emphasis added.) General Statutes § 1-79 (11).

As a non-elected public official, Mrs. Lamont is also subject to the ''potential conflicts of interest'' provision in General Statutes § 1-86 (a), which provides as follows: ''[a]ny public official . . . other than an elected state official, who, in the discharge of such official's . . . official duties, would be required to take an action that would affect a financial interest of such official . . . such official's . . . spouse, parent, brother, sister, child or the spouse of a child or a business with which such official is associated, other than an interest of a de minimis nature, an interest that is not distinct from that of a substantial segment of the general public or an interest in substantial conflict with the performance of official duties as defined in section 1-85 has a potential conflict of interest. . . .''

In providing background information regarding Mrs. Lamont's business activities at Oak HC/FT, OIP and their respective portfolio companies, the petitioner identifies which of these entities would meet the definition of an ''associated business'' under General Statutes § 1-79 (2) and thus be subject to §§ 1-85 and 1-86 (a).

The petitioner also identifies two possible scenarios in which substantial conflicts of interest might arise regarding Governor Lamont's and Mrs. Lamont's ''associated businesses'' and provides proactive measures to eliminate any possibility of both substantial and potential conflicts of interest, by having Governor Lamont and Mrs. Lamont recuse themselves from taking official action that directly and specifically involves Oak HC/FT, OIP and any of their respective portfolio companies.

Under the proposed recusal process, which includes the creation of a regularly updated recusal list with respect to Oak HC/FT, OIP and any of their respective portfolio companies, Governor Lamont and Mrs. Lamont will (1) abstain from any official action that directly and specifically relates to such companies, (2) exercise no oversight responsibilities for matters relating to any such companies, and (3) take no steps to attempt to influence the outcome of any actions regarding any such companies.

Because recusal is the remedy for both substantial and potential conflicts, the proposed recusal process to which the Governor and Mrs. Lamont will adhere is appropriate under the Code and should engender compliance with its provisions.

RESPONSE TO QUESTION 2

General Statutes § 1-84 (i) (1) provides, in relevant part, that ''no public official . . . or member of the official['] . . . immediate family or a business with which he is associated shall enter into any contract with the state, valued at one hundred dollars or more . . . unless the contract has been awarded through an open and public process . . . .'' The petitioner acknowledges that Governor Lamont and Mrs. Lamont and any of their ''associated businesses'' are barred from entering into state contracts unless such contracts are subject to ''open and public'' process required under § 1-84 (i) (1).

Although the State enters into contracts on a noncompetitive basis, defined under the Office of Policy and Management (OPM) Procurement Standards as ''sole source contracts,'' the former State Ethics Commission concluded in an informal opinion that the ''open and public'' requirement of § 1-84 (i) (1) may not be waived for such contracts. Request for Advisory Opinion No. 0283 (1987).

Nevertheless, we confirm that the Governor's proposed instruction to the OPM not to approve sole-source contracts with Oak HC/FT, OIP and any of their respective portfolio companies listed on the recusal list, combined with Mrs. Lamont's similar

instruction to Oak HC/FT, OIP and those related portfolio companies that constitute ''associated businesses,'' will better ensure compliance with § 1-84 (i) (1).

RESPONSE TO QUESTION 3

The Governor's and Mrs. Lamont's proposed plan to use an independent intermediary to manage the bulk of their assets for the purpose of divesting control over and knowledge of such assets and, therefore, minimizing the need for recusals under the conflict of interests provisions of the Code is functionally similar to the use of a blind trust. Under the Code, a blind trust is ''a trust established by a public official . . . *for the purpose of divestiture of all control and knowledge of assets*.'' (Emphasis added.) General Statutes § 1-79 (1). The former State Ethics Commission recognized the blind trust ''as an appropriate device for avoidance of conflicts.'' Advisory Opinion No. 96-24.

Because divestiture of all control and knowledge of assets is the critical element required for the avoidance of substantial and potential conflicts of interests, a management vehicle that contains this element will be treated in a similar fashion as a blind trust under the Code. See Conflicts of Interest Board Advisory Opinion No. 2007-4 (Dec. 26, 2007) regarding New York City Mayor Michael Bloomberg's arrangement to divest knowledge and control for his investments.

