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2001 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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SURVEY

MAKING GOOD LAW REQUIRES MORE LAWYERS

RANDALL T. SHEPARD*

INTRODUCTION

While we lawyers largely think of ourselves as people who "practice" law, the fact is that we "make" law regularly during the course of our work. Lawyers and judges do this by interpreting statutes, resolving litigation, and forging common law as a matter of course.

Lawyers also make law in a rather different setting. Legislative bodies at all levels of government have long been places where the voters sent lawyers to represent them in much greater proportion than the number of lawyers in the population. The contribution of lawyers to legislative deliberations has been a good and important one for the whole of society. We are in danger of losing it.

I. OH, REALLY?

Surely this cannot be so, says the reader, even the lawyer-reader. The legislature is full of lawyers. It used to be so. In fact, at the very first session of the General Assembly, a quarter of the forty members were lawyers.[1] Further, a random review of 1941 legislators who served between 1816 and 1899 showed that 536 were lawyers. By the 1980-81 session of the Indiana General Assembly, the numbers were still substantial. There were twenty-nine lawyers in a total membership of 150 legislators, for a percentage of just under twenty percent. Likewise, the 1990-91 session of the legislature had twenty-three lawyers. While there were still twenty-three lawyers in the General Assembly of 2001-02, we have just experienced a sweeping loss: six of the thirteen lawyers in the House have left or announced they will not seek re-election.

This dramatic drop in the number of lawyers has been masked by the participation of lawyers in very prominent roles. We have now had three lawyers in a row serve as speaker of the House of Representatives, for example.[2] And the minority leader of the House has recently tended to be a lawyer. These legislators put a lawyer's face before the public and the profession as representing the legislative body, and we tend to lose track of the declining trend.

Indiana is not unique in experiencing an exodus of lawyer-legislators. For example, the percentage of lawyers in the Maryland legislature has dropped from thirty-eight percent in 1966 to just eleven percent today.[3] The same is true in

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1. A BIOGRAPHICAL DIRECTORY OF THE INDIANA GENERAL ASSEMBLY 1816-1899, at 437 (Rebecca A. Shepherd et al. eds., 1980) (compiled from biographical sketches of the legislators who were listed as members of the first General Assembly).

2. In reverse order, these were Rep. John R. Gregg (D-Sandborn), Rep. Paul S. Mannweiler (R-Indianapolis), and Rep. Michael Phillips (D-Boonville).

3. *See* Janet Stidman Eveleth, *Where Have All the Lawyer Legislators Gone?*, MARY. B.J., Nov.-Dec. 2001, at 50.

Wisconsin, where lawyers are only eleven percent of the current Wisconsin legislature.[4] Similar phenomena exist in a number of other states: Arkansas' legislature is comprised of only fourteen percent lawyers;[5] Idaho lawyers represent only seven percent of the legislature;[6] and Kansas has experienced a decline of more than fifty percent in lawyer-legislators over the past forty years.[7] It appears that this development has not affected the U.S. Congress.[8]

II. WHY IS THIS OCCURRING? TIME AND MONEY

All professions represented in the legislature face the challenge of serving the public and meeting their private obligations to family and vocation. However, there are a unique number of causes for the reduction in the number of lawyers serving. I offer here four that fit my observations of the trend.

A. Hardly Part-Time

First, while Indiana continues to hold to the notion that it has a "part-time citizen legislature," the fact is that the time demands on persons serving as legislators are hardly part-time and they grow more consuming by the year. During the legislature as it existed in the 1960s, for example, an elected legislator could expect to spend two months in Indianapolis during a representative's twenty-four month term of office. Since 1971, the General Assembly has met every year, and the sessions run until March 15 in even-numbered years and until April 15 in odd-numbered years. Thus the number of months during a term that a representative should expect to spend largely in Indianapolis has roughly tripled as a result of the decision to hold annual sessions. Moreover, the number of special sessions has grown. A listing of the years in which special sessions have called legislators away from their homes since 1960 tells this story well enough: 1963, 1967, 1977, 1981, 1983, 1987, 1989, 1991, 1993, 1997, and perhaps 2002.

Beyond the commitment of time to session days, members of the General Assembly confront a growing need to go to the capitol for inter-session business. For example, the "2001 Roster of Interim Study Committees and Statutory Commissions and Committees," lists ninety-eight groups examining issues

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4. *See* George C. Brown, *Lawyers as Legislators: With Fewer Lawyer-Legislators Making Wisconsin Laws, Attorneys Involvement in the Legislative Process Is a Must*, WIS. LAW., Sept. 2001, at 3.

5. *See* Don Hollingsworth, *The Decline of the Lawyer Legislator*, ARK. LAW., Spring 2001, at 5.

6. Tom Moss, *Being a Lawyer Legislator*, ADVOCATE, Dec. 2000, at 18.

7. Paul T. Davis, *The Kansas Legislature Needs You!*, J. KAN. B. ASS'N, May 2000, at 5. The Kansas Bar Association has taken a proactive stance against the dramatic decline in lawyer legislators and actively sought out lawyers to run for office. *See id.*

8. Based upon my research, fifty-two members of the current U.S. Senate have law degrees. *See* The United States Senate, Senators of 107th Congress, *available at* http://www.senate.gov/ (last visited May 13, 2002).

ranging from education to rail corridor safety. By contrast, there were just sixty-five such committees at work in 1985. While the number of such committee assignments is sometimes criticized in the press, what topics should the General Assembly choose not to examine in the relatively more orderly and intense way that study committees have provided. The death penalty? Medicaid? Economic development?

The days consumed by such activities are but one way to assess the overall weight of the task of serving in the General Assembly. Measuring growth in the number and relative complexity of issues on the legislature's agenda by the volume of legislation ultimately passed is another way, though not a particularly sophisticated one. In 1941, the legislature passed enough pages of laws to fill one volume. In 1971, it passed enough law to fill two volumes. By 2001, four volumes were required to capture the work product of the General Assembly.[9] While we often are blithe to say that the republic would be better off if fewer laws were adopted, the fact is that these measures are most often the product of some level of public demand.

B. Lawyer Hours Not Billed

And, of course, as Abraham Lincoln said, "A lawyer's time and advice are his stock in trade."[10] Time the lawyer spends in Indianapolis hearing citizen testimony or laboring over bills during session is time the lawyer cannot spend billing hours at the law office. This problem is plain enough to see. What is not so plain, as a lawyer in the House recently explained to me, is that clients perceive the lawyer is gone even more often than the lawyer actually is gone. Because something about the legislature is so often in the news even when the body is not in session, citizens figure their lawyer is out of town and, at least; at the margin, call somebody they figure is home to handle their problems.

This aspect of the decline is virtually a reverse of the impulse which once worked to lead some to seek public office. Throughout much of the history of the legal profession, lawyers did not advertise their services, either because the club frowned on the practice or because bar rules or state laws prohibited doing so. Thus, a good way to raise a lawyer's visibility in the community was to run for office. If you won, great. If you did not win but acquitted yourself honorably, then at least your name was on the public's mind the next time a potential client ran down through the Yellow Pages. Of course, the U.S. Supreme Court decided that lawyer advertising would "offer great benefits" to the public, including a potential for "dramatically lower" costs for legal services

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9. The pages of adopted laws were 973 for 1941, 2275 for 1971 but probably because of a change in typestyle or format, the 2001 number would only be 2801.

10. Sterling v. Philadelphia, 106 A.2d 793, 795 n.2 (1954). The dissent in this case spins an interesting yarn on the authenticity of this quote, claiming its origin is actually from the Allen Smith Company, an Indianapolis plaque manufacturer. *Sterling*, 106 A.2d at 804 (Musmanno, J., dissenting).

and should thus be declared a First Amendment right.[11] Thus, lawyers now do all sorts of advertising, and there is hardly a need to run for office in order to place your name on billboards.

Law firm economics also make a difference in whether lawyers can run for office.[12] The level of overhead, a common topic of lament for firms large and small, means that firms can hardly afford learning periods for young associates, let alone carrying one of the partners for the time necessary to campaign and serve in the office.[13]

C. Professional Support

Finally, lawyer-legislators tell me that they receive very little support of any sort from their fellow lawyers. "They call me when they have a client who needs help on legislation," one legislator told me, "but I really cannot count on any substantial support from local lawyers when it comes to election time."[14]

III. WHY DOES IT MATTER?

Many among our fellow citizens, if they knew, would doubtless say that this diminution of lawyers in the legislature is not anything worth worrying about. Some might indeed celebrate the trend.

I argue that this trend is bad for two reasons.

First, it is plainly bad for our profession. More than any other segment of society, we lawyers rely on the product of legislative deliberations in the work we do solving people's problems. Laws carefully crafted with the active participation of the legal mind and experience will doubtless be easier for all of us to work with during our daily travails. This joining of authorship and daily use is helpful to all for the same reason that Shirley Shideler once told me that Barnes & Thornburg's trust and estates lawyers believed that the same lawyers who write the instruments should be responsible for their implementation: "We'll always be better writers if we know we will have to live with the documents we prepare."

The dramatic decline in lawyer-legislators means that even in those committees of the legislature in which the lawyer interest is most intense, most

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11. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 377 (1977).

12. One out-going member of the Indiana legislature is a partner in the prestigious Chicago law firm of Mayer, Brown, Rowe & Maw. According to the most recent numbers, the average profits per partner at Mayer Brown is $725,000. *See Four Firms Make Their Debut: The List of the 100 Alphabetically*, AM. LAW., July, 2001, *available at* http://www.law.com/special/professionals/amlaw/amlaw100/july01/A_to_Z.html (last visited May 13, 2002).

13. *See* Kyle O'Dowd, *Inflation Blues: The Need for a CJA Rate Hike*, 25 CHAMPION 60 (2001). Citing a 2000 survey, the author states that non-reimbursable average overhead costs are $65 per hour, or extrapolated over 2000 billable hours, $130,000. *See id.*

14. Fortunately, there is one form of institutional support—the Indiana State Bar Association's BARPAC, which pays special attention to supporting lawyers who become candidates.

of the policy-makers are not a part of the legal profession. In the 112th General Assembly, for example, the House of Representatives Committee on Courts and Criminal Code has six lawyers and nine non-lawyers. The Judiciary Committee has seven lawyers and six non-lawyers; three of the lawyers are not returning to the General Assembly next year.

Second, the public at large is not well served by this paucity of legal voice. The special contributions of the legal mind to the deliberations of multi-member bodies, our special talent for problem-solving, and our general attitude of commitment to the common good seem to me good arguments for why the end product in public policy, not just in craftsmanship, is better when a good number of our profession are engaged.

IV. WHAT TO DO?

I write here to lift up this development for consideration by our profession. I have only just begun to think about possible solutions.

The variety of causes outlined above do suggest some of the ways by which the profession might make it easier for its members to participate in the public decisions about the future of our state. These ideas flow along lines of economic incentives, time relief, support by fellow lawyers, and public recognition. Before any such ideas can be spelled out in greater detail, we must widen the circle of those interested in working on this problem.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2001*

KEVIN W. BETZ**
P. JASON STEPHENSON***

Even though mandatory criminal appeals still overwhelmingly dominated the Indiana Supreme Court's docket in 2001,[1] the constitutional change that occurred in 2001 in the court's mandatory criminal appeals began to show its effects with far less consensus and unanimity in the court's opinions.[2] It was expected that

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* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

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1.

	MANDATORY	DISCRETIONARY	TOTAL
1991	109 (53%)	98 (47%)	207
1992	64 (41%)	93 (59%)	157
1993	60 (44%)	77 (56%)	137
1994	60 (45%)	73 (55%)	133
1995	46 (38%)	76 (62%)	122
1996	68 (59%)	48 (41%)	116
1997	100 (58%)	71 (42%)	171
1998	84 (63%)	50 (37%)	134
1999	101 (59%)	69 (41%)	170
2000	132 (69%)	60 (31%)	192
2001	97 (62%)	59 (38%)	156

2. Previously, article VII, section 4 of the Indiana Constitution provided that, in criminal cases, all appeals from judgments imposing a sentence of death, life imprisonment or imprisonment for a term greater than fifty years was to be taken directly to the supreme court. Because the Indiana General Assembly has increased the term of imprisonment for many crimes, the court's docket was filling with criminal appeals falling within the scope of article VII ,section 4, notwithstanding that

this change would open the court to "people with ordinary family and business legal problems" and open the court to take a more significant role in providing law-giving criminal opinions.[3]

Apparently, the change in the court's jurisdiction also has had another, unintended consequence—the consensus among the justices has decreased sharply. The number of split decisions by the court nearly doubled this year. The court issued only nine split decisions in 1999, 15 split decisions in 2000 but 28 split decisions in 2001. Among the split decisions were two plurality decisions, both involving civil issues.[4] Two other split appeals garnered majorities only because one or more justices voted to concur in the result only.[5] Overall, the justices were also less aligned on both civil and criminal appeals as compared to the 2000, 1999 or 1998 terms. This jurisdictional change to the court's docket occurred in June 2001. The 2002 docket will have a full year of its new jurisdiction and will test whether the decreased unanimity is a result of the issues presented to the court.

The cause for the lack of consensus is not immediately clear. Some had hoped that the change in the court's jurisdiction would bring more civil cases to its docket. If this had occurred, the logical result would have been less agreement because historically the justices have disagreed on civil cases more than on criminal cases. However, the court did not decide more civil cases in 2001—the court issued the same number of civil opinions in 2001 as it did in 2000 (excluding per curium opinions) and actually issued more civil opinions in 1999. The more likely cause is the court's ability to accept more criminal appeals with the potential for significant legal precedent, rather than the compulsory criminal appeals with little or no precedential value. Presumably, the more significant legal precedent brings less willingness to compromise by the justices because of the long-term impacts of the decision. The number of dissents in criminal opinions also increased dramatically in 2001 to 30. In 1999 and 2000, the court had only 17 dissents in criminal cases.

The following is a description of the highlights from each table:

Table A. In 2001, the supreme court issued 211 opinions that were authored by an individual justice. This is a negligible increase from last year's 192 opinions authored by an individual justice. Of the 211 issued in 2001, only 49 were civil

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many of these cases did not involve significant legal questions as evidenced by the high percentage of direct appeal judgments affirmed. In June 2001, the court's mandatory jurisdiction over criminal appeals changed because of an amendment to Indiana's Constitution. Article 7, section 4 now provides a right of direct appeal to the court only for judgements imposing a penalty of death.

3. Randall T. Shepard, *Why Changing the Supreme Court's Mandatory Jurisdiction Is Critical to Lawyers and Clients*, 33 IND. L. REV. 1101, 1104 (2001).

4. *See* City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001); Degussa Corp. v. Mullens, 744 N.E.2d 407 (Ind. 2001).

5. Osborne v. State, 754 N.E.2d 916 (Ind. 2001) (Shepard, C.J., Boehm, J., Dickson, J., all concurring in result); Sears Roebuck and Co. v. Manuilov, 742 N.E.2d 453 (Ind. 2001) (Sullivan, J., concurring in result; Shepard, C.J. & Boehm, J., dissenting).

opinions—the same number of civil opinions issued in 2000. Justice Boehm authored the most opinions at 48. Those who hoped the change in the court's mandatory jurisdiction over criminal appeals would allow more civil cases to be heard by the court were disappointed in 2001, but it is still too early in the court's new docket. A sudden increase in civil appeals granted transfer was not expected since the court still must clear its docket of the mandatory criminal appeals that came before it prior to June 2001. Next year should be a watershed year in determining the real impact of the docket change in the court's mandatory jurisdiction.

The court as a whole issued 24 per curiam opinions—23 civil and 1 criminal. Almost all 23 civil opinions were attorney discipline matters. In 2000, this article reported that the court had issued 71 per curiam opinions. That number has declined this year because the court is issuing more attorney discipline decisions as orders rather than per curiam opinions. When considering both per curiam decisions and orders involving the discipline of attorneys, the court's number of cases in this area has remained about the same.

Continuing the trend of increases in dissents identified in last year's article, the court again increased its dissents to 56. For comparison purposes, the court issued 42 dissents in 2000 and 38 dissents in 1999. In an about face from previous years, Justice Sullivan had the least total dissents with 6. In the previous four years, Justice Sullivan led the court with the number of dissents. This year, Justice Dickson drafted the most dissents with a total of 22. Last year, Justice Sullivan had the most dissents with 13.

Table B-1. For civil cases, Chief Justice Shepard and Justice Sullivan were the two justices most aligned at 85.4%. Chief Justice Shepard and Justice Boehm were next at 82.5%. Justices Dickson and Boehm were the least aligned at 67.5%.

Chief Justice Shepard was the most aligned with other justices, and Justice Dickson was the least aligned.

Table B-2. For criminal cases, Chief Justice Shepard and Justice Sullivan are the most aligned pair of justices—in agreement 92.1% of the time. Justices Sullivan and Dickson were the least aligned at 78.4%. As for criminal cases, Justice Shepard was the most aligned with his fellow justices.

Table B-3. For all cases, Chief Justice Shepard and Justice Sullivan were the two justices most aligned at 90.5%. The two least aligned justices, the same as last year, were Justices Sullivan and Dickson at 76.1%.

Overall, Chief Justice Shepard was the most aligned with his fellow justices, and Justice Dickson was the least aligned.

Table C. Echoing the trend toward a lack of consensus among the court's justices, unanimity declined in 2001. The court was unanimous in 69.1% of its decisions in 2001, as compared to 81.3% in 2000 and 72.8% in 1999. The number of dissents increased in 2001 to 18.5% from 12.4% in 2000 and 1999.

Table D. Table D, more than any other table, demonstrates the increased divisions among the justices. The number of 3-2 split decisions doubled in 2001 from 2000. Last year, the court issued 15 split decisions and it issued only nine the year before. This year, however, the court issued 27 split decisions. The authors have counted two plurality decisions as split decisions.[6] Neither of these cases, strictly speaking, are 3-2 decisions, but they certainly fall into the spirit of 3-2 decisions in demonstrating issues on which the court is deeply divided. The opinion in *City Chapel*, for example, spawned three separate dissenting opinions. Chief Justice Shepard was by far in the majority in the most number of split opinions. He was in the majority in 21 of the 27 split opinions. The next closest justice was in the majority in 14 such opinions.

Table E-1. The court affirmed over 77% of the mandatory criminal appeals, which were also still the majority of its docket. Overall, the court affirmed cases 55.8% of the time. This high percentage was driven by the large percentage of mandatory criminal appeals affirmed. In contrast, civil appeals were affirmed only 14.7% of the time and nonmandatory criminal appeals were affirmed only 28% of the time. The large percentage of cases affirmed by the court is likely to decline because of the change in the court's jurisdiction over mandatory criminal appeals, effective in June 2001, which will bring more discretionary criminal and civil issues on which the court has, historically, lacked consensus.

Table E-2. Expectations were high that the change in the court's mandatory jurisdiction would lead to an increase in the number of civil petitions granted transfer. The court's jurisdiction changed in June 2001. Nonetheless, the number of civil petitions granted transfer by the court declined from 61 in 2000 to only 34 in 2001. This change may also reflect the decline in petitions to transfer filed in 2001. During 2000, 825 petitions to transfer were filed but this year only 740 were filed. A civil petition to transfer stood about a 12.4% chance of being granted, and a criminal petition stood about a 6.6% chance of being granted. No juvenile petitions were granted transfer in 2001.

Table F. The court continues its vigorous interest in the Indiana Constitution with 26 opinions involving such issues. A review of these cases demonstrates that the court is especially interested in the double jeopardy provision of the Indiana Constitution. The number of attorney discipline cases listed in this table (23) appears to have drastically declined from the number of such cases last year (60). This decline is misleading. The court has begun to decide more attorney discipline cases in orders rather than per curiam opinions. The authors have determined that only per curiam opinions will be reflected in Table F. When accounting for the number of attorney discipline cases decided by order (53), the number of attorney discipline cases remains about the same as last year. The court also decided 10 death penalty cases, affirming eight and reversing two such cases.

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6. *See City Chapel Evangelical Free, Inc.*, 744 N.E.2d at 443; *Degussa Corp.*, 744 N.E.2d at 407.

TABLE A
OPINIONS[a]

	OPINIONS OF COURT[b]			CONCURRENCES[c]			DISSENTS[d]		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	32	7	39	2	1	3	2	7	9
Dickson, J.[e]	17	7	24	4	2	6	13	9	22
Sullivan, J.[e]	36	11	47	5	3	8	4	2	6
Boehm, J.[e]	32	16	48	10	4	14	7	4	11
Rucker, J.[e]	21	8	29	5	5	10	4	4	8
Per Curiam	1	23	24						
Total	139	72	211	26	15	41	30	26	56

[a] These are opinions and votes on opinions by each justice and in per curiam in the 2001 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a "consensus of the justices in the majority" on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. *See* Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *See id.* at 210.

[b] This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions. Also, the following three miscellaneous cases are not included in the table: Stanrail Corp. v. Unemployment Ins. Rev. Bd., 749 N.E.2d 483 (Ind. 2001) (dissent from denial of transfer); *In re* Becker, 743 N.E.2d 1115 (Ind. 2001) (dissent from order approving statement of circumstances and conditional agreement for discipline); *In re* Shorter-Pifer, 743 N.E.2d 115 (Ind. 2001) (dissent from order finding misconduct and imposing discipline).

[c] This category includes both written concurrences, joining in written concurrence and votes to concur in result only.

[d] This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

[e] Justices declined to participate in the following non-disciplinary cases: Justice Boehm (State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657 (Ind. 2001)); Justice Rucker (Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc., 746 N.E.2d 941 (Ind. 2001); Degussa Corp. v. Mullens, 744 N.E.2d 407 (Ind. 2001)); Justice Sullivan (Forney v. State, 742 N.E.2d 934 (Ind. 2001); State Employees Appeal Comm'n v. Bishop, 741 N.E.2d 1229 (Ind. 2001); Rogers v. R.J. Reynolds Tobacco Co., 745 N.E.2d 793 (Ind. 2001)).

TABLE B-1

VOTING ALIGNMENTS FOR CIVIL CASES[f] NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		27	33	31	28
	S		3	2	2	1
	D	---	30	35	33	29
	N		42	41	40	40
	P		71.4%	85.4%	82.5%	72.5%
Dickson, J.	O	27		28	24	28
	S	3		0	3	4
	D	30	---	28	27	32
	N	42		41	40	40
	P	71.4%		68.3%	67.5%	80.0%
Sullivan, J.	O	33	28		29	27
	S	2	0		1	1
	D	35	28	---	30	28
	N	41	41		39	39
	P	85.4%	68.3%		76.9%	71.8%
Boehm, J.	O	31	24	29		26
	S	2	3	1		3
	D	33	27	30	---	29
	N	40	40	39		38
	P	82.5%	67.5%	76.9%		76.3%
Rucker, J.	O	28	28	27	26	
	S	1	4	1	3	
	D	29	32	28	29	---
	N	40	40	39	38	
	P	72.5%	80.0%	71.8%	76.3%	

[f] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 27 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-2

VOTING ALIGNMENTS FOR CRIMINAL CASES NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[8]

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		116	125	119	124
	S		1	3	1	0
	D	—	117	128	120	124
	N		140	139	140	140
	P		83.6%	92.1%	85.7%	88.6%
Dickson, J.	O	116		109	113	111
	S	1		0	5	1
	D	117	---	109	118	112
	N	140		139	140	140
	P	83.6%		78.4%	84.3%	80.0%
Sullivan, J.	O	125	109		112	119
	S	3	0		2	2
	D	128	109	---	114	121
	N	139	139		139	139
	P	92.1%	78.4%		82.0%	87.1%
Boehm, J.	O	119	113	112		114
	S	1	5	2		2
	D	120	118	114	-	116
	N	140	140	140		140
	P	85.7%	84.3%	80.0%		82.9%
Rucker, J.	O	124	111	119	114	
	S	0	1	2	2	
	D	124	112	121	116	---
	N	140	140	139	140	
	P	88.6%	80.0%	87.1%	82.9%	

[8] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 116 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-3

VOTING ALIGNMENTS FOR ALL CASES NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[h]

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		143	158	150	152
	S		4	5	3	1
	D	---	147	163	153	153
	N		182	180	180	180
	P		80.7%	90.5%	85.0 %	85.0 %
Dickson, J.	O	143		137	137	139
	S	4		0	8	5
	D	147	---	137	145	144
	N	182		180	180	180
	P	80.7%		76.1%	80.5 %	80.0 %
Sullivan, J.	O	158	137		141	146
	S	5	0		3	3
	D	163	137	---	144	149
	N	179	180		178	178
	P	90.5%	76.1%		80.9 %	83.7 %
Boehm, J.	O	150	137	141		140
	S	3	8	3		5
	D	153	145	144	---	145
	N	180	180	178		178
	P	85.0%	80.5%	80.9%		81.5 %
Rucker, J.	O	152	139	146	140	
	S	1	5	3	5	
	D	153	144	148	145	--
	N	180	180	178	178	
	P	85.0%	80.0%	83.7 %	81.5%	

[h] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 143 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2001. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE C

UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[i]

Unanimous[j]			Unanimous with Concurrence[k]			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
100	23	123 (69.1%)	17	5	22 (12.4%)	18	15	33 (18.5%)	178

[i] This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percent of overall opinions with concurrence and overall opinions with dissent.

[j] A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

[k] A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS[l]

Justices Constituting the Majority	Number of Opinions[m]
1. Shepard, C.J., Dickson, J., Boehm, J.	3
2. Shepard, C.J., Dickson, J., Sullivan, J.	4
3. Shepard, C.J., Sullivan, J., Boehm, J.	5
4. Shepard, C.J., Sullivan, J., Rucker, J.	8
5. Dickson, J., Boehm, J., Rucker, J.	2
6. Boehm, J., Sullivan, J., Rucker, J.	2
7. Sullivan, J., Rucker, J.	1
8. Dickson, J., Rucker, J.	2
9. Shepard, C.J., Sullivan, J.	1
Total[n]	28

[l] This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

[m] This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

[n] The 2001 term's 3-2 decisions were:

1. Shepard, C. J., Dickson, J., Boehm, J.: Sanchez v. State, 749 N.E.2d 509 (Ind. 2001) (Boehm, J.); Query v. State, 745 N.E.2d 769 (Ind. 2001) (Boehm, J.); Hughes v. City of Gary, 741 N.E.2d 1168 (Ind. 2001) (Shepard, C.J.).

2. Shepard, C.J., Dickson, J., Sullivan, J.: *In re* Capper, 757 N.E.2d 138 (Ind. 2001) (per curium); Vitek v. State, 750 N.E.2d 346 (Ind. 2001) (Sullivan, J.); Zimmerman v. State, 750 N.E.2d 337 (Ind. 2001) (Dickson, J.); Daniels v. State, 741 N.E.2d 1177 (Ind. 2001) (Shepard, C.J.).

3. Shepard, C.J., Sullivan, J., Boehm, J.: Mangold *ex rel.* Mangold v. Dep't of Natural Res., 756 N.E.2d 970 (Ind. 2001) (Rucker, J.); Hollowell v. State, 753 N.E.2d 612 (Ind. 2001) (Sullivan, J.); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492 (Ind. 2001) (Boehm, J.); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484 (Ind. 2001) (Boehm, J.); Durham *ex rel.* Estate of Wade v. U-Haul Int'l, 745 N.E.2d 755 (Ind. 2001) (Boehm, J.).

4. Shepard, C.J., Sullivan, J., Rucker, J.: Francis v. State, 758 N.E.2d 528 (Ind. 2001) (Rucker, J.); Randolph v. State, 755 N.E.2d 572 (Ind. 2001) (Rucker, J.); Miller v. State, 753 N.E.2d 1284 (Ind. 2001) (Sullivan, J.); Wallace v. State, 753 N.E.2d 568 (Ind. 2001) (Rucker, J.); Wadsworth v. State, 750 N.E.2d 774 (Ind. 2001) (Shepard, C.J.); Holsinger v. State, 750 N.E.2d 354 (Ind. 2001) (Sullivan, J.); Pennycuff v. State, 745 N.E.2d 804 (Ind. 2001) (Shepard, C.J.); Noble County v. Rogers, 745 N.E.2d 194 (Ind. 2001) (Sullivan, J.).

5. Dickson, J., Boehm, J., Rucker, J.: Jiosa v. State, 755 N.E.2d 605 (Ind. 2001) (Boehm, J.); Segura v. State, 749 N.E.2d 496 (Ind. 2001) (Boehm, J.).

6. Boehm, J., Sullivan, J., Rucker, J.: Ashabraner v. Bowers, 753 N.E.2d 662 (Ind. 2001) (Sullivan, J.); *In re* Harshey, 740 N.E.2d 851 (Ind. 2001) (per curiam).

7. Sullivan, J., Rucker, J.: Osborne v. State, 754 N.E.2d 916 (Ind. 2001) (Rucker, J.) (Shepard, C.J., Boehm, J., Dickson, J., concurring in result).

8. Dickson, J., Rucker, J.: City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001) (Dickson, J.) (Shepard, C.J., Sullivan, J., and Boehm, J., all dissenting with separate opinion); Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453 (Ind. 2001) (Dickson, J.) (Sullivan, J. concurring in result; Shepard, C.J. and Boehm, J., dissenting).

9. Shepard, C.J., Sullivan, J.: Degussa Corp. v. Mullens, 744 N.E.2d 407 (Ind. 2001) (Sullivan, J.) (plurality decision: Boehm, J., Dickson, J., dissenting).

TABLE E-1

DISPOSITION OF CASES REVIEWED BY TRANSFER AND DIRECT APPEALS[o]

	Reversed or Vacated [p]	Affirmed	Total
Civil Appeals Accepted for Transfer	29 (85.3%)	5 (14.7%)	34
Direct Civil Appeals	0	0	0
Criminal Appeals Accepted for Transfer	18 (72%)	7 (28%)	25
Direct Criminal Appeals	22 (22.7%)	75 (77.3%)	97
Total	69 (44.2%)	87 (55.8%)	156[q]

[o] Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APPELLATE RULE 56 and also pursuant to Rules of Procedure for Original Actions. All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APPELLATE RULE 57.

[p] Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term "reverse" is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically "vacates" every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APPELLATE RULE 58(A). As a practical matter, "reverse" or "vacate" simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

[q] This does not include 23 attorney and judicial discipline opinions or one opinion related to certified questions. These opinions did not reverse, vacate, or affirm any other court's decision. This also does not include 10 opinions which considered petitions for post conviction relief.

TABLE E-2

DISPOSITION OF PETITIONS TO TRANSFER TO SUPREME COURT IN 2001[r]

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil[s]	240 (87.6%)	34 (12.4%)	274
Criminal[t]	410 (93.4%)	29 (6.6%)	439
Juvenile	27 (100%)	0 (0%)	27
Total	677 (91.5%)	63 (8.5%)	740

[r] This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APPELLATE RULE 58(A).

[s] This also includes petitions to transfer in tax cases and worker's compensation cases.

[t] This also includes petitions to transfer in post-conviction relief cases.

TABLE F

SUBJECT AREAS OF SELECTED DISPOSITIONS WITH FULL OPINIONS[u]

Original Actions	Number
• Certified Questions	1[v]
• Writs of Mandamus or Prohibition	0
• Attorney Discipline	23[w]
• Judicial Discipline	2[x]
Criminal	
• Death Penalty	10[y]
• Fourth Amendment or Search and Seizure	9[z]
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	0
Real Estate or Real Property	4[aa]
Personal Property	0
Landlord-Tenant	0
Divorce or Child Support	3[bb]
Children in Need of Services (CHINS)	0
Paternity	0
Product Liability or Strict Liability	1[cc]
Negligence or Personal Injury	6[dd]
Invasion of Privacy	1[ee]
Medical Malpractice	0
Indiana Tort Claims Act	2[ff]
Statute of Limitations or Statute of Repose	1[gg]
Tax, Department of State Revenue, or State Board of Tax Commissioners	3[hh]
Contracts	2[ii]
Corporate Law or the Indiana Business Corporation Law	2[jj]
Uniform Commercial Code	2[kk]
Banking Law	1[ll]
Employment Law	1[mm]
Insurance Law	2[nn]
Environmental Law	2[oo]
Consumer Law	0
Worker's Compensation	2[pp]
Arbitration	0
Administrative Law	3[qq]
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	3[rr]
Indiana Constitution	26[ss]

[u] This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed, and how many times it did so in 2001. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of

cases in which the court substantively discussed legal issues about these subject areas. Also, the following 53 miscellaneous attorney discipline cases are not in the table: *In re* Relphorde, 760 N.E.2d 172 (Ind. 2001) (order approving statement of circumstances and conditional agreement); *In re* Smith, 760 N.E.2d 171 (Ind. 2001) (order accepting resignation); *In re* Lowry, 760 N.E.2d 170 (Ind. 2001) (order suspending respondent); *In re* Hoogland, 760 N.E.2d 169 (Ind. 2001) (order approving statement of circumstances and conditional agreement); *In re* Herthel, 760 N.E.2d 155 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Tudor, 760 N.E.2d 154 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Blackham, 760 N.E.2d 153 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Griffiths, 760 N.E.2d 153 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Evans, 759 N.E.2d 1064 (Ind. 2001) (order approving statement of circumstances and conditional agreement); *In re* Butler, 759 N.E.2d 215 (Ind. 2001) (order to show cause); *In re* Hardy, 759 N.E.2d 214 (Ind. 2001) (order to show cause); *In re* Graybill, 759 N.E.2d 213 (Ind. 2001) (order to show cause); *In re* Forgey, 759 N.E.2d 212 (Ind. 2001) (order to show cause); *In re* Caravelli, 758 N.E.2d 930 (Ind. 2001) (order approving agreed resolution of objections to automatic reinstatement); *In re* Sheldon, 758 N.E.2d 929 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* John, 758 N.E.2d 929 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Layson, 758 N.E.2d 515 (Ind. 2001) (order suspending the respondent from the practice of law); *In re* Watson, 757 N.E.2d 1002 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Headlee, 756 N.E.2d 969 (Ind. 2001) (order finding misconduct and imposing sanction); *In re* Benjamin, 756 N.E.2d 967 (Ind. 2001) (order accepting resignation and concluding proceeding); *In re* Starkes, 756 N.E.2d 964 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Bean, 756 N.E.2d 964 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Layson, 755 N.E.2d 162 (Ind. 2001) (order to show cause); *In re* Alvarez, 755 N.E.2d 162 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Meek, 755 N.E.2d 161 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Johnson, 755 N.E.2d 160 (Ind. 2001) (order to show cause); *In re* Caravelli, 755 N.E.2d 160 (Ind. 2001) (order staying automatic reinstatement pending resolution of commission objections); *In re* Atanga, 754 N.E.2d 498 (Ind. 2001) (order revoking respondent's probation and imposing suspension); *In re* Singleton, 754 N.E.2d 498 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Holajter, 754 N.E.2d 497 (Ind. 2001) (order approving consent to discipline and imposing suspension and order clarifying final order); *In re* Harlowe, 753 N.E.2d 1284 (Ind. 2001) (order suspending respondent due to disability); *In re* Transki, 753 N.E.2d 1283 (Ind. 2001) (order to show cause); *In re* Coons, 751 N.E.2d 678 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Silverman, 750 N.E.2d 376 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Caravelli, 750 N.E.2d 376 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Wells, 750 N.E.2d 369 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Jones, 750 N.E.2d 368 (Ind. 2001) (order accepting resignation and concluding proceeding); *In re* Carl, 748 N.E.2d 856 (Ind. 2001) (order to show cause); *In re* Bowman, 748 N.E.2d 364 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* McQuillin, 747 N.E.2d 563 (Ind. 2001) (order accepting resignation and concluding proceeding); *In re* Johnson, 747 N.E.2d 563 (Ind. 2001) (order accepting resignation and concluding proceeding); *In re* Jones, 747 N.E.2d 562 (Ind. 2001) (order of suspension upon notice of guilty finding); *In re* Mysliwiec, 747 N.E.2d 561 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Evans, 747 N.E.2d 561 (Ind. 2001) (order of suspension upon notice of guilty finding); *In re* Petrovic, 747 N.E.2d 560 (Ind. 2001) (order accepting resignation and concluding proceeding); *In re* Poole, 747 N.E.2d 56 (Ind. 2001) (order accepting resignation and concluding proceeding); *In re* Taylor, 744 N.E.2d 431 (Ind. 2001) (order postponing effective date of suspension); *In re* Haynes, 744 N.E.2d 430 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Peters, 742 N.E.2d 503 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Collins, 741 N.E.2d 1246 (Ind. 2001) (order approving statement of circumstances and conditional

agreement for discipline); *In re* Light, 741 N.E.2d 1245 (Ind. 2001) (order finding misconduct and imposing discipline); *In re* Cheslek, 741 N.E.2d 1244 (Ind. 2001) (order approving statement of circumstances and conditional agreement for discipline); *In re* Chovanec, 741 N.E.2d 1244 (Ind. 2001) (order of reinstatement).

[v] Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572 (Ind. 2001).

[w] *In re* Miller, 759 N.E.2d 209 (Ind. 2001); *In re* Baker, 758 N.E.2d 56 (Ind. 2001); *In re* Capper, 757 N.E.2d 138 (Ind. 2001); *In re* Moore, 756 N.E.2d 506 (Ind. 2001); *In re* Richards, 755 N.E.2d 601 (Ind. 2001); *In re* Hear, 755 N.E.2d 579 (Ind. 2001); *In re* McClellin, 754 N.E.2d 500 (Ind. 2001); *In re* Rodriguez, 753 N.E.2d 1289 (Ind. 2001); *In re* Caravelli, 750 N.E.2d 376 (Ind. 2001); *In re* Tsoutsouris, 748 N.E.2d 856 (Ind. 2001); *In re* Radford, 746 N.E.2d 977 (Ind. 2001); *In re* Thayer, 745 N.E.2d 207 (Ind. 2001); *In re* Galanis 744 N.E.2d 423 (Ind. 2001); *In re* Wagner, 744 N.E.2d 418 (Ind. 2001); *In re* Spraker, 744 N.E.2d 415 (Ind. 2001); *In re* Haith, 742 N.E.2d 940 (Ind. 2001); *In re* Paras, 742 N.E.2d 924 (Ind. 2001); *In re* Luddington, 742 N.E.2d 503 (Ind. 2001); *In re* Taylor, 741 N.E.2d 1293 (Ind. 2001); *In re* Shull, 741 N.E.2d 723 (Ind. 2001); *In re* Murgatroyd, 741 N.E.2d 719 (Ind. 2001); *In re* Davis, 740 N.E.2d 855 (Ind. 2001); *In re* Harshey, 740 N.E.2d 851 (Ind. 2001).

[x] *In re* Spencer, 759 N.E.2d 1064 (Ind. 2001); *In re* Funke, 757 N.E.2d 1013 (Ind. 2001).

[y] Castor v. State, 754 N.E.2d 506 (Ind. 2001) (affirming); Ben-Yisrayl v. State, 753 N.E.2d 649 (Ind. 2001) (affirming); Timberlake v. State, 753 N.E.2d 591 (Ind. 2001) (affirming); Wrinkles v. State, 749 N.E.2d 1179 (Ind. 2001) (affirming); Allen v. State, 749 N.E.2d 1158 (Ind. 2001) (affirming); Ingle v. State, 746 N.E.2d 927 (Ind. 2001) (reversing); Lambert v. State, 743 N.E.2d 719 (Ind. 2001) (affirming); Stephenson v. State, 742 N.E.2d 463 (Ind. 2001) (affirming); Daniels v. State, 741 N.E.2d 1177 (Ind. 2001) (affirming); Prowell v. State, 741 N.E.2d 704 (Ind. 2001) (reversing).

[z] Edwards v. State, 759 N.E.2d 626 (Ind. 2001); Gray v. State, 758 N.E.2d 519 (Ind. 2001); West v. State, 758 N.E.2d 54 (Ind. 2001); Crawford v. State, 755 N.E.2d 565 (Ind. 2001); Woodford v. State, 752 N.E.2d 1278 (Ind. 2001); Vitek v. State, 750 N.E.2d 346 (Ind. 2001); Lockett v. State, 747 N.E.2d 539 (Ind. 2001); Mitchell v. State, 745 N.E.2d 775 (Ind. 2001); Smith v. State, 744 N.E.2d 437 (Ind. 2001).

[aa] Equicor Dev., Inc. v. Westfield-Washington Township Plan Comm'n, 758 N.E.2d 34 (Ind. 2001); City of New Haven v. Reichhart, 748 N.E.2d 374 (Ind. 2001); Noble County v. Rogers, 745 N.E.2d 194 (Ind. 2001); City Chapel Evangelical Free, Inc. v. City of South Bend, *ex rel.* Dep't of Redev., 744 N.E.2d 443 (Ind. 2001).

[bb] Sholes v. Sholes, 760 N.E.2d 156 (Ind. 2001); Cannon v. Cannon, 758 N.E.2d 524 (Ind. 2001); Buckalew v. Buckalew, 754 N.E.2d 896 (Ind. 2001).

[cc] Degussa Corp. v. Mullens, 744 N.E.2d 407 (Ind. 2001).

[dd] Moberly v. Day, 757 N.E.2d 1007 (Ind. 2001); Mangold *ex rel.* Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970 (Ind. 2001); Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905 (Ind. 2001); Forte v. Connerwood Healthcare, Inc., 745 N.E.2d 796 (Ind. 2001); Elmer Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939 (Ind. 2001); Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453 (Ind. 2001).

[ee] Felsher v. Univ. of Evansville, 755 N.E.2d 589 (Ind. 2001).

[ff] Mangold *ex rel.* Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970 (Ind. 2001); Noble County v. Rogers, 745 N.E.2d 194 (Ind. 2001).

[gg] Degussa Corp. v. Mullens, 744 N.E.2d 407 (Ind. 2001).

[hh] State *ex rel.* Ind. Dep't of Revenue v. Deaton, 755 N.E.2d 568 (Ind. 2001); State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657 (Ind. 2001); State Bd. of Tax Comm'rs v. Indianapolis Racquet Club, Inc., 743 N.E.2d 247 (Ind. 2001).

[ii] Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001); Brown v. Branch, 758 N.E.2d 48 (Ind. 2001).

[jj] Ind. Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556 (Ind. 2001); G&N Aircraft, Inc. v. Boehm, 743 N.E.2d 227 (Ind. 2001).

[kk] Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572 (Ind. 2001); Rheem Mfr. Co. v. Phelps Heating & Air Conditioning, Inc., 746 N.E.2d 941 (Ind. 2001).

[ll] Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572 (Ind. 2001).

[mm] Fratus v. Marion Cmty. Sch. Brd. of Trs., 749 N.E.2d 40 (Ind. 2001).

[nn] Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001); Gallant Ins. Co. v. Isaac, 751 N.E.2d 672 (Ind. 2001).

[oo] Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001); Ind. Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556 (Ind. 2001).

[pp] Degussa Corp. v. Mullens, 744 N.E.2d 407 (Ind. 2001); GKN Co. v. Magness, 744 N.E.2d 397 (Ind. 2001).

[qq] Equicor Dev., Inc. v. Westfield-Washington Township Plan Comm'n, 758 N.E.2d 34 (Ind. 2001); Fratus v. Marion Cmty. Sch. Brd. of Trs., 749 N.E.2d 40 (Ind. 2001); Turner v. City of Evansville, 740 N.E.2d 860 (Ind. 2001).

[rr] Forrest v. State, 757 N.E.2d 1003 (Ind. 2001); LeShore v. State, 755 N.E.2d 164 (Ind. 2001); Ashabraner v. Bowers, 753 N.E.2d 662 (Ind. 2001).

[ss] Sholes v. Sholes, 760 N.E.2d 156 (Ind. 2001); Boatright v. State, 759 N.E.2d 1038 (Ind. 2001); Hopkins v. State, 759 N.E.2d 633 (Ind. 2001); Gates v. State, 759 N.E.2d 631 (Ind. 2001); Edwards v. State, 759 N.E.2d 626 (Ind. 2001); Gray v. State, 758 N.E.2d 519 (Ind. 2001); West v. State, 758 N.E.2d 54 (Ind. 2001); Crawford v. State, 755 N.E.2d 565 (Ind. 2001); Hubbell v. State, 754 N.E.2d 884 (Ind. 2001); Johnson v. State, 749 N.E.2d 1103 (Ind. 2001); Sanchez v. State, 749 N.E.2d 509 (Ind. 2001); Marley v. State, 747 N.E.2d 1123 (Ind. 2001); Fosha v. State, 747 N.E.2d 549 (Ind. 2001); Lockett v. State, 747 N.E.2d 539 (Ind. 2001); Kilpatrick v. State, 746 N.E.2d 52 (Ind. 2001); Mitchell v. State, 745 N.E.2d 775 (Ind. 2001); Noble County v. Rogers, 745 N.E.2d 194 (Ind. 2001); City Chapel Evangelical Free, Inc. v. City of South Bend *ex rel.* Dep't of Dev., 744 N.E.2d 443 (Ind. 2001); Smith v. State, 744 N.E.2d 437 (Ind. 2001); Games v. State, 743 N.E.2d 1132 (Ind. 2001); Russell v. State, 743 N.E.2d 269 (Ind. 2001); Redman v. State, 743 N.E.2d 263 (Ind. 2001); Long v. State, 743 N.E.2d 253 (Ind. 2001); Roby v. State, 742 N.E.2d 505 (Ind. 2001); Ledo v. State, 741 N.E.2d 1235 (Ind. 2001); Sivels v. State, 741 N.E.2d 1197 (Ind. 2001).

A YEAR OF TRANSITION IN APPELLATE PRACTICE

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INTRODUCTION

The year 2001 was a time of transition for the appellate lawyer in Indiana. An entirely new set of Rules of Appellate Procedure went into effect, governing all appeals initiated on or after January 1, 2001. Most of the published opinions during the reporting period, having already been initiated under the former rules, were governed by those now-superseded rules. However, by the end of 2001, many of the pending appeals had been initiated under the newer rules, and some interpretative case law was being published.

By the end of 2001, the Indiana Supreme Court began to experience the benefits of a change in the rules governing its jurisdiction. For the first time in its history, the court had almost complete discretionary control over its appellate docket. The court also adopted several noteworthy amendments to the new appellate rules. Finally, the year ended with the implementation of two innovative Internet applications of particular interest and benefit to the appellate practitioner.

This Article examines recent developments in the area of state appellate procedure during this important transitional year.[1]

I. A FEW WORDS ABOUT THE NOT-SO-NEW RULES

The Rules of Appellate Procedure that went into effect at the start of the year 2001 have been written about elsewhere, and there is no need to reexamine their genesis or significance in detail.[2] However, at least a rudimentary overview of how and why the new rules came into being is warranted.

The rules of procedure governing the appellate process in this state were rewritten and replaced after a significant effort by committees made up of members of the Indiana State Bar Association's Appellate Practice Section, by the Indiana Supreme Court Rules Committee, and by the Indiana Supreme Court itself.[3] The new rules became effective for all appeals initiated on or after

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1. This Article includes discussions of significant opinions handed down by the Indiana Court of Appeals before October 1, 2001, or by the Indiana Supreme Court before November 1, 2001, plus information concerning other important developments that occurred in 2001.

2. *See, e.g.*, Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 744-747 (2001); George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: New Appellate Rules, a Constitutional Amendment, and a Proposal*, 33 IND. L. REV. 1275 (2000).

3. *See generally* George T. Patton, Jr., *Appellate Rules Proposal Before Rules Committee*, RES GESTAE, Apr. 1999, at 10, 10-11.

January 1, 2001.[4] The goals of the complete revision included making the appellate process easier to understand, more streamlined, and more uniform in practice.[5] Although there was considerable carryover of language and general operation, there were many substantive changes. The rules governing appellate procedure were reorganized and renumbered. Changes were made to the nomenclature of appeals work, in the timing for many aspects of taking an appeal, in motions practice, and in the procedures for seeking transfer to the Indiana Supreme Court. The greatest changes brought about by the new rules, however, were in how the record on appeal is prepared and presented to the appellate court.

II. RULE AMENDMENTS

As expected, the Indiana Supreme Court determined that a number of minor amendments to the newly-promulgated Rules of Appellate Procedure were warranted after their first year in operation. The court's order, issued December 21, 2001, included changes to forty-seven different sections of the appellate rules.[6] Although many of the changes were cosmetic, a few of the amendments provided important clarification and improvement to the operation of the appellate rules. The rule amendments were made effective April 1, 2002.[7]

A. The New "Addendum to Brief"

One amendment of particular interest to appellate practitioners was the addition of new Appellate Rule 46(H). That new provision states:

> H. Addendum to Brief. Any party or any entity granted *amicus curiae* status may elect to file a separately-bound Addendum to Brief. An Addendum to Brief is not required and is not recommended in most cases. An Addendum to Brief is a highly selective compilation of materials filed with a party's brief at the option of the submitting party. Note that only one copy of the Appendix is filed (see Rule 23(C)(5)), but an original and eight copies of any Addendum to Brief must be filed, in accordance with Rule 23(C)(3). If an Addendum to Brief is submitted, it must be filed and served at the time of the filing and service of the brief it accompanies. An Addendum to Brief may include, for example, copies of key documents from the Clerk's Record or Appendix (such as contracts), or exhibits (such as photographs or maps), or copies of critically important pages of testimony from the Transcript, or full text copies of statutes, rules, regulations, etc. that would be helpful to the

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4. *See* Order Amending Indiana Rules of Appellate Procedure (Ind. Feb. 4, 2000) (No. 94S00-0002-MS-77), *available at* http://www.in.gov/judiciary/opinions/archive/11090001.ad.html.

5. *See* Patton, *supra* note 2, at 1275-76.

6. *See* Order Amending Indiana Rules of Appellate Procedure WL IN ORDER 01-24 (Dec. 21, 2001) (No. 94S00-0101-MS-67) [hereinafter Order].

7. *Id.*

> Court on Appeal but which, for whatever reason, cannot be conveniently or fully reproduced in the body of the brief. An Addendum to Brief may not exceed fifty (50) pages in length and should ordinarily be much shorter in length. The first document in the Addendum to Brief shall be a table of contents, and documents contained in the Addendum to Brief should be indexed or numbered in some manner that facilitates finding the documents referred to therein, preferably with indexed tabs. The Addendum to Brief shall be bound in book form along the left margin, preferably in a manner that permits the volume to lie flat when opened. The Addendum to Brief shall have a cover that is the same color and similarly styled as the brief it accompanies (see Form App. 43-1), except that it shall be clearly identified as an Addendum to Brief. An Addendum to Brief may not contain argument.[8]

The "addendum to brief" is an appropriate new name for an old idea. The superseded rules permitted parties to accompany their briefs with a separately bound "appendix."[9] The appendix could contain "significant parts of the record or other material deemed useful."[10] Because a party would file an original and eight copies of the appendix along with the party's briefs,[11] the old rule provided a useful vehicle for making certain that each judge or justice reviewing the appeal had ready access to key documents from the record. In a contract dispute, for example, the filing of an appendix containing a complete copy of the contract at issue would ensure that all the members of the reviewing court could examine the whole contract without having to look for it elsewhere in the single set of bound volumes of the record of proceedings.

When the new rules went into effect, however, the term "appendix" was appropriated to designate something that is now more properly thought of as being part of the appellate record than as a supplement to a brief.[12] The appendix is generally a bound compilation of the documents filed in the trial court.[13] Only one copy of an appendix is filed,[14] thus minimizing its value as an instrument for conveniently placing key documents in front of each reviewing judge or justice. Moreover, the appendix as currently defined generally would be too large and inclusive to serve the narrow, specific purpose of the old appendix rule. For example, in a criminal appeal, the appellant's appendix consists, inter alia, of *all* the documents that had been filed with the clerk of the trial court.[15] Even in civil appeals, the appendix contains any "pleadings and other documents" filed in the

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8. *Id.* (amending IND. APPELLATE RULE, 46 effective Apr. 1, 2002).
9. APP.R. 8.2(A)(4) (repealed Jan. 1, 2001).
10. *Id.*
11. *See* APP.R. 9(B)(1) (repealed Jan. 1, 2001).
12. *See* APP.R. 2(C).
13. *See id.*
14. APP.R. 23(C).
15. *See* APP.R. 50(B)(1).

trial court that are "necessary for resolution of the issues raised on appeal."[16]

It was clear, therefore, that the old appendix was something very different from the new appendix, and that there was nothing in the new rules to take its place. The occasionally useful function previously performed by the old appendix was lost in the new rules, as initially adopted. The adoption of new Appellate Rule 46(H) corrects that omission by creating an "addendum to brief." The new rule also gives greater definition to the function than was ever provided in the past.

As was the practice under the old rule,[17] parties file an original and eight copies of each addendum to brief at the time of the filing of the brief itself.[18] The rule expressly states that an addendum should be a "highly selective compilation" of not more than fifty pages and "ordinarily . . . much shorter in length."[19] The rule expressly states that an addendum "is not required and is not recommended in most cases."[20] In other words, addenda should be very thin in physical dimension, and only filed in appeals where the reviewing court would be aided by having multiple copies of key documents available. The rule articulates examples of the types of documents that may be included with an addendum and also details the required format.[21] If record materials are included in an addendum, then citations to those materials in an appellate brief must include citation to both the record and the addendum.[22] This amendment heralds the return, with a new name, of a useful tool of appellate advocacy.

B. Appendices

The Indiana Supreme Court also adopted some important changes affecting the form and filing of appendices. As noted above, the appendix serves the function of providing the appellate court with a record of the filings made in the trial court.[23] A seemingly minor, but potentially significant, clarifying amendment was made to the rule governing the contents of the appellant's appendix. In both civil and criminal appeals, the applicable rule had required that the appendix include "any record material relied on in the brief."[24] Because parties also rely on portions of the *transcript* in their briefs, the rule as initially adopted could have been read to require that copies of any portion of the transcript relied on in a brief be included in the appendix.

Those same rules, as amended, now state that the appendix must include "any record material relied on in the brief *unless the material is already included in*

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16. APP.R. 50(A)(2)(f).
17. *See* APP.R. 9(B)(1) (repealed Jan. 1, 2001).
18. Order, *supra* note 6 (amending APP.R. 23(C)(3)).
19. *Id.* (amending APP.R. 46).
20. *Id.*
21. *See id.*
22. *Id.* (amending APP.R. 22(C)).
23. *See supra* note 12 and accompanying text.
24. APP.R. 50(A)(2)(h), (B)(1)(e) (amended Apr. 1, 2002).

the Transcript."[25] In other words, there is no need to include those sections of the transcript referenced in the brief in the appendix. So long as any record material relied on in the brief can be found in *either* the appendix or the transcript, then the rules have been satisfied.

Another amendment affecting appendices was specifically directed to appellants in criminal cases. The rule governing required service of documents, as now amended, provides that appendices filed in criminal appeals need not be copied and served on the Attorney General.[26] This amendment helps reduce unnecessary copying. The Attorney General has ready access to the filed appendices through the appellate court clerk's office. If there was any doubt about that availability, the rules as amended now expressly state that parties may have access to transcripts and appendices during the period that they are working on their briefs, subject to internal rules the appellate court clerk might use to ensure accountability and fairness.[27]

C. Transcripts, Exhibits, and the Duties of the Court Reporter

The amended appellate rules clarify that preparation of the separately-bound volumes of exhibits from trial are part of the transcript preparation process and, thus, the responsibility of the court reporter.[28] Also, the court reporter is required to prepare an index of exhibits, to "be placed at the front of the first volume of exhibits."[29] In addition, the rules require the court reporter to serve the parties with copies of any motions requesting additional time to file the transcript.[30]

One of the appellate rules requires the court reporter to annotate each page of a transcript with information "where a witness's direct, cross, or redirect examination begins."[31] Previously, those annotations had to be placed as headers at the top of the page, but the amendment now alternatively allows the annotations to be placed as footers at the bottom of the page.[32] The requirement that the court reporter format the transcript to an electronic disk has been changed to requiring "an electronically formatted medium (such as disk, CD-ROM, or zip drive)."[33]

D. Duties of the Trial Court Clerk

A criminal appellant will typically have appointed local counsel who will need access to the transcript while working on the appellant's brief. Accordingly, the rules state that the transcript in criminal appeals is generally not

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25. Order, *supra* note 6 (amending APP.R. 50(A)(2)(h), (B)(1)(e)).
26. *Id.* (amending APP.R. 24(A)).
27. *Id.* (amending APP.R. 12(C)).
28. *Id.* (amending APP.R. 2(K), 11(A)).
29. *Id.* (amending APP.R. 29(A)).
30. *Id.* (amending APP.R. 11(C)).
31. APP.R. 28(A)(4).
32. Order, *supra* note 6 (amending APP.R. 28(A)(4)).
33. *Id.* (amending APP.R. 30(A)(2)).

transmitted by the trial court clerk to the appellate court clerk (in Indianapolis) until after the appellant's brief has been filed.[34]

A new amendment changes this rule in situations where the appellant is represented by the State Public Defender, rather than local counsel. Under the rule as amended, when a criminal appellant is represented by the State Public Defender, the transmission of the transcript by the trial court clerk to the appellate court clerk is to occur immediately on completion and certification of the transcript.[35] This amendment is one of administrative convenience because the offices of both the State Public Defender and the Attorney General are in Indianapolis. Thus, the transcript is sent immediately to the location where the interested attorneys are located.

Moreover, an addition to the rules makes clear that any party may file a motion with the appellate court seeking an order directing "the trial court clerk to transmit the [t]ranscript at a different time than provided for in the rules."[36]

The amendments also state that the copies of the chronological case summary accompanying the notice of completion of clerk's record "served on the parties need not be individually certified."[37] Further, only one original notice of completion of clerk's record and one original notice of completion of transcript need be filed with the appellate court clerk.[38]

In addition, the trial court clerk is now required to serve the parties with any motions seeking an extension of time to assemble the record.[39]

E. Rehearing Practice

The new amendments corrected an apparently unintentional change in rehearing practice associated with the rewriting of the rules. The superseded rules permitted a party an automatic extension of time within which to respond to a brief or other document served via mail or carrier *by a party*.[40] However, the automatic extension did not apply to petitions that were responsive to filings made by the appellate court itself.[41] For example, a party filing a petition for rehearing or transfer following the issuance of an opinion by the court of appeals had to file the petition within the thirty days allotted by rule, without the benefit of the automatic extension rule.[42] However, the party *responding* to the petition was allowed the benefit of the automatic extension if service was by mail or courier.[43]

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34. *See* APP.R. 12(B) (amended Apr. 1, 2002).
35. Order, *supra* note 6 (amending APP.R. 12(B)).
36. *Id.*
37. *Id.* (amending APP.R. 10(C)).
38. *Id.* (amending APP.R. 23(C)(6)).
39. *Id.* (amending APP.R. 10(E)).
40. APP.R. 12(D) (repealed Jan. 1, 2001).
41. *See* APP.R. 11 (repealed Jan. 1, 2001).
42. *See id.*
43. *See* APP.R. 12(D) (repealed Jan. 1, 2001).

When the new rules went into effect January 1, 2001, they operated in much the same way, with one exception. The new rules contained a provision stating that the automatic extension rule did *not* apply to the filing of a brief in response to a petition for rehearing.[44] The new rules created an apparently unintended variance from traditional practice and a discrepancy between rehearing and transfer practice.[45] The court amended the rule to comport with traditional practice and to make the transfer and rehearing rules uniform. The appellate rule governing the filing of a response to a petition for rehearing, as amended, now states in relevant part, "Rule 25(C), which provides a three-day extension for service by mail or third-party carrier, may extend the due date; however, no other extension of time shall be granted."[46]

The amendments also clarify the form and content requirements for the petition for rehearing. Specifically, as amended, the rule expressly states that not all the content requirements of Appellate Rule 46(A) must be met, only some of them.[47]

F. Petitions Seeking Review of a Decision of the Indiana Tax Court

The appellate rules, as adopted effective January 1, 2001, contained no provision expressly stating the content requirements for a petition seeking review of a decision of the Indiana Tax Court. As amended, the rules now include a content requirement, modeled along the lines of a petition to transfer.[48] The amended rule also makes clear that a petition for review is available when the tax court is sitting as an appellate court, reviewing a decision of a trial court with probate jurisdiction.[49]

G. Other Miscellaneous Changes of Note

The rules now expressly codify what had been an unwritten rule since 1997, when the court first adopted word limit restrictions on brief size, as opposed to page restrictions.[50] Under the amended rules, a motion seeking leave to file an oversize brief or petition must express the total number of *words* desired for the oversize brief, not the number of pages.[51]

The rules now clarify the standard practice on the timing for filing a request for oral argument. The motion is due within seven days after any reply brief

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44. *See* APP.R. 54(C) (amended Apr. 1, 2002).

45. *See* APP.R. 57(D) (permitting an automatic extension of time to file a response to a petition to transfer served by mail or carrier).

46. Order, *supra* note 6 (amending APP.R. 54(C)).

47. *See id.* (amending APP.R. 54(F)).

48. *See id.* (amending APP.R. 63(A)); *see also* APP.R. 57(G) (stating the form and content requirements for a petition to transfer).

49. *Id.* (amending APP.R. 63(A)).

50. *Compare* APP.R. 8.2(A)(4) (repealed Jan. 1, 1997) (imposing page restrictions on brief length), *with* APP.R. 8.2(A)(4) (repealed Jan. 1, 1998) (word restrictions on brief length).

51. Order, *supra* note 6 (amending APP.R. 44(B)).

would be due before the court in which the motion is to be filed.[52]

In addition to being served on all parties, the notice of appeal must now be filed with the clerk of the appellate court.[53]

III. DEVELOPMENTS IN THE CASELAW

The courts issued a few cases of general significance during the reported period, regardless of which set of rules under which parties are operating. One of the few opinions to develop new law from the new rules, *Johnson v. State*,[54] is the first decision discussed below.

A. Failure to Provide an Appendix Not Automatic Grounds for Dismissal

When an appeal is taken in a criminal proceeding under the new rules, documents that were filed with the trial court are to be assembled by the appellant into an "appendix" that is to be filed with the appellant's brief.[55] A criminal defendant, acting *pro se*, attempted to appeal a trial court order. He failed to submit an appendix with his brief, as required by the appellate rules. On motion from the State, the Indiana Court of Appeals dismissed the appeal for failing to comply with required appendix rule.[56]

The Indiana Supreme Court granted transfer to clarify "a specific point of appellate procedure."[57] The court noted the compulsory nature of the appendix filing requirement, but stated that ordering compliance with the rule, rather than dismissing the appeal, is the "better practice for an appellate court to follow."[58]

The court found support for this view in the new rules, specifically Appellate Rule 49(B), which expressly states that "[a]ny party's failure to include any item in an Appendix shall not waive any issue or argument."[59] The court also noted that the rules permit the appellee to file its own appendix, "containing materials not found in the appellant's appendix," and permit either party to file a supplemental appendix.[60]

Significantly, the court noted that Appellate Rule 49(B) represents a departure from prior case law under the old rules, wherein the appellate courts decided that issues were waived due to appellant's failure to provide an adequate

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52. *See id.* (amending APP.R. 52(B)).

53. *Id.* (amending APP.R. 9(A)(1)).

54. 756 N.E.2d 965 (Ind. 2001) [hereinafter *Johnson II*].

55. *See* APP.R. 49(A), 50(B).

56. Johnson v. State, 756 N.E.2d 508 (Ind. Ct. App.), *vacated by* 756 N.E.2d 965 (Ind. 2001).

57. *Johnson II*, 756 N.E.2d at 966-67.

58. *Id.* The court did state, however, that if an appellant is given an opportunity to cure a problem with the appendix and inexcusably fails to do so, "dismissal of the appeal . . . would be available as the needs of justice might dictate." *Id.* at 967.

59. *Id.* (quoting APP.R. 49(B)).

60. *Id.* (citing APP.R. 50(A), 50(B)(2), 50(D)).

record for appellate review.[61] The new rules "signal[] a preference for an ameliorative approach toward failures by the parties to provide a complete record."[62] The appeal was reinstated and remanded to the court of appeals for further proceedings consistent with the court's opinion.[63]

It is important to note that if the appellant's appendix fails in a significant manner to include parts of the record necessary for appellate review, thereby requiring the appellee to submit his own appendix, there is recent authority for the proposition that the appellant might be compelled to pay the cost of preparing the filing.[64]

B. Two Out-of-the-Ordinary Applications of the "Law of the Case" Doctrine

Two cases decided during the reporting period are noteworthy for their new interpretations of the law of the case doctrine. In one decision, the court of appeals found an unusual exception to the doctrine;[65] in the other, the court found the doctrine inapplicable.[66] "The doctrine of the law of the case is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially the same facts."[67] The U.S. Supreme Court has held that there are exceptions to the rule, but they are limited to "extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"[68]

In *Turner v. State*,[69] the Indiana Court of Appeals recognized one of those extraordinary circumstances in which the law of the case doctrine would not bar relitigation of an issue previously decided by another panel of the court. Forrest Turner and co-defendant David McCarthy were tried together and both were convicted of murder and attempted murder.[70] They separately appealed, and both claimed error in the failure of the trial court to give jury instructions on lesser-included offenses.[71]

In Turner's original appeal,[72] the court of appeals affirmed, finding "no

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61. *Id.* (citing Lee v. State, 694 N.E.2d 719, 721 n.6 (Ind. 1998)).

62. *Id.*

63. *Id.*

64. *See, e.g.*, Scott v. Crussen, 741 N.E.2d 743, 745 n.1 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 413 (Ind. 2001).

65. *See* Turner v. State, 751 N.E.2d 726 (Ind. Ct. App. 2001).

66. *See* Humphreys v. Day, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).

67. Cutter v. State, 725 N.E.2d 401, 405 (Ind. 2000) (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817-18 (1998); State v. Lewis, 543 N.E.2d 1116, 1118 (Ind. 1989)).

68. *See Christianson*, 486 U.S. at 817 (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)).

69. 751 N.E.2d 726 (Ind. Ct. App. 2001).

70. *See id.* at 728-29.

71. *Id.*

72. Turner v. State, 691 N.E.2d 516 (Ind. Ct. App. 1998) (unpublished table decision), *post*

serious evidentiary dispute concerning the element of intent" and thus no error in refusing to give the lesser-included offense instructions on reckless homicide and criminal recklessness.[73] McCarthy, on the other hand, successfully obtained relief raising the same issues. In his direct appeal[74]a different panel of the court of appeals concluded that the trial court should have given a reckless homicide instruction as a lesser-included offense of murder and a criminal recklessness instruction as a lesser-included offense to attempted murder.[75] McCarthy was ultimately retried with the new instructions, and the second jury convicted him of reckless homicide and criminal recklessness rather than murder and attempted murder.[76]

Turner, having been denied relief on appeal, also filed a petition for post-conviction relief, but his request for relief was denied.[77] On appeal of that denial, the court of appeals determined that the failure to give the instruction on the lesser-included offenses was error, and that the contrary decision of the original panel of that court was "clearly erroneous and would work manifest injustice."[78] The denial of post-conviction relief was reversed, and the cause was presumably remanded for a new trial. The disparity of the outcomes between McCarthy and Turner was a factor considered by the court of appeals in determining that an inequity justifying extraordinary relief existed.[79]

In *Humphreys v. Day*,[80] the court of appeals did not find an exception to the law of the doctrine. Instead, the court found the doctrine legally inapplicable under the circumstances presented.[81] Although the appeal involved a somewhat complex interpretation of Medicaid regulations, the teachings of the case regarding the law of the case doctrine are straightforward. In an earlier appeal involving the same parties, the court of appeals had decided two questions of law.[82] One of the parties petitioned for transfer to the supreme court, and the petition was granted.[83] In its opinion, the supreme court adopted the holding of

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conviction relief granted, 751 N.E.2d at 728-29.

73. *Turner*, 751 N.E.2d at 728-29.

74. McCarthy v. State, 703 N.E.2d 199 (Ind. Ct. App. 1998) (unpublished table decision).

75. *Turner*, 751 N.E.2d at 729. The court of appeals also held that the error in refusing the criminal recklessness instruction had been waved because McCarthy's counsel had not joined in the request for such an instruction during trial. However, McCarthy successfully obtained relief in a post-conviction proceeding, successfully asserting that his trial counsel had been constitutionally ineffective for failing to join in the request. *Id.* at 729 n.1.

76. *Id.* at 729.

77. *Id.*

78. *Id.* at 734.

79. *See id.* at 729, 734.

80. 735 N.E.2d 837 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).

81. *Id.* at 841.

82. *See* Sullivan v. Day, 661 N.E.2d 848 (Ind. Ct. App. 1996), *vacated in part by* 681 N.E.2d 713 (Ind. 1997).

83. *See Humphreys*, 735 N.E.2d at 840.

the court of appeals on one issue (Issue X).[84] As to the second issue (Issue Y), which the court of appeals had addressed *sua sponte*, the high court determined the parties should have been given the opportunity to develop a record and obtain a ruling from the trial court.[85] The court therefore vacated that part of the opinion addressing Issue Y and remanded the case to the trial court for further proceedings.[86]

On remand, the trial court entered a judgment on Issue Y, and the *Humpheys v. Day* appeal on that issue ensued.[87] One of the parties argued that the question had already been decided by the court of appeals in its earlier opinion and had therefore become the law of the case.[88] The court of appeals rejected this contention. The court noted in particular the application of an appellate rule providing generally that when the supreme court grants transfer, the opinion of the court of appeals is vacated except for those portions "expressly adopted" or "summarily affirmed."[89] The earlier holding of the court of appeals on Issue Y had been neither adopted nor summarily affirmed by the supreme court. Thus, the court of appeals concluded that on this issue, "the previous opinion is not the law of the case because it is a nullity."[90]

C. Revisiting Motions Already Addressed in the Same Appeal

The parties to an appeal will occasionally file substantive motions before an appeal has been fully briefed.[91] Such motions are ruled on by a rotating panel of court of appeals' judges referred to as the "motions panel." The motions panel will almost certainly be composed of a different set of judges from those assigned to vote on and author the final opinion.

No rule prevents the party whose pre-briefing motion is denied from raising the issue again in that party's brief on appeal. However, the question arises whether the authoring panel is bound by the earlier decision of the motions panel. This issue might be thought of as a cousin to the law of the case doctrine.[92] Four opinions issued during the reporting period addressed this question.

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84. Sullivan v. Day, 681 N.E.2d 713, 716 (Ind. 1997).

85. *Id.* at 716-17.

86. *Id.* at 717.

87. 735 N.E.2d at 840-41.

88. *Id.* at 841.

89. *Id.* The opinion references former APP.R. 11(B)(3). That older rule was repealed on January 1, 2001 and was replaced by APP.R. 58(A), which contains essentially the same language.

90. *Id.*

91. The most common example would probably be a motion to dismiss involuntarily an appeal due to alleged procedural or jurisdictional defects, filed pursuant to APP.R. 36(B).

92. The law of the case doctrine is generally thought of as applying to issues arising in subsequent appeals as opposed to issues arising twice within the same appeal. *See supra* note 67 and accompanying text; *see also* CNA Ins. Cos. v. Vellucci, 596 N.E.2d 926, 927 (Ind. Ct. App. 1992).

In *Walker v. McTague*,[93] the court refused to address an issue that had been raised earlier by motion, stating, "The Motions Panel issued an order allowing the case to proceed on its merits . . . . Therefore, we need not reconsider the procedural issue here . . . ."[94] The appellate courts took similar stances in *Mahone v. State*,[95] *Snider v. State*,[96] and *In re Estate of Inlow*.[97]

These opinions imply that the court of appeals either will not reconsider matters earlier decided by that court by order[98] or that it should only do so "in the case of extraordinary circumstances."[99] However, there is ample precedent for courts overruling prior orders issued in the appeal.[100] As the court of appeals has previously stated, "[B]ecause we could change our decision pursuant to a petition for rehearing, it would make no sense to refuse to do so at an earlier stage before we have expended further resources."[101]

In short, recent opinions have demonstrated an appropriate reluctance on the part of the court of appeals to overrule orders already decided by its rotating motions panels. Nevertheless, these decisions do not hold that the authoring court is absolutely precluded from reconsidering issues previously decided on a motion. Indeed, such a holding would be contrary to the court's traditional practice. If a party fails to obtain requested relief from a pre-briefing motion to dismiss (assuming the motion has colorable merit), the best practice is to raise that issue again in that party's brief on the merits. Similarly, the issue should be available for a petition to transfer. Professionally responsible advocacy would dictate that the prior unsuccessful motion also be brought to the appellate court's attention.

D. Lost Appeal of a Deemed Denied Motion to Correct Error Not Salvageable Through Alleged Cross-Error

A motion to correct error is deemed denied if not ruled on within certain time limits.[102] Thus, the clock for initiating an appeal begins to run once the motion to correct error is deemed denied. Any subsequent ruling on the motion after it has been denied by operation of rule is not necessarily void, but is considered

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93. 737 N.E.2d 404 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

94. *Id.* at 406 n.1.

95. *See* 742 N.E.2d 982, 985 n.3 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 11 (Ind. 2001).

96. *See* 753 N.E.2d 721, 724 n.2 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 421 (Ind. 2001).

97. 735 N.E.2d 240, 243 n.2 (Ind. Ct. App. 2000).

98. *See supra* notes 95-97 and accompanying text.

99. *Id.* (citing *In re* Train Collision at Gary, Ind., 654 N.E.2d 1137, 1140 n.1 (Ind. Ct. App. 1995)).

100. *See, e.g.*, St. Amand-Zion v. Review Bd. of Ind. Dep't of Employment & Training Servs., 635 N.E.2d 184, 185 n.2 (Ind. Ct. App. 1994); Phipps v. First United Sav. Bank, 601 N.E.2d 13, 15 n.1 (Ind. Ct. App. 1992).

101. CNA Ins. Cos. v. Vellucci, 596 N.E.2d 926, 927 (Ind. Ct. App. 1992).

102. *See* IND. TRIAL RULE 53.3.

voidable.[103]

In *Carter v. Jones*,[104] the plaintiff filed a mandatory motion to correct error, seeking addittur to the damage award.[105] By operation of Trial Rule 53.3(A), the motion was deemed denied thirty days after the final hearing held on the motion. About three weeks after the motion to correct error was deemed denied, the trial court entered an order purporting to grant the motion and ordering an eleven-fold increase in the jury's verdict on damages.[106] The plaintiff took no action to initiate an appeal of the deemed denial that had already occurred.

The defendant, however, did initiate a timely appeal of the order granting the motion to correct error. The defendant argued on appeal that the motion to correct error had already been deemed denied and that the subsequent order granting relief should not be given effect.[107] The plaintiff then attempted to appeal the deemed denial of her motion to correct error by raising the issue as cross-error in her brief of the appellee. The plaintiff relied procedurally on the language of Trial Rule 59(G).[108] Specifically, that rule says that "if a notice of appeal rather than a motion to correct error is filed by a party in the trial court, the opposing party may raise any grounds as cross-errors . . . ."[109]

The court of appeals rejected this method of attempting to revive an otherwise lost right to an appeal.[110] The court held that the plaintiff forfeited her ability to take an appeal when she failed to take the proper steps to initiate an appeal within thirty days of the date the motion to correct error was deemed denied.[111] Concluding it lacked jurisdiction to review the merits of the deemed denial of the motion to correct error, the court dismissed the appeal, noting the trial court's obligation simply to enter judgment on the jury's original verdict.[112]

If the result in *Carter* seems somewhat at odds with the language of Trial Rule 59(G), it is nevertheless completely consistent with a 1996 supreme court opinion. In *Cavinder Elevators, Inc. v. Hall*,[113] the high court specifically cautioned that when a motion to correct error is deemed denied, the moving party must take the steps necessary to perfect an appeal from the deemed denial or be

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103. Cavinder Elevators, Inc. v. Hall, 726 N.E.2d 285, 288 (Ind. 2000).

104. 751 N.E.2d 344 (Ind. Ct. App.), *clarified on reh'g*, 757 N.E.2d 224 (Ind. Ct. App. 2001).

105. *Id.* at 345. A motion to correct error is a prerequisite to an appeal on a claim that the jury verdict is inadequate or excessive. IND. TRIAL RULE 59(A)(2).

106. *Carter*, 751 N.E.2d at 345.

107. *Id.* at 346.

108. *Id.* at 346-47.

109. IND. TRIAL RULE 59(G).

110. *Carter*, 751 N.E.2d at 346-47.

111. *Id.* Because the events relating to this appeal took place in the year 2000, the plaintiff would have initiated an appeal by filing a praecipe within thirty days. *See* IND. APPELLATE RULE. 2(A) (repealed Jan. 1, 2001). Under the current rules, an appeal is initiated with the filing of a notice of appeal. *See* APP.R. 9(A).

112. *Carter*, 751 N.E.2d at 347 & n.3.

113. 726 N.E.2d 285 (Ind. 2000).

precluded from raising the issue as cross-error.[114]

E. Appealing Summary Disposition in Favor of a Codefendant

One of the key issues in *U-Haul International, Inc. v. Nulls Machine & Manufacturing Shop*[115] was whether a defendant in a civil action has standing to appeal the dismissal of a codefendant from the action.

Before the Comparative Fault Act[116] was enacted in 1983, this question was generally answered in the negative.[117] In order to have standing to litigate in Indiana, a party generally must show a "demonstrable injury."[118] Under pre-comparative fault law, there was "no right to contribution among joint tortfeasors."[119] Therefore, a defendant would generally not be able to show any prejudice or injury resulting from the dismissal of a codefendant from the case.

In 1996, the court of appeals recognized that the adoption of comparative fault altered the analysis for determining the standing of a codefendant to take an appeal.[120] In the recent *U-Haul International* case, the court of appeals more thoroughly analyzed this question and its holdings are worth noting to the appellate practitioner.

Various U-Haul corporations, referred to collectively as U-Haul, were a few of the forty-five defendants named in a wrongful death action.[121] Another group of defendants, referred to collectively as the Valve defendants, were granted summary judgment by the trial court.[122] U-Haul appealed the entry of summary judgment in favor of the Valve defendants. The plaintiff estate did not participate in the appeal.

The Valve defendants argued that U-Haul lacked standing to take an appeal, asserting that U-Haul could show no demonstrable injury from their dismissal from the suit. The court of appeals stated that it could find "no Indiana case that is directly on point,"[123] but ultimately disagreed with the defendants, finding that U-Haul did indeed have standing to appeal.[124]

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114. *Id.* at 289.

115. 736 N.E.2d 271 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

116. Pub. L. No. 317-1983 (codified as amended at IND. CODE §§ 34-6-2-45, -88, 34-51-2-1 to -19 (1998)).

117. *See, e.g.*, Ind. State Highway Comm'n v. Clark, 371 N.E.2d 1323, 1325-26 (Ind. App. 1978) (holding that Defendant State of Indiana had no standing on appeal to challenge judgment on the evidence entered in favor of co-defendants).

118. Hammes v. Brumley, 659 N.E.2d 1021, 1029-30 (Ind. 1995).

119. *Clark*, 371 N.E.2d at 1326.

120. *See* Shand Mining, Inc. v. Clay County Bd. of Comm'rs, 671 N.E.2d 477, 479-80 (Ind. Ct. App. 1996).

121. U-Haul Int'l, Inc. v. Nulls Mach. & Mfg. Shop, 756 N.E.2d 271, 273 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

122. *Id.* at 274.

123. *Id.* at 275.

124. *Id.* at 280.

The court recognized that under the comparative fault principles governing current negligence law, fault (and the accompanying liability for damages) is allocated among those who may be culpable to the plaintiff.[125] Therefore, under comparative fault, the removal of a party against whom fault could be allocated creates the potential for prejudice to a codefendant by increasing that codefendant's potential share of fault and liability.[126]

The court of appeals further noted that preservation of error is a part of the applicable analysis.[127] According to the *Bloemker* and *Rausch* opinions, the failure to object to a codefendant's dismissal from a suit generally will waive the right to later name that former codefendant as a non-party.[128] The court of appeals found cases like *Bloemker* and *Rausch* instructive in that they "established the principle that a defendant may not sit idly as its interests are subjected to possible prejudice when other co-defendants seek dismissal from the case, and then, at a later stage in the proceedings, seek to protect that interest after dismissal has occurred."[129]

The court of appeals ultimately held that in cases involving application of the Comparative Fault Act, the dismissal of a defendant from a case subjects remaining codefendants to greater potential liability, thus creating "sufficient prejudice to confer standing upon a codefendant" who wants to appeal the dismissal.[130] However, the codefendant "must do something at the trial court level to preserve" the right to a later challenge to the dismissal through the appeal process.[131] Having preserved the claim of error by objecting to the summary judgment motion, and because the case was governed by comparative fault principles, the court concluded that U-Haul could take the appeal.[132]

U-Haul makes an important procedural point: a defendant must properly object to any motion that would eliminate a codefendant from the pool of potentially liable parties, not only to preserve any available non-party defense, but also to preserve the right to appeal an adverse decision.

F. Procedural Guidance on Certified Questions from Federal Courts

Appellate Rule 64 sets out the procedures a federal court should follow in certifying a question of state law to the Indiana Supreme Court. In terms of party procedure, however, the rule states simply that if the question is accepted, "the Supreme Court may establish by order a briefing schedule on the certified

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125. *See id.* at 275.

126. *Id.* at 280.

127. *See id.* at 278-80 (citing Bloemker v. Detroit Diesel Corp. 687 N.E.2d 358 (Ind. 1997); Rausch v. Reinhold, 716 N.E.2d 993 (Ind. Ct. App. 1999)).

128. *See id.*

129. *Id.* at 279.

130. *Id.* at 280.

131. *Id.*

132. *Id.* However, the court of appeals ultimately affirmed the entry of summary judgment in favor of the Valve defendants. *Id.* at 285.

question."[133]

An example of a typical order establishing a briefing schedule was published by the supreme court during the reporting period.[134] In addition to establishing a briefing schedule, the order identified the certified question, consolidated the briefing to avoid duplicative arguments, set up procedures for placing key documents from the federal court record before the court, and established length restrictions on the briefing.[135]

This published order should be reviewed by any attorney involved in a certified question from a federal court. Of particular note is the simultaneous briefing approach used by the court. The two consolidated sides were given approximately six weeks from the date of the order, within which both sides were to file principal briefs not to exceed 8400 words.[136] Both sides were then given approximately four more weeks within which they could file a brief in response to their opponent's principal brief.[137] The court's order stated that extensions of time would be granted only under extraordinary circumstances.[138]

G. Motion for Judgment on the Evidence Held Not a Prerequisite to Appeal on Sufficiency of the Evidence in a Civil Case

The first four subparts of Trial Rule 50(A) identify junctures during a trial when a motion for judgment on the evidence may be made.[139] "The purpose of [a Trial Rule 50] motion for judgment on the evidence is to test the [legal] sufficiency of the evidence" presented by a party with the burden of proof on a particular claim.[140] The fifth subpart of Trial Rule 50(A), however, is not written in parallel with the first four. In an apparent reference to when parties may raise the sufficiency issue, the fifth subpart states that a party "may raise the issue upon appeal for the first time in criminal appeals but not in civil cases."[141]

In *Walker v. Pillion*,[142] Walker appealed a civil judgment entered against him, asserting that it was contrary to the evidence. However, he had not moved for judgment on the evidence pursuant to Trial Rule 50(A).[143] The appellees, the Pillions, asserted on appeal that any claim of error had been waived by the failure of Walker to raise the issue in the trial court. The Pillions relied on the express language of Trial Rule 50(A)(5), arguing that the sufficiency of the evidence can

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133. IND. APPELLATE RULE 64(B).

134. Livingston v. Fast Cash USA, Inc., 737 N.E.2d 1155 (Ind. 2000), *certified question answered by* 753 N.E.2d 572 (Ind. 2001).

135. *See id.* at 1155-56.

136. *See id.*

137. *See id.*

138. *Id.* at 1156.

139. *See* IND. TRIAL RULE 50 (A)(1)-(4).

140. First Bank of Whiting v. Schuyler, 692 N.E.2d 1370, 1372 (Ind. Ct. App. 1998).

141. IND. TRIAL RULE 50(A)(5).

142. 748 N.E.2d 422 (Ind. Ct. App. 2001).

143. *Id.* at 424.

be raised for the first time on appeal in criminal cases but not in civil.[144]

The court of appeals acknowledged that "[a] reading of subsection (5) in isolation suggests that the Pillions are correct."[145] The court nevertheless went on to hold that the appellant was not required to move for judgment on the evidence in the civil trial before raising the sufficiency issue on appeal.[146] The court of appeals found that requiring a motion for judgment on the evidence would be inconsistent with Trial Rule 59(A), which states that a post-trial motion to correct error is only mandatory when a party seeks to address newly discovered evidence or claims of inadequacy or excessiveness of the verdict.[147]

Apart from being counterintuitive to the express language of Trial Rule 50(A), the holding of *Walker* runs somewhat contrary to the general principle that issues not raised in the trial court are not preserved for appellate review.[148] Although *Walker* holds that no motion for judgment on the evidence is required to preserve the sufficiency of the evidence issue in a civil trial, the best practice does not change. Trial Rule 50(A) sets out specific junctures in a jury trial when motions for judgment on the evidence may be made. If the sufficiency of the evidence is legitimately in dispute, counsel should consider making Trial Rule 50(A) motions at all the appropriate times allowed by the rule.[149] In addition to assuring that no claim of waiver can be made on appeal, making the motions creates the possibility of being the appellee, rather than the appellant, in any ensuing appeal.

H. Effect of Bankruptcy Stay Issued During Pendency of Appeal

When an entity files a bankruptcy petition, the federal court will issue an order staying all state court proceedings involving the debtor.[150] In two opinions issued during the reporting period, the supreme court determined that such stays would generally not prevent it from handing down an opinion involving a bankrupt entity. In *Forte v. Connorwood Healthcare, Inc.*,[151] one of the defendant-appellees declared bankruptcy while the appeal was pending and a stay of all state court proceedings was issued.[152] The supreme court nevertheless handed down its opinion in the appeal, stating that the opinion was rendered "with respect to the non-bankrupt parties only."[153] In *Owens Corning Fiberglass*

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144. *Id.* at 424-25.

145. *Id.* at 425.

146. *Id.* at 426.

147. *Id.* at 425-26.

148. *See* Clarkson v. Dep't of Ins., 425 N.E.2d 203, 206 (Ind. Ct. App. 1981).

149. *See, e.g.*, 3 WILLIAM F. HARVEY, INDIANA PRACTICE § 50.1, at 463 (3d 2002) (referring to the filing of a Trial Rule 50(A) motion at the conclusion of one party's submission of evidence and again at the conclusion of the submission of all the evidence as a "sound practice").

150. *See* 11 U.S.C. § 362(a)(1) (2000).

151. 745 N.E.2d 796 (Ind. 2001).

152. *Id.* at 798 n.1.

153. *Id.* (citing Seiko Epson Corp. v. Nu-Kote Int'l, Inc., 190 F.3d 1360, 1364-65 (Fed. Cir.

Corp. v. Cobb,[154] a federal stay was issued during the pendency of the appeal as a result of the bankruptcy filing of the sole defendant-appellant.[155] The supreme court was not constrained by the stay from issuing its opinion, stating simply that the decision was "subject to applicable rules of bankruptcy law."[156]

I. Appellate Standard of Review Established in Counsel Disqualifications Cases

The defendant in *Robertson v. Wittenmyer*[157] filed a motion seeking to disqualify the plaintiff's attorney due to an alleged conflict of interest. The trial court granted the motion and an appeal ensued.[158] On a question of first impression in Indiana, the court of appeals held that it would apply an abuse of discretion standard of review in determining whether error occurred.[159]

J. Law Firm Name a Necessary Part of Brief Captioning

In *Stone v. Stakes*,[160] the court of appeals admonished counsel about failing to include the name of their law firm in the captioning of the briefs filed.[161] The court noted that the failure to include the firm name gives the sometimes-misleading impression of being a solo practitioner,[162] in contradiction of the spirit of the supreme court's opinion in *Cincinnati Insurance Co. v. Wills*.[163]

K. Miscellanies of Note During the Reporting Period

1. The Least and the Most at Stake.—The Damon Corporation (successfully) appealed a judgment entered against it in the total amount of $121.14 plus costs.[164] The Kroger Company (unsuccessfully) appealed a compensatory damage judgment entered against it in the amount of $55 million.[165]

2. Best Use of a Pop Culture Reference.—During a dispute about a vehicle blocking traffic, Jaron Johnson made vulgar comments to the driver of another vehicle. The offended driver started to get out of his car, possibly to explain why

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1999)).

154. 754 N.E.2d 905 (Ind. 2001).

155. *See id.* at 916.

156. *Id.*

157. 736 N.E.2d 804 (Ind. Ct. App. 2000).

158. *Id.* at 805.

159. *Id.* at 805-06. The trial court judgment was ultimately affirmed. *Id.* at 809.

160. 749 N.E.2d 1277 (Ind. Ct. App.), *aff'd on reh'g*, 755 N.E.2d 220 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 182 (Feb. 15, 2002).

161. *See id.* at 1282 n.7.

162. *Id.*

163. 717 N.E.2d 151, 165 (Ind. 1999).

164. Damon Corp. v. Estes, 750 N.E.2d 891 (Ind. Ct. App. 2001).

165. Ritter v. Stanton, 745 N.E.2d 828 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 100 (Ind. Jan. 31, 2002), *cert. denied*, 70 U.S.L.W. 3642 (U.S. 2002).

it was unlikely he was going to comply with Johnson's explicit suggestions. Johnson lifted his jacket to show the driver an automatic weapon he was carrying and coolly stated, "Don't even think it."[166] A majority of a panel of the court of appeals reversed Johnson's conviction for intimidation, holding that Johnson's vague remark did not communicate a threat within the meaning of the applicable statute.[167] In his dissent, the Honorable James Kirsch wrote: "In the *Dirty Harry* movies, Clint Eastwood's famous 'Go on . . . make my day' line was equally vague, but neither the derelicts invited to make Harry's day in the movie, nor the millions of movie goers who viewed it, had any doubts as to whether Harry was communicating a threat."[168] The supreme court unanimously agreed with the dissent, granting transfer and affirming the trial court.[169] The high court also credited Judge Kirsch's *Dirty Harry* analogy in its opinion.[170]

3. Appellate Brief-Writing Shortcoming of the Year.—The most frequently occurring problem with appellate briefs during the reporting period was improprieties in the statement of facts section, particularly, appellants' failures to prepare a concise but complete statement of facts in narrative form that is not argumentative, stated in a manner consistent with the applicable standard of review.[171] No fewer than twelve published opinions made specific reference to this problem.[172] Doubtless, many such problems occurred without comment from the court of appeals or occurred in cases in which the opinion was unpublished. These documented reminders to counsel in the reported decisions probably represent the tip of an iceberg.

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166. 725 N.E.2d 984, 986 (Ind. Ct. App.), *vacated and trans. granted*, 741 N.E.2d 1254 (Ind. 2000), *trial court aff'd by* 743 N.E.2d 755 (Ind. 2001).

167. *Id.* at 987.

168. *Id.* at 988 (Kirsch, J., dissenting).

169. *Johnson*, 743 N.E.2d at 755.

170. 743 N.E.2d at 756 n.1.

171. *See* IND. APPELLATE RULE 46(A)(6); APP.R. 8.3(A)(5) (repealed Jan. 1, 2001).

172. *See* Boczar v. Meridian St. Found., 749 N.E.2d 87, 92 (Ind. Ct. App. 2001); Walker v. Pillion, 748 N.E.2d 422, 424 n.3 (Ind. Ct. App. 2001); Elliott v. Sterling Mgmt. Ltd., 744 N.E.2d 560, 562 n.1 (Ind. Ct. App. 2001); Burrell v. Lewis, 743 N.E.2d 1207, 1209 (Ind. Ct. App. 2001); Dunson v. Dunson, 744 N.E.2d 960, 962 n.2 (Ind. Ct. App), *trans. granted and vacated by* 761 N.E.2d 415 (Ind. 2001); S.E. v. State, 744 N.E.2d 536, 538 n.1 (Ind. Ct. App. 2001); Buchanan v. State, 742 N.E.2d 1018, 1021 n.2 (Ind. Ct. App.), *trans. granted*, 753 N.E.2d 13 (Ind. 2001), *aff'd in part and vacated in part*, 767 N.E.2d 967 (Ind. 2002); Kanach v. Rogers, 742 N.E.2d 987, 988 n.1 (Ind. Ct. App. 2001); Major v. OEC-Diasonics, Inc., 743 N.E.2d 276, 278 n.3 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 15 (Ind. 2001); Speed v. Old Fort Supply Co., 737 N.E.2d 1217, 1218 n.1 (Ind. Ct. App. 2000); Rogers *ex rel.* Rogers v. Cosco, Inc., 737 N.E.2d 1158, 1161 n.1 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 419 (Ind. 2001); Walker v. McTague, 737 N.E.2d 404, 406 n.2 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

IV. OTHER NOTEWORTHY DEVELOPMENTS

A. Some Change, Some Constancy in Leadership

Every five years, the Indiana Judicial Nominating Commission must appoint a new chief justice for the state.[173] The seven members of the Commission unanimously voted in December of 2001 to retain the Honorable Randall T. Shepard in the job he has held since 1987.[174] Shepard has now begun his fourth term as chief justice.[175] No other jurist has served as chief justice of Indiana for so long.[176] Shepard initially joined the court as an associate justice in 1985.[177]

The former chief judge on the Indiana Court of Appeals decided that his nine-year tenure was long enough. Effective January 1, 2002, the Honorable John Sharpnack voluntarily relinquished the reins of appellate court leadership.[178] The fifteen-member court of appeals elected the Honorable Sanford Brook to the position of chief judge of the court.[179] Chief Justice Randall T. Shepard stated, "I've always thought Judge Brook was one of the best and brightest the Indiana judiciary has to offer."[180] Judge Brook hopes to follow in the well-respected footsteps of Judge Sharpnack, who will now be free to focus on opinion writing. With regard to his predecessor, Judge Brook stated: "We're in wonderful shape in terms of how we manage our caseloads and how we go about writing our opinions."[181]

B. Phasing in of New Jurisdictional Rule

On November 7, 2000, the voters of Indiana gave final approval to an amendment to the Indiana Constitution, limiting the obligatory criminal appellate jurisdiction of the Indiana Supreme Court to only those cases in which a sentence of death has been imposed.[182] Previously, the state constitution required the State's highest court to assume direct jurisdiction over any case in which the appellant received a sentence in excess of fifty years on any one count.[183] The purpose of the amendment was to free up the supreme court's docket to accept a broader range of civil and criminal cases based upon the importance of the legal questions presented through its discretionary authority to transfer jurisdiction

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173. IND. CONST. art. VII, § 3.

174. Denise G. Callahan, *Commission Confirms Chief Justice Shepard*, IND. LAW., Dec. 19, 2001, at 5; *Shepard to Continue as Chief Justice*, RES GESTAE, Dec. 2001, at 29, 29.

175. *Shepard to Continue as Chief Justice*, *supra* note 174, at 29.

176. *Id.*

177. *Id.*

178. Denise G. Callahan, *New Chief Judge Takes Over on CA*, IND. LAW., Jan. 2, 2002, at 3.

179. *Id.*

180. *Id.*

181. *Id.*

182. *See* Certification of Ratification (Nov. 7, 2000) (on file with the Indiana Secretary of State) (amending IND. CONST. art. VII, § 4).

183. IND. CONST. art. VII, § 4 (amended 2000).

from the court of appeals.[184]

Once the constitutional amendment became effective, the court immediately changed its jurisdictional rule to route all criminal cases in which a fixed term of years has been imposed to the court of appeals.[185] However, the new jurisdictional rule only became effective as to cases initiated with the filing of a notice of appeal on or after January 1, 2001.[186] All the cases already pending in the appellate courts, those being briefed, and those still in the record preparation process remained in their existing appellate pipeline. Therefore, despite the rule change, cases involving sentences in excess of fifty years continued to be sent to the supreme court at the usual rate throughout most of the year 2001.

Table 1 documents the number of direct criminal appeals transmitted to the supreme court over an eighteen-month time period ending January 1, 2002.[187] Transmission to the court does not occur until the appeal is fully briefed. The table illustrates the effect of the court's phased-in approach to the jurisdictional change.

Table 1.

Direct Appeals Transmitted to the Indiana Supreme Court for Opinion

Two-Month Period	Criminal Appeals Transmitted to the Supreme Court for Opinion
July-Aug. 2000	21
Sept.-Oct. 2000	21
Nov.-Dec. 2000	25
Jan.-Feb. 2001	23
Mar.-Apr. 2001	19
May-June 2001	20
July-Aug. 2001	20
Sept.-Oct. 2001	6
Nov.-Dec. 2001	2

As Table 1 demonstrates, the number of transmitted new cases over which the supreme court exercised mandatory jurisdiction dropped off significantly in September 2001. Depending on the number of new capital and life without parole cases, the number of direct appeals transmitted to the supreme court for

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184. *See* Randall T. Shepard, *Equal Access to the Supreme Court Requires Amending the Indiana Constitution*, RES GESTAE, Sept. 2000, at 12, 13.

185. *See* IND. APPELLATE RULE 4(A)(1)(a) (amended Nov. 9, 2000).

186. Order Amending Indiana Rules of Appellate Procedure (Ind. Nov. 9, 2000) (No. 94S00-0002-MS-77), *available at* http://www.in.gov/judiciary/opinions/archive/11090001.ad.html.

187. The information used to compile this table is on file with the Division of Supreme Court Administration, 315 State House, 200 W. Washington Street, Indianapolis, IN 46204.

opinion as a matter of primary jurisdiction should remain at a fairly stable low number. Of course, the court will be required to vote and write on all the cases already transmitted under the old jurisdictional rule. However, once those cases have worked their way through the system, the supreme court can, for the first time in its history, fully realize its role as the court of last resort in Indiana.

C. Appellate Dockets Online

Checking the status of a pending appeal has been significantly easier since October 2001. During that month, the chronological case summaries (dockets) of appeals before the Indiana Supreme Court, Indiana Court of Appeals, and Indiana Tax Court became available over the Internet.[188] In addition to currently active appeals, the website includes docket information dating back many years.

The website permits the user to search for appellate dockets by the appellate cause number, the trial court cause number, litigant name, or attorney name. Once an individual case is identified, a listing of all the filings and orders entered in the appeal is available, along with party and counsel information. This information is of great value in determining the status of a pending appeal, especially whether a petition to transfer jurisdiction to the supreme court has been filed, is pending, or may have been granted in a particular case.

D. Webcasts of Oral Arguments

Since September of 2001, the supreme court has been broadcasting its oral arguments live over the Internet. In addition, all the video and audio recordings of the oral arguments that have been previously "webcasted" are being archived and may be viewed at any time via the Internet.[189] Only a few states produce their oral arguments for broadcast in this manner.

CONCLUSION

The early indications are that the new Rules of Appellate Procedure are working well following this year of transition. By the end of their first year in operation, only minor clarifying amendments to the rules were necessary. Court reporters and trial court clerks seem to be handling their new duties, and attorneys are learning to use the new rules. The Indiana Court of Appeals continues to issue its opinions within a short time period from when each appeal is fully briefed.[190] In the coming years, the Indiana Supreme Court will become

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188. As of this writing, access to the online appellate docket is achieved by logging on to the Indiana Judicial System webpage located at http://www.in.gov/judiciary and clicking on the words "Online Docket: Case Search."

189. As of this writing, access to the live webcasts and archived arguments is achieved by logging on to the webpage located at http://www.in.gov/judiciary/education and clicking on the graphic labeled "Watch Oral Arguments." Certain software is needed to view the arguments.

190. *See* COURT OF APPEALS OF INDIANA, 2000 ANN. REP. 1 (2001) (stating that the average age of appeals pending before the court, measured from the date the appeal was fully briefed, was

more active in the civil arena. Information about the status of cases pending on appeal is now available at the click of a button, and an attorney can watch an appellate oral argument from the comfort of her office. In sum, the rules and the tools are in place to make Indiana an accommodating place to practice appellate law.

1.5 months).

RECENT DEVELOPMENTS IN CIVIL PROCEDURE

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INTRODUCTION

In his January 2002 address to the legislature on the state of the judiciary, Chief Justice Shepard described the evolution of Indiana's court system as a process of "re-constructing courts so substantially that the change is a matter of kind and not of degree."[1] Courts now foster public policy not just by rendering decisions for discrete controversies, but by connecting vitally to the community through a series of innovative programs. It seems especially fitting in the wake of recent events that Indiana's judiciary should strive to promote the rule of law through a series of projects to modernize and humanize the delivery of legal services in the state. Many of these programs came to fruition in 2001, and many others have made substantial progress. They will affect the nature of civil practice substantially now and for the future.

For instance, after four years of work, the "Juries for the 21st Century

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1. Chief Justice Randall T. Shepard, Address to the Indiana Legislature, State of the Judiciary, The Changing Nature of Courts (Jan. 16, 2002) [hereinafter "Address"], *available at* http://www.in.gov/judiciary/supreme/02stjud.html.

Project" has been completed, and the court has issued a coherent set of Indiana Jury Rules in response.[2] The Family Court Project has proved so successful that it has been extended to five additional counties.[3] The Indiana Pro Bono Commission distributed its first funds to local communities to begin the delivery of legal services.[4] In response to technological change and as part of a broader move to improve the statewide management of the courts, the Judicial Technology and Automation Committee ("JTAC"), headed by Justice Sullivan, is promoting the advantages of electronic communications and records for judges and lawyers. These are just a few of the efforts shaping the nature of courts in the state. Aside from these programs, the Indiana Supreme Court has promulgated important rule changes affecting not just juries but also the trial rules,[5] administrative rules,[6] and even rules for digital transcripts on appeal.[7] In addition, it has revised the process of appeal from the Indiana Tax Court.[8]

The decisions rendered in 2001 by the Indiana Supreme Court itself are complex and cover a broad array of topics; throughout they show a keen sensitivity to the capacity of the judiciary to act as a "strong partner" with the executive and legislative branches.[9] One of the most important themes underlying the court's 2001 cases is the impact of civil litigation on governmental organizations and the need to mediate between the ability of citizens to curb improper official action with the freedom of public entities to function.

The Indiana Court of Appeals has been operating under the new appellate rules for a year and has issued numerous decisions. Many of them cover technical issues in civil procedure—for instance, in 2001 a remarkable number of appellate cases dealt with amendment of pleadings[10]—while others touch on some of the most controversial policy questions that a reviewing court could be asked to resolve.[11]

At the federal level, court decisions and proposed legislation threatened increased barriers to plaintiffs' ability to bring actions, particularly class actions.

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2. IN Order 01-19 (Dec. 21, 2001). *See also* Citizens Commission for the Future of Indiana Courts, *Juries for the 21st Century: Reports of the Citizens Commission for the Future of Indiana Courts and the Judicial Administration Committee of the Indiana Judicial Conference*, [hereinafter *Reports*], *available at* http://www.state.in.us/judiciary/citizen/; and Comparison of Recommendation, *available at* http://www.state.in.us/judiciary/citizen/comparison.html.

3. Press Release, Indiana Supreme Court, Division of State Court Administration, Supreme Court Family Court Project Expands (Nov. 16, 2001), *available at* http://www.in.gov/judiciary/supreme/press/pr111601.html.

4. *See* Address, *supra* note 1.

5. *See infra* notes 644-67 and accompanying text.

6. *See infra* notes 665-67 and accompanying text.

7. *See infra* notes 668-69 and accompanying text.

8. *See infra* notes 663-64 and accompanying text.

9. *See* Address, *supra* note 1.

10. *See infra* Part II.A.

11. *See infra* Part II.C (regarding the plethora of asbestos cases).

Federalism continued as a theme in Supreme Court opinions as well. However, on the rulemaking level, less significant changes were made than in 2000.

I. INDIANA SUPREME COURT DECISIONS

A. Decisions Clarifying Important Policies

1. Attorney's Fees.—The decision by the Indiana Supreme Court with the largest policy implications may well be *State Board of Tax Commissioners v. Town of St. John*.[12] It rejects the "private attorney general" exception to the "American Rule" on fee shifting. Contrary to the legal regimes of other industrialized democracies—most notably England—the winner of a lawsuit in an American court is typically prohibited from recovering attorney's fees from the loser, unless there is a specific statute or contract provision authorizing fee shifting.[13] The rationale for this approach is that fee shifting would have a chilling effect on plaintiffs' willingness to bring claims that deserve to be litigated but might still be lost. If the cost of failure would bring with it the risk of a hefty "fine" in the form of having to pay the winner's fees, the strong commitment of the American legal regime to open access to the courts might be frustrated.[14] Indiana follows the American Rule.[15]

Despite the American Rule, courts have developed common law exceptions to promote competing goals, most notably preventing unjust enrichment and sanctioning bad faith conduct in litigation. For instance, when litigation results in the generation of a common store of money to be distributed to a class, the "common fund" exception allows the court to award the named plaintiff attorneys' fees from the fund. This prevents class members from being unjustly enriched by not having to pay their fair share of the costs of the litigation.[16] Similarly, when litigation results in a nonmonetary common benefit that aids an ascertainable group, courts have applied various techniques to shift fees to the group for the same reason.[17] Expenses for litigation frivolously initiated can be recovered in a separate suit for malicious prosecution, and fees are often awarded

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12. 751 N.E.2d 657 (Ind. 2001).

13. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); *see also* John Yukio Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1 (1999).

14. *See* Gotanda, *supra* note 13, at 38. n.172.

15. *See* Gavin v. Miller, 54 N.E.2d 277, 280 (Ind. 1944).

16. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 869-70 (2d ed. 1999).

17. *See, e.g.*, Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970) (fees assessed against corporation and thus the cost of litigation that benefitted shareholders of the corporation derivatively shifted to them); Cmty. Care Ctrs., Inc. v. Ind. Family & Soc. Servs. Admin., 716 N.E.2d 519 (Ind. Ct. App. 1999). As the Indiana Supreme Court noted in *Town of St. John*, sometimes the common benefit theory overlaps or is confused with the private attorney general exception. *See Town of St. John*, 751 N.E.2d at 658 n.3.

as a form of sanction against a party's misconduct in litigation as part of the courts' power to control the behavior of those who appear before them.[18] The most controversial and least recognized common law exception to the American Rule is the idea that fees can be shifted when a litigant creates a public good by acting as a private attorney general.

One functions as a private attorney general when one initiates litigation that would normally be brought by the government to promote important public policies, but the government is either unable or unwilling to bear the enforcement burden involved.[19] The private attorney general exception became extremely significant in the late 1960s and early 1970s—especially at the federal level—when it was used to justify the award of fees in public impact litigation.[20] However, the doctrine posed a substantial risk to public entities, for they were often the targets of such lawsuits.[21] In 1975, the U.S. Supreme Court prohibited fee shifting in federal courts on a private attorney general theory through the landmark case, *Alyeska Pipeline Service Co. v. Wilderness Society*.[22] This decision resulted from a challenge to the Alaska oil pipeline on environmental grounds. Pursuant to federalism principles, the case had no binding effect on the states, allowing them to retain the freedom to entertain common law exceptions to the American Rule for state-based claims litigated in state courts.[23] Until the Indiana Supreme Court's decision in *Town of St. John*,[24] it was not clear what the status of the private attorney general exception was in Indiana.

The fee issue in *Town of St. John* arose from the protracted litigation that

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18. Indiana has codified fee awards based on the notion of "obdurate" litigation behavior. IND. CODE § 34-52-1-1 (1998).

19. *See, e.g.*, Serrano v. Priest, 569 P.2d 1304 (Cal. 1977) (class action brought to reform California's method of public school financing justified fee shifting on private attorney general theory).

20. *See, e.g.*, Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) (fees shifted where private litigation successfully challenged racial discrimination in home sales).

21. To the extent constitutional rights were the subject of litigation, the state action requirement insured the presence of a governmental entity as a defendant. Moreover, when suits involved statutes or regulations, the governmental agency charged with their enforcement might be joined as a party. *See, e.g.*, La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (litigants procured injunction prohibiting the Secretary of Transportation and others from violating housing displacement and relocation legislation and were awarded attorneys' fees), *aff'd*, 488 F.2d 559 (9th Cir. 1973).

22. 421 U.S. 240 (1975). In response to the holding of *Alyeska*, Congress passed the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988. It allows for one-way fee shifting in civil rights cases.

23. Several federal circuit courts treat the issue of attorneys' fees as procedural under the *Erie* doctrine and so do not follow state practice on fees in diversity actions. This is apparently the position of the Seventh Circuit, as least where a Federal Rule of Civil Procedure conflicts with a state approach. *See* Minnesota Power & Light Co. v. Hockett 14, Fed. Appx. 703, 706 (7th Cir. 2001) (unpublished opinion) (declining to apply Indiana Trial Rule 65(C) as a basis for fees).

24. 751 N.E.2d 657 (Ind. 2001).

invalidated Indiana's method of property taxation.[25] The prevailing taxpayers requested an award of their attorneys' fees from the tax court and it granted the request. The State Tax Board sought review in the Indiana Supreme Court, which in an opinion by Chief Justice Shepard, rejected the private attorney general exception to the American Rule.[26]

The court conceded that some Indiana appellate cases appeared to allow the private attorney general exception, but it characterized those opinions as involving mere dicta.[27] Thus, to allow the taxpayers' request would be to adopt the exception, not just retain it. Chief Justice Shepard canvassed those states that follow and reject the private attorney general exception. Those who allow it, do so to motivate private litigants to undertake complex litigation to vindicate important public policies, or, in the words of New Hampshire's supreme court, to insure funding for lawsuits designed to "guard the guardians."[28] On the other hand, states rejecting the doctrine are concerned with "unbridled judicial authority to 'pick and choose' which plaintiffs and causes of action merit an award . . . and would not promote equal access to the courts . . . [because] it lacks sufficient guidelines . . . ."[29] The exception would also impose a burden on judicial resources, for judges would have to revisit the merits of each case to determine whether it sufficiently promoted the public good.[30]

In light of these competing concerns, Chief Justice Shepard characterized the private attorney general exception as a "double-edged sword," and concluded that there is "no proven need" in Indiana for it, given the numerous statutes that already allow for fee-shifting:

> It is apparent that the General Assembly knows how to create statutory exceptions to the American rule, and that it has been willing to do so when it deems appropriate. Taking into account the plethora of statutory provisions already on the books, we are not persuaded that the judiciary needs to adopt a sweeping common-law exception to the American rule for all public interest litigation.[31]

Moreover the test commonly used for applying the doctrine gives rise to a "slippery slope,"[32] for it injects subjective determinations as to what is socially important into judicial decisions, it expends judicial resources, and it raises the questions of how to determine what is a benefit and to whom the benefit should

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25. State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657, 657, 658 (Ind. 2001).

26. *Id.* at 664.

27. *Id.* at 659-60.

28. *Id.* at 661 (quoting Claremont Sch. Dist. v. Governor, 761 A.2d 389, 394 (N.H. 1999)).

29. *Id.* (quoting N.M. Right to Choose v. Johnson, 986 P.2d 450, 459 (N.M. 1999)).

30. *Id.*

31. *Id.* at 662.

32. The test looks at "(1) the societal importance of the vindicated right; (2) the necessity for private enforcement and the accompanying burden; and (3) the number of people benefitting from the decision." *Id.*

be given, among other problems.[33]

The court did not emphasize the oft-cited rationale for the private attorney general exception—that it is the only way to obtain enforcement of important rights and policies in the face of recalcitrant governmental entities that are unwilling, or unable, to act.[34] The court conceded that private litigation was necessary to force a change in the way the state assessed the value of property in the very case before it,[35] however, it was also concerned that the private attorney general justification could make Indiana a magnet for litigators who might be more motivated by the prospect of fees than vindicating rights.[36] It is fair to infer that one of the court's underlying concerns was the negative impact on governmental functioning that a geometric increase in public interest lawsuits might bring.

2. The Indiana Tort Claims Act and Trial Rule 65(C).—Another decision that echoes a concern for the impact of procedure on governmental functioning is *Noble County v. Rogers.*[37] *Rogers* raised the issue of whether a governmental entity that has procured an invalid temporary restraining order or preliminary injunction is immune under the Indiana Tort Claims Act from paying the wronged party damages in compensation under Trial Rule 65(C). On its surface it looks quite different from the policies surrounding the private attorney general doctrine, but at a higher level of description, the questions are the same: to what extent and for what goals should civil litigation be allowed to affect—even burden—the activities of public entities?

The remedies for an improperly issued injunction specified in Indiana Trial Rule 65(C) are quite unique. In most jurisdictions public entities need not procure a bond in order to seek injunctive relief. In those jurisdictions,[38] when a preliminary injunction has been obtained by a government agency in error, there is no remedy for the wronged defendant for there is no bond to satisfy any claim for compensation and the governmental entity is typically exempted from

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33. *Id.* at 662-64. In this discussion the court also included an intriguing comparison of the nature and importance of Indiana constitutional and statutory rights. *Id.* at 661-62. To remove some of the court's concerns about subjective evaluations of the public good that could be occasioned by the doctrine, the taxpayers had asked that the private attorney general concept be limited to constitutional rights. *Id.* at 662. But, according to Chief Justice Shepard,

> because statutory law is far more easily updated than constitutional law, in many areas it more accurately reflects current social priorities . . . . It does not belittle the rights embodied in the Indiana Constitution to say that we cannot presume that constitutional mention automatically equates to the degree of current social importance.

Id.

34. *See* Serrano v. Priest, 569 P.2d 1304, 1314 (Cal. 1977). *See generally* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002).

35. *Town of St. John*, 751 N.E.2d at 663.

36. *Id.* at 662.

37. 745 N.E.2d 194 (Ind. 2001).

38. *Id.* at 201 (Boehm J., dissenting).

paying monies in the absence of a bond.[39] However, Indiana Trial Rule 65(C) specifically provides: "No such security [bond] shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."[40] But, in *Rogers* the county argued that this rule violates the immunity granted to it by the ITCA,[41] because the remedy given a defendant in the trial rule amounts to a tort. The court of appeals disagreed, characterizing the measure as procedural.[42]

By a 3-2 margin and in an opinion crafted by Justice Sullivan, the court mediated between the need to protect government employees from "harassment by litigation or threats of litigation over decisions made while in the scope of their employment,"[43] and the need to preserve the courts' power to sanction litigants for improper behavior.[44] The court chose not to explicitly characterize the rule as either one of procedure or one of tort—a difficult task since it shows traits of both and employs the term "wrongful." Instead, Justice Sullivan limited the application of Rule 65(C) to injunctions procured by governmental entities acting in bad faith. Only in those cases would the ITCA fail to shield government entities from paying compensation. This was necessary in his view because, otherwise, the ITCA would be constitutionally infirm.[45]

The majority noted that the legislature's power to immunize government has "few limits."[46] However, one of those limits stems from the courts' ability to sanction those appearing before them, a capacity essential to the courts' independent function in government.[47] Moreover, a long line of Indiana cases makes it clear that the government and its lawyers are subject to sanctions for litigation misconduct.[48] An accommodation through statutory interpretation was warranted:

> The parties ask us to resolve this apparent conflict by applying either the Trial Rule or the ITCA to the exclusion of the other. This posture puts into tension the powers of coordinate branches of our state government by asking us to ignore the pronouncement of one such branch. However, we have long held that "if an act admits of two reasonable interpretations, one of which is constitutional and the other not, we

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39. *Id.* at 202.

40. IND. TRIAL RULE 65(c).

41. IND. CODE §§ 34-13-3-1 to -25 (1998).

42. *Rogers*, 745 N.E.2d at 196.

43. *Id.* at 197 (quoting Celebration Fireworks Inc. v. Smith, 727 N.E.2d 450, 452 (Ind. 2000)).

44. *Id.*

45. *Id.* at 199.

46. *Id.* at 197.

47. *Id.* at 197-98.

48. *Id.* at 198-99.

> choose that path which permits upholding the act."[49]

The key was the interpretation of the rule's reference to "wrongfully." The court explicitly construed the meaning of that term in Rule 65(C) to require compensation only when the government acts "with such bad faith and malice that their actions undermine the authority of the court issuing the restraining order or injunction."[50] This holding created an appropriate "balance" between the legislative policy of the ITCA and the judiciary's role and inherent power to sanction litigants. Thus, only in "rare cases" when the acts of government are so egregious as to "threaten the proper functioning of the court" would immunity be stripped and compensation would lie under Trial Rule 65(C).[51]

In an intriguing dissent joined by Justice Dickson, Justice Boehm argued that the remedial provisions of 65(C) ought to be definitively characterized because when identified, they sound in contract, not tort. Thus, Rule 65(C) compensation is totally outside the ICTA.[52] After canvassing the practice of other jurisdictions on injunction bonds and governmental liability, as well as the histories of the ICTA and Trial Rule 65(C), Justice Boehm concluded that compensating a party affected by an erroneously issued injunction is a quid pro quo voluntarily undertaken by the plaintiff to obtain provisional relief.[53] Noting that in the past, Indiana law required governmental entities to post a bond, he asserted that:

> The 1970 changes [to Trial Rule 65] merely replaced the bond requirement, which plainly directed a contractual obligation of the governmental entity with a simple requirement that the entity reimburse directly. Basic contract principles and the doctrine that statutes are to be construed in harmony . . . lead me to conclude that the action for "wrongful injunction" is not a tort . . . . If the legislature wants to change that rule of substantive law, it may do so, but the laws on the books do not provide the immunity Noble County claims.[54]

This was because Noble County voluntarily accepted the arrangement imposed by the rule[55] when it sought a restraining order against Rogers. Moreover, in Justice Boehm's view, removing governmental immunity solely for bad faith conduct still conflicts with the ITCA.[56]

Regardless of which category best identifies the remedy of Rule 65(C), it is important to note that the majority's holding is limited to governmental entities.[57] Where private parties are involved, compensation from a bond ought to be

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49. *Id.* at 196, 197 (quoting Price v. State, 622 N.E.2d 954, 956 (Ind. 1993)).
50. *Id.* at 197.
51. *Id.* at 199.
52. *Id.* at 200, 201, 204 (Boehm, J. dissenting).
53. *Id.* at 202-04.
54. *Id.*
55. *Id.*
56. *Id.* at 205-07.
57. *Id.* at 197 n.4.

available whenever it is later determined that a temporary restraining order or preliminary injunction should not have issued.

3. Compensation to Appointed Counsel in Civil Matters.—Another opinion showing the tension statutory enactments can create over the power of courts as a separate and co-equal branch of government is *Sholes v. Sholes*,[58] decided in December 2001. It has far reaching significance for *pro bono* practice because it clarifies whether an indigent person must have counsel appointed in a *civil* matter and whether appointed counsel must be compensated.

Sholes involved a divorce sought by the wife of an inmate serving a life sentence in state prison.[59] He filed two requests to be allowed to proceed as a pauper and he also requested a free record.[60] The trial court made no findings on Sholes' indigency status and denied the request to furnish a record. A judgment was entered in which the wife received virtually all the marital property and all of Sholes' retirement funds. Sholes moved to have the judgment set aside and also requested appointment of counsel. The trial court did not set the judgment aside and denied the request for counsel without making findings. The court did, however, find that Sholes lacked sufficient funds to obtain an appellate transcript and ordered one at public expense.[61] On review, the Indiana Court of Appeals reversed the trial court's decision not to set the judgment aside,[62] basing its holding on Indiana Code section 34-10-1, which governs appointment of counsel for indigents.[63] It concluded that because Sholes had presented sufficient evidence of his indigency, the judgment should have been set aside.[64] Accordingly, all matters after the request for counsel were vacated.

On transfer, the Indiana Supreme Court stated that:

> [I]n ruling on an application for appointment in a civil case, the trial court must determine whether the applicant is indigent, and whether the applicant, even if indigent, has means to prosecute or defend the case.

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58. 760 N.E.2d 156 (Ind. 2001).

59. *Id.* at 157.

60. *Id.* at 157-58.

61. *Id.* at 158.

62. *Id.*

63. IND. CODE § 34-10-1-1 (1998) provides:

> Sec. 1. An indigent person who does not have sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as an indigent person.
>
> Sec. 2. If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court shall:
>
> (1) admit the applicant to prosecute or defend as an indigent person; and (2) appoint an attorney to defend or prosecute the cause.
>
> All officers required to prosecute or defend the action shall do their duty in the case without taking any fee or reward from the indigent person.

64. *Sholes*, 760 N.E.2d at 158.

> If those criteria are met, and there is no funding source or volunteer counsel, the court must determine whether the mandate of expenditure of public funds is appropriate in the case.[65]

The court reached this result through a complex series of arguments.

The first issue the court considered was whether appointment of counsel in a civil case is mandatory or discretionary under Indiana Code section 34-10-1. It noted that in 1999, the court of appeals had determined in *Holmes v. Jones*[66] that the plain language of the statute mandated appointment of counsel and did not leave the question to trial court discretion.[67] However, the process of appointment requires a multilevel inquiry. As Justice Boehm opined, appointment of counsel is not automatic upon indigency status but also requires that the indigent be without "sufficient means" to proceed.[68] How could one who is indigent have sufficient means? That might occur when the matter is one typically undertaken by nonindigents on a pro se basis (e.g., small claims matters), funded through a contingent fee, one to which a fee shifting statute applies, or is one for which a nonpaid volunteer attorney is available.[69] However, if both requirements are met—indigency and insufficiency—an attorney must be appointed. The question then becomes whether the attorney must be compensated. It is here that controversy arises and an element of court discretion is re-introduced.

According to the express terms of Indiana Code section 34-10-1-2 an appointed attorney is prohibited from collecting a "fee or reward from the indigent person."[70] In Justice Boehm's view, this language should not prohibit payment from other sources for several reasons. First, courts have inherent power to "incur and order paid all such expenses as are necessary for the holding of court and the administration of its duties,"[71] which has been codified in Trial Rule 60.5.[72] Second, no other legislation prohibits compensation. Third, if the

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65. *Id.* at 157.

66. 719 N.E.2d 843 (Ind. Ct. App. 1999).

67. Notwithstanding that the legislature attempted to modify this result, these attempts were not successful, so in the court's view, the statute had to be taken at face value. *Sholes*, 760 N.E.2d at 159 n.2.

68. *Id.* at 161.

69. *Id.*

70. IND. CODE § 34-10-1-2 (1998).

71. *Sholes*, 760 N.E.2d at 164 (quoting Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405, 413 (1940)).

72. Trial Rule 60.5(A) states:

> Courts shall limit their requests for funds to those that are reasonably necessary for the operation of the court or court-related functions. Mandate will not lie for extravagant, arbitrary or unwarranted expenditures nor for personal expenditures (e.g., personal telephone bills, bar association memberships, disciplinary fees).
>
> Prior to issuing the order, the court shall meet with the mandated party to demonstrate the need for said funds.

statute were read to require uncompensated appointment, then it would be unconstitutional for impressing the services of lawyers in violation of article 1, section 21 of the Indiana Constitution.[73]

While Justice Boehm recognized that attorneys have a duty to provide pro bono services—a point that was central to the dissent—he characterized it as an obligation of the whole profession that could not be imposed on a single attorney without violating the Indiana Constitution. In reaching this conclusion, the majority characterized the long and complex history of Indiana's commitment to making counsel available to litigants quite differently from Justice Dickson's characterization in dissent. The majority alleged that early cases construing article 1, section 21 of the 1851 Indiana Constitution stand for the proposition that attorneys, like all other persons, cannot have their labor "conscripted" by the states without compensation. Although the populist view of the profession (one which had allowed any voter to function as an attorney) was eventually replaced with a regulatory view that includes pro bono service as an ethical requirement,[74] that change did not impliedly except lawyers from the prohibition of unpaid services contained in article 1, section 21.[75]

In making this analysis, Justice Boehm had to confront *Board of Commissioners v. Pollard*,[76] which Justice Dickson read (along with other cases) to authorize mandatory unpaid representation.[77] Justice Boehm distinguished its facts, in that the *Pollard* attorney had already rendered the services in issue but had not been paid by the county. The *Pollard* court did not require the county to pay, distinguishing the payment obligation for criminal from civil cases. Nonetheless in dicta it stated, "An attorney at law cannot, in this state, be compelled by an order of a court to render professional services without compensation."[78] Noting that the *Pollard* court did not have to answer the question of what to do when no volunteer is available, Justice Boehm distinguished the case by concluding: "Although *Pollard* refused to hold that the statute required payment in civil cases, it also refused to press attorneys into uncompensated service."[79] Since *Pollard*, the inherent power of Indiana courts to order payment of monies to assist in the administration of justice has been established. Given this history, the *Sholes* majority found that when Indiana

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Trial Rule 60.5(B), in relevant part, states:

> Whenever a court . . . desires to order either a municipality, a political subdivision of the state, or an officer of either to appropriate or to pay unappropriated funds for the operation of the court or court-related functions, such court shall issue and cause to be served upon such municipality, political subdivision or officer an order to show cause why such appropriation or payment should not be made.

73. IND. CONST. art. 1, § 21.

74. *Sholes*, 760 N.E.2d at 163-64.

75. *Id.* at 164.

76. 55 N.E. 87 (Ind. 1899).

77. *Sholes*, 760 N.E.2d at 167 (Dickson, J., dissenting).

78. *Id.* at 162 (quoting Bd. of Comm'rs v. Pollard, 55 N.E. 87, 87 (Ind. 1899)).

79. *Id.*

Code section 34-10-1 mandates a lawyer's appointment in a civil matter, the attorney must be compensated, unless she or he volunteers to serve without pay.[80] This, however, does not end the analysis.

As an additional tier of inquiry the court reasoned that when an appointed lawyer seeks payment under Trial Rule 60.5, payment is only justified when circumstances warrant the serious measure of a court ordering compensation from general public funds. This final level of inquiry re-introduces discretion in the trial court's process of determining whether counsel must be made available in a civil matter. This is permissible because appointment of counsel in a civil case is statutory, not constitutional, and so can be balanced against other concerns:

> In most civil cases . . . we have only a statutory directive, and there is no constitutional requirement that counsel be appointed for indigent litigants . . . . As explained, before appointing counsel, the trial court is to consider the type of case presented to determine whether even an indigent applicant has "sufficient means" to proceed without appointed counsel. In addition, the trial court is obliged to consider whether any specific fiscal or other governmental interests would be severely and adversely affected by a Trial Rule 60.5 order requiring payment of any appointed counsel.[81]

The majority suggested several relevant factors for courts to consider, many of which involve the merits of the action at issue—whether, *inter alia*, the matter is "frivolous," whether it raises legal principles that are "insignificant," and whether it presents a "vendetta."[82] The court ordered a remand in *Sholes* for a determination of all these issues but underscored that: "If no uncompensated attorney is willing to serve and the trial court finds itself unable to order payment, then . . . the statutory obligation to appoint counsel fails as an unconstitutional order to attorneys to work without compensation."[83] Justice Boehm argued that if the statute were interpreted to obviate courts' discretion at this level, it would be an unconstitutional intrusion on the judiciary's inherent powers to administer justice.[84] Thus, while the *Sholes* majority requires appointment of counsel in a proper civil case, an indigent's actual ability to obtain representation is by no means assured.

4. Batson *Challenges*.—A decision that directly connects constitutional rights with procedural issues is *Ashabraner v. Bowers*,[85] a case that underscores the concern for diverse juries emanating from the Indiana Jury Rules themselves. The sequence of events in *Ashabraner* is important. The lawsuit was between

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80. *Id.* at 166.
81. *Id.* at 165-66.
82. *Id.* at 166.
83. *Id.*
84. *Id.*
85. 753 N.E.2d 662 (Ind. 2001).

two motorists whose cars collided.[86] During voir dire, the defendant's attorney exercised a peremptory challenge to the sole African-American potential juror. The plaintiff—who was not of the same race as the defendant—made a "*Batson*"[87] challenge to the striking of the juror, arguing that the juror's answers showed her to be neutral and intelligent; the inference was that the only basis for striking the juror must have been her race.[88] Defense counsel gave no real reason for the challenge[89] but simply assured the court it was not race-based. The trial court overruled the plaintiff's objection stating, "peremptory challenges can be utilized for any reason."[90] This statement indicated that the trial court had not followed the mandate of *Batson v. Kentucky*,[91] which establishes a two-tiered procedure for questioning. First, a prima facie case must be made by the objecting party that a challenge is race-based. If that is accomplished, the burden shifts to the peremptory challenger to give a race-neutral reason for the challenge. *Batson* was extended to civil cases in *Edmonson v. Leesville Concrete Co.*[92]

On review the court of appeals clearly applied *Batson*, but concluded that the plaintiff had not made a prima facie case that the challenge was race-based, so the defendant did not have to give a race neutral reason.

On transfer and by a 3-2 decision, the Indiana Supreme Court found the court of appeals' ruling erroneous. First, the court noted that *McCants v. State*[93] established that removing the sole juror of color from the venire is enough to establish prima facie racial discrimination—at least in a criminal matter. In the civil context, it is "evidence of discrimination that must weigh in the balance."[94] This evidence, coupled with the juror's neutral answers on voir dire and her apparent competency, was sufficient to shift the burden to the defendant to give a race-neutral explanation. The majority was particularly concerned that:

> "[W]hen a *Batson* objection has been made, [the objecting party] is entitled to the benefit of the proposition that peremptory challenges allow those inclined to discriminate to do so." By finding that a party has established a prima facie case where the only minority juror gave "neutral" answers to jury selection questions but was removed anyway, we recognize that there may be an unconstitutional discrimination where

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86. *Id.* at 664.

87. This is the informal reference to the requirement of *Batson v. Kentucky*, 476 U.S. 79 (1986), a criminal case, that when a pattern of peremptory challenges suggests racial bias, the challenger must provide a race-neutral explanation.

88. *Ashabraner*, 753 N.E.2d at 665.

89. Later, defense counsel explained that the strike was exercised in order to make room for another potential juror, a law student, whom the defense believed would be more understanding of the doctrine of res ipsa loquitur. *Id.* at 665 n.7.

90. *Id.* at 666.

91. 476 U.S. 79, 96-98 (1986).

92. 500 U.S. 614 (1991).

93. 686 N.E.2d 1281, 1284 (Ind. 1997).

94. *Ashabraner*, 753 N.E.2d at 667.

> the venire contained a single or a small number of minority jurors. We believe it appropriate that trial courts make a *Batson* investigation into potential discrimination in such circumstances.[95]

The Indiana Supreme Court concluded that the lower courts had not handled the first phase of *Batson*'s two-tiered procedure properly and remanded without reaching the second level of inquiry.[96] Nonetheless, it warned that an explanation for a challenge stating "I did not strike the juror because of race. I struck [the juror] because of the way I saw the jury panel being made up," is not sufficient under *Batson*'s mandate.[97] *Ashabraner* shows that the court will carefully scrutinize the compliance of Indiana's courts with the goal of removing racial discrimination in jury selection.

5. Tolling the Statute of Limitations.—With its decisions from *City of St. John* through *Ashabraner*, the court shows its clear willingness to confront difficult policy and theoretical questions,[98] yet its most significant recent opinions may be ones that impact the nuts and bolts of everyday civil litigation. Leading this group is *Ray-Hayes v. Heinamann*,[99] which resolves a split in the court of appeals over the steps to be taken to commence an action for purposes of tolling the statute of limitations. Moreover, because the court has determined that something more than mere filing with the clerk's office is required—a deviation from federal practice—the new requirements may pose a trap for the unwary.[100] A complete understanding of the Indiana requirements for commencement are essential to the litigator.

The ambiguity over what counts as the beginning of a case for purposes of tolling can be traced to the court's opinion in *Boostrom v. Bach*,[101] a small claims matter in which the court held that payment of the filing fee, and not the mere tender of the complaint to the clerk, is necessary to "commence" an action.[102]

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95. *Id.* at 668 n.10 (quoting Henry F. Greenberg, *Criminal Procedure*, 44 SYRACUSE L. REV. 189, 226 (1993)).

96. Chief Justice Shepard and Justice Dickson dissented, asserting that the trial court's comments did not show definitively that it had not followed *Batson*. In addition, they concluded that the defendant had complied with the second aspect of *Batson* by *volunteering* a race neutral reason for striking the juror. At that stage, the dissenters argued that the explanation need not be "persuasive or even plausible," *id.* at 669 (Dickson, J., dissenting), but rather that *Batson* contemplates a third level of inquiry when the trial judge, taking into account that the objector has the ultimate burden of persuasion on racial motivation for the challenge, has met that challenge. *Id.* at 669-70.

97. *Id.* at 666.

98. *See generally id.* (clarifying *Batson* objections for racial discrimination to peremptory strikes of potential jurors); State Bd. of Tax Comm'rs v. Town of St. John, 751 N.E.2d 657 (Ind. 2001) (rejecting private attorney general doctrine as basis for award of attorneys' fees).

99. 760 N.E.2d 172 (Ind. 2002).

100. *Id.* at 174.

101. 622 N.E.2d 175 (Ind. 1993), *cert. denied*, 513 U.S. 928 (1994).

102. *Id.* at 176-77.

The rationale was that "the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit."[103] In a footnote the court identified the necessary documents as the complaint, the summons and the filing fee.[104] Because *Boostrom* was a small claims case and turned on nonpayment of the filing fee, court of appeals' decisions were in conflict over its applicability to summonses and its precedential value for larger controversies.

In *Fort Wayne International Airport v. Wilburn*,[105] the plaintiff timely tendered the complaint and fee to the clerk of the circuit court, but did not provide the summons until shortly *after* the running of the statutory period. The court of appeals concluded the action was time-barred and treated the footnote in *Boostrom* (identifying the summons as an essential document) as controlling.[106] However, the court of appeals decisions in *Ray-Hayes*,[107] and later, in *Oxley v. Matillo*,[108] limited *Boostrom* to its particular facts and judged its references to the summons as dictum. They also justified doing so because current Trial Rule 3 provides literally that commencement of an action occurs by "filing a complaint with the court."[109] Thus it trumped the "dictum" in *Boostrom* so that the plaintiffs' tendering of their summonses after the limitations period did not bar their claims due to untimeliness. The Indiana Supreme Court granted transfer in *Ray-Hayes* and made it clear that *Boostrom*—broadly read—is controlling.

In *Ray-Hayes*, the plaintiff timely filed an amended complaint to add Nissan Motor Company as a new defendant on a products liability claim, but she did not tender the summons to the clerk until more than four months after the two-year limitations period had run.[110] On these facts, and by a 3-2 decision, the court found the action time-barred, citing *Boostrom*.[111] It also stated:

> Requiring that the summons be tendered within the statute of limitations is also good policy, because it promotes prompt, formal notice to defendants that a lawsuit has been filed. This not only helps to prevent surprise to defendants, but it also helps to reduce stagnation that might otherwise occur if the claims could be filed only to remain pending on

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103. *Id.* at 177.

104. *Id.* at 177 n.2.

105. 723 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).

106. *Id.* at 968.

107. 743 N.E.2d 777 (Ind. Ct. App.), *trans. granted sub nom.*, Nissan N. Am. v. Ray-Hayes, 2002 Ind. LEXIS 1 (Ind. 2001), *superceded by* Ray-Hayes v. Heinamann, 760 N.E.2d 172 (Ind. 2002).

108. 747 N.E.2d 1179 (Ind. Ct. App.), *trans. granted*, 2002 Ind. LEXIS 166 (Ind. 2001), *superceded by* 762 N.E.2d 1243 (Ind. 2002).

109. *Id.* at 1180; *see also* IND. TRIAL R. 3.

110. *Ray-Hayes*, 760 N.E.2d at 174.

111. *Id.*

court dockets without notified defendants.[112]

In addition to these policy concerns, imminent changes in Trial Rule 3 were a consideration for the majority.[113] These took effect on April 1, 2002 and explicitly require tender of the complaint (or its equivalent), payment of the filing fee, if any, and "furnishing to the clerk of the court as many copies of the complaint and summons as are necessary" to effectuate service, where service is required.[114] Now, to begin an Indiana action within any applicable limitations period, one must tender the complaint, the filing fee and the summons to the clerk.[115]

The issue of the steps needed to toll a statute of limitations is complicated by federal practice. The Federal Rules of Civil Procedure provide that an action is commenced on the filing of the complaint.[116] Federal Rule of Civil Procedure 4 details the requirements of proper service as a separate matter, but it does provide that if the summons and complaint are not served on the defendant within 120 days from filing the case must be dismissed without prejudice or the court must order a specific time within which service must be accomplished.[117] Federal cases establish that in federal matters, commencement occurs on the tendering of the complaint to the clerk,[118] and the Seventh Circuit has held that the even the filing fee is not necessary.[119] These differences in approach to tolling between the federal system and Indiana can cause confusion. This is especially true when a state claim is filed in federal court under diversity jurisdiction, and the federal court is confronted with the question of how to apply the *Erie* doctrine[120] in light of *Ray-Hayes*. The landmark case of *Hanna v. Plummer*[121] established that where a Federal Rule of Civil Procedure directly governs in a diversity action, it prevails over contrary state practice so long as it is a validly promulgated rule

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112. *Id.*

113. *See infra* notes 639-41 and accompanying text.

114. The new text of IND. TRIAL R. 3 provides:

> A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing an order waiving the fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.

115. In a dissent, with which Justice Dickson concurred, Justice Rucker pointed out that given the ambiguity in the law existing at the time the claim in *Ray-Hayes* was filed, it was not clear that plaintiff should have had her action time-barred, under a proper construal of T.R. 41(E) (procedure on dismissals), and T.R. 12(B)(6) (dismissals for failure to state a claim for relief). *Ray-Hayes*, 760 N.E.2d at 175 (Rucker, J., dissenting).

116. FED. R. CIV. P. 3.

117. FED. R. CIV. P. 4.

118. Henderson v. United States, 517 U.S. 654, 657 n.2 (1996).

119. *See* Robinson v. Doe, 272 F.3d 921, 922-923 (7th Cir. 2001), *reh'g en banc denied by* 2002 U.S. App. LEXIS 585 (7th Cir. 2002); *see also* FED. R. CIV. P. 5(e).

120. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

121. 380 U.S. 460 (1965).

under the Rules Enabling Act,[122] that is, so long as it is arguably procedural. However, in *Walker v. Armco Steel, Corp.*[123] the U.S. Supreme Court concluded that Federal Rule of Civil Procedure 3 does not speak directly to the issue of when a *state action* is commenced under the rule for purposes of tolling.[124] It held a case time-barred when the plaintiff had filed his tort claim within the state limitations period but did not achieve actual service on the defendant until after the statutory period ran.[125] These cases caution the litigator who practices both in Indiana and federal courts to pay attention to the possibility that the Indiana rule on tendering all essential documents, including the summons might not be applied in a diversity action.

6. Nonparty Defendant Notice and Product Identification for Purposes of Summary Judgment.—Another opinion with practical impact on everyday litigation decisions is *Owens Corning Fiberglass Corp. v. Cobb*.[126] It explores the proper standard for summary judgment when product identification is the issue, and it details the considerations governing timely notice of the nonparty defense.

In *Owens Corning Fiberglass* the plaintiff brought claims for products liability, negligence, strict liability and breach of warranty against thirty-three defendants in connection with his development of lung cancer from asbestos.[127] Owens Corning was one of the named defendants. It filed an answer presenting a plethora of affirmative defenses, including the nonparty defense and also reserved the right to object to the dismissal of any settling defendant and to amend its answer to identify such settling defendant as a nonparty.[128]

A little more than a year later, plaintiff Cobb and Owens Corning filed cross-motions for summary judgment. The plaintiff sought partial summary judgment on Owens Corning's affirmative defenses and Owens Corning, in turn, sought summary judgment on the theory that plaintiff could not carry his burden to show that he had ever been exposed to Owen Corning's products.[129] The trial court denied the Owens Corning motion for summary judgment without comment.

A few days later, Owens Corning opposed plaintiff's motion by a two-part strategy: it moved for leave to amend its answer to specifically identify other asbestos-producing nonparties—some of which had settled with plaintiffs and some of which had not—and it filed a response to plaintiff's motion in which it cross-referenced to the new answer and designated evidence as to each nonparty.

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122. 28 U.S.C. § 2072 (1999).

123. 446 U.S. 740, 752-753 (1980).

124. *Id.* at 748-51.

125. *Id.*

126. 754 N.E.2d 905 (Ind. 2001).

127. *Id.* at 907.

128. Following the Indiana Supreme Court's opinion last year in *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140 (Ind. 2000), a settling defendant must be identified as a nonparty after dismissal so that credit for sums paid in settlement in the context of comparative negligence is subject to the jury process.

129. *Owens Corning Fiberglass*, 754 N.E.2d at 908.

Owens Corning argued that it thereby created a material issue as to whether it could meet its burden of proof that the nonparties had contributed to plaintiff's condition. Cobb countered that Owens Corning had not met its burden on product identification for the nonparties. Moreover he claimed the answer should not be allowed because timely notice of nonparties had not been given. The trial court granted plaintiff's motion for partial summary judgment and denied the motion to amend.[130]

Although the defendant had the burden of proof on the nonparty defense,[131] the Indiana Supreme Court characterized the cross-motions for summary judgment as "mirror images"[132] of each other. Both parties were attempting to exploit the paucity of evidence on product identification—Owens Corning alleged that plaintiff had not shown a triable issue as to whether its product caused his injuries; Cobb alleged that Owens Corning had not shown a triable issue as to whether any of the nonparties' products contributed to his condition. But in both instances, the court concluded that each had mustered enough evidence to avoid summary judgment[133] and that it need not apply *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*[134] Nonetheless, the issue of the timely identification of the nonparties was still central.

According to the court, the main purposes of notice are to allow the plaintiff an opportunity to join the nonparty as an additional named defendant prior to the running of the statute of limitations[135] and, secondarily, to apprise the plaintiff of defense strategy. Thus, Indiana Code section 34-4-33-10(c)[136] requires designation of nonparties with "reasonable promptness." But, the reasonablity of notice depends on when the defendant becomes aware that there is a nonparty

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130. *Id.* The trial court did allow amendment to name one entity as a nonparty, Rutland Fire Clay. As the Indiana Supreme Court noted, this was inconsistent with the ruling in plaintiff's favor granting summary judgment on all affirmative defenses. *See id.* at 912 n.11. After trial, the jury awarded almost $700,000 in compensatory damages against Owens Corning and $15 million in punitive damages, which the trial court remitted in conformity with Indiana legislation capping punitive damages. *Id.* at 908.

131. *See* Cornell Harbison Excavating, Inc. v. May, 546 N.E.2d 1186, 1187 (Ind. 1989); IND. CODE § 51-2-15 (1999).

132. *Owens Corning Fiberglass*, 754 N.E.2d at 913.

133. Cobb's testimony that he had seen defendant's product, Kaylo, in sites where he had worked was sufficient to create a genuine issue regarding whether Owens Corning's product were a cause of his lung cancer. Similarly, Cobb's testimony that he purchased and used various asbestos-containing goods from nonparty defendant, Sid Harvey, should have precluded summary judgment on Owens Corning's motion at least with regard to it. *Id.*

134. 644 N.E.2d 118, 123 (Ind. 1994). By the opinion in *Jarboe*, Indiana rejects the approach to summary judgment established for the federal courts in *Celotex Corp. v. Catnett*, 477 U.S. 317 (1986).

135. *See Owens Corning Fiberglass*, 754 N.E.2d at 913-14.

136. IND. CODE § 34-4-33-10(c) (1998) (repealed by P.L. 1-1988, Sec. 201) (current version at IND. CODE § 34-51-2-16 (1999)).

to be identified. In the case of a defendant who is dismissed,[137] this awareness can come late in the proceedings. Moreover, when the plaintiff has knowledge of the existence and identity of a potential nonparty—which is certainly the case with a settling defendant—the plaintiff cannot logically be prejudiced by delay in identifying the nonparty. Thus the court stated: "No violence is done . . . by permitting a defendant to assert a nonparty affirmative defense reasonably promptly after receiving notice that a named party defendant has been dismissed from the lawsuit."[138] Because Owens Corning did not move to amend its answer as to certain nonsettling and nonjoined entities for more than one year after it knew or should have known their identities, the timeliness of notice was not met as to them. However with regard to one defendant that had settled with the plaintiff, notice was reasonably prompt and the motion to amend was not too late. Thus, the trial court committed reversible error when it granted plaintiff summary judgment on Owens Corning's nonparty defense relating to that entity.

7. Availability of Wrongful Death Remedies.—The topic of remedies blurs the distinction between procedure and substance. In 2001, the Indiana Supreme Court decided a quartet of cases clarifying the remedies available under the wrongful death and child wrongful death statutes, primarily in regard to punitive damages. The most important of these is *Durham v. U-Haul International*.[139] It explicitly prohibits recovery of punitive damages for wrongful death and it overrules *Burk v. Anderson*,[140] which had excluded loss of consortium damages from the scope of the statute.

In *Durham*, a driver was killed in a head-on collision with a U-Haul truck. The driver's husband and ex-husband sued for wrongful death as co-representatives on behalf of her estate. Her husband also filed an independent common law claim for loss of consortium. All plaintiffs sought punitive damages. On reconsideration, the trial court granted partial summary judgment in favor of all defendants on punitive damages, but denied summary judgment as to the loss of consortium claim. The court of appeals affirmed in part and reversed in part. Most importantly, it held that sound policy reasons support recovery of punitive damages in a wrongful death action, and so reversed on that ground. The Indiana Supreme Court granted transfer and, in an opinion written by Justice Boehm, identified three issues raised by the case—whether punitive damages are recoverable under the wrongful death statute; whether excluding them from recovery would be unconstitutional; and whether loss of consortium—and punitive damages premised on it—survives as an independent claim outside the purview of the statute.[141]

At common law, one who killed the victim of his or her tortious conduct

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137. This is especially true where the dismissal is pursuant to settlement, and the nonparty should be identified pursuant to *Mendenhal v. Skinner & Broadbent Co.*, 728 N.E.2d 140 (Ind. 2000).

138. *Owens Corning Fiberglass*, 754 N.E.2d at 915.

139. 745 N.E.2d 755 (Ind. 2001).

140. 109 N.E.2d 407 (Ind. 1952).

141. *Durham*, 745 N.E.2d at 758.

outright could escape paying any compensation, because the victim's personal cause of action was extinguished by death.[142] Wrongful death statutes were enacted to remove this injustice and provide deterrence. They have been strictly construed to give only a narrow remedy to dependents of the deceased to compensate them for the pecuniary losses caused by the death.[143] The Indiana General Assembly adopted the state's first wrongful death statute in 1852 and has repeatedly amended it.[144] In all its permutations, the statute has never explicitly mentioned the topic of punitive damages.[145] Relying on the doctrine of "legislative acquiescence," the court concluded that punitive damages are not available under the statute notwithstanding the statutory gap.

The plaintiffs argued that since the ban on punitive damages under the statute was judicially created, it could be judicially removed. Justice Boehm disagreed, positing that the legislature's long failure to amend the statute in the face of case law disallowing punitive damages expressed its agreement with the judicial interpretation. He noted that the legislative response to Indiana cases construing the child wrongful death statute shows how swiftly the legislature can act when it disagrees with the courts' interpretation[146] and he argued that the legislature's lack of action suggests it agreed with the conclusion of courts that punitive damages were not available.[147] In the majority's view, this, along with the doctrine of stare decisis, restricted its discretion to allow punitive damages as a element of recovery:

> [I]f a line of decisions of this Court has given a statute the same construction and the legislature has not sought to change the relevant parts of the legislation, the usual reasons supporting adherence to

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142. *Id.*; *see also* DAN B. DOBBS, LAW OF REMEDIES § 8.3(1) (2d ed. 1993).

143. *See Durham*, 745 N.E.2d at 758.

144. *Id.* at 758-59.

145. *Id.* at 758. Justice Boehm noted that, in contrast, the wrongful death statute governing unmarried adults does expressly prohibit punitive damages. *Id.* at 758-59. He also noted that the child wrongful death statute provides a specific, enumerated list of recoverable items and does not mention punitive damages. *Id.* at 759. *See also infra* text accompanying notes 166-74, discussing *Forte v. Connerwood Healthcare*, 745 N.E.2d 796 (Ind. 2001), in which the court construed the child wrongful death statute to prohibit punitive damages.

146. *Durham*, 745 N.E.2d at 761. One the cases relied on was *Andis v. Hawkins*, 489 N.E.2d 78 (Ind. Ct. App. 1986). It held that recovery for love and affection was not available under the statute. The legislature immediately responded with an amendment making it clear that such items are recoverable. Justice Boehm argued that though this was an appellate opinion, it should be treated as if the appellate court were one of last resort due to the difficulty of civil cases making their way to the Indiana Supreme Court as a result of the requirement that the court review so many criminal cases. *Durham*, 745 N.E.2d at 760-61 & 761 n.2.

147. *Id.* at 761. The court cited *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *Herriman v. Conrail, Inc.*, 887 F. Supp. 1148 (N.D. Ind. 1995); *Kuba v. Ristow Trucking Co.*, 508 N.E.2d 1 (Ind. 1987); and *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990) as the cases establishing judicial construction of the statute to preclude punitive damages.

> precedent are reinforced by the strong probability that the courts have correctly interpreted the will of the legislature.[148]

In addition, the court noted that since the wrongful death statute derogates the common law it should be strictly construed. Finally, the majority disagreed with the court of appeals' claim that Indiana law showed a general trend in favor of punitive damages.[149]

Turning to the constitutional question, the court construed the issue under the Federal Constitution because the plaintiffs had not challenged the exclusion of punitive damages under the state constitution. The plaintiffs alleged that not allowing punitive damages violated the Equal Protection Clause.[150] The court scrutinized the statute using the "rational basis" analysis. Finding that the goal of the wrongful death statute is to compensate statutory beneficiaries for the pecuniary loss caused by the victim's death, the court did not punish the defendants. The court reasoned that the statute passed muster because it rationally advanced that goal.[151] In addition, the court found that the statute reflects the "qualitative difference" between injuries to tort victims themselves and harms to their survivors caused by their deaths.[152]

This left the third question to be addressed: what was the status of the husband's loss of consortium claim?[153] In resolving this question, the court gave the plaintiff half a loaf. Justice Boehm began the analysis by noting that loss of consortium is derivative of a victim's personal injury claim. Moreover, allowing such a claim to survive independent of the statute would promote easy circumvention of the ban on punitive damages.[154] Because these factors militated in favor of including consortium claims within the purview of the legislation, the court overruled *Burk v. Anderson*,[155] which had indicated that the cause of action for loss of consortium did survive outside the statute.

This conclusion did not mean that the period for which recovery was

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148. *Durham*, 745 N.E.2d at 759 (citing Heffner v. White, 47 N.E.2d 964, 965 (1943)).

149. *Id.* at 762-63. Justices Rucker and Dickson dissented. They argued that the legislative history cuts both ways—the failure of the legislature to speak on the issue of punitive damages at the same time that it responded specifically regarding the unmarried persons and child wrongful death statutes could just as easily lead to the inference that availability of punitive damages under the wrongful death statute itself was, at a minimum, an open question. *Id.* at 767-68 (Rucker, J. dissenting). Moreover, they asserted that the doctrine of legislative acquiescence was *not* applicable because it required legislative inaction in the face of a clear line of cases by the state's highest court—a factor not present here in their view. *Id.* at 768. Their dissent is especially significant because Justice Boehm himself noted that the policy arguments in favor of punitive damages under the wrongful death statute were persuasive had the court been writing on a clean slate.

150. *Id.* at 763-64.

151. *Id.*

152. *Id.* at 764.

153. *Id.*

154. *Id.* at 764-65.

155. 109 N.E.2d 407 (Ind. 1952).

available was similarly limited to the contours of the common law. Although most states treat consortium claims as covering only the period between the victim's injury and the date of death, the court concluded that simply because death extinguishes the common law claim for post-mortem consortium damages does not mean they are excluded under the wrongful death statute.[156] It held that damages for consortium thereunder can cover losses to the date of the surviving spouses's death in a proper case.[157] The court also noted that the traditional items of damage for consortium are included in the wrongful death claim; however, consistent with the main holding that the wrongful death statute does not support punitive damages, they are not available for the consortium elements as well.

Bemenderfer v. Williams[158] is a companion case with *Durham* and is also authored by Justice Boehm. It further refined how loss of consortium should be handled under the wrongful death statute and specifically addressed the problem of the death of a beneficiary which occurs after filing but before verdict. In *Bemenderfer*, the decedent's death was allegedly caused by a doctor's negligence.[159] The victim's elderly husband suffered from Alzheimer's disease, and she had cared for him at home. A lawsuit was filed naming the husband and decedent's daughter as plaintiffs.[160] Soon after the wife's death, the husband had to be put in a nursing home and he died relatively quickly. The inference that the wife's absence hastened his death was strong.[161] His daughter was substituted as the party plaintiff in his place, but the doctor moved for summary judgment arguing that the husband's death precluded wrongful death recovery for the pecuniary loss to him and further, that his consortium claim only covered the three days between decedent's injury and her demise.[162] The Indiana Supreme Court rejected both arguments.

Citing to *Durham*, the court reiterated that consortium claims are subsumed by the wrongful death statute.[163] In contrast to *Durham*, the court denied that any doctrine of legislative acquiescence applied to the issue of the effect of a beneficiary's death prior to verdict.[164] Consequently, the court was free to consider the policy questions directly. Recognizing that the death of the beneficiary can give a defendant a windfall, the court held that a beneficiary may recover damages from the decedent's death up to the beneficiary's death and that these damages are an asset of the beneficiary's estate.[165]

In *Forte v. Connerwood Healthcare Inc.*[166] the issue was whether punitive

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156. *Durham*, 745 N.E.2d at 765.
157. *Id.*
158. 745 N.E.2d 212 (Ind. 2001).
159. *Id.* at 214.
160. *Id.*
161. *Id.* at 214-15.
162. *Id.* at 215.
163. *Id.* at 216.
164. *Id.*
165. *Id.* at 218-19.
166. 745 N.E.2d 796 (Ind. 2001).

damages could be recovered under the child wrongful death statute. There a disabled child died within days of being admitted to a nursing home.[167] The child's mother filed an action for compensation under a complaint that was pled very generally. She also asked for punitive damages. Defendants moved for partial summary judgment, claiming that punitive damages are not recoverable under the Child Wrongful Death Act.[168] The plaintiff responded that punitive damages were allowable and that her complaint could be read to include an independent loss of consortium claim supporting punitive damages.[169] On interlocutory appeal, the court of appeals affirmed the trial court's conclusion that the mother had no statutory right to punitive damages, but treated the consortium argument as a claim for loss of the child's services that survived the wrongful death statute.[170]

In an opinion by Justice Rucker, the court first reviewed the child wrongful death statute and noted that it contains a highly specific list of damages. This list does not include punitive damages.[171] Because the statute is in derogation of the common law and therefore should be strictly construed, the court concluded that the statute did not include claims for punitive damages.[172] However, in contrast to the analysis in *Durham*, the court allowed loss of services as an independent tort, but argued that the tort does not support punitive damages either.[173] Justice Rucker reached this conclusion on the premise that loss of services is derivative of the personal injury claims of the victim. In the absence of legislation and following the common law approach, the cause of action dies with the child.[174]

Finally, in *Elmer Buchta Trucking, Inc. v. Stanley*[175] the court had to determine whether the 1965 amendments to the wrongful death statute dispensed with the requirement that the decedent's expenses be deducted from the damages to beneficiaries for pecuniary loss.[176] These amendments established three groups of beneficiaries and designated the personal representative of the estate as the proper party plaintiff.[177] The estate receives compensation for discrete pecuniary losses for funeral, medical, and hospital expenses and the beneficiaries receive the remainder of any recovery.[178] The statute does not expressly require a deduction for monies the decedent would have spent personally or for his or her own maintenance. Noting that the language dictating recovery for "lost earnings" could support interpretations both requiring and excluding the deduction, the

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167. *Id.* at 798.
168. *Id.*
169. *Id.*
170. *Id.* at 798-99.
171. *Id.* at 800.
172. *Id.*
173. *Id.* at 802-03.
174. *Id.* at 803.
175. 744 N.E.2d 939 (Ind. 2001).
176. *Id.* at 940-41.
177. *Id.* at 941.
178. *Id.*

majority treated the statute as ambiguous.[179] Noting that cases construing the statute had characterized it as a remedy for pecuniary loss and being concerned with the over-compensation that would arise if a deduction was not made, the court stated: "That juries should account for actual financial loss has been held the object of the statute from the Nineteenth Century through to the last two decades. We cannot find legislative desire to alter that formula in the relatively general amendments adopted thirty-six years back."[180] The defendant should have been able to introduce evidence as to the expenses the decedent would have incurred during his lifetime.

B. Other Significant Indiana Supreme Court Decisions

1. Appeals.—The court used the controversy in *GKN Co. v. Magness*,[181] as an opportunity to clarify the standard of appellate review when scrutiny of a Rule 12 motion to dismiss for lack of subject matter jurisdiction is the issue. There the question concerned whether the plaintiff cement truck driver was a dual employee for purposes of the worker's compensation statute.[182] The trial court made its ruling on the basis of a paper record, and dismissed the case without making findings as to disputed facts.[183]

In a unanimous opinion authored by Justice Rucker, the court established as a general principle that

> a review of the case authority shows that the standard of appellate review for Trial Rule 12(B)(1) motion to dismiss is indeed a function of what occurred in the trial court. That is, the standard of review is dependent upon: (i) whether the trial court resolved disputed facts; and (ii) if the trial court resolved disputed facts, whether it conducted an evidentiary hearing or ruled on a "paper record."[184]

Where no disputed evidence is at issue, the matter is a pure question of law and therefore the standard of review is de novo.[185] However, even if facts are disputed, where the trial court rules on a paper record and conducts no evidentiary hearing, the standard of review is also de novo because the appellate court is in the same position as the trial court to judge the evidence.[186] Justice Rucker reiterated that the trial court's ruling will be sustained on any applicable legal theory and that, in the case of a paper record review, "we will reverse on the basis of an incorrect factual finding only if the appellant persuades us that the

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179. *Id.* at 942.
180. *Id.* at 943.
181. 744 N.E.2d 397 (Ind. 2001).
182. *Id.* at 400.
183. *Id.*
184. *Id.* at 401.
185. *Id.*
186. *Id.*

balance of the evidence is tipped against the trial court's findings."[187] The court went on to conclude that, applying the factors for dual employee status developed in *Hale v. Kemp*,[188] the trial court had correctly dismissed the action, despite the absence of findings.[189]

In addition to the question of appellate review, the court also addressed burdens of pleading and proof. Despite the strong public policy of subsuming employee injury claims under the Worker's Compensation Act, Justice Rucker stated that coverage under the statute is an affirmative defense that must be raised by the defendant and that the defendant has the burden of proof on the question unless "the employee's complaint demonstrates the existence of an employment relationship . . . . Thus we disapprove of the language in those cases declaring that once an employer raises the issue of the exclusivity of the Act, the burden automatically shifts to the employee."[190]

Tom-Wat, Inc. v. Fink,[191] is an important case that sheds light on the court's standards for appellate review of personal jurisdiction challenges, the scope of appeal from interlocutory orders, and late affidavits on summary judgment, among other issues.

The case involved a trade debt between Tom-Wat, Inc. ("Tom-Wat"), a Connecticut corporation, and George Fink ("Fink"), an Indiana sole proprietor.[192] When Fink failed to pay for goods ordered, Tom-Wat sued him in a Connecticut state court and obtained a default judgment.[193] In 1994, Tom-Wat filed an action to enforce this judgment in an Indiana state court, and Fink both answered and moved to dismiss the action for lack of personal jurisdiction over him in Connecticut.[194] Because he attached an affidavit to his motion to dismiss, the Indiana Supreme Court treated it as a motion for summary judgment based on invalidity of the Connecticut judgment. However, the affidavit gave no specific information as to the jurisdictional facts.[195] In the trial court, Tom-Wat had timely filed opposition and designated particular facts as creating genuine issues for trial. A month later, Tom-Wat filed its own cross-motion for summary judgment, which it supported by designations of facts and an affidavit.[196] In the summer of 1995, Tom-Wat requested a hearing on its motion for summary judgment and reiterated that request in 1997. A hearing was set, but Fink requested a continuance, which was granted. The matter was finally heard in March 1998.[197]

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187. *Id.*
188. 579 N.E.2d 63 (Ind. 1991).
189. *GKN*, 744 N.E.2d at 402.
190. *Id.* at 404.
191. 741 N.E.2d 343 (Ind. 2001).
192. *Id.* at 345.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

Two days before this hearing Fink filed a designation of material facts and two affidavits alleging, among other things, that he had never been to Connecticut and that he had contracted to buy the goods in a meeting in Louisiana. On the basis of this information, Fink's only connection with Connecticut was his purchase of goods from a Connecticut corporation while outside the state. Tom-Wat then moved to strike this material for lateness. No ruling on that motion was evident from the record and the transcript of the hearing on all motions was lost.[198] The trial judge denied both Fink's motion to dismiss and Tom-Wat's motion for summary judgment and then recused himself. Tom-Wat filed an interlocutory appeal from the order denying the motions for summary judgment, but alleged that the trial court had actually stricken Fink's new material.[199]

The court tackled this procedural morass by first noting that on interlocutory appeal every issue entailed by the order appealed from must be reviewed. Although the cross-motions for summary judgment were mutually inconsistent, because the trial court denied both, the Indiana Supreme Court had to review the matters raised by each.[200] Citing to *Anthem Insurance Co. v. Tenet Healthcare Corp.*,[201] which was decided just last year, Justice Boehm reiterated that "personal jurisdiction is a question of law and, as such, it either exists or does not."[202] Where there is no question as to the jurisdictional facts, the appellate court will make a "final determination" of the issue, taking into account the normal standard on review of summary judgment, that is, one which is the same as that which applies at the trial level. This standard construes all facts and reasonable inferences therefrom in favor of the nonmoving party and requires that the moving party show that no genuine issue of material fact exists to be resolved.[203]

From the court's perspective, there was no dispute over the operative facts regarding Fink's connection with Connecticut—"In sum, the facts established by both parties present a familiar pattern: Buyer . . . is never physically present in Seller's . . . state, but places an order . . . with Seller to be shipped from Seller's facility in Seller's state."[204] To reach this characterization, the court had to consider the facts in Fink's late-filed affidavits. This is consistent with the court's opinion in *Indiana University Medical Center v. Logan*,[205] which authorized trial court discretion to consider late-filed affidavits. It then treated the procedural history of the case as if the trial court had denied the motion to strike and found that this was not an abuse of discretion.[206] The later-presented

198. *Id.*
199. *Id.* at 345-46.
200. *Id.* at 346.
201. 730 N.E.2d 1227 (Ind. 2000).
202. *Tom-Wat*, 741 N.E.2d at 346.
203. *Id.*
204. *Id.* at 347.
205. 728 N.E.2d 855 (Ind. 2000).
206. *Tom-Wat*, 741 N.E.2d at 347.

material was supplemental to the earlier conclusory affidavit of Fink and did not really present facts different from those relied on by Tom-Wat.[207] This left the merits of the personal jurisdiction question for determination.

The court resolved this by asserting that under both federal and Indiana law, Fink had the burden of showing the invalidity of the Connecticut judgment due to lack of personal jurisdiction.[208] It pointed out that the Connecticut approach to personal jurisdiction parallels the analysis adopted by Indiana in *Anthem*[209]—that is, in both states a defendant's activities must fit within the long arm statue of the jurisdiction and the long arm as applied must comport with due process.[210] For Justice Boehm, whether the Connecticut judgment should be enforced rested ultimately on federal principles, which require that the defendant's activities show minimum contacts with the forum and that jurisdiction not be so unfair as to be unreasonable.[211] While under federal cases, one contact might be enough to satisfy the minimum contacts prong of the analysis, it would be too unfair to require a one time, out-of-state purchaser with no other connections to Connecticut to go there to defend himself. Based on the facts before it, the Indiana Supreme Court concluded that the Connecticut judgment could not be enforced.[212] However, because it conceded that Tom-Wat might not have had an adequate opportunity to respond to Fink's late-filed affidavits, the court remanded the action to the trial court.[213] Again, the Indiana Supreme Court has shown that it will give parties opposing summary judgment every opportunity to show genuine issues for trial.

Finally, in *Bemenderfer v. Williams*,[214] previously discussed in connection with the wrongful death,[215] the court reviewed the proper procedure for appeal from a nonfinal order. In *Bemenderfer*, the trial court denied the defendant-doctor's motion for partial summary judgment.[216] Thereafter, rather than following the certification procedure for interlocutory appeals, a procedure which requires the court of appeals to accept jurisdiction before the appeal can proceed, the trial court signed an "Agreed Final Judgment and Agreement Preserving the Issue of the Appropriate Measure of Damages"[217] to create a final judgment pursuant to Rule 54(B).[218] The court of appeals then reviewed the decision and affirmed. On transfer, the Indiana Supreme Court pointed out that, as a private agreement between the parties, the "Agreed Judgment" was not an appealable

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207. *Id.*
208. *Id.* at 348.
209. Anthem Ins. Co. v. Tenet Healthcare Corp., 730 N.E.2d 1227 (Ind. 2000).
210. *Tom-Wat*, 741 N.E.2d at 348.
211. *Id.* at 348-50.
212. *Id.* at 350.
213. *Id.*
214. 745 N.E.2d 212 (Ind. 2001).
215. *See supra* notes 158-65.
216. *Bemenderfer*, 745 N.E.2d at 219.
217. *Id.* at 215 n.2.
218. IND. TRIAL R. 54 (B).

final judgment.[219] Because both the trial court and the court of appeals treated the matter as appealable and remanding for certification would only delay resolution of the merits, the court exercised its discretion to grant review.[220] However, it is clear that the Indiana Supreme Court disapproved of this method of attempting to construct appellate jurisdiction.

2. Attorney Solicitation.—In Re Murgatroyd[221] is an interesting per curiam opinion that blends issues of personal jurisdiction and subject matter jurisdiction in the context of attorney discipline. It involved solicitation of potential Indiana clients by two out-of-state California lawyers. The lawyers sent targeted mail to families and victims of a 1992 Indiana airliner crash offering representation without following the Indiana professional conduct rules restricting such solicitation.[222] In prior litigation, the respondents had challenged Indiana's personal jurisdiction over them directly and lost.[223] In the case before the court, the specific issue was the Indiana Supreme Court's regulatory power to impose discipline over out-of-state lawyers pursuant to an agreed judgment. Chief Justice Shepard wrote:

> Notwithstanding the fact that the respondents hold no Indiana law licenses and therefore are not subject to this Court's usual disciplinary sanctions for licensed Indiana attorneys who engage in professional misconduct, any acts which the respondents take in Indiana that constitute the practice of law are subject to our exclusive jurisdiction to regulate professional legal activity in this state. By directing the solicitations to the prospective clients, the respondents communicated to those persons that they were available to act in a representative capacity for them in Indiana courts .... As such, they held themselves out to the public as lawyers in this state when neither was admitted to practice here. Those acts constituted professional legal activity in this state subject to our regulatory authority.[224]

The court concluded that while it may not directly subject the law license of another state to discipline, it can impose penalties on persons for professional misconduct that occurs *in* Indiana.[225]

3. Corporate Privacy Rights and Injunctions.—Felsher v. University of Evansville,[226] is a significant torts and injunction case. Most important, it establishes as a matter of first impression that a corporation does not have a common law right of privacy where there is an alleged misappropriation of its name and likeness. It also reiterates that injunctive relief must be narrowly

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219. *Bemenderfer*, 745 N.E.2d at 215 n.2.
220. *Id.*
221. 741 N.E.2d 719 (Ind. 2001).
222. *Id.* at 720.
223. *Id.*
224. *Id.* at 720-21 (footnotes omitted).
225. *Id.* at 722.
226. 755 N.E.2d 589 (Ind. 2001).

tailored.

The defendant, a former University of Evansville professor, created a website and e-mail accounts that purported to be those of the university and certain of its officials. He used these means to pursue a vendetta against the university and others. One of his activities was to nominate university personnel for positions with other institutions. The University of Evansville and several of the individuals he targeted sought an injunction against him for violation of their rights to privacy. Summary judgment was granted for all defendants and a permanent injunction issued.

On transfer, the supreme court rejected the privacy theory insofar as the university was concerned, holding that a corporation has no privacy right to vindicate and should pursue business-related causes of action for misappropriation. This had procedural implications, for although the court concluded that other state claims unrelated to privacy would authorize injunctive relief for the university, for example, state unfair competition, the injunction could not be affirmed as to the university on those grounds because they had not been presented in the pleadings. The court also stressed that in reviewing grants of summary judgment it will carefully scrutinize prior proceedings to insure that the nonmoving party has not been deprived of its day in court. Moreover, in passing on the more substantive issues raised by the case, the court noted that the defendant professor could not raise an issue for the first time on appeal by reply brief. Finally, the court found that the injunctive order issued was overbroad insofar as it prohibited the defendant from nominating individuals for positions in his own name and narrowed it to exclude this prohibition.

4. Juries.—Rogers v. R.J. Reynolds Tobacco,[227] combined issues of harmless error and a trial judge's *ex parte* communication with a jury. The case involved claims brought by the widow of a smoker and had been previously appealed after the grant of summary judgment for defendants. In connection with the trial on remand, one of the jurors asked the bailiff whether the jury could hold a press conference after the verdict. The trial judge was informed and responded to the jury via the bailiff simply, "yes."[228] On appeal, the Indiana Supreme Court found this to be harmless, although the process violated the requirement that when the jury has questions or requests of the court, the parties are to be notified so they may be present and have knowledge of the judge's response before it is communicated to the jury.[229] The court suggested that one important factor for determining whether a judge's *ex parte* communication to a jury is harmful is to scrutinize the reaction of the jury, and particularly whether it returns a verdict shortly thereafter.[230]

5. Law of the Case.—In *City of New Haven v. Reichhart*,[231] the court was faced with an issue of first impression: whether the First Amendment right to

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227. 745 N.E.2d 793 (Ind. 2001).

228. *Id.* at 795.

229. *Id.*

230. *Id.*

231. 748 N.E.2d 374 (Ind. 2001).

petition the government prohibits an official entity from bringing a malicious prosecution claim against a person who exercises a statutory right to challenge governmental action.[232] However, the court did not reach the constitutional question, determining that the dispute could be resolved on other grounds.[233] In the case, the plaintiff-taxpayer was an employee of a business that would have been adversely affected by an annexation ordinance adopted by the city of New Haven. The employer funded a lawsuit brought to challenge the city's process as a violation of the Open Door Act and to challenge the ordinance itself. A temporary restraining order was granted to plaintiff on the Open Door grounds; thereafter the city rescinded the ordinance.[234] However, it filed a counterclaim against plaintiff for abuse of process. The plaintiff sought summary judgment thereon, which was denied. The court of appeals reversed, finding that the plaintiff's suit was not improper and summary judgment should have been granted. While the interlocutory appeal was pending, the city amended its complaint on remand to present a claim for malicious prosecution.[235] Later, the plaintiff argued that the court of appeals' ruling on abuse of process was the law of the case and presented other challenges to support a motion to dismiss the malicious prosecution claim. The motion was granted and then affirmed by the court of appeals, which held that its previous ruling on abuse of process was not the law of the case as to malicious prosecution, but that the First Amendment did bar such a cause of action.[236]

The Indiana Supreme Court affirmed, but on other grounds. It agreed with the court of appeals on the law of the case issue, pointing out that the elements of both theories are distinct, so that the city was not precluded by the prior ruling on the element of probable cause.[237] Rather than reaching the constitutional question, the court concluded that no probable cause to bring the action existed on the facts of the case.[238]

6. Local Rules.—Buckalew v. Buckalew[239] raised the issue of whether a trial court's failure to follow a local rule is jurisdictional, rendering its actions thereafter void. In a dissolution proceeding, the trial court allowed the filing of a financial disclosure form, although both parties were not represented by counsel as explicitly required by a Howard County local rule.[240] The wife filed for relief from the judgment, which was denied. On appeal, she argued that the trial court's action was void.[241] Writing for a unanimous court, Justice Dickson

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232. *Id.* at 378.
233. *Id.* at 379.
234. *Id.* at 376-77.
235. *Id.* at 377.
236. *Id.*
237. *Id.* at 379.
238. *Id.*
239. 754 N.E.2d 896 (Ind. 2001).
240. *Id.* at 897.
241. *Id.*

disagreed. Notwithstanding *Meredith v. State*,[242] which suggested that some local rules involving the substantive rights of the parties are mandatory and cannot be waived, Justice Dickson declared that the wife's attempt to characterize the question as one of jurisdiction was incorrect.[243] He pointed out that there are only two requisites for trial court jurisdiction—competency over the subject matter and personal jurisdiction over the defendant. When both are present, there is no jurisdictional defect, although there may be reversible error in the manner in which the court employs its jurisdiction. In general, the failure to follow a local rule leads to error which might provide the basis for appeal, but does not render a judgment void *ab initio*.[244]

7. New Trial Versus Judgment on Evidence.—In *Neher v. Hobbs*[245] the Indiana Supreme Court gave guidance as to the findings and procedures needed for a new trial motion to be properly granted. The case involved a collision between a van and an automobile. The van driver brought a claim for damages for his injuries and his wife presented a claim for loss of consortium and services. Although the jury found the automobile driver was at fault, it awarded the van driver no damages for his injuries and found for the automobile driver on the wife's claims. The plaintiffs filed a motion to correct error, which was granted and the trial court ordered a new trial. The car driver appealed, arguing that the trial court had not made the proper findings and followed the proper procedure in advance of giving the remedy of a new trial, especially one premised on the idea that the jury's verdict was against the weight of the evidence. The van driver filed a cross-appeal. The court of appeals reversed.

On transfer and in an opinion by Justice Dickson, the Indiana Supreme Court discussed the requirements of a new trial motion and distinguished between the findings necessary when the ground for granting such a motion is that it is against the weight of the evidence versus the ground that it is clearly erroneous. In the latter circumstance, the trial court does not have to set forth the evidence both supporting and opposing the verdict in findings. Disagreeing with the defendant, the court concluded that the basis for the new trial order was that the verdict was clearly erroneous and it concluded that the findings sustained the new trial relief. The defendant also argued that the court was required to show why it did not grant judgment on the evidence rather than ordering a new trial. The supreme court rejected this claim of error as well, noting that the explanation process under Indiana Trial Rule 59 is designed to assist the appellate court on review; in the case before it, the reasons for not using the judgment on the evidence procedure were clear from the trial court's findings–the verdict was clearly erroneous because no damages were awarded though the defendant was at fault. In that circumstance, the trial court could not assess damages itself and enter judgment. However, noting that when a motion for new trial is granted, the scope of retrial should be limited only to those issues affected by error, the court

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242. 679 N.E.2d 1309 (Ind. 1997).

243. *Buckalew*, 754 N.E.2d at 897-98.

244. *Id.* at 898.

245. 760 N.E. 2d 602 (Ind. 2001).

limited the trial court's order so that only the issue of damages and the wife's right to recovery were subject to retrial and remanded for proceedings consistent with that limitation.

8. Proceedings to Vindicate Minority Shareholder Rights.—*Galligan v. Galligan*[246] presented procedural issues in the context of a lawsuit over alleged breaches of fiduciary duty owed to minority shareholders by a majority shareholder. The controversy arose from sales made of corporate assets to a third party. The trial court granted defendants partial summary judgment and denied plaintiffs partial summary judgment. The Indiana Supreme Court affirmed in part and reversed in part. In so doing, it stated that the failure to comply with statutory requirements of the corporations statutes does not automatically result in a breach of fiduciary duty as a matter of law; instead undisputed facts that the majority shareholder failed to act in the interests of the corporation were required. This precluded summary judgment for plaintiffs on that issue. The court also concluded that the minority shareholders' primary remedy came from their statutory rights to dissent to the transaction, but that they could pursue separate claims against the persons responsible for the violation of those rights due to the absence of required notice.[247] Similarly, in *G & N Aircraft, Inc. v. Boehm*,[248] the court again canvassed the remedies available to minority shareholders, holding among other things that the minority shareholder did not need to bring a derivative action where breach of fiduciary duty was the claim and that the primary remedy was the forced sale of the minority shareholder's interest. The court also rejected a claim for attorneys' fees, except insofar as the defendant had presented a frivolous counterclaim.

9. Public Lawsuits.—In litigation stemming from the controversy over the revitalization of Gary, the court clarified the bond requirement in the context of a "public lawsuit" as defined by Indiana Code section 34-13-5-2.[249] *Hughes v. City of Gary*[250] involved two members of the Gary Common Council who objected to the council's approval of a plan to use casino revenues as security for municipal bonds to finance the Genesis Center, a baseball stadium, waterfront redevelopment, and other matters. They filed a lawsuit to invalidate the action.[251]

Under Indiana legislation governing "public lawsuits,"[252] one who sues to challenge public works projects must meet certain procedural hurdles not imposed in normal litigation.[253] The purpose of these is to protect governmental entities from delay in and increased expense of public improvements caused by

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246. 741 N.E.2d 1217 (Ind. 2001).

247. *Id.* at 1228.

248. 743 N.E.2d 227 (Ind. 2001).

249. IND. CODE § 34-13-5-2(b) (1998).

250. 741 N.E.2d 1168 (Ind. 2001).

251. *Id.* at 1170.

252. IND. CODE § 34-13-5-2 (1998).

253. They are to show in a preliminary hearing that one's action raises "substantial questions to be tried," and, if this showing cannot be made, to post a bond to avoid dismissal of the case. *Hughes*, 741 N.E.2d at 1170.

nonmeritorious litigation.[254] The trial court certified the action as a public lawsuit and held an interlocutory hearing. At the hearing, the city presented evidence of the increased costs the projects might incur as a result of the lawsuit.[255] The statute also required the plaintiffs to make a showing that would justify the issuance of a temporary injunction, despite the risk to the city from delay. The trial court made various conclusions (which the Indiana Supreme Court treated as findings) and determined that the plaintiffs had not met their burden. It ordered that they post a $2.35 million bond to cover the minimum expenses the city might incur from the effects of the suit on the contemplated projects. Because plaintiffs did not then post the bond, the case was dismissed and they appealed.[256]

Under an unusual procedure, the Indiana Supreme Court granted emergency transfer from the court of appeals.[257] In so doing, it held that the public lawsuit statute requires that "plaintiffs must introduce sufficient evidence that there is a substantial issue to be tried in order to avoid the bond requirement."[258] It underscored that the legislation balances the right of citizens to challenge public improvements against unwarranted delay, frustration, and additional expense caused by "harassing litigation."[259]

In a concurring opinion joined by Justice Sullivan, Justice Rucker pointed out that Indiana "case authority does not make clear what is meant by a 'substantial question' in the context of a public lawsuit."[260] However, the statute incorporates the standards for a temporary injunction. In 1970, in the case of *Johnson v. Tipton Community School Corp.*,[261] the court had established a multipart test for the necessary showing: that the question to be tried is substantial, that the status quo be maintained pending final determination (absent clear imminent injury); that there is no remedy at law, and that a bond be posted.[262] Justice Rucker asserted that when a plaintiff in a public lawsuit does *not* seek temporary injunctive relief, then only the first prong of *Johnson* should apply.[263] He asserted further that when preliminary injunctive relief *is* sought in a public lawsuit, as it was in *Hughes*, *all* the *Johnson* factors should be part of the

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254. Indiana *ex. rel.* Habercorn v. DeKalb Circuit Court, 241 N.E.2d 62, 65 (Ind. 1968).

255. *Hughes*, 741 N.E.2d at 1169-70.

256. *Id.* at 1170.

257. *Id. See also* IND. APPELLATE RULE 56(A), which authorizes such transfer when the supreme court determines that "an appeal involves a substantial question of law of great public importance and that an emergency exists requiring speedy determination."

258. *Hughes*, 741 N.E.2d at 1171. The court also reiterated that a trial court's findings are challenged under the "clearly erroneous" standard, which also applies to the procedural processes involved in filtering our nonmeritorious public lawsuits. *Id.* at 1172.

259. *Id.* (quoting Johnson v. Tipton Cmty. Sch. Corp., 255 N.E.2d 92, 94 (Ind. 1970)).

260. *Id.* at 1175 (Rucker, J., concurring).

261. 255 N.E.2d 92, 94 (Ind. 1970).

262. *Id.*

263. *Hughes*, 741 N.E.2d at 1175 (Rucker, J., concurring).

plaintiff's showing, including maintenance of the status quo.[264] Notwithstanding the justices' unanimous agreement on the result, at a minimum *Hughes* demonstrates the complexities and ambiguities surrounding the procedure for matters classified as "public lawsuits."

10. Relief from Judgment Under Rule 60(B).—In *Clear Creek Conservancy District v. Kirkbride*[265] the court had to determine whether landowners who filed untimely requests for exceptions to an appraiser's report governing their conservancy district assessment could obtain relief under Trial Rule 60(B)(1).[266] Justice Sullivan concluded that if the principles of *Lehnen v. State*[267] (governing eminent domain) extend to conservancy district matters, Rule 60 relief would not be available.[268] While the court of appeals had distinguished *Lehnen* on the ground that the conservancy district legislation was not comprehensive, Justice Sullivan agreed with Judge Friedlander in the dissent below, that the rule of *Lehnen* requires that a statute's fixed procedure be followed: "[T]he Conservancy Act provides a definite procedure for interested landowners to follow when contesting an appraiser's report . . . . Allowing landowners to file untimely exceptions in the trial court is simply not authorized by the conservancy district statutory scheme."[269] For the court, requiring landowners to follow the statute insures that a district's financial arrangements can proceed with finality.[270] Allowing the use of Rule 60 to get around the requirement would "undermine the statutory scheme for fixing in place the financing arrangements of conservancy districts, and by extension, other governmental units operating under similar statutory arrangements."[271]

Allstate Insurance Co. v. Watson[272] provides some welcome direction from the supreme court as to the standards for setting aside a default judgment under Indiana Trial Rule 60(B) in the context of settlement negotiations. In that case, the plaintiffs sought recovery from Allstate for uninsured motorists coverage and protracted settlement discussions ensued over several years. Originally, plaintiffs' lawyer represented that a default judgment would not be pursued while negotiations were pending. Later the lawyer made a settlement demand and represented that it would be held open for a time certain. Before the running of that time, the plaintiffs' lawyer took Allstate's default. The trial court denied Allstate's motion to set the default aside and the appellate court affirmed. In an opinion by Justice Dickson, the Indiana Supreme Court reversed and stressed again the disfavor in which default judgments are held. Although the court recognized that trial court rulings on Rule 60(C) motions are given deference,

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264. *Id.* at 1175-76.
265. 743 N.E.2d 1116 (Ind. 2001).
266. *Id.* at 1118.
267. 693 N.E.2d 580 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 169 (Ind. 1998).
268. *Kirkbride*, 743 N.E.2d at 1118.
269. *Id.* at 1120.
270. *Id.*
271. *Id.*
272. 747 N.E.2d 545 (Ind. 2001).

that deference must be seen in the context of a public policy in favor of trial on the merits and the unique facts of each case, which bear on the justness of setting the judgment aside. Moreover, the court noted that an attorney's conduct might be technically correct under the trial rules and still violate the rules of professional responsibility. This bore on the case before the court, as the plaintiff's attorney did not honor his own representation. The opinion strongly suggests that where the granting of a default judgment rewards what is arguably attorney misconduct, all things being equal, the default should be set aside.

11. Statute of Limitations.—Revisiting issues similar to those involved in *Van Dusen v. Stotts*,[273] the Indiana Supreme Court construed the application of the "discovery" rule for the running of the statute of limitations in *Degussa Corp. v. Mullens*.[274] *Degussa Corp.* was an action based on negligence and products liability involving a worker who alleged lung injury from chemicals used in the making of animal feed. Defendants moved for summary judgment on the theory that plaintiff's claims were time-barred.[275] The trial court denied the motion. On transfer, Justice Sullivan noted that the court has adopted a "discovery" rule to clarify the negligence and products liability limitation statute[276] where injuries are caused by exposure to foreign substances.[277] Even on defendant's theory, the action was commenced only eight days after the running of the period. Although plaintiff visited her doctor complaining of respiratory problems more than two years before she filed suit, she was only told then that there was a reasonable *possibility*, not a *probability*, that her condition was caused by exposure to defendants' products. Plaintiff diligently pursued further testing to "transform speculation into a causal link."[278] Because that link had not been made in the eight days at issue in the case, the cause of action had not yet accrued and the trial court properly denied the motion to dismiss.[279] The court's opinion suggests that although certainty is not necessary to trigger the running of the statute of limitations, the mere possibility that an injury is caused by a defendant's product is not sufficient either.[280] Whether mere possibility has ripened into something

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273. 712 N.E.2d 491 (Ind. 1999) (construing the issue of when a patient should be on inquiry notice regarding medical malpractice such that a cause of action accrues).

274. 744 N.E.2d 407 (Ind. 2001).

275. One defendant also moved to dismiss for lack of subject matter jurisdiction claiming exclusive worker's compensation jurisdiction. This motion was also denied by the trial court. Because the court was evenly divided on this question, the trial court's judgment was affirmed pursuant to Indiana Appellate Rule 59(B). In scrutinizing the questions raised regarding worker's compensation, Justice Dickson, writing for the dissenting members of the court, followed the analysis of *GNK Co. v. Magness*, 744 N.E.2d 397 (Ind. 2001), and reiterated that where the trial court rules on a paper record, the standard of review is de novo. *Degussa Corp.*, 744 N.E.2d at 415 (Dickson, J., dissenting).

276. IND. CODE § 33-1-1.5-5 (1998).

277. *Degussa Corp.*, 744 N.E.2d at 410.

278. *Id.* at 411.

279. *Id.*

280. *Id.* at 411-12.

more is a question of fact that will be determined on a case-by-case basis. In analyzing the case, Justice Sullivan explicitly stated that decisions under the Medical Malpractice Act are persuasive as to questions of when a plaintiff should have discovered a possible negligence or products liability cause of action.[281]

12. Summary Judgment.—Mangold v. Indiana Department of Natural Resources[282] is an important torts decision involving governmental immunity and duty that also has significance for summary judgment. There a twelve-year-old boy returned home after watching a school-sponsored Department of Natural Resources (DNR) demonstration of firearm safety. He took apart a shotgun shell, struck it with a hammer and chisel and was injured when it exploded. An action was filed on his behalf against the school and the DNR. The school presented the affirmative defense that it owed no duty for injuries sustained off of school grounds and the DNR defended on grounds of governmental immunity. Contributory negligence was also interposed as a defense by each defendant. Both the school and the DNR moved for summary judgment, which was granted by the trial court and affirmed on appeal. The Indiana Supreme Court allowed transfer and held that a school's duty is not dependent on the plaintiff's injuries occurring on school property. It also reaffirmed that governmental immunity under section nine of the Indiana Tort Claims act should be narrowly construed, following *Hinshaw v. Board of Commissioners of Jay County*,[283] so as to apply only where vicarious liability is premised on the acts of third parties other than government employees. Nonetheless, three of the members of the court, Chief Justice Shepard and Justices Sullivan and Boehm, found that summary judgment still should be affirmed due to the contributory negligence of the boy.

Several significant principles for summary judgment arise from the case. First, citing to the standards for summary judgment established in early 2001 by *Tom-Wat, Inc. v. Fink*,[284] the court reiterated that summary judgment is only proper where there is no genuine issue of material fact in dispute, after all facts and reasonable inferences therefrom are construed in favor of the nonmoving party, and the movant is entitled to judgment as a matter of law. Second, although Justice Rucker noted that the *existence* of duty is normally a question of law for the court, not one of fact for the jury, he reiterated that *breach* of duty, "which requires a reasonable relationship between the duty imposed and the act alleged to have constituted breach is usually a matter left to the trier of fact."[285] Finally, in Chief Justice Shepard's concurring opinion for the majority, he strongly suggested that because "even the slightest contributory negligence by the plaintiff bars recovery," it is much more likely for contributory negligence to succeed on summary judgment as an affirmative defense than the defense of comparative negligence.

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281. *Id.* at 410-11.

282. 756 N.E.2d 970 (Ind. 2001).

283. 611 N.E.2d 637 (Ind. 1993).

284. 741 N.E.2d 343 (Ind. 2001). *See also supra* text accompanying notes 191-213.

285. *Mangold*, 756 N.E. 2d at 975 (citing Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 974 (Ind. 1999)).

II. SELECTED DECISIONS FROM THE INDIANA COURT OF APPEALS

As expected, the decisions from the court of appeals affecting Indiana civil procedure were extremely varied. Along with the usual crop of opinions grappling with Rule 12 and summary judgment motions, there were a surprising number of cases dealing with amendment of pleadings and attorneys' fees. One of the most significant cluster of decisions involved the application of Indiana's Product Liability Act to asbestos-related injuries. What follows is a description of selected court of appeals opinions, organized by topic.

A. Amendment of Pleadings

SLR Plumbing & Sewer, Inc. v. Turk[286] involved an action by a subcontractor on a mechanic's lien. The court of appeals held that the denial of plaintiff's oral motion to amend to add a claim for homeowners' personal responsibility was harmless.[287] This is because in ruling on the homeowner's motion for summary judgment, the trial court already scrutinized the key issue in the amended opinion—whether the subcontractor's letter gave notice of personal responsibility as required by Indiana Code section 32-8-3-9.[288] The court also noted that the amendment of pleadings is within the broad discretion of the trial court and enjoys a deferential standard of review.[289]

In *Osterloo v. Wallar*,[290] a car collided with a child on a sled. The case raised the same nonparty "Catch-22" that was resolved by the Indiana Supreme Court in *Owens Corning Fiberglass Corp. v. Cobb*.[291] The question was whether the defendant-motorist could amend his pleading to add as a nonparty the child's father, who had previously been a defendant but was dismissed from the action.[292] The problem was whether the amended pleading met the timeliness rules under the Comparative Fault Act.[293] Relying directly on *Cobb*, the court of appeals determined that the purpose of the nonparty requirement—to apprise the plaintiff of potential defendants—was met where the plaintiff was surely aware of the potential nonparty's existence; thus the amendment was "reasonably prompt" under the statute and should have been allowed.[294]

Davis v. Ford Motor Co.[295] showed the overlap of Indiana Trial Rules 12(B)(6) (dismissal for failure to state a claim) and 12(C) (motion for judgment on the pleadings). Rule 12(C) does not provide for amendment as an alternative to dismissal, but 12(B)(6) does. The issue was whether in a circumstance where

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286. 757 N.E.2d 193 (Ind. Ct. App. 2001).
287. *Id.* at 197-98.
288. *Id.*
289. *Id.*
290. 758 N.E.2d 59 (Ind. Ct. App. 2001).
291. 754 N.E.2d 905 (Ind. 2001).
292. *Osterloo*, 758 N.E.2d at 61.
293. *Id.* at 63-64.
294. *Id.* at 64-65.
295. 747 N.E.2d 1146 (Ind. Ct. App. 2001).

a defendant strategically files a motion for judgment on the pleadings that could be characterized as a 12(B)(6) motion, the trial court should treat it as a 12(B)(6) request, thus affording plaintiff the opportunity to amend.[296] Answering this question turned on the nature of the defect in the pleading. Quoting *Federal Practice and Procedure*,[297] the court of appeals suggested that a Rule 12(B) motion goes to a plaintiff's failure to satisfy a "procedural" condition for his claim, such as insufficient particularity in the pleading.[298] In contrast, a motion for judgment on the pleadings, which presumes an end to the pleadings, goes to the substantive merits.[299] Where the defect is procedural, a trial court commits reversible error when it puts form over substance and treats the matter under 12(C), thereby preventing amendment.[300] One problem with this approach is the difficulty of distinguishing between procedural and substantive defects. Another is that following Rule 12(C) could end the pleading stage prematurely by precluding amendments that might correct defects that are not easily classified in terms of these categories.

In *Russell v. Bowman, Heintz, Boscia & Vician, Inc.*,[301] an action brought under the federal Fair Debt Collection Practices Act,[302] the debtor amended his complaint to add his wife as a party-plaintiff and to add the assignee of the debt, Bowman, as a new defendant.[303] Bowman filed a motion to dismiss the amended complaint, arguing that the husband's settlement with the assignor was fatal and that the amendment came too late. The trial court granted dismissal for lack of subject matter jurisdiction due to the settlement.[304] The court of appeals reversed because no responsive pleading had been filed by the original settling defendant. Under the express terms of Indiana Trial Rule 15(A), the plaintiff has a right to amend without leave of court. Plaintiff could also add new claims and parties so long as the joinder rules were met.[305] Finally, there was no subject matter defect because the action was still pending against the original defendant when the amendment was made.[306] In contrast, the court concluded in *Kuehl v. Hoyle* [307] that the amendment of right rule in 15(A) does not trump the relation-back requirements of Rule 15(C) simply because no responsive pleading is filed.[308]

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296. *Id.* at 1148.

297. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1369 (2d ed. 1990).

298. *Davis*, 747 N.E.2d at 1150.

299. *Id.*

300. *Id.* at 1149.

301. 744 N.E.2d 467 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 420 (Ind. 2001).

302. Fair Debt Collection Practices Act, Pub. L. 95-109, 91 Stat. 874 (codified as amended in scattered sections of 15 U.S.C., ch. 41).

303. *Russell*, 744 N.E.2d at 469.

304. *Id.* at 469-70.

305. *Id.* at 471.

306. *Id.*

307. 746 N.E.2d 104 (Ind. Ct. App. 2001).

308. *Id.* at 108.

Thus, the statute of limitations may still bar amendment.[309]

B. Arbitration

Mislenkov v. Accurate Metal Detinning, Inc.[310] involved a claim of misappropriation of trade secrets by a former employee, Mislenkov, and that employee's second employer, Shoreland. Both defendants moved to dismiss, claiming an arbitration agreement between Mislenkov and Accurate Metal Detinning ("Accurate Metal") deprived the court of subject matter jurisdiction.[311] The court of appeals applied a two-tiered test for arbitration: whether there is an enforceable agreement to arbitrate between the parties and whether the dispute falls within the scope of that agreement.[312] Because Shoreland was not in privity on agreement, the company could not enforce it, so the first prong of the test was not met as to Shoreland.[313] Although there was an enforceable arbitration agreement between Mislenkov and Accurate Metal, it did not cover the whole employment relationship, but only matters occurring after a release had created a new contractual relationship. As to Mislenkov, the second tier of the analysis was not satisfied because the dispute related to pre-agreement actions.[314]

C. Asbestos

Asbestos cases present difficult problems for issues relating to limitation of actions and product identification/causation. The diseases caused by asbestos take a very long time to develop. In the typical circumstance where a worker might be exposed, numerous companies could have produced the article creating the exposure. After many years, workers' memories fade and documentary evidence linking the asbestos of a particular defendant to a specific work environment is difficult to discover. Where asbestos is a component part of a product, a worker might never have been aware of the identity of the supplier of the asbestos in the first place. From a procedural perspective, these issues typically arise on summary judgment. Complicating matters, the ten-year repose period of the Indiana Products Liability Act[315] ("PLA") runs from the date a product is delivered to the initial user or consumer, regardless of when the claim

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309. *Id.* at 108-09.

310. 743 N.E.2d 286 (Ind. Ct. App. 2001).

311. *Id.* at 288.

312. *Id.* at 289.

313. *Id.* at 290.

314. *Id.*

315. IND. CODE § 34-20-3-1 (1998) provides in part that:

> [A] product liability action must be commenced:
> (1) within two (2) years after the cause of action accrues; or
> (2) within ten (10) years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

accrues as to a particular plaintiff. However, it does not apply to certain actions for asbestos exposure. Instead, where the requirements of Indiana Code section 34-20-3-2 ("the asbestos exception") are met, a claim may be brought within two years from the date it accrues, regardless of when the product was put on the market.[316] The asbestos exception raises problems of statutory interpretation, and, depending on how they are resolved, exposes the PLA to constitutional infirmity under *Martin v. Richey*[317] and related cases.

Black v. ACandS, Inc.[318] may prove to be one of the most important decisions from the court of appeals in 2001 because it construes the asbestos exception broadly. It has already had an impact on the many asbestos-related actions brought in Indiana courts. *Black* arose from a suit brought by the widow and the estate of a blast furnace worker who worked in the Gary USX steel works. He died from asbestos-induced lung cancer.[319] The action came up for review after the Indiana Supreme Court granted transfer in *Owens Corning Fiberglass Corp. v. Cobb*,[320] but before it issued its opinion. In *Cobb*, the supreme court affirmed the trial court's determination that the plaintiffs had shown sufficient evidence linking defendant's product to decedent to avoid summary judgment. It disagreed with the court of appeals that the evidence presented no issue of material fact for trial.[321]

The *Black* trial court had granted summary judgment for two different groups of defendant-companies on two different grounds. For the first group, it concluded that the PLA ten-year repose period applied, not the two-year asbestos exception, because the defendants in this group were not *both* miners *and* sellers of asbestos.[322] Regarding the second group, the court found insufficient evidence on product identification.[323]

As to the first ground, the court of appeals construed the language "persons who mined and sold" in the statutory exception to determine whether it was meant in the conjunctive—so that *both* mining *and* selling were required of the same defendant—or the disjunctive—so that *either* mining *or* selling would suffice.[324] Despite a line of previous cases that suggested both attributes were

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316. *Id.* § 34-20-3-2. The statute provides, in pertinent part, that the exception is available as follows:

> (d) This . . . [exception] applies only to product liability actions against:
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> (1) persons who mined and sold commercial asbestos; and
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> (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.

317. 711 N.E.2d 1273 (Ind. 1999).

318. 752 N.E.2d 148 (Ind. Ct. App. 2001).

319. *Id.* at 150.

320. 754 N.E.2d 905 (Ind. 2001).

321. *See supra* notes 126-38 and accompanying text.

322. *Black*, 752 N.E.2d at 156.

323. *Id.* at 157.

324. *Id.* at 151-52.

required,[325] the court of appeals determined that "the construction [of the statute] urged by defendants is inconsistent with other provisions of the products liability act and with our supreme court's precedent and would lead to an absurd result."[326] The "absurd result" would be that a company that mined but did not sell asbestos, and a company that sold but did not mine asbestos, would both be able to take advantage of the ten-year limit, despite causing the same harm to plaintiffs as companies that both mined *and* sold it. Moreover, this interpretation would not promote the purpose of giving plaintiffs in asbestos cases an adequate time from discovery of their condition to sue. This policy was suggested by the Indiana Supreme Court in *Covalt v. Carey Canada, Inc.*,[327] a case that was decided prior to the asbestos exception statute. There the supreme court argued that the ten year limit ought not to apply "to cases involving protracted exposure to an inherently dangerous foreign substance which is visited into the body."[328] The court of appeals agreed with the distinction in *Covalt* between a regular product in the marketplace and asbestos, "a hazardous foreign substance which causes disease,"[329] especially because the diseases it causes take a long time to develop. It reversed the trial court's grant of summary judgment based on the PLA.[330]

In resolving the issue of product identification, the court of appeals was persuaded by the Seventh Circuit's opinion in *Peerman v. Georgia-Pacific Corp.*[331] *Peerman* suggests that a plaintiff must come forward with facts showing the victim's inhalation of a particular defendant's asbestos to avoid summary judgment on product identification.[332] The court of appeals interpreted *Peerman* to mean that "concrete facts" would be required to show product identification, not speculative inferences.[333] Although there was *some* evidence that the defendants' products might have been in the firebricks or used as insulation where decedent worked, the court of appeals discounted it as speculative and inferential.[334] It concluded that the trial court had not erred in granting the defendants summary judgment therefore. However, given the Indiana Supreme

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325. *See* Novicki v. Rapid-American Corp., 707 N.E.2d 322, 324 (Ind. Ct. App. 1999); Sears Roebuck & Co. v. Noppert, 705 N.E.2d 1065, 1068 (Ind. Ct. App. 1999); *see also* Spriggs v. Armstrong World Indus., No. IP91-651, 1999 U.S. Dist. LEXIS 19874 (S.D. Ind. 1999).

326. *Black*, 752 N.E.2d at 152.

327. 543 N.E.2d 382 (Ind. 1989).

328. *Id.* at 385.

329. *Id.* at 386.

330. *Black*, 752 N.E.2d at 151, 154.

331. 35 F.3d 284, 287 (7th Cir. 1994) (applying Indiana law).

332. *Id.* at 286. Moreover, according to *Peerman*, no Indiana court had articulated a test for causation in asbestos cases.

333. *Id.* at 286-87. The reference to "concrete facts" comes from the court of appeals decision in *Owens Corning Fiberglass Corp. v. Cobb*, 714 N.E.2d 295, 303 (Ind. Ct. App. 1999), which was vacated when the Indiana Supreme Court granted transfer. *See* Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905 (Ind. 2001).

334. *Black*, 752 N.E.2d at 155-57.

Court's opinion in *Cobb*, this conclusion is in doubt.[335]

Jurich v. Garlock, Inc.[336] also raised the question of how to construe the PLA in the case of a worker whose claim was filed more than ten years after he could have been exposed to defendants' products but within the asbestos exception. This panel of the court of appeals found the analysis of the exception statute in *Black* "reasonable" and followed it.[337] However, it confronted a new interpretive problem—whether plaintiffs would have to show that defendants were miners or sellers of *commercial* asbestos, defined as asbestos in the raw processed form. If so, the exception would not apply to persons who sold products that contained asbestos as a component.[338] In that circumstance, the PLA could be unconstitutional as applied for violating the Indiana Constitution open courts provision.[339]

The court of appeals reasoned that the word "commercial" was intended to have effect in the statute and not be mere surplusage. Moreover, it was persuaded by a regulation of the Environmental Protection Agency that "commercial asbestos" must be defined in terms of its raw state.[340] Thus, the exception did not apply to defendants who only sold products incorporating asbestos. Therefore, the court had to reach the question of whether the PLA violates the Indiana Constitution open courts provisions in light of the Indiana Supreme Court's holdings in *Martin v. Richey*[341] and its progeny.[342] The court concluded that it might in two circumstances: where a person is injured by an asbestos product within the PLA ten-year period but does not gain knowledge of the injury until afterward; and where a person is injured prior to the passage of the PLA and the date of the product's delivery is unknown.[343] This latter situation was presented by the facts of the case and the court held the PLA unconstitutional as applied to plaintiffs.

Allied Signal, Inc. v. Herring[344] combined the issues raised by both *Black* and *Jurich*. There the defendants argued the plaintiff would have to show they were *both* miners *and* sellers of asbestos to prevail.[345] A different panel of the court of appeals found the analysis in *Black* on that question compelling and adopted it.[346] As in *Jurich*, the defendants also argued that plaintiffs would have to show they dealt in *commercial* asbestos.[347] However, the court did not reach this issue,

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335. *See supra* notes 126-38 and accompanying text.
336. 759 N.E.2d 1066 (Ind. Ct. App. 2001).
337. *Id.* at 1069-70.
338. *Id.* at 1070-71.
339. *Id.* at 1071; IND. CONST. art.12, § 1.
340. *Jurich*, 759 N.E.2d at 1070.
341. 711 N.E.2d 1273 (Ind. 1999).
342. *See, e.g.*, McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000).
343. *Jurich*, 759 N.E.2d at 1071.
344. 757 N.E.2d 1030 (Ind. Ct. App. 2001).
345. *Id.* at 1032-33.
346. *Id.* at 1035-36.
347. *Id.* at 1036-37.

for it found that defendants had not raised it below and so waived it on appeal.[348] This waiver also obviated the need to discuss constitutional questions raised by the PLA.

Fulk v. Allied Signal, Inc.[349] is yet another asbestos case involving Allied Signal as a defendant. Judge Mattingly-May, who wrote the opinion in *Black*, used its analysis on the asbestos exception again in *Fulk*.[350] The opinion also followed the same reasoning on product identification and affirmed the trial court's grant of summary judgment for a number of defendants where there was some evidence of decedent's exposure to their products, but it was not strong.[351] Once again, after *Cobb* the product identification aspect of this case is in doubt.[352]

Parks v. A.P. Green Industries[353] again presented issues of product identification and the statute of repose. In *Parks* a boilermaker with lung cancer and his wife sued a variety of asbestos producers for products liability and loss of consortium.[354] The defendants moved for summary judgment on the grounds that the plaintiffs had failed to bring their actions in time and that they had failed to muster sufficient evidence to link the boilermaker's lung cancer with inhaling their asbestos.[355] Among its rulings, the trial court denied summary judgment to defendant Chicago Firebricks on the issue of product identification, but granted all defendants summary judgment for the plaintiffs' failure to bring their claims within the ten-year repose period of the PLA.[356] The court of appeals affirmed denial of summary judgment as to Chicago Firebricks on product identification, but reversed as to a number of defendants on the timeliness issue following the analysis in *Black*.[357]

The cases from *Black* to *Parks* show an emerging consensus on whether a defendant must be *both* a miner *and* a seller of asbestos for the asbestos exception to the PLA to apply. However, the issue of whether "commercial asbestos" is limited to raw processed asbestos is an open question, as is the manner in which the court of appeals will interpret the showing necessary to avoid summary judgment on product identification after *Cobb*.

D. Attorneys' Fees

Former Appellate Rule 15(G) allowed appellate courts to assess damages when a judgment was affirmed on appeal. This award was informally referred

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348. *Id.* at 1037.
349. 755 N.E.2d 1198 (Ind. Ct. App. 2001).
350. *Id.* at 1202-03.
351. *Id.* at 1203-06.
352. *See supra* notes 126-38 and accompanying text.
353. 754 N.E.2d 1052 (Ind. Ct. App. 2001).
354. *Id.* at 1054-55.
355. *Id.* at 1055.
356. *Id.*
357. *Id.* at 1059.

to as "appellate attorneys' fees."[358] In *Kuehl v. Hoyle*,[359] the court of appeals strictly construed the application of the rule to avoid a chilling effect on the taking of appeals. Even though the plaintiff in *Kuehl* waited more than eight years to amend her complaint, there had been two previous appeals in the action, and it was possible she was litigating matters that had been settled, the appellate court declined to award attorney fees.[360] Sanctions for frivolous or bad faith appeals are now governed by Indiana Appellate Rule 66(E), which provides: "The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution."[361]

In *SLR Plumbing & Sewer, Inc. v. Turk*,[362] described above, the court of appeals reviewed the process for determining whether a prevailing party should be awarded fees under Indiana Code section 34-52-1-1 covering "groundless" claims. Citing *Emergency Physicians of Indianapolis v. Pettit*,[363] the court described three steps for reviewing a fee award, two of which go to merit questions: a review of the trial court's findings of fact under the clearly erroneous standard, a review de novo of the trial court's legal conclusions, and a review of the trial court's decision to award attorney fees under an abuse of discretion standard.[364] Concluding that there were facts to support the subcontractor's claim, but that the legal significance he gave them was incorrect, the court of appeals did not consider the action "groundless" and reversed the award of fees.[365]

Stephens v. Parkview Hospital, Inc.[366] injects some confusion over the applicable standard of review on fees for it states:

> We note that the trial court's decision to grant or deny attorney fees will not be disturbed absent an abuse of discretion. When the trial court determines that attorney fees were not warranted under the statute permitting the award of attorney fees for bringing or pursuing a frivolous claim, we will review that conclusion de novo.[367]

In *Davidson v. Boone County*,[368] the trial court awarded the county almost

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358. *See* Greasel v. Troy, 690 N.E.2d 298, 304 (Ind. Ct. App. 1997).

359. 746 N.E.2d 104 (Ind. Ct. App. 2001).

360. *Id.* at 111.

361. IND. APPELLATE RULE 66(E).

362. 757 N.E.2d 193 (Ind. Ct. App. 2001). *See supra* notes 286-89 and accompanying text.

363. 714 N.E.2d 1111, 1115 (Ind. Ct. App.), *adopted on transfer*, 718 N.E.2d 753 (Ind. 1999).

364. *SRL Plumbing & Sewer, Inc.*, 757 N.E.2d at 201. IND. CODE §§ 34-52-1-1 (1998) provides: "In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party: (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless . . . ."

365. *SRL Plumbing*, 757 N.E.2d at 201-02.

366. 745 N.E.2d 262 (Ind. App. 2001).

367. *Id.* at 267 (citations omitted).

368. 745 N.E.2d 895 (Ind. Ct. App. 2001).

$80,000 in attorneys fees without the county's requesting them.[369] Plaintiffs had filed a claim against Boone County alleging discrimination and other constitutional violations stemming from its construction of a building without a permit. The court of appeals affirmed the trial court and also cited to *Emergency Physicians of Indianapolis*.[370] It held that a trial court has the power under the statute to award fees sua sponte.[371] The facts were particularly egregious in the case before the court and it found that, among other things, the plaintiffs had brought their claims for purposes of harassment.

In *Grubnich v. Renner*,[372] the court of appeals concluded that, given the changes in Indiana case law and ambiguity as to the extent of retroactivity of relevant decisions, the question concerning whether the Medical Malpractice Act limited a defendant's liability for post-judgment interest was so complex it prevented his defense from being groundless.[373] The decision includes a useful summary of the standards for the award of interest and review of an award of attorneys' fees. With regard to the latter, it follows the multistep process outlined by *Emergency Physicians of Indianapolis*.

Major v. OEC-Diasonics, Inc.[374] presented a different fee question. There a law firm sought to foreclose on an attorney's fee lien and based the claim on unjust enrichment, an equitable remedy. The defendant alleged that the lawyer's professional misconduct in entering into an oral contingent fee modification, and other acts, prevented quantum meruit recovery due to unclean hands.[375] He also argued that the lawyer must disgorge any fees as a result of ethical violations. The court of appeals disagreed and ruled these arguments were factors to be balanced, but were not complete barriers to recovery.[376] Moreover, the risk to the firm of losing the case on which the firm had worked for more than a decade justified consideration of the oral contingent fee agreement. It supported the quantum meruit award, which included a $650,000 bonus in addition to fees calculated on the firm's hourly rates.[377]

E. Bankruptcy Stay

In *Zollman v. Gregory*,[378] plaintiffs filed a medical malpractice claim with the Indiana Department of Insurance after the doctor sought federal bankruptcy protection. Nonetheless, the federal bankruptcy court later allowed plaintiffs

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369. *Id.* at 898.

370. *Id.* at 849. *See also* Emergency Physicians of Indianapolis v. Pettit, 714 N.E.2d 1111, 1115 (Ind. Ct. App. 1999).

371. *Davidson*, 745 N.E.2d at 900. *See* IND. CODE §§ 34-52-1-1 (1998).

372. 746 N.E.2d 111 (Ind. Ct. App. 2001).

373. *Id.* at 119-20.

374. 743 N.E.2d 276 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 15 (Ind. 2001).

375. *Id.* at 281-82.

376. *Id.* at 282-83.

377. *Id.* at 360-61.

378. 744 N.E.2d 497 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 17 (Ind. 2001).

relief from the stay to pursue their action.[379] The court of appeals treated this relief as a *nunc pro tunc* order, although it was not labeled as such. The bankruptcy court had specifically directed that the plaintiffs be able to proceed with their action and described that action as "pending" in state court.[380] Thus, the plaintiffs' filing was not void and tolled the running of the statute of limitations on their claim.[381]

F. Burden of Proof

In *B.E.I., Inc. v. Newcomer Lumber & Supply Co.*,[382] a lumber supplier sued a homeowner on a theory of account stated for building supplies delivered. The homeowner disputed certain charges and credits, despite the fact that the supplier had sent him invoices to which he never objected.[383] The trial court entered judgment against him inferring that his nonresponse to the invoices showed his agreement that the amount claimed was correct.[384] The court of appeals affirmed and approved the principle that "[a]n agreement that the balance is correct may be inferred from delivery of the statement and . . . failure to object . . . within a reasonable amount of time."[385] This creates a prima facie presumption that the debtor must rebut. The trial court's findings of fact that the homeowner had a reasonable time to object and had not rebutted the presumption were not erroneous, given the deferential standard of review.

Under worker's compensation law, the "odd lot" doctrine treats a worker as totally disabled, even though the worker is not completely unable to work, if the disability would prevent employment "in any well-known branch of the competitive labor marked absent superhuman efforts, sympathetic friends or employers, a business boom, or temporary good luck."[386] When raised, it can affect burdens of production. In *Schultz Timber v. Morrison*,[387] the employer used the odd-lot theory to argue that it had rebutted the employee's prima facie case of total disability before the Worker's Compensation Board.[388] The court of appeals declined to recognize the principle stating that in *Walker v. State, Muscatatuck State Development Center*,[389] our supreme court "did not expressly adopt the odd lot doctrine."[390]

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379. *Id.* at 498.
380. *Id.* at 501-02.
381. *Id.*
382. 745 N.E.2d 233 (Ind. Ct. App. 2001).
383. *Id.* at 235-36.
384. *Id.* at 236.
385. *Id.* at 237 (quoting Auffenberg v. Bd. of Tr. of Columbus Reg'l Hosp., 646 N.E.2d 328, 331 (Ind. Ct. App. 1995)).
386. *See* BLACK'S LAW DICTIONARY 559 (5th ed. 1983).
387. 751 N.E.2d 834 (Ind. Ct. App. 2001).
388. *Id.* at 837-38.
389. 694 N.E.2d 258 (Ind. 1998).
390. *Schultz Timber*, 751 N.E.2d at 838.

United Farm Insurance Co. v. Riverside Autosales[391] was a bailment action brought by the insurance company as subrogee of the insured over a fire that destroyed an automobile. The trial court granted the bailee, Riverside, judgment on the evidence as to breach of warranty, but allowed the case to go forward on negligence. Thereafter, the trial court made findings of fact and conclusions of law sua sponte and entered judgment for Riverside as to negligence.[392] In a bailment where the arrangement benefits both parties, and property is delivered to the bailee in good condition but is returned damaged, the inference arises that the bailee has been negligent.[393] The court of appeals concluded that Riverside rebutted the inference by showing evidence of due care as reflected in the findings. Thus, plaintiff had the ultimate burden of proof on negligence.[394] Finally, the trial court's sua sponte findings and conclusions resulted in the court of appeals treating the verdict as a general verdict and viewing the special findings as going only to the specific issues they covered.[395]

G. Discovery

Davidson v. Perron[396] involved a wrongful termination action by a former police officer brought on the theory that he had been fired in retaliation. Under the authority of *Tyson v. State*,[397] the trial court struck the affidavit of one of the officer's witnesses though he was proceeding pro se.[398] The witness had not been listed for trial, the officer did not provide a witness list to defendant until after the discovery cutoff date, and the testimony was prejudicial.[399] The court of appeals also upheld the trial court's disallowance of discovery regarding alleged retaliatory firings of other officers stating that the officer's claim had to stand on its own.[400]

Potts. v. Williams[401] was a medical malpractice action brought by a minor child for injuries suffered during delivery.[402] The plaintiff obtained depositions and trial transcripts of testimony of the defendant's expert for cross-examination. The trial court denied the defendant's motion to compel discovery on the ground the materials were attorney work-product.[403] The court of appeals agreed because the items were obtained in anticipation of litigation as required by Trial Rule

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391. 753 N.E.2d 681 (Ind. Ct. App. 2001).
392. *Id.* at 684.
393. *Id.* at 685.
394. *Id.*
395. *Id.* at 684.
396. 756 N.E.2d 1007 (Ind. Ct. App. 2001).
397. 619 N.E.2d 276 (Ind. Ct. App. 1993).
398. *Davidson*, 756 N.E.2d at 1013.
399. *Id.* at 1014.
400. *Id.* at 1015.
401. 746 N.E.2d 1000 (Ind. Ct. App. 2001).
402. *Id.* at 1003-04.
403. *Id.* at 1005-06.

26(B)(3) and the defendant did not show substantial need overbalancing work product protection, because he had equal or better access to the previous testimony of his own expert.[404]

H. Findings

The court of appeals continues to distinguish the significance of trial court findings of fact when reviewing summary judgment rulings and judgments resulting from bench trials or trials with advisory juries. Indiana Trial Rule 52[405] requires the trial court to make findings whenever a bench trial takes place or judgment is rendered with the help of an advisory jury. Those findings can result from a request by the parties or sua sponte. There is a two-part process for reviewing the findings–first, the appellate court must determine if the findings are supported by the evidence, and second, whether the judgment is supported by the findings. The appellate court will affirm the judgment on any legal theory supported by the findings, not just those theories "espoused in the trial court proceeding,"[406] and will only reverse if the judgment is clearly erroneous.[407] The Indiana Supreme Court reiterated this approach this year in *G & N Aircraft, Inc. v. Boehm*.[408] Moreover, findings issued sua sponte are entitled to the same standard of review.[409]

In contrast, when a court makes findings in connection with a summary judgment motion, they are not entitled to the same deference given in the case of a bench trial or an advisory jury and they do not change the de novo standard of review on summary judgment. As the court explained it in *Ferrell v. Dunescape Beach Club Condominiums Phase I*:[410]

> Here, the trial court entered specific findings of fact and conclusions thereon, which would normally trigger the two-tiered appellate standard of review contained in Indiana Trial Rule 52. However, specific findings and conclusions entered by the trial court when ruling on a motion for summary judgment merely afford the appellant an opportunity to address the merits of the trial court's rationale. They also aid our review by providing us with a statement of reasons for the trial court's actions, but they have no other effect. Rather than relying upon the trial court's findings and conclusions, we must base our decision upon the materials properly presented to the trial court under Indiana Trial Rule 56(C).[411]

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404. *Id.* However, *Marshall v. State*, 759 N.E.2d 665, 669-70 (Ind. Ct. App. 2001), distinguished the applicability of *Potts* in a criminal case where the defendant did not seek information of his own expert.

405. IND. TRIAL R. 52.

406. Mitchell v. Mitchell, 695 N.E.2d 920, 924 (Ind. 1998).

407. Shenvar v. Johnson, 741 N.E.2d 1275, 1279 (Ind. App. 2001).

408. 743 N.E.2d 227, 234 (Ind. 2001).

409. Klotz v. Klotz, 747 N.E.2d 1287, 1190 (Ind. App. 2001). *See also supra* Part II.F.

410. 751 N.E.2d 702, 709 (Ind. App. 2001).

411. *Id.* (citations omitted).

I. Injunctions, Declarations, and Other Special Relief

To obtain injunctive relief, the plaintiff typically has to show "irreparable harm," that is, that there is no adequate remedy at law to redress his or her injury. This usually means that compensatory damages will not make the plaintiff whole due to the uniqueness of the wrong involved.[412] When an injunction is sought before disposition of a case on the merits, the plaintiff must show additional factors—that there is a likelihood of success on the merits, that the status quo will be maintained, that the balance of hardships is in favor of the plaintiff if an injunction is issued, and that the public interest is not harmed by issuance.[413] The court of appeals decided a number of injunction cases in 2001 illuminating the type of injury that satisfies the irreparable harm requirement.

Normally, irreparable harm is absent where plaintiff's loss is purely economic,[414] but in *Barlow v. Sipes*[415] the court issued a preliminary injunction against an insurance adjuster who had accused a body shop of fraud. The body shop owners sued for defamation and intentional interference with business relationships.[416] Because they could not quantify the economic losses threatened and because intangible reputational harm to the business was involved, the remedy at law was inadequate.[417] The court of appeals affirmed, despite acknowledging that preliminary injunctive relief should be used sparingly.[418]

In *Cohoon v. Financial Plans & Strategies, Inc.*,[419] irreparable harm for the preliminary injunction was supplied by the presence of an enforceable covenant not to compete and the difficulty of ascertaining the loss to the former employer's business goodwill from the employee's breach.[420]

Indiana strictly construes covenants not to compete against enforcement. So to obtain an injunction based on one, the covenant must be reasonable in terms of the employer's legitimate business interests and the geographic and chronological limits it imposes.[421] If it is enforceable, then the uncertainty as to the exact monetary losses associated with loss of goodwill—a property right—can support a finding of irreparable harm.[422] Moreover, the court of appeals gives deference to the trial court's findings on these issues.[423] Hence, the court of appeals affirmed the trial court's injunction against the certified financial planner's violation of a two-year long covenant not to compete. It also found that

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412. *See* DOBBS, *supra* note 142, § 25(1).
413. *Id.*
414. *Id.*
415. 744 N.E.2d 1 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).
416. *Id.* at 2.
417. *Id.* at 6-8.
418. *Id.* at 9-10.
419. 760 N.E.2d 190 (Ind. Ct. App. 2001).
420. *Id.* at 193.
421. *Id.* at 194.
422. *Id.* at 195.
423. *Id.* at 193-94.

the covenant was specific enough in terms of customers that this cured any geographic overbreadth.[424]

In contrast, in *Mercho-Roushdi-Shoemaker-Dillery-Thoraco-Vascular Corp. v. Blatchford*[425] the trial court denied the issuance of a preliminary injunction sought by a group of physicians to enforce a noncompetition agreement.[426] The court of appeals affirmed the denial because pure economic loss does not generally result in injunctive relief.[427] Giving deference to the trial court, the appellate court stated the trial court had not erred in determining that plaintiffs failed to carry their burden to show that monetary losses were difficult to calculate.[428]

In *Indiana Family & Social Services Administration v. Legacy Healthcare, Inc.*,[429] which focused on a dispute over the termination of a Medicaid provider agreement, the court of appeals agreed with the trial court that the operator of a nursing home did not show irreparable harm to itself or its mentally disabled residents. This was because the nursing home only alleged pure economic harm, even though in the form of threatened business failure.[430] Moreover, because a receiver had been appointed to run the nursing home, the court found no irreparable harm to the residents who were being cared for under the control of the receiver.[431] The nursing home's reliance on pure economic harm to justify a stay was particularly ineffective because it had failed to exhaust administrative remedies.[432]

In *Reed Sign Service, Inc. v. Reid*,[433] an important decision for TRO procedure, the court held that where a billboard owner who was ordered to dismantle a sign had actual notice of the order, but was not served after a number of service attempts, did not deprive the court of personal jurisdiction. This was the result because actual notice, coupled with the attempts at service, showed that notice reasonably calculated to inform the defendant of the proceeding was undertaken. Moreover, the failure to order a bond did not void the TRO and prevent a contempt citation where the TRO had dissolved and the defendant had not complied with the order.

In *Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc.*[434] the court discussed declaratory relief and also detailed the showing necessary for the issuance of a preliminary injunction. The case also provides a useful description of the differences between preliminary and injunctive relief. It emphasizes that

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424. *Id.* at 195-96.
425. 742 N.E.2d 519 (Ind. Ct. App. 2001).
426. *Id.* at 521.
427. *Id.* at 526.
428. *Id.* at 523-24.
429. 756 N.E.2d 567 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 254.
430. *Id.* at 571.
431. *Id.*
432. *Id.* at 571-72.
433. 755 N.E.2d 690 (Ind. App. 2001).
434. 751 N.E.2d 702 (Ind. App. 2001).

difference as one of timing—a preliminary injunction issues during the pendency of an action while a permanent injunction is a remedy given after a final determination. Finally, in *Malone v. Price*,[435] the court canvassed the proper procedures to follow to establish entitlement to the statutory remedy of mandate, to declaratory relief, and to a writ of mandamus.

J. Instructions

Several appellate cases give good guidance on the standards for review of trial court instructions. Review of the appropriateness of an instruction is undertaken pursuant to an abuse of discretion standard. The appellate court determines abuse of discretion using a three-part test: whether the tendered instruction correctly states the law; whether there is evidence in the record to support giving the instruction; and whether the substance of the instruction is covered by other instructions that are given.[436] Moreover, the harmless error doctrine is particularly applicable to the giving of an erroneous instruction, for one must show that it affected the outcome of the proceeding to gain reversal.[437]

K. Judgment on the Evidence

S.E. Johnson Co. v. Jack,[438] another auto case, involved a dispute over whether a subcontractor should be liable to a motorist for an accident at a road construction site where asphalt had been removed leaving the yellow line marking the roadway obscured.[439] The subcontractor's theory was that its work was accepted by the general contractor. Under *Hill v. Rieth-Riley Construction Co.*,[440] "acceptance" eliminates the independent contractor's liability to third parties. But, such acceptance is subject to the fact-sensitive, multifactoral test of *Blake v. Calumet Construction Corp.*[441] The contractor moved for judgment on the evidence at close of all the evidence, which was denied.[442] The court of appeals asserted that there was sufficient evidence for the case to go to the jury when it was not clear that the Indiana Department of Transportation had accepted the work at the end of each day.[443] The court strongly suggested that under *Blake*, it would be difficult to take a case from the jury.[444]

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435. 755 N.E.2d 213 (Ind. App. 2001).

436. Faulk v. Northwest Radiologists, P.C., 751 N.E.2d 233, 241(Ind. App. 2001). *See also* Kostidis v. General Cinema Corp. of Indiana, 754 N.E.2d 563, 570 (Ind. App. 2001).

437. Centennial Mortgage, Inc. v. Blumenfeld, 745 N.E.2d 268, 278 (Ind. App. 2001).

438. 752 N.E.2d 72 (Ind. Ct. App. 2001).

439. *Id.* at 75.

440. 670 N.E.2d 940, 944 (Ind. Ct. App. 1996).

441. 674 N.E.2d 167 (Ind. 1996).

442. *S.E. Johnson*, 752 N.E.2d at 75-76.

443. *Id.* at 78.

444. *Id.* at 77-78.

L. Jurisdiction

1. "Jurisdiction over the Case."—Georgetown Board of Zoning Appeals v. Keele[445] presented a dispute over a use variance granted by the Georgetown municipal zoning board for the construction of multifamily housing on agricultural land. Keele and other residents of the county sued to have the variance invalidated on the ground that the municipal board had no subject-matter jurisdiction to grant a variance, as the land was outside the city. The trial court agreed and the board and developer appealed.[446] On review, the court of appeals distinguished lack of subject matter jurisdiction which cannot be waived from jurisdiction over the case, which can be waived. The court defined subject matter jurisdiction as "the power of [a tribunal] to hear and determine a general class of cases to which the proceeding before it belongs"[447] and derives from a constitutional or statutory grant of power. It cannot be forgone by a party. In contrast, "jurisdiction over the case" is the authority to hear a specific case within a category of cases over which a court has subject matter jurisdiction.[448] The court of appeals concluded that the board did have subject matter jurisdiction over the variance.[449]

First, the court noted that an Indiana statute allows municipalities to control zoning of land within a two mile fringe of city boundaries.[450] Second, it stated that the board had subject matter jurisdiction over zoning variances. Thus, following the reasoning of *Board of Trustees v. City of Fort Wayne*,[451] the court concluded that even though the board did not fulfill the conditions of the statute, that failure went to jurisdiction over the case, not over the subject matter. Because Keele never raised his objections with the board originally, he and the other plaintiffs waived the defect.[452]

In matters involving the Uniform Child Custody Jurisdiction Act ("UCCJA"),[453] a trial court must first decide if it has jurisdiction and then whether that jurisdiction should be exercised.[454] *Christensen v. Christensen*[455] raised the issue of whether the jurisdictional inquiry of the UCCJA goes to subject matter, personal jurisdiction, or something in between, that is, "jurisdiction over the case."

Under classic principles of personal jurisdiction, a defendant can consent to

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445. 743 N.E.2d 301 (Ind. Ct. App. 2001).

446. *Id.* at 302.

447. *Id.* at 303 (quoting Santiago v. Kilmer, 605 N.E.2d 237, 239-40 (Ind. Ct. App. 1992)) (alteration in original).

448. *Id.*

449. *Id.* at 304.

450. *See also* IND. CODE 36-7-4-205 (1998).

451. 375 N.E.2d. 1112 (1978).

452. *Georgetown Bd. of Zoning Appeals*, 743 N.E.2d at 305.

453. IND. CODE § 31-17-3-3 (1998).

454. *See* Ashburn v. Ashburn, 661 N.E.2d 39, 41 (Ind. Ct. App. 1996).

455. 752 N.E.2d 179 (Ind. Ct. App. 2001).

a court's jurisdiction over his or her person, thereby waiving any defects in the geographic power of the court.[456] One way for a defendant to consent is to seek affirmative relief from the court in question. In *Christensen*, the former wife filed a petition to enforce a foreign support decree in an Indiana court under the Uniform Reciprocal Enforcement of Support Act.[457] Prior to the Indiana proceeding, she and her husband had shared legal custody, but she had been the primary custodial parent of the children, who lived with her in Virginia.[458] The court enforced the support order, but thereafter the husband sought to domesticate the foreign decree and pursued a change in custody.[459] The trial court domesticated the action on the assumption that both parties agreed and were proceeding pro se. Thereafter the wife sought to vacate the domestication and requested dismissal of the custody matters. The court denied this relief and eventually changed physical custody to the father.[460]

The court of appeals affirmed the trial court's jurisdiction to do so. First, under the authority of *Williams v. Williams*,[461] the court held that the jurisdictional requirement of the UCCJA did not, on the facts before it, go to subject matter. Instead, it raised the issue of jurisdiction over the case.[462] Using the same framework applicable to consent to personal jurisdiction, it held that the wife waived objection to the court's authority because she expressly consented to the trial court's power when she originally sought affirmative relief from the court.[463] The court of appeals also justified this result in policy terms, arguing that failing to give effect to the trial court's ruling would promote forum shopping by parents unhappy with custody determinations in one jurisdiction.[464]

2. Personal Jurisdiction.—Bartle v. HCFP Funding, Inc.[465] raised issues of preclusion and personal jurisdiction and also characterized choice of law provisions in the context of personal jurisdiction. The action was one to enforce a judgment obtained in a Maryland court proceeding against the Indiana guarantor of a sale of accounts receivable. The defendant defaulted in the action, so he never appeared and consented to the Maryland court's jurisdiction over him.[466] The facts relating to personal jurisdiction were not actually litigated in the Maryland proceeding and so they did not give rise to issue preclusion on the jurisdictional questions. This meant that the guarantor could collaterally attack the validity of the Maryland judgment in the Indiana court.[467]

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456. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).
457. *Christensen*, 752 N.E.2d at 181.
458. *Id.* at 181-82.
459. *Id.*
460. *Id.*
461. 555 N.E.2d 142 (Ind. 1990).
462. *Christensen*, 752 N.E.2d at 183.
463. *Id.*
464. *Id.* at 184.
465. 756 N.E.2d 1034 (Ind. Ct. App. 2001).
466. *Id.* at 1035.
467. *Id.* at 1036.

The guarantor had no contact with Maryland other than his execution of the guaranty agreement. The plaintiff was not even a Maryland entity and there was no evidence the guarantor had any other connection with the jurisdiction.[468] On the facts of the case, the court of appeals concluded that the guarantor's actions did not come within the Maryland long-arm statute which required that he transact business in the state. The threshold requirement for personal jurisdiction was not satisfied.[469] Moreover, the court held that a choice of law provision is not the equivalent of a forum selection clause. Thus, the choice of law provision alone could not establish the guarantor's consent to Maryland jurisdiction.[470]

3. Subject Matter Jurisdiction.—Lake County Sheriff's Corrections Merit Board v. Peron[471] combined issues of mootness with failure to exhaust administrative remedies. In that case, a group of correctional officers sought a preliminary injunction to stay the merit board from holding disciplinary hearings before they could conduct discovery.[472] The officers were accused of leaving work without permission and falsifying time sheets, among other things. Notice was given to them only three days before the hearing.[473] The trial court granted the injunction on the ground that the officers would be irreparably harmed and stayed proceedings for forty-five days. On appeal by one of the officers, the court ruled that the injunction had expired after forty-five days and the merit board granted an additional continuance, rendering the appeal moot.[474] The court of appeals disagreed and held that the public interest exception to the mootness doctrine applied.[475] It considered the issue raised—whether a stay of administrative proceedings is proper to allow discovery—to be one of great importance and likely to reoccur.[476] The court also held that the trial court lacked subject matter jurisdiction because the officers aborted the administrative process and did not exhaust their administrative remedies. Thus, no special exception to the exhaustion requirement was made for discovery.[477]

In *Boone County Area Planning Commission v. Shelburne*,[478] the question was whether the trial court abused its discretion when it ordered the planning commission to certify that it had no recommendation to make to the board of commissioners after it had a matter pending for many months. Construing Indiana Code section 36-7-4-608(b)[479] and related statutes, the court of appeals held that a planning commission is statutorily required to initiate a public hearing

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468. *Id.*
469. *Id.*
470. *Id.* at 1037-38.
471. 756 N.E.2d 1025 (Ind. Ct. App. 2001).
472. *Id.* at 1026-27.
473. *Id.* at 1027.
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.* at 1028-29.
478. 754 N.E.2d 576 (Ind. Ct. App. 2001).
479. IND. CODE § 36-7-4-608(b) (1998).

on a proposed zoning map amendment within sixty days.[480] However, it is not required to complete all its information gathering within that time frame.[481] But, not only did the planning commission repeatedly delay concluding any hearing, it also decided not to take any action on the matter before it. Because the planning commission abandoned its role in the zoning process, it was not a violation of subject matter jurisdiction or an abuse of discretion for the trial court to mandate that the commission certify to the board of commissioners that it had no recommendation.[482]

In *Turner v. Richmond Power & Light Co.*,[483] the court of appeals reversed the trial court's conclusion that it had no subject matter jurisdiction over an action brought against the Richmond Power and Light Company by a city employee. The dismissal had been made on the basis of the exclusive jurisdiction of the worker's compensation system, but the court of appeals found that the trial court had mischaracterized the nature of the utility.[484] It concluded that, as a matter of law, it was not a city agency, but a hybrid entity, distinguishable enough from the city that the plaintiff was not its employee.[485] The court of appeals reiterated this analysis on Petition for Rehearing[486] and cited the Indiana Supreme Court's opinion in *GKN Co. v. Magness*.[487] *GKN* holds that when an appellate court reviews a trial court's disposition of a case made purely on a written record, the trial court's findings of fact are not entitled to deference but are treated as issues of law.[488]

Grubnich v. Renner,[489] discussed supra, involved an action for dental malpractice and questioned whether the trial court retained jurisdiction to grant post-judgment interest three years after entry of a judgment that did not mention interest.[490] Noting that the post-judgment interest statute directs that interest accrues on the date of the verdict and that case law treats such interest as part of the money judgment, the appellate trial court found the court did have the power to assess interest when the plaintiffs sought to have their judgment enforced.[491]

The Indiana Supreme Court has granted transfer and vacated the opinion of the court of appeals in *Green v. Hendrickson Publishers, Inc.*, which had concluded that certain counterclaims for failure to timely pay royalties were not

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480. *Shelburne*, 754 N.E.2d at 581-82.

481. *Id.*

482. *Id.*

483. 756 N.E.2d 547 (Ind. Ct. App. 2001).

484. *Id.* at 558.

485. *Id.*

486. *See* Turner v. Richmond Power & Light Co., 763 N.E.2d 1005 (Ind. Ct. App. 2002) (Petition for Rehearing).

487. 744 N.E.2d 397 (Ind. 2001).

488. *See Turner*, 763 N.E.2d at 1005.

489. 746 N.E.2d 111 (Ind. Ct. App. 2001); *see also supra* notes 372-73 and accompanying text.

490. *Grubnich*, 746 N.E.2d at 113.

491. *Id.* at 115.

copyright claims within the exclusive jurisdiction of the federal courts.[492]

Sims v. Beamer[493] involved a § 1983 action traceable to a judge's denial of a request for default after the judge had entered an order changing venue. The court of appeals stated that when judicial immunity is in question, a court's jurisdiction will be broadly construed. This fosters the policy "to preserve judicial independence in the decision-making process . . . . Judicial decision-making without absolute immunity would be driven by fear of litigation and personal monetary liability."[494]

M. Limitation of Actions

Allen v. Great American Reserve Insurance Co.[495] involved relating back an amendment of pleadings so as to satisfy the statute of limitations. There subagents sold tax-deferred annuities for a general life insurance agent.[496] They brought actions against the general agent and the insurance company on numerous theories involving misconduct regarding misrepresentations about front-loading provisions of the annuities.[497] The trial court granted the defendants partial summary judgment and the subagents appealed.[498] The court of appeals concluded that the subagents' claims related back, but found that the agents did not reasonably rely on representations concerning the annuity provisions in question.[499]

Indiana Code section 22-3-3-27 imposes a one-year limit on modifying a worker's compensation award for permanent partial impairment awards.[500] *Halteman Swim Club v. Duguid*[501] raised the question of whether this limit also applies to claims for medical expenses incurred after the permanent partial impairment award under Indiana Code section 22-3-3-4(c).[502] It showed again the courts' use of the doctrine of legislative acquiescence.

Twenty years previously, in *Gregg v. Sun Oil Co.*,[503] the court of appeals had decided that claims for medical expenses can be brought if the claim "is filed within one year from the last day on which compensation was paid, whether under the original award or a previous modification."[504] Thereafter in *Berry v.*

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492. Green v. Hendrickson Publishers, Inc., 751 N.E.2d 815 (Ind. App. 2001), *trans. granted*, 2002 WL 1397891 (Ind. Jun 27, 2002) (NO. 79S02-0206-CV-352).

493. 757 N.E. 2d 1021 (Ind. App. 2001).

494. *Id.* at 1024.

495. 739 N.E.2d 1080 (Ind. Ct. App. 2000).

496. *Id.* at 1081-82.

497. *Id.* at 1082.

498. *Id.* at 1083.

499. *Id.* at 1085.

500. IND. CODE § 22-3-3-27 (1998).

501. 757 N.E.2d 1017 (Ind. Ct. App. 2001).

502. IND. CODE § 22-3-3-27(c) (1998).

503. 388 N.E.2d 588 (Ind. App. 1979).

504. *Gregg*, 388 N.E.2d at 590.

Anaconda Corp.,[505] the question was whether the one-year statute of limitations runs from the date of the last benefit payment or from the date of the last medical expense payment. The court concluded that the operative date was the last benefit payment date.[506]

In *Halterman Swim Club*, the court of appeals characterized the distinction between medical expenses and the permanent partial disability award as "a distinction without a difference" under *Gregg*.[507] Therefore plaintiff would have to provide a significant reason for failing to follow *Gregg* and related cases. Because the claimant presented no justification for deviating from the legislature's tacit agreement with the courts' interpretation, the Worker's Compensation Board erred when it denied the employer's motion to dismiss.[508]

In *Rogers v. Mendel*[509] and following *Boggs v. Tri-State Radiology, Inc.*,[510] the court of appeals concluded that the two-year, occurrence-based limitations of action under the medical malpractice statute was constitutional as applied where, in a lawsuit over alleged malpractice in connection with uterine cancer, the plaintiff discovered or should have discovered her possible claim within ten months of the running of the period. In contrast, in *Shah v. Harris*,[511] the plaintiff was allowed to have the limitations period run from the date of discovery and not the occurrence, where seven years previously her doctor had misdiagnosed her multiple sclerosis as a vitamin deficiency and she gained no information within the two-year period to put her on notice of a potential claim.

In *Lusk v. Swanson*,[512] the court of appeals concluded that the standard form letter sent to the plaintiff from the Indiana Department of Insurance concerning her medical malpractice claim and stated in hypothetical terms, for example, "*If* Indiana Code 34-18-1-1, et seq. is applicable to this claim," did not toll the running of the statute of limitations on her action against a provider who was not covered by the Medical Malpractice Act.

N. Local Rules

In *Spudich v. Northern Indiana Public Service Co.*,[513] plaintiff Spudich was stringing lights on the trees at the East Chicago City Hall building. He was hurt by power from noninsulated lines owned by the Northern Indiana Public Service Commission ("NIPSCO") while standing in an aerial bucket.[514] One issue that developed in the case was whether expert testimony would establish a duty on

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505. 534 N.E.2d 250 (Ind. Ct. App. 1989)
506. *Id.* at 253.
507. Halteman Swim Club v. Duguid, 757 N.E.2d 1017, 1020 (Ind. Ct. App. 2001).
508. *Id.* at 1020.
509. 758 N.E.2d 946 (Ind. Ct. App. 2001).
510. 730 N.E.2d 692, 694 (Ind. 2000).
511. 758 N.E.2d 953 (Ind. Ct. App. 2001).
512. 753 N.E.2d 748 (Ind. Ct. App.2001).
513. 745 N.E.2d 281 (Ind. Ct. App. 2001).
514. *Id.* at 284-85.

NIPSCO's part to insulate wires within a certain distance from the tree where Spudich was working. During discovery, NIPSCO asked Spudich to designate experts he would call at trial.[515] This information had not been provided when NIPSCO moved for summary judgment.[516] Spudich then filed supplemental interrogatory answers in which he designated an expert witness, and then opposed NIPSCO's motion, arguing, among other things, that NIPSCO had a duty to insulate lines within a certain distance from trees. He used the affidavit of the expert to support his opposition.[517]

Lake County Local Rule 4 permits the moving party to file a reply to the nonmoving party's opposition. Conversely, Trial Rule 56 makes no mention of a reply. After deposing the expert, NIPSCO filed a reply in which it designated evidence in support of its motion that it had not previously used.[518] The trial court granted NIPSCO summary judgment and the plaintiff appealed. He argued that Local Rule 4 was in conflict with Rule 56.

The court of appeals stated that, as a general proposition, Indiana Trial Rules trump contrary local rules, although Trial Rule 81 itself allows for local rules to be promulgated.[519] The question is one of consistency. The test established by the Indiana Supreme Court is whether it is possible to apply both a trial rule and a local rule at the same time.[520] In the case of Rule 56, a reply is neither authorized nor prohibited. However, the court of appeals noted that the rule contemplates supplemental information being provided, so that "additional evidence after initial filings is contemplated . . . and the Local Rule [4] merely provides a mechanism for filing that evidence not inconsistent with the Trial Rule."[521] Spudich also argued that even if Local Rule 4 were proper, the content of NIPSCO's reply still violated Rule 56(C),[522] which speaks of making evidentiary designations at the time the motion is filed. The court of appeals rejected this argument as well, again relying on that portion of Rule 56 which authorizes supplementation.[523]

O. Preclusion

City of Anderson v. Davis[524] was a case that arose out of a police dog's attack of an officer.[525] The plaintiff officer charged that the dog should not have been used because his propensity to attack was known. He also claimed excessive

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515. *Id.* at 285.
516. *Id.*
517. *Id.*
518. *Id.*
519. *Id.* at 286.
520. *Id.* (citing State v. Bridenhager, 279 N.E.2d 794, 796 (Ind. 1972)).
521. *Id.* at 287.
522. *Id.* at 288.
523. *Id.* at 288-89.
524. 743 N.E.2d 359 (Ind. Ct. App. 2001).
525. *Id.* at 288-89.

force.[526] The officer had previously filed a civil rights claim in federal court that was dismissed on summary judgment.[527] The court of appeals held that the officer's argument concerning knowledge of the dog's propensity was a negligence claim barred by governmental immunity. While the court conceded that the status of an excessive force claim in the context of immunity is not clear, it concluded that the plaintiff was collaterally estopped by the federal case on that theory.[528] Indiana recognizes the doctrine of collateral estoppel (issue preclusion) in an inter-system context between state and federal courts. Because the same issues were litigated in the federal action and the officer had a full and fair opportunity to develop them there, he was precluded from relitigating them in the Indiana court.[529] The court also stated that appellate review of governmental claims of immunity is de novo and that no particular deference is given the trial court determination of the issue.[530]

In re Adoption of A.N.S.[531] involved the concurrent jurisdiction of a court determining paternity and a court authorizing adoption. The biological father notified the mother of his intention to contest the adoption of a child born out of wedlock, but did not begin a paternity proceeding until a few days after the time required by statute.[532] The mother contested paternity by a summary judgment motion, which argued that the father's notification came too late, but her motion was denied. Later she initiated a separate adoption action in another court of the same county and argued that the father should not be allowed to intervene because he had not objected to the adoption within the statutory period. The adoption court eventually allowed intervention and the mother appealed.[533] The appellate court did not reach the merits of the case, but instead determined that the prior proceeding precluded relitigation of the issue of paternity, foreclosing the adoption. The court recognized the concurrent jurisdiction of both courts, but treated preclusion as dispositive.[534]

P. Real Party in Interest

IDEM v. Jennings Northwest Regulatory Utilities[535] involved a dispute over the status of a water and sewage utility district. The Indiana Department of Environmental Management ("IDEM") originally established the utility such that

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526. *Id.* at 361.

527. *Id.*

528. *Id.* at 366.

529. *Id.*

530. *Id.* at 362.

531. 741 N.E.2d 780 (Ind. Ct. App. 2001).

532. *Id.* at 782. *See* IND. CODE § 31-3-1-6.4 (repealed and reenacted as IND. CODE § 31-19-3-4 (1998)). The statute requires the putative father to establish paternity by action to contest an adoption within thirty days of notice.

533. *A.N.S.*, 741 N.E.2d at 784.

534. *Id.* at 787.

535. 760 N.E.2d 184 (Ind. Ct. App. 2001).

its board would be elected by customers and it would be independent of the county commissioners. Later, IDEM sought to change that structure by issuing an "Amended Order" to its previous final order of agency action.[536] The utility filed a petition for judicial review of the Amended Order and IDEM defended on the bases that the utility lacked standing to sue and was not the real party in interest. The petition was dismissed, and the utility amended its petition, but only after the thirty-day period specified in the Administrative Orders and Procedures Act for judicial review. The trial court proceeded with the action and set aside the Amended Order. IDEM appealed on the ground of lack of subject matter jurisdiction.[537]

The court of appeals agreed with IDEM that the later petition could not relate back to the earlier one, in order to bring the utility's action within the time period for seeking judicial review of agency action. It thus rejected the argument that the dismissal should have been treated as a simple 12(B)(6) failure to state a claim that could be remedied.[538] However, it disagreed that the original petition was subject to dismissal, for it found that the utility did have standing to sue and was the real party in interest. The utility had standing under Indiana Code section 4-21.5-5-3(a)(4) as an entity "aggrieved or adversely affected by the agency action."[539] This was because the Amended Order removed the utility's independence, which was prejudicial. Moreover, there was standing because the utility should have received notice of the action as the entity created by the original order and would be affected by its amendment.[540] For similar reasons, the utility was the real party in interest, for the right threatened—to be independent—was owned by the utility.[541]

Q. Right to Counsel

In a decision that raised some of the issues the Indiana Supreme Court grappled with in *Sholes v. Sholes*,[542] the court in *Lattimore v. Amsler*[543] held that the pauper statute creates an independent right to court-appointed counsel. The case involved a father who filed a pro se proceeding to establish paternity, which was dismissed. The court believed the opinion in *Holmes v. Jones*[544] required the counsel, so that once the trial court found the father indigent and waived the filing fee, it had no discretion to deny him representation. How this opinion should be read in light of the Indiana Supreme Court's refinement of these issues in *Sholes* is an open question.

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536. *Id.* at 186.
537. *Id.* at 186-87.
538. *Id.* at 187-88.
539. *Id.* at 188; *see also* IND. CODE § 4-21.5-5-3(a)(4) (1998).
540. *Jennings*, 760 N.E.2d at 188-89.
541. *Id.*
542. 760 N.E.2d 156 (Ind. 2001). *See also supra* notes 58-84 and accompanying text.
543. 758 N.E. 2d 568 (Ind. Ct. App. 2001).
544. 719 N.E.2d 843 (Ind. Ct. App. 1999).

R. Service/Notice

In a dispute over a permanent protective order issued against a father, the court of appeals construed proper service under Trial Rule 4.1(A)(3). In *Hill v. Ramey*,[545] the father, Hill, was served with a temporary protective order and later with a permanent protective order by the sheriff leaving a copy of the papers with his parents at their home. However, Hill was living in Louisville, Kentucky, not with his parents, at the time of service.[546] He requested relief from the default judgment leading to the permanent protective order on the grounds of lack of notice. This was denied.[547] The court of appeals reversed and held that even if service was made at Hill's parents home on the theory that it was his last known address, this was not sufficient to satisfy the requirement that it be made at his "dwelling house or usual place of abode."[548] Thus, no personal jurisdiction had ever been established over Hill, rendering the court's action void. This was true even if he had received actual notice of the proceeding. *Hill* is a good example of the fact that the procedures for service are strictly construed.[549]

Boczar v. Reuben[550] involved a lawsuit by an attorney to collect his fee. The court of appeals made a number of points concerning personal jurisdiction and service. In that action, the plaintiff attorney used abode service to acquire jurisdiction over the defendants but did not follow it up by mailing a copy of the summons to them as required by Indiana Trial Rule 4.1(B). Distinguishing the decision in *Barrow v. Pennington*,[551] the court concluded that this failure did not deprive the court of personal jurisdiction over the defendants where they received actual notice and the "exigencies" of *Barrow* were not present.[552] In *Volunteers of America v. Premier Auto Acceptance Corp.*,[553] the appellate court opined that in a garnishment action, a summons addressed simply to the employer and not to a specific officer or person is inadequate for service where the employer did not have actual notice of the proceeding.

S. Settlement

Last year in *Vernon v. Acton,* the Indiana Supreme Court established that a settlement agreement need not be in writing to be enforceable.[554] The court of appeals applied this principle in a novel context in *In re Estate of Skalka.*[555] The case involved a family dispute over real estate and an action to partition. During

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545. 744 N.E.2d 509 (Ind. Ct. App. 2001).
546. *Id.* at 510.
547. *Id.* at 511.
548. *Id.*
549. *Id.* at 512.
550. 742 N.E.2d 1010 (Ind. Ct. App. 2001).
551. 700 N.E.2d 477 (Ind. Ct. App. 1998).
552. *Boczar* at 1015-16.
553. 755 N.E.2d 656 (Ind. Ct. App. 2001).
554. 732 N.E.2d 805, 809 (Ind. 2000).
555. 751 N.E.2d 769 (Ind. Ct. App. 2001).

the pretrial conference, the trial judge met with the parties without their attorneys present and reached a settlement.[556] Thereafter, the plaintiffs' attorney reduced the settlement agreement to writing, but the parties never signed it. Later, the plaintiffs alleged that they had not entered into a settlement agreement. Nonetheless, the court enforced one and made supportive findings. Plaintiffs appealed, arguing among other things, that there was insufficient evidence they had agreed to settle, that the judge acted as a mediator in violation of the ADR rules, and that in meeting with them without their lawyers, the judge improperly pressured them to settle.

The court of appeals rejected all arguments. First, and given the deference accorded to trial court findings, it concluded that there was sufficient evidence to support the judge's opinion that there was a settlement, particularly because plaintiffs' own lawyer drafted an agreement incorporating it. That fact removed any concern over undue pressure. If the plaintiffs did not really agree to a settlement, their lawyer would not have drafted the document.[557] Finally, the court rejected the notion that the judge functioned as a formal mediator in violation of the ADR rules. Although in remarks the judge spoke of "no longer going to be the mediator"[558] this statement, in context, showed that he was simply attempting to assist the parties to reach settlement.

T. Standard of Review

In *Justiniano v. Williams*[559] the court of appeals applied the principle that review of a paper record requires no special deference on findings in the context of a worker's compensation proceeding. In *Walker v. State*, the Indiana Supreme Court held that where there is no evidentiary hearing below, the facts are not in dispute, and review is of a documentary record, the questions on appeal are akin to legal ones.[560] The court of appeals stated that in making such "legal analysis" under the Worker's Compensation Act, the doubts as to the Act's meaning should be construed in favor of coverage to foster the humane purpose of worker's compensation.[561]

In *Justiniano*, a worker whose legs were injured in a single accident, argued that the board did not give him a large enough award because it used the wrong standard to judge his degree of impairment.[562] The court of appeals disagreed, noting that the award made was supported by the statement of plaintiff's own doctor as to the percentage of his impairment in terms of the "whole body standard."[563] The board's hearing judge was not required to accept a stipulation

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556. *Id.* at 770.
557. *Id.* at 772-73.
558. *Id.* at 772.
559. 760 N.E.2d 225 (Ind. Ct. App. 2001).
560. 694 N.E.2d 258, 266 (Ind. 1998).
561. *Justiniano*, 760 N.E.2d at 228.
562. *Id.* at 227.
563. *Id.* at 228-29.

that showed a larger injury, but could make independent inquiry into the matter by analyzing the claimant's medical records, which findings could then be adopted by the board.[564]

Although it ultimately reversed the trial court's disposition, *Homer v. Burman*[565] reiterates that on appellate review, extreme deference is generally accorded the actions of the Small Claims Divisions of Indiana courts of general jurisdiction: "Indiana Small Claims Rule 8(A) provides for informal hearings with relaxed rules of procedure in order that speedy justice can be dispensed. As a result, we are particularly deferential to the trial court's judgment."[566]

U. Standard of Review Where No Appellee Brief

What should the response of the courts of appeals be when an appeal is taken but the winner below, the appellee, files no brief in opposition? Unfortunately, this is a frequently recurring situation. The appellate decisions are in agreement that in that circumstance, a lesser showing is required of an appellant to obtain a reversal. All that need be demonstrated is that there is a "prima facie" showing of error below. As the court explained in *Muncie Indiana Transit Authority v. Smith*,[567]

> At the outset we note that Smith has failed to file an appellee's brief. When an appellee fails to submit a brief in accordance with our rules, we need not undertake the burden of developing an argument for the appellee. Rather, Indiana courts have long applied a less stringent standard of review with respect to showings of reversible error when an appellee fails to file a brief. Thus, we may reverse if the appellant is able to show *prima facie* error. In this context, "prima facie" is defined as "at first sight, on first appearance, or on the face of it."

As these cases show, this will continue to be the approach even under the new Appellate Rules.

V. Standing

Cittadine v. Indiana Department of Transportation[568] presented the question whether a local Elkhart citizen could use the public standing doctrine to force the Indiana Department of Transportation (INDOT) to prevent a railroad from placing rolling stock on an interchange on Elkhart city streets. In general, the public standing doctrine allows a member of the public with no specific interest or injury at stake to initiate litigation to enforce a public right. Because of inquiries from acquaintances, plaintiff Cittadine sought a writ of mandamus

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564. *Id.* at 229.

565. 743 N.E.2d 1144 (Ind. Ct. App. 2001).

566. *Id.* at 1146.

567. 743 N.E.2d 1214, 1216 (Ind. Ct. App. 2001) (citing Robinson v. Valladares, 738 N.E.2d 278, 280 (Ind. Ct. App. 2000)) (all other citations omitted).

568. 750 N.E.2d 893 (Ind. Ct. App. 2001).

requiring INDOT to interpret Indiana Code section 8-6-7.6-1 (governing obstructions of motorist views at railway-highway intersections) to prevent the railroad practice. He specifically relied on the public standing doctrine to sue.[569] But according to the court of appeals, the Indiana Supreme Court has significantly narrowed the doctrine in *Pence v. State*,[570] and now requires extreme circumstances to justify a lawsuit based solely on taxpayer or citizen status. The rationale for this approach is to protect state separation of powers. The court noted that there were legitimate reasons for the manner in which INDOT acted, and it exercised its executive branch power consistently with its authority, so the suit would not be allowed.[571]

In *In re Guardianship of K.T.*,[572] the court of appeals reiterated that the fundamental principles of standing are whether the person seeking relief has a demonstrable injury in respect of the lawsuit and is the proper person to invoke the court's power for such relief. Under those guidelines, it concluded that the natural father and custodial parent of a child born out of wedlock had standing to seek a modification of the court order allowing visitation by the child's maternal grandparents, who had been the previous guardians of the child.

W. Summary Judgment

In *Board of Commissioners of the County of Harrison v. Lowe*,[573] the trial court granted the county partial summary judgment on the ground it was "legislatively" immune from suit arising from an auto accident under the Indiana Tort Claims Act.[574] However, the county was not totally immune because posting warning signs regarding road conditions is not statutorily mandated. On appeal, the county argued that summary judgment in its favor was still appropriate, because the plaintiff had not designated the warning issue as a material fact when opposing the motion.[575] The court of appeals disagreed, citing to *Cavinder Elevators, Inc. v. Hall*,[576] a 2000 decision of the Indiana Supreme Court that made it clear the nonmoving party has no obligation to present opposition evidence to avoid summary judgment, if the moving party has not first met its burden of showing no genuine issue of material fact.[577] The case also contains an exhaustive discussion of the history of immunity under the Act and the legislative exception.[578]

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569. *Id.* at 895.
570. 652 N.E.2d 486, 488 (Ind. 1995).
571. *Cittadine*, 750 N.E.2d at 896.
572. 743 N.E.2d 348 (Ind. Ct. App. 2001).
573. 753 N.E.2d 708 (Ind. Ct. App. 2001).
574. *Id.* at 710-11.
575. *Id.* at 720.
576. 726 N.E.2d 285, 290 (Ind. 2000).
577. *Lowe*, 753 N.E.2d at 720.
578. *Id.* at 716-19.

In *Steuben County Waste Watchers v. Family Development Ltd.*,[579] the controversy was over whether a developer was required to obtain an improvement location permit before building a landfill. The county and environmental groups sued to require the permit. The developer moved for summary judgment, which the trial court granted.[580] In opposition to the motion for summary judgment, plaintiffs attached affidavits that referred to the prior condition of the landfill and that also included statements from the county zoning administrator as to the steps by which the permit could be obtained.[581] On review, the Indiana Court of Appeals held that the trial court had properly struck these materials. The prior condition of the landfill was irrelevant to the building of a subsequent landfill, and the county zoning commissioner's comments represented a statement of legal conclusions, not facts.[582] In reviewing the adequacy of the administrator's affidavit, the court of appeals noted that, normally, not even expert witnesses are competent to testify as to legal conclusions.[583] Although it agreed with the trial court's striking of the affidavits, the court reversed, stressing that a reviewing court gives no special deference to a trial court's interpretation of a statute.[584]

In *Chandler v. Dillon*,[585] the trial court granted the plaintiff an extension of time to respond to a motion for summary judgment and then rescinded the extension, giving the plaintiff only one day to oppose the motion. Thereafter the trial court granted summary judgment.[586] It gave numerous reasons for the rescission: that the extension was "inconsistent" with prior orders establishing a case management schedule; that the order had a stamped, not written, signature; and that the order was issued without a hearing.[587] The court of appeals concluded that such a short time to respond after the grant of an extension deprived the plaintiff of due process.[588] It also rejected the trial court's reasons for the rescission.[589] It noted that under *State ex rel. Peacock v. Marion Superior Court, Civil Div., Room No. 5*,[590] a stamped signature is given the same effect as a written one, absent specific evidence of irregularity.[591] Nothing in the applicable trial rules for enlarging time or granting summary judgment requires a hearing before an extension to respond to a summary judgment motion may be given.

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579. 753 N.E.2d 693 (Ind. Ct. App. 2001).
580. *Id.* at 696.
581. *Id.*
582. *Id.* at 699.
583. *Id.* at 697-700.
584. *Id.*
585. 754 N.E.2d 1002 (Ind. Ct. App. 2001).
586. *Id.* at 1004.
587. *Id.* at 1005-06.
588. *Id.* at 1006.
589. *Id.* (citing Harder v. Estate of Rafferty, 542 N.E.2d 232, 234 (Ind. Ct. App. 1989)).
590. 490 N.E.2d 1094, 1096 (Ind. 1986).
591. *Chandler*, 754 N.E.2d at 1005.

Azhar v. Town of Fishers[592] involved a citizen lawsuit for violation of the Open Door Act against the town, town council, and an ad hoc committee of the town council. The trial court granted defendants summary judgment.[593] The court of appeals concluded that the plaintiff was not prejudiced when the defendants' motion to dismiss was converted to summary judgment motion without express notice.[594] This was because he was given adequate time to respond. Moreover, the obvious use of evidence outside the pleadings should have put the plaintiff on notice that the motion was actually a summary judgment request.[595] However, summary judgment was unwarranted because genuine issues of material fact existed regarding whether the defendants had cured their previous violation of open door requirements.[596]

In *Deuitch v. Fleming*[597] the trial court granted summary judgment, but the court of appeals reversed concluding that there were genuine issues of material fact as to breach of duty, causation, and elements of res ipsa loquitur. In so doing, the court described what it characterized as ambiguity in the standards for granting summary judgment.[598] The court was particularly critical of the Indiana Supreme Court's opinion in *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,[599] which prohibits a movant on summary judgment from meeting its prima facie burden by merely pointing out that a plaintiff has failed to produce evidence raising material issues of fact on essential elements of a claim. For the *Deuitch* court, this created the following reality: "Thus, applying the standard as articulated in *Jarboe* permits a plaintiff who has no evidence supporting his claim to proceed to trial, thereby wasting the parties' time and money as well as judicial resources. One would hope that this anomaly would be addressed by the supreme court."[600] Thus, it requested direction from the Indiana Supreme Court on these questions.[601]

A number of appellate cases reiterate that simply because cross-motions for summary judgment are filed, this does not change the standard of review and each motion should be scrutinized on its own under the applicable requirements for summary judgment.[602]

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592. 744 N.E.2d 947 (Ind. Ct. App. 2001).
593. *Id.* at 950.
594. *Id.* at 950-51.
595. *Id.*
596. *Id.* at 953.
597. 746 N.E.2d 993 (Ind. Ct. App. 2001).
598. *Id.* at 999-1000.
599. 644 N.E.2d 118, 123 (Ind. 1994).
600. *Deuitch*, 746 N.E. 2d at 1000.
601. *Id.* at 1000.
602. *See, e.g.*, Conseco Fin. Servicing Corp. v. Old Nat'l Bank, 754 N.E.2d 997 (Ind. App. 2001); Hoosier Ins. Co. v. Audiology Found. of Am., 745 N.E.2d 300, 306 (Ind. Ct. App. 2001).

X. Tort Claims Act

In *Indiana Department of Transportation v. Shelly & Sands, Inc.*,[603] an action in which a contractor sued the Department of Transportation on theories of constructive fraud and estoppel, the court of appeals held that such claims, when grounded in tortious conduct, are still subject to the notice requirements of the Tort Claims Act.[604]

Porter v. Fort Wayne Community Schools[605] involved a collision between a car and a school bus. On the advice of the school district's insurance adjuster, the driver's lawyer sent a letter to the defendant that included detailed information about the accident, fairly inferred that a lawsuit was contemplated, but did not formally state an intent to sue.[606] The trial court granted summary judgment for failure to provide notice under the ITCA. The court of appeals reversed, concluding that the letter substantially complied with the notice requirements.[607] In so holding, the court noted that compliance with the Act is a preliminary procedural issue that must be resolved prior to trial.[608]

III. INDIANA'S NEW JURY RULES

The "Juries for the 21st Century" project has culminated in the approval of new Indiana Jury Rules by the Indiana Supreme Court.[609] It was undertaken jointly by the Citizens Commission for the Future of Indiana Courts ("CCFC") and the Judicial Administration Committee of the Judicial Conference (both collectively referred to as the "Commission")[610] to promote a number of goals. Among these were to make all rules affecting juries accessible in one place, to increase public understanding of the role of jurors in the trial process, to expand jury service, to diversify the jury pool, to increase respect for jurors, and to protect juror privacy and safety.[611] The new rules take effect on January 1, 2003.

The Indiana Jury Rules introduce new matters and preserve features of current practice.[612] Many of the Commission's recommendations became rules, though not all. The Commission felt strongly that virtually no exemptions from jury service should be granted. Instead, a process of deferral should be utilized when undue hardship, extreme inconvenience, or public necessity would support

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603. 756 N.E.2d 1063 (Ind. Ct. App. 2001).

604. *Id.* at 1077.

605. 743 N.E.2d 341 (Ind. Ct. App. 2001).

606. *Id.* at 342-43.

607. *Id.* at 345.

608. *Id.* at 344.

609. Press Release, The Indiana Supreme Court Adopts Most Rules Proposed by Coalition of Citizens and Judges [hereinafter CCFC Press Release], copy on file with the *Indiana Law Review*. *See also Reports*, *supra* note 2.

610. *See Reports*, *supra* note 2, at 1.

611. *See* CCFC Press Release, *supra* note 609, at 1-2.

612. *Id.* at 1.

a delay in a citizen's participation.[613] The Indiana Jury Rules strictly limit exemptions from service to those specifically enumerated by statute. However, the Indiana Supreme Court felt that it did not have the power to eliminate the substantive right not to serve accorded to some citizens by the legislature.[614] As a compromise, where a specific exemption does *not* apply and burden is alleged to justify nonparticipation, rather than completely excusing a potential juror, service will be deferred.[615]

Innovative rules to educate the jury on its role and to increase its understanding of the processes and substantive issues unfolding during trial will affect trial practice.[616] While these changes might improve functioning, they also allocate more responsibility to the trial judge and might alter the order of classic procedures such as the giving of final instructions. Juror understanding and efficiency could be being bought at the expense of the trial lawyer's ability to control the presentation of his or her case. For instance, upon welcoming the panel, the trial judge must now immediately introduce the jury to the case.[617] The introduction must include a description of the nature of the matter and applicable standards and burdens of proof, among other things.[618] At this early stage, and with the court's consent, the parties are allowed to present "mini" opening statements.[619] Carrying forward this same theme, Indiana Jury Rule 20 provides that the court shall again guide the jury before opening statements by reading instructions on the issues for trial, burdens of proof, credibility of witnesses and how to weigh evidence.[620] The trial judge must also inform jurors that they themselves may seek to ask questions by giving the questions in writing to the judge.[621] Rule 23 authorizes the judge to issue to jurors a trial book which can include instructions, witness lists, and copies of all admitted exhibits.[622] The Commission also recommended a new chronology for final instructions. It would have had the trial judge give the instructions *prior* to closing arguments to provide jurors with a framework for the arguments.[623] The Indiana Supreme Court did not mandate this sequence, but instead left it to the discretion of the trial judge.[624] According to the Commission, the purpose of the repeated guidance of these rules is to increase jury understanding: "Repetition of complex legal issues, such as standards of proof, are [sic] expected to assist jurors to learn

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613. *Compare Reports*, *supra* note 2, at 6, 34-37, 65-66, *with* IND. JURY R. 6 (effective Jan. 1, 2003).

614. *See* CCFC Press Release, *supra* note 609, at 1.

615. IND. JURY R. 7 (effective Jan. 1, 2003).

616. *See Reports*, *supra* note 2, at 49-55.

617. IND. JURY R. 14 (effective Jan. 1, 2003).

618. *Id.*

619. *Id.*

620. IND. JURY R. 20 (effective Jan. 1, 2003).

621. *Id.*

622. IND. JURY R. 23 (effective Jan. 1, 2003).

623. *See* CCFC Press Release, *supra* note 609, at 2.

624. IND. JURY R. 27 (effective Jan. 1, 2003).

unfamiliar concepts and apply them during deliberations."[625]

Another important topic and one allied to exemptions and excusals is the need to diversify the jury pool. Survey results obtained by the Commission[626] and citizen comments at public hearings around the state showed that Indiana citizens are deeply concerned that jury panels become more demographically representative, not just in terms of race, but also in terms of vocation, life experience, and economic background.[627] To achieve this, the Indiana Jury Rules direct that the jury pool be derived not just from voter registration lists, but also from lists of utility customers, property taxpayers, income tax form mailing lists, motor vehicle registrations and drivers' licenses, as well as city and telephone directories.[628]

The Commission recognized that the practice of peremptory challenges undermines jury diversity, but could not agree on a solution to the problem.[629] Instead, it recommended that the court require documentation of juror disqualification, exemptions and deferrals,[630] and that the process of jury selection be recorded, including sidebar conferences,[631] so that a study could be made. The court enacted these suggestions in Indiana Jury Rules 8 and 12.[632] It is interesting to note that in *Ashabraner v. Bowers*,[633] just decided in 2001, the court insisted on strict adherence to the *Batson*[634] doctrine, which is designed to reduce peremptory challenges motivated by racial bias.

On the issues of jury respect, privacy, and safety, a number of changes have been instituted. According to the Commission, respect for jurors is increased by Rule 4, which requires a minimum of two weeks notice of potential service; Rule 9, which limits service to one day or one trial; Rule 7, which allows deferrals for service whose timing works a hardship on the citizen (e.g., farmers in the growing season; accountants at tax time); and Rule 3, which prevents bystanders from being conscripted for jury service.[635] Issues of juror privacy and safety can coalesce. Rule 10 provides that personal information obtained about jurors be kept confidential, unless discussed in open court.[636] To reduce hostility to the jury, Rule 30 now requires that the verdict be read aloud by the judge, rather than the foreperson.[637]

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625. *See* CCFC Press Release, *supra* note 609, at 2.
626. *See Reports*, *supra* note 2, at 26-31, 37-41.
627. *See* CCFC Press Release, *supra* note 609, at 2.
628. IND. JURY R. 2 (effective Jan. 1, 2003).
629. *See Reports*, *supra* note 2, at 37-41.
630. *See* CCFC Press Release, *supra* note 609, at 2.
631. *Id.*
632. IND. JURY R. 8, 12 (effective Jan. 1, 2003).
633. 753 N.E.2d 662 (Ind. 2001). *See supra* Part I.A.4.
634. 476 U.S. 79 (1986).
635. *See Reports*, *supra* note 2, at 30; CCFC Press Release, *supra* note 609, at 4.
636. IND. JURY R. 10 (effective Jan. 1, 2003).
637. IND. JURY R. 30 (effective Jan. 1, 2003).

IV. OTHER INDIANA RULE CHANGES

On April 1, 2002, a series of changes to the Indiana Trial Rules became effective. The most important of these involves Trial Rule 3 and parallels the Indiana Supreme Court's decision in *Ray-Hayes*,[638] which required tender of the summons to the clerk of the court to commence an action. Now the rule expressly provides that a civil action is not begun unless the complaint is filed along with "payment of the prescribed filing fee or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary."[639] This change makes it clear that a litigant can no longer toll the statutes of limitations while, at the same time, delaying tender of the summons to the clerk of the court. Where practitioners initiate an action at the last moment, failure to tender the summons until after the statute has run will be fatal. Trial Rule 4(B) has also been amended to conform to the changes in Rule 3 and remove any ambiguity as to the required chronology.[640]

In response to changing technology, Rule 5(E), which defines "filing with the court," allows electronic filings not just by facsimile, but by all forms of electronic transmission. This is consistent with Indiana's recent adoption of the Uniform Electronic Transactions Act,[641] which contains provisions designed to encourage electronic records for governmental entities.[642] Recognizing the heavy use of express delivery services by attorneys, new Rule 5(E)(4) allows filing with the clerk by use of "any third-party commercial carrier" so long as service is to take place within three calendar days.[643] Renumbered Rule 5(E)(5) makes third-party commercial carrier filing effective on deposit with the carrier. However, if any method of filing with the clerk other than personal delivery is employed, parties must retain proof of filing.[644]

Like the changes to Rule 3, amendments to Trial Rule 15(C) will impact the ability of parties to meet the statute of limitations. Previously, when a new party was to be added by amending a pleading, that amendment would not relate back to the date of commencement unless, within the limitations period, the new party both received notice of the lawsuit so as not to be prejudiced, and was or should have been aware that he or she was mistakenly omitted from the action.[645] Now these requirements must be met within 120 days of "commencement of the action."[646]

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638. 753 N.E.2d 662 (Ind. 2001).
639. IND. TRIAL R. 3 (amended 2001).
640. IND. TRIAL R. 4(B) (amended 2001).
641. IND. CODE § 26-2-8 (1998 & Supp. 2001).
642. *Id.*
643. IND. TRIAL R. 5(E)(4) (amended 2001).
644. IND. TRIAL R. 5(E)(5) (amended 2001).
645. IND. TRIAL R. 15(C) (amended 2001).
646. *Id.*

Last year in *Old Indiana Ltd. Liability Co. v. Montano*,[647] the court of appeals strictly construed the language of Rule 35 on mental and physical exams to require all examinations thereunder to be performed by a licensed physician.[648] This interpretation prevented important categories of professionals, such as psychologists, physical therapists, vocational specialists, and the like, from eligibility to conduct court-ordered examinations. Amended Rule 35 now specifies that a court may order an examination by any "suitably licensed or certified examiner."[649]

Trial Rule 53.1 imposes time limits on trial courts for ruling on motions.[650] It has been amended to better accommodate the effects of alternative dispute resolution ("ADR") on the chronology of cases. Now, the time from the point when a matter is referred to ADR until the ADR report is submitted is excluded for purposes of computing the time when a judge must rule on a motion.[651]

As the previous discussion of *Sholes v. Sholes*[652] shows, Indiana Trial Rule 60.5 is a unique provision that affords courts a procedure for mandating the expenditure of public funds for the operation of the court or court-related activities.[653] The rule specifies that when a court seeks to mandate funds, an order to show cause why the appropriation should not be made shall issue and a bench trial should be undertaken, presided over by a special judge.[654] Previously, the Indiana Supreme Court was to appoint such a judge from a panel of judges and former judges maintained by the court.[655] Now, Rule 60.5 has been amended to dispense with the panel.[656] Under the previous version of the rule, any determination that expenditure of funds should occur was automatically reviewed in the Indiana Supreme Court, unless the government entity waived review within two days after entry of the decree. The time for waiver is now extended to a full thirty days.[657]

Trial Rule 75 on venue has been amended to refer generally to "actions," not "causes" or "proceedings," and to impose the duty of paying the costs associating with transferring an action for improper venue within twenty days of the order of transfer.[658] If this payment is not timely made, the action must be dismissed (though without prejudice) and attorneys' fees and costs must be awarded. Subdivision (E) of the Rule has also been changed to cross-refer to new Appellate Rule 14(A)(8) on interlocutory appeals.

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647. 732 N.E.2d 179 (Ind. Ct. App. 2000).
648. *Id.* at 186-87.
649. IND. TRIAL R. 35 (amended 2001).
650. IND. TRIAL R. 53.1.
651. IND. TRIAL R. 53.1(B) (amended 2001).
652. 760 N.E.2d 156 (Ind. 2001).
653. *See supra* Part I.A.3.
654. IND. TRIAL R. 60.5.
655. *Id.*
656. IND. TRIAL R. 60.5 (amended 2001).
657. *Id.*
658. IND. TRIAL R. 75(1)(2) (amended 2001).

Finally, Rule 79 governing the appointment of special judges in conjunction with provisions such as Rule 60.5 has been amended to allow a judge who has granted a change of venue to serve as a special judge in the same matter in its new location. This is conditioned on agreement of the parties and the sending and receiving judges of the respective counties.[659] Subdivision (K) has also been changed to specifically include special judges appointed pursuant to Indiana Code section 34-13-5-4 on public lawsuits.[660] Part (P) has been modified to provide a special fee for senior judges who serve as special judges and the last sentence of that section, mandating that their payment be determined by the fee schedule of the Director of the Division of State Court Administration, has been deleted.[661]

Effective January 1, 2002 are revisions to Tax Court Rules 1 through 9, and 16 through 20.[662] These changes are in response to the new Indiana Board of Tax Review, established in 2001 by Indiana Code section 6-1.5-2-1 and provide procedures for appeal in state tax matters, among other things.[663] In addition, a new form, entitled "Verified Petition for Judicial Review of a Final Determination of the Indiana Board of Tax Review" has been added. While state tax court procedure is beyond the scope of this Article, tax practitioners should take care to familiarize themselves with the rule amendments and their focus on the requirement of exhausting administrative remedies. This is found in the constant references to the "final determinations" of taxing authorities in the new rules.

Changes to three Indiana Administrative Rules will become effective on various dates. Rule 5 governing senior judges has been amended to afford them state insurance benefits and entitlements, effective January 1, 2002.[664] Administrative Rule 8 immediately institutes a new type designation for the case numbering system affecting civil plenary matters—"PL" for all cases filed after January 1, 2002, not "CP."[665] In conformity with the concern for juror privacy and safety expressed in the reports of the Commission, Administrative Rule 9 has been amended so that, effective January 1, 2003, personal information about jurors and prospective jurors that is not disclosed in open court will be kept confidential from public dissemination.[666] Finally, pursuant to Appellate Rule 30, the Indiana Supreme Court has promulgated technical standards for digital transcripts to be used on appeal.[667] Among these standards is the requirement that all eligible documents be converted into the Adobe Portable Document

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659. IND. TRIAL R. 79(J)(1) (amended 2001).
660. IND. TRIAL R. 79(K) (amended 2001).
661. IND. TRIAL R. 79(P) (amended 2001).
662. *See* http://www.in.gov/judiciary/research/amend02/tax.pfd (last visited May 21, 2002).
663. *Id.*
664. IND. ADMIN. R. 5 (amended 2001).
665. IND. ADMIN. R. 8.
666. IND. ADMIN. R. 9(L) (amended 2001; amendment effective 2003).
667. http://www.in.gov/judiciary/research/amend02/digital.pfd.

Format by the court reporter for transmission to the court of appeals.[668] Civil practitioners should also review changes to the Rules for Small Claims Court,[669] the Rules of Judicial Conduct,[670] and the Rules of Evidence.[671]

V. FEDERAL PRACTICE

The year 2001 proved a particularly discouraging one for the plaintiff's bar insofar as federal practice was concerned. The U.S. Supreme Court decided a number of cases that reduce the incentives for taking civil litigation or make access to court trials more difficult. Both Congress and the federal rulemakers seem intent on restricting state class actions by federalizing them using minimal diversity or erecting obstacles to class action status or attorney compensation. The changes to the Federal Rules of Civil Procedure ("FRCP") for this rulemaking cycle were less extensive than in 2000, although proposed rule changes in the pipeline are controversial. What follows is a brief review of some of the developments affecting civil practice in the federal courts.

A. Procedural Legislation

1. Resident Aliens and the Diversity Statute.—The Federal Court Improvements Act of 2001[672] would repeal the provision of 28 U.S.C. §1332 that deems a resident alien a citizen of the state of her/his permanent residence and replace it with a rule that prohibits federal jurisdiction for disputes involving such persons.

2. Multiparty, Multiforum Litigation.—In March 2001, the U.S. House of Representatives passed the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001.[673] It permits federal jurisdiction on minimal diversity in mass tort cases where at least twenty-five persons have died or been injured and each plaintiff claims damages in excess of $150,000.[674] However, it also mandates that federal courts abstain from exerting this jurisdiction where a substantial portion of plaintiffs and primary defendants are from the same state. Likewise, that state's law will govern the conflict. It also legislatively overrules *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[675] which had allowed a judge who had received a case pursuant to 28 U.S.C. § 1407 (multidistrict litigation) to retain the case for trial.[676]

3. Class Actions.—Several bills are pending in Congress that affect class actions and parallel attempts from the FRCP rulemaking process ("FRCP") to

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668. *Id.*
669. *Available at* http://www.in.gov/judiciary/research/rules.html.
670. *Id.*
671. *Id.*
672. H.R. 2522, 107th Cong. (2001).
673. H.R. 860, 107th Cong. (2001).
674. H.R. 860, 107th Cong., § 3 (2001).
675. 523 U.S. 26 (1998).
676. H.R. 860, 107th Cong., § 2 (2001).

rein in state class actions.[677] S.1712[678] expands the provisions of H.R. 2341, the Class Action Fairness Act of 2001.[679] The House bill, if passed, would provide federal subject matter jurisdiction over state-based class actions where there is minimal diversity among class members, there are at least 100 such members, and the amount in controversy exceeds $2 million. H.R. 2341 also regulates the adequacy of class notice and the attorneys' fees that are recoverable. In addition, it heightens pleading requirements for such classes and stays discovery until motions to dismiss can be heard. S. 1712 goes beyond this proposed legislation because it allows removal to federal court of matters not formally designated as class actions in two situations, any public interest lawsuit not filed by a state attorney general and claiming monetary relief and any claim for monetary relief tried jointly with 100 or more persons.

4. Television in the Courtroom.—In the fall of 2001, the Senate Judiciary Committee approved the Sunshine in the Courtroom Act, S. 986. It gives federal judges the discretion to allow television broadcasting of proceedings, even though the Judicial Conference of the United States has been opposed to this move.[680]

5. Electronic Communications.—The E-Government Act of 2001, S.803, would require all federal courts to establish a website where detailed information about cases and other matters would be available.[681]

6. Government Lawyers.—S. 1437, introduced by Senator Leahy and entitled the Professional Standards for Government Attorneys Act of 2001, would require federal rulemakers to regulate the conduct of government lawyers, especially insofar as their ability to contact represented persons is concerned. It would also authorize government lawyers to act in "sting" operations.[682]

7. Terrorism.—S. 1751, the Terrorism Risk Insurance Act of 2001, would use the multidistrict litigation approach to put all matters stemming from a terrorist incident in one federal forum. It would also preclude punitive damages for actions under the act.[683] A similar approach is taken in the Terrorism Risk Protection Act, H.R. 3210.[684] Finally, the Air Transportation Safety and System Stabilization Act of 2001,[685] introduced in response to the September 11 disaster, would limit the liability of airlines, but provide new causes of action to litigants.

B. U.S. Supreme Court and Seventh Circuit Decisions

In 2001, the decision that will most affect civil practice is one that spans the

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677. *See infra* text accompanying notes 741-43.
678. S. 1712, 107th Cong. (2001).
679. H.R. 2341, 107th Cong. (2001).
680. S. 986, 107th Cong. (2001). H.R. 2519 is the companion House bill.
681. S. 803, 107th Cong. (2001).
682. S. 1437, 107th Cong. (2001).
683. S. 1751, 107th Cong. (2001).
684. H.R. 3210, 107th Cong. (2001).
685. H.R. 2926, 107th Cong. (2001).

categories of substance and procedure. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[686] introduces a stunning reconception of the nature of a jury's determination of punitive damages. In so doing it revolutionizes the standard of appellate review to be applied. Normally, the award of punitive damages is a matter within the purview of the states, because the ability to recover monies in a civil matter to punish a defendant's bad behavior is a creature of common law. This makes it difficult to "constitutionalize" a jury's assessment of punitive damages so as to reach the federal forum. Nonetheless, the U.S. Supreme Court has decided a number of significant punitive damages cases.[687] One of the most controversial questions about those decisions is whether they involve substantive due process, or whether they are procedural due process decisions.[688] This is because the fundamental question inherent in all of them is this: When is the amount of punitive damages simply too large to be constitutional, regardless of any other factor?

To add to the controversy, issues of punitive damages have historically been treated as questions of fact within the sound province of the jury to answer, curbed by the ability of courts to review an assessment for excessiveness under a deferential standard.[689] In *Cooper*, the Supreme Court has struck at the heart of this classic allocation of functions between judge and jury, and trial and reviewing courts, by holding that punitive damage assessments are not matters of fact, but are moral evaluations.[690] Thus, an appellate court is now authorized to use a de novo standard of review in scrutinizing them. Previously, when a trial judge left the jury's verdict intact, the reviewing court was required to use an abuse of discretion standard. Now, the court of appeals is free to make its own determination of the jury's results as if it were deciding a question of law. This view runs counter to a long history of allocating punitive damage issues to juries, in part from the founders' concern that government can oppress a defendant by fining in a civil context, almost as easily as by pursuing criminal prosecution. The jury was to be a bulwark against political retaliation worked by this device. Moreover, the Court's own opinions on the right to jury trial have treated as especially jury-worthy any remedy that involves a penalty or fine.[691] And, the classic factors a jury must consider for fixing punitive damages in most jurisdictions plainly involve issues of fact—for example, given the defendant's financial condition, what amount of damages is effective to deter?

By expressing its analysis in terms of the standard of review, the Court has neatly finessed many of the difficult substantive issues raised by punitive

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686. 532 U.S. 424 (2001).

687. *See, e.g.*, BMV of N. Am. Inc. v. Gore, 517 U.S. 559 (1995) (holding award of $4 million in punitive damages as unconstitutionally "excessive").

688. *See, e.g., id.*

689. *Cooper*, 532 U.S. at 437.

690. One of the great debates in philosophy is whether there are any objectively verifiable moral "facts" or whether when one makes an ethical judgment, one is merely expressing an opinion or an emotion.

691. *See, e.g.*, Tull v. United States, 481 U.S. 412 (1987).

damages. However, as Justice Ginsberg suggested in *Gasperini v. Center for Humanities*,[692] making it easier for appellate courts to undo jury verdicts can function as an indirect cap on damages.[693] There is also the practical issue of how to define and demarcate this new category of "moral" assessment. For all these reasons, *Cooper* is a troubling opinion. Its new conceptual framework could have a far-reaching impact not just on jury determinations of punitive damages, but also on any jury verdict that requires judgments about intangible items such as pain and suffering and emotional distress.

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources[694] is another decision that significantly affects plaintiffs. It rejects the "catalyst of reform"[695] theory for shifting fees under two fee-shifting statutes, the Fair Housing Act and the Americans with Disabilities Act ("ADA").[696] One of the difficult questions raised by an award of fees is whether a litigant is a "prevailing party" for purposes of fee shifting. In many instances, especially when the defendant is goaded to change its behavior by litigation, but a full merits determination is not made, "prevailing party" status is not clear. Nine of the circuit courts had authorized an award of fees on the theory that, if the litigation provoked significant change, it was a catalyst of reform and should count as a win for the plaintiff. The Court ignored this consensus and interpreted the Fair Housing Act and the ADA to prohibit fee shifting for this reason. This case could have implications for any fee-shifting statute.

Not only in *Cooper* and *Buckhannon*, but in a variety of other cases the U.S. Supreme Court has affected civil practice. *Circuit City Stores, Inc. v. Adams* [697] will also negatively treat plaintiffs, for it holds that the Federal Arbitration Act applies to all employment agreements, except those of transportation workers.[698] This carries forward the Court's trend of vigorously applying the Act, but it discounts the policy argument that it is inappropriate to force arbitration when civil rights and other policy questions are raised in an employment context.[699] Continuing the same general theme, restricting plaintiff lawsuits, the Supreme Court concluded in a 5-4 decision that there is no private right of action to enforce regulations promulgated under Title VI of the Civil Rights Act dealing with the disparate impact of state action.[700] This was the question in *Alexander*

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692. 518 U.S. 415 (1996).

693. *Id.* at 425 (Ginsburg, J., dissenting).

694. 532 U.S. 598 (2001).

695. *See* Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) (holding fees appropriate when plaintiff's lawsuit is causally linked to defendant's change in behavior and there is some legal basis for plaintiff's claim).

696. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. 598 at 605.

697. 532 U.S. 105 (2001). This decision overrules *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999).

698. *See, e.g., Craft*, 177 F.3d at 1094.

699. *See also* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2001).

700. 42 U.S.C. § 2000d-1 (1999); 28 CFR § 42.104(b)(2) (1999). *See also* 49 CFR §

v. Sandoval,[701] which challenged the State of Alabama's requirement that one show proficiency in English in order to obtain a driver's license.

In *Becker v. Montgomery*,[702] by a unanimous opinion, the Court held that a party's failure to sign a notice of appeal is not a fatal defect. This is because the substance of the notice made it clear who the parties involved in the appeal were, so that absence of a signature was a technical problem that did not go to the reviewing court's appellate jurisdiction. *Thomas v. Chicago Park District*[703] emanated from the Seventh Circuit Court of Appeals and raised significant First Amendment questions about parade permits. It held that because Chicago's requirements do not constitute a content-based regulation, access to prompt judicial review under the procedural requirement of *Freedman v. Maryland*[704] governing prior restraints did not apply.[705]

Finally, important cases pending before the Court include *Mathias v. Worldcom Technologies, Inc.*[706] and *Verizon Maryland, Inc. v. Public Service Commission of Maryland*.[707] These represent a circuit split over the appealability of state commissions' actions regarding interconnection agreements. Among other questions, they address whether prospective relief against such commissions for violation of the Telecommunications Act of 1996 are permissible under the *Ex parte Young* doctrine.[708] In *Devlin v. Scardelletti*,[709] the Court will determine whether a nonintervening class member has standing to appeal, even after the motion to intervene was properly denied. *Dusenbery v. United States*,[710] orally argued in late October and decided in January 2002, held that the proper standard for notifying a prisoner of a civil forfeiture proceeding is designated by the "reasonable under the circumstances test" of *Mullane v. Central Hanover Bank & Trust Co.*[711] not the more stringent test of *Mathews v. Eldridge*[712] for notice and opportunity to be heard where provisional remedies are sought.[713] Another pending case just decided in 2002 is *Raygor v. Regents of the University of Minnesota*.[714] It holds that the Eleventh Amendment is violated by the thirty-day statute of limitations tolling provision of the federal supplemental

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21.5(b)(2) (2000).

701. 532 U.S. 275 (2001).

702. 532 U.S. 757 (2001).

703. 122 S. Ct. 755 (2001).

704. 380 U.S. 51 (1965).

705. *Thomas*, 122 S. Ct. at 778-80.

706. U.S. No. 00-878, reported below as *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), *cert. granted*, 532 U.S. 903 (2001).

707. U.S. No. 00-1531.

708. 209 U.S. 123 (1908).

709. U.S. No. 01-417.

710. 534 U.S. 161 (2002).

711. 339 U.S. 306 (1950).

712. 424 U.S. 319 (1976).

713. *Dusenbery*, 534 U.S. at 669.

714. 122 S. Ct. 999 (2002).

jurisdiction statute, § 28 U.S.C. 1367. This occurs where a state-based claim filed against a nonconsenting state in federal court is subsequently dismissed on Eleventh Amendment grounds and then refiling is sought in state court.[715]

The U.S. Court of Appeals for the Seventh Circuit has decided a number of cases important to civil practice matters. A cluster of them were concerned with arbitration agreements. For instance, in *George Watts & Son v. Tiffany & Co.*,[716] the Seventh Circuit Court of Appeals held that the "manifest disregard of the law" principle is not available to justify court intervention into arbitration on the issue of attorneys' fees, because, although a Wisconsin statute authorized fees, it did not prevent parties from agreeing to bear their own legal expenses and there was no agreement to the contrary between them.[717] In *IDS Life Insurance Co. v. Royal Alliance Ass'n*[718] the Seventh Circuit stated that an arbitration award need not be correct or reasonable to be binding, continuing the theme of *George Watts & Son.* However, in *Penn v. Ryan's Family Steak Houses, Inc.*,[719] a case from Indiana, the court concluded that an arbitration agreement that allowed the employer to modify its terms without notice and included other one-sided provisions lacked contractual mutuality and was unenforceable.

Other opinions from the Seventh Circuit of interest to civil practitioners are *Downey v. State Farm Fire & Casualty Co.*[720] (no federal subject matter jurisdiction in an action against a private insurer that issued federal flood insurance; consent judgment preserves the right to appeal where expressly reserved); *Ester v. Principi*[721] (when an agency decides the merits of a complaint without addressing the question of timeliness of exhaustion of remedies, it has waived the defense in subsequent lawsuits); *Thompson v. Altheimer & Gray*[722] (abuse of discretion in racial discrimination case not to dismiss juror for cause when juror could not assure court that, given her background, she could be impartial); *Hetreed v. Allstate Insurance Co.*[723] (when appealing decision on merits litigant must file notice of appeal covering award of costs to appeal such award); *Indiana Civil Liberties Union v. O'Bannon*[724] (preliminary injunction against erection of stone monument with the Ten Commandments on statehouse grounds proper because likelihood of success on merits showing violation of Establishment Clause); *Isaacs v. Sprint Corp.*[725] (no conditional grant of class certification); *United Air Lines, Inc. v. International Ass'n of Machinist &*

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715. *Id.* at 1004-05.
716. 248 F.3d 577 (7th Cir. 2001).
717. *Id.* at 581.
718. 266 F.3d 645 (7th Cir. 2001).
719. 269 F.3d 753 (7th Cir. 2001).
720. 276 F.3d 243 (7th Cir. 2001).
721. 250 F.3d 1058 (7th Cir. 2001).
722. 248 F.3d 621 (7th Cir. 2001).
723. 135 F.3d 1155 (7th Cir. 2001) (unpublished opinion).
724. 259 F.3d 766 (7th Cir. 2001).
725. 261 F.3d 679 (7th Cir. 2001).

Aerospace Workers[726] (federal court had jurisdiction to issue injunction against labor union despite Norris-LaGuardia Act because union actively promoted work slowdown); *Kalan v. City of St. Francis*[727] (where parties stipulate to specifically identified magistrate judge, different magistrate judge cannot preside without their consent); *Lockwood International B.V. v. Volm Bag Co.*[728] (paying a plaintiff to replead a complaint does not eliminate the liability of the insurer to defend its insured); *National Organization for Women, Inc. v. Scheidler*[729] (private party may obtain civil injunctive relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in disagreement with Ninth Circuit on same issue); *Szabo v. Bridgeport Machines, Inc.*[730] (when ruling on class certification, a court does not have to accept the allegations in plaintiff's complaint as true); *In re Synthroid Marketing Litigation*[731] (gives detailed guidance on notice of appeal for would-be intervenors who oppose class settlement; requires trial court to estimate market rates to set fees; concludes incentive awards not available where party does not become class representative until after success is likely).

C. Rules Changes

1. The Federal Rules of Civil Procedure ("FRCP").—Proposed changes to the FRCP became effective December 1, 2001. Rule 5(b)(2)(D) allows for electronic service and service through court facilities.[732] To conform with this change, Rule 6(e) extends the time for response to documents so served for three days.[733] Rule 77(d) provides the clerk of the court with more alternatives for notifying parties of entry of an order or judgment, including facsimile and computer transmission. Rule 65 adds a new subdivision (f) to govern copyright impoundment.[734] Finally, Rule 81(a)(1) clarifies that the FRCP apply in bankruptcy proceedings, mental health proceedings, and copyright proceedings.[735]

In September 2001, the Judicial Conference Committee on Rules of Practice and Procedure approved changes previously proposed for comment. New Rule 7.1 would be added to require disclosures that will assist judges in avoiding conflicts of interest. Among other things, it would require the disclosure of corporate parties' financial interests, including the disclosure of parent

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726. 243 F.3d 349 (7th Cir. 2001).

727. 274 F.3d 1150 (7th Cir. 2001).

728. 273 F.3d 741 (7th Cir. 2001).

729. 267 F.3d 687 (7th Cir. 2001).

730. 249 F.3d 672 (7th Cir. 2001).

731. 264 F.3d 712 (7th Cir. 2001).

732. FED. R. CIV. PROC. 5(b)(2)(D), *available at* http://www.house.gov/judiciary/civil2001.pfd.

733. FED. R. CIV. PROC. 6(e), *available at* http://www.house.gov/judiciary/civil2001.pfd.

734. FED. R. CIV. PROC. 65, *available at* http://www.house.gov/judiciary/civil2001.pfd.

735. FED. R. CIV. PROC. 81(a)(1), *available at* http://www.house.gov/judiciary/civil2001.pfd.

corporations and stock interests of at least ten percent held by public corporations.[736] Rule 58 will be changed to clarify when the time runs for filing an appeal.[737] Section (b) thereof specifically designates the time of entry of judgment and includes a provision that keys off of the date when a separate document setting forth the court's action must be filed under proposed Rule 58(a)(1). That subsection makes it clear that, except for orders for disposing of motions for judgment under Rule 50(b), to amend or make findings of fact under Rule 52(b), for attorneys' fees under Rule54(d)(2)(B), for new trial or to alter or amend the judgment under Rule 59, and for Rule 60 relief, *all* judgments, even amended ones, must be entered on a separate document.[738] The rule also makes it clear entry of judgment may not be delayed or the time for appeal enlarged due to motion to tax costs or for fees and conforms the procedure for ruling on motion for attorneys' fees to Appellate Rule 4. To be consistent with these changes, Rule 54 would also be amended to delete the requirement of service before the submission of a motion for attorneys' fees and to delete the requirement of a separate judgment therefor.[739] Rule 81(a)(2) would also be amended to remove a conflict between the FRCP and the Rules Governing 2254 Cases and Rules Governing 2255 Proceedings. Finally, certain amendments to Supplemental Rule C on Admiralty are proposed that would govern interrogatories in civil forfeiture proceedings and other matters.

The advisory committee has also published for comment proposed changes to Rules 23, 51, 53, 54(d)(2), and 71(a). The proposed changes to Rule 23 are significant. They are designed to address the general concerns for fairness of class procedure for unnamed class members raised by the U.S. Supreme Court's opinion in *Anchem Products Inc. v. Windsor*.[740] In addition, like the proposed class action legislation pending in Congress, they include measures that will affect the ability of parties to bring class actions in state forums. Two particularly controversial topics are measures to enjoin overlapping class actions filed in multiple state courts and appointment and reimbursement of class counsel.[741] Among other changes are those requiring notice to class members at the certification stage, appeals by nonintervening class members, and the preclusive effects of class certification and settlement.

2. Seventh Circuit and Local Rule Matters.—Effective December 1, 2001, the Seventh Circuit amended a number of its Rules—22.2(a) (disclosure statements of prior proceedings and other matters), 26.1 (disclosure statements

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736. Proposed FED. R. CIV. PRO. 7.1(a)(1)(A).

737. *See* Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to Honorable Anthony J. Scircia, Standing Committee on Rules of Practice and Procedure, at 91 (May 2000) (on file with the *Indiana Law Review*).

738. *Id.*

739. *Id.*

740. 521 U.S. 59 (1997). *See also* BNA LEGAL WEEK, May 8, 2001, at. 2684.

741. *See* Civil Rules Committee Hears Testimony on Proposals to Amend Class Action Rule, BNA LAW WEEK, Dec. 18, 2001, at 2366; *Senators Offer New Class Action Legislation Similar to Bill Approved Earlier by Committee*, BNA LAW WEEK, Dec. 18, 2001, at 2367.

of identity of nongovernmental attorneys), 31(e) (digital briefs), 32(a) (brief lie flat rule), and 34(h) (argument by law students).[742] It also included in its Internal Operating Procedures a provision concerning the sealing of records. It requires a court order for records to be sealed, unless a stature provides to the contrary.[743] Notice has also been given by the Administrative Office of the U.S. Courts that interest rates on judgments in the federal courts have been changed pursuant to statute, effective on all judgments entered on or after December 21, 2000.[744]

On January 2, 2002, a series of changes to the Local Rules for the U.S. District Court for the Northern District of Indiana became effective[745] and a new fee schedule was introduced.[746] The U.S. District Court for the Southern District of Indiana has also effectuated changes to certain of its Local Rules, effective January 1, 2002.[747] In addition, all cases filed on or after November 16, 2001 must submit a Case Management Plan, unless otherwise exempted, that complies with the Instructions for Preparing Case Management Plans promulgated by the Southern District pursuant to its Local Rule 16.1.[748]

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742. *See* http://www.ca7.uscourts.gov/webnote.htm (last visited Mar. 15, 2002).

743. *See* http://www.ca7.uscourts.gov/Rules/rules.htm (last visited Mar. 15, 2002).

744. Current rates are available at http://www.federalreserve.gov/releases/H15/Current.

745. *See* Local Rules 5.1(c), 1(f), 1(g), 1(h), 8.2, 16.1(b), 16.3, 24.1(a), 1(b), 1(c), 47.3, 72.1(d), 1(e), 1(f), 1(g), 1(i), 1(j), 72,2(a), 79.1, 83.7(a), 7(c), 200.1 and Rule III of the Rules of Disciplinary Enforcement, *available at* http://www.innd.uscourts.gov/localrules.html.

746. *See* http://www.innd.uscourts.gov/feeinfo.html.

747. *See* Local Rules 4.6, 16.1(b), 1(c), 24.1, 72.1, 72.3, 76.1, 81.2, 83.5, *available at* http://www.insd.uscourts.gov/pub_main.htm.

748. *See* http://www.insd.uscourts.gov/whats_new_main.htm.

INDIANA'S REVISED ARTICLE 9 AND OTHER DEVELOPMENTS IN COMMERCIAL AND CONSUMER LAW

MATTHEW T. ALBAUGH*

INTRODUCTION

July 1, 2001 witnessed the long awaited arrival of Revised Article 9 to most of the United States. A culmination of over a decade's work,[1] Revised Article 9 will be in effect in all fifty states plus the District of Columbia as of January 1, 2002.[2] With these major changes to the law of secured transactions, the coming months will be a significant challenge to secured parties, practitioners, and the courts as the transition takes full effect. As Revised Article 9's provisions have been in force for only a short period, few of the unavoidable gaps and ambiguities have received judicial scrutiny. Indiana is not immune from the challenges posed by the adoption of Revised Article 9. Revised Article 9's changes not only represent a departure from numerous provisions in the old Article 9, but also present an additional hazard for many parties in Indiana because of several non-uniform amendments to the revised article.

Space does not permit a full treatise on the ramifications of Revised Article 9. Truly, others have already risen to the task.[3] Instead, my objective in this Article is to provide a sufficient framework of the present filing procedures in Indiana and to highlight and explain those provisions in which the Indiana General Assembly has departed from the uniform article. Also, reference both to comparable state departures from the uniform act and to Revised Article 9's official comments will be provided where applicable.

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1. The Permanent Editorial Board of the Uniform Commercial Code (U.C.C.) established a committee in 1990 to study the need for revising Article 9. *See* Donald W. Garland, *Revised Article 9: Understanding the Changes to Secured Transactions*, 64 TEX. B.J. 974, 974 (2001). Revised Article 9 was promulgated by the National Conference of Commissioners on Uniform State Law (N.C.C.U.S.L.) in 1998. *See* Ingrid Michelsen Hillinger & Michael G. Hillinger, *2001: A Code Odyssey (New Dawn for the Article 9 Secured Creditor)*, 106 COM. L.J. 105, 105 (2001).

2. New York, New Jersey, and Massachusetts enacted Revised Article 9 just days before the July 1, 2001 deadline. In addition, four states pushed forward the effective date of Revised Article 9 to allow more time for their filing offices to adjust to the changes. Connecticut's law becomes effective on October 1, 2001. Alabama, Florida, and Mississippi represent the final three states to come on board with effective dates of January 1, 2002. *See* Press Release, National Conference of Commissioners on Uniform State Laws, States Uniformly Enact U.C.C. 9 Revisions (July 2, 2001), *available at* http://www.nccusl.org/nccusl/pressreleases/pr1-07-01.asp (last visited Dec. 5, 2001).

3. *See, e.g.*, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: 1999 ARTICLE 9 SUPPLEMENT (4th ed. Supp. 1999); THE NEW ARTICLE 9: UNIFORM COMMERCIAL CODE (Corrine Cooper ed., 2d ed. 2000).

In the second part of this Article, I will discuss other major legislative developments and case law in the field of commercial law during the survey period.[4] Included in this discussion is an important, though questionably decided, opinion from the Indiana Supreme Court regarding payday loan creditors.[5]

I. INDIANA'S REVISED ARTICLE 9

In a nutshell, Revised Article 9 makes the law of secured transactions more certain for the experienced practitioner and more daunting for the novice. As White and Summers explain in their treatise, "length and complexity" are the byproduct of resolving the ambiguities of the old Article 9.[6] Some of the major developments, discussed in further depth below, include an expansion of Article 9's scope, new priority rules, changes to choice-of-law rules, and changes to the enforcement provisions, to name but a few.

A. The Scope of Article 9

Article 9's basic scope provision, Indiana Code section 26-1-9.1-109,[7] sweeps a huge array of transactions into the fold. As subsection (a)(1) states, generally "a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract" is governed by Article 9.[8] The creation of a security interest makes Article 9 applicable, regardless of the transaction's form or the name parties assign to it.[9] Reference to Indiana Code section 26-1-1-201(37) must be made for the definition of "security interest."

Generally speaking, Revised Article 9 provides for sixteen categories of collateral that can be subject to a security interest. They are:

- Consumer Goods
- Farm Products
- Inventory
- Equipment
- Instruments
- Documents
- Accounts
- Deposit Accounts

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4. The survey period is from October 1, 2000 to September 31, 2001, although more recently decided cases will be included in this Article to make it as timely as possible.

5. The Indiana Supreme Court was still suffering from the onslaught of direct criminal appeals during the survey period. As the recently amended jurisdiction of the Indiana Supreme Court ends mandatory review of criminal cases imposing sentences greater than fifty years, practitioners should look to the Indiana Supreme Court to take a more direct role in shaping consumer and commercial law. *See* IND. CONST. art. VII, § 4 (amended 2000).

6. WHITE & SUMMERS, *supra* note 3, at 33.

7. Formerly IND. CODE § 26-1-9-102 (1995).

8. IND. CODE § 26-1-9.1-109(a)(1) (Supp. 2001).

9. *See* U.C.C. § 9-109 cmt. 2 (2000).

- Health Care Insurance Receivables
- Chattel Paper
- Electronic Chattel Paper
- Letter of Credit Right
- Commercial Tort Claims
- General Intangibles
- Investment Property
- Proceeds[10]

The above list, with the exception of one category, is mutually exclusive (i.e., the type of collateral does not change if in the same person's hands). The one category of collateral that can present problems to secured creditors is farm products. For instance, a farmer that grows and harvests corn possesses farm products. But after processing the corn, it converts into inventory. A secured party must be careful with regard to taking a security interest in a farmer's farm products. An imprecise or under-inclusive description of the collateral in the security interest may result in an invalid security interest.[11]

Indiana has made two non-uniform amendments to Article 9's scope provision. First, the uniform Article 9, subsection 9-109(d)(8) excludes several transactions, including:

> a transfer of an interest in or an assignment of a claim under a policy insurance, other than an assignment by or to a health-care provider of a

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10. *See* IND. CODE §§ 26-1-9.1-102(a)(23) (Supp. 2001) (defining "consumer goods" as "goods that are used or bought for use primarily for personal, family, or household purposes"); 26-1-9.1-102(a)(34) (defining "farm products"); 26-1-9.1-102(a)(48) (defining "inventory"); 26-1-9.1-102(a)(33) (defining "equipment," a catch-all provision covering "goods other than inventory, farm products, or consumer goods"); 26-1-9.1-102(a)(47) (defining "instrument"); 26-1-9.1-102(a)(30) (defining "document" as a "document of title," which functions as a substitute for the actual goods (i.e., warehouse receipts, bills of lading)); 26-1-9.1-102(a)(2) (defining "account"); 26-1-9.1-102(a)(29) (defining "deposit account"); 26-1-9.1-102(a)(46) (defining "health-care-insurance receivable" as an "interest in or claim under a policy of insurance that is a right to payment of a monetary obligation for health-care goods or services provided"); 26-1-9.1-102(a)(11) (defining "chattel paper"); 26-1-9.1-102(a)(31) (defining "electronic chattel paper"); 26-1-9.1-102(a)(51) (defining "letter-of-credit right"); 26-1-9.1-102(a)(13) (defining "commercial tort claim" and excluding "damages arising out of personal injury to or the death of an individual"); 26-1-9.1-102(a)(42) (defining "general intangible"); 26-1-9.1-102(a)(49) (defining "investment property" as a "security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account"); 26-1-9.1-102(a)(64) (defining "proceeds").

11. A problem Revised Article 9 does not address is the whether a document labeled "lease" is a lease outside of Article 9's provisions or a security agreement. While a "nervous lessor" is permitted to file a financing statement under U.C.C. § 9-505, filing is not required. The distinction between a lease and a security agreement can be very tricky, and a careless secured party could find himself out in the cold in the event of a priority dispute. *See generally* WHITE & SUMMERS, *supra* note 3, at 39-50 (describing in detail the problem of differentiating between leases and security agreements).

> health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.[12]

In its place, Indiana has carved out an exception in subsection 9-109(a)(7) to provide that "a transfer of an interest or a claim in a contractual right of a person to receive commissions or other compensation payable by an insurer" is an interest that falls within Revised Article 9.[13] Indiana's subsection 9-109(d)(8) is amended to reflect these changes.[14]

The second non-uniform change is to section 9-109's preemption provisions. Under the uniform 9-109(c)(2) and (3), Article 9 does not apply to the extent that

> (2) another statute of this State expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or a governmental unit of this State;
> (3) a statute of another State, a foreign country, or a governmental unit of another State or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the State, country, or governmental unit . . . .[15]

These provisions provided that Article 9 would apply to security interests created by state or foreign governmental units except to the extent another statute governed the issue. Subsection (c)(2) would defer to all forum state statutes