Nevertheless, the divesture of knowledge and control requirement cannot extend to investments or assets in which the holder's ownership right or interest is required to be recorded in a public office or those assets whose permanency makes transfer by the intermediary improbable or impractical, e.g., a business or real property. In fact, the Governor and Mrs. Lamont's ''associated businesses'' discussed in the responses to questions 1 and 2, above, (i.e., Oak HC/FT, OIP and certain portfolio companies), would not be subject to divestiture because of the active role that Mrs. Lamont plays in them as the owner, officer or director.

Further, the proposed grant of a durable power of attorney to an independent intermediary to effectuate the divestiture of all control and knowledge of assets must be in place for the duration of the Governor's time in office. During this period, for those assets that are managed by the independent intermediary, to which the petitioner refers as Managed Investments, neither the Governor nor Mrs. Lamont would be required to recuse themselves from any official action regarding such investments, because they would have no knowledge or control regarding them. If, however, the Governor or Mrs. Lamont subsequently gains knowledge or control over an asset or investment that has been placed under the management of the independent intermediary, such asset or investment will become subject to the recusal process outlined by the petitioner for the purpose of compliance with §§ 1-85 and 1-86 (a).

Further, the proposed intermediary's instructions to the broker, manager or general partner of each account, fund or partnership holding Managed Investments that all communications regarding such investments should be exchanged solely with the intermediary or the intermediary's designee is consistent with the divestiture of all control and knowledge of assets requirement.

The proposed exceptions to interactions between the intermediary and the Governor or Mrs. Lamont described in your letter concerning (i) general investment parameters, (ii) cash disbursements, and (iii) the provision of general information as to the overall performance of all Managed Investments under the intermediary's

control and for the purpose of preparing tax returns, among other legal obligations, are acceptable, provided such excepted interactions adhere to the non-disclosure of specific identifiable assets that are subject to the divestiture of all control and knowledge.

Finally, Governor Lamont and Mrs. Lamont must provide the Office of State Ethics with a copy of the executed agreement granting the Power of Attorney to an independent intermediary.

RESPONSE TO QUESTION 4

As a state-wide elected officer, the Governor is a required filer of a Statement of Financial Interests (SFI), as set forth in General Statutes § 1-83. The Governor filed his first report on May 1, 2019, providing information for calendar year 2018, as required under that provision.

With respect to the Governor's filing for calendar year 2019 - which will be due on or prior to May 1, 2020, and which will contain all required information prior to the date of the grant to the intermediary of a durable power of attorney over Managed Investments, as discussed above, and, thereafter, only those securities and other property not under the control of the intermediary - such manner of filing will be treated similarly as the disclosure of a blind trust.

Because the proposed power of attorney arrangement is being recognized as a functional equivalent of a blind trust under the Code, the SFI filing for calendar year 2019 and any subsequent filing for the period in which the Governor is in office must identify the existence of the Power of Attorney and name the intermediary in a manner similar to that required for the identification of a blind trust, without the disclosure of any specific assets over which the Governor and Mrs. Lamont have no control or knowledge and which are under the control of the intermediary holding the Power of Attorney.

In sum, the proposed disclosures for the Governor's SFIs are consistent with the filing requirements set forth in § 1-83 and the reporting provisions outlined in §§ 1-81-2 through 1-81-11 of the Regulations of Connecticut State Agencies.

RESPONSE TO QUESTION 5

As public officials, Governor Lamont and Mrs. Lamont are also subject to the ''use of office'' prohibition, under which a public official may not use his or her office or any confidential information acquired by virtue of his or her office for personal financial benefit or the financial benefit of certain family members or any associated businesses. General Statutes § 1-84 (c). This ''use of office'' prohibition restricts, for example, exploitation of a public official's state authority or contacts, or confidential information acquired in state service, to advance or facilitate private business interests. See Declaratory Ruling 2011-A.

We confirm that the Governor's and Mrs. Lamont's plans for avoiding the misuse of confidential information obtained by reason of his or her office as outlined by the petitioner are adequate and should better ensure compliance with § 1-84.

Before closing, we recommend that if there are any substantive changes to the steps taken by Governor Lamont and Mrs. Lamont concerning their financial assets and associated businesses, the petitioner should contact the Office of State Ethics for further advice.

CONCLUSION

We conclude that the steps taken by Governor Lamont and Mrs. Lamont concerning their financial assets and associated businesses, as set forth in this opinion, are adequate to better ensure compliance with the Code, particularly its conflict-of-interests provisions and disclosure requirements.

By order of the Board,

Dated 5/16/19 /s/Dena M. Castricone

Chairperson /~~Vice Chairperson~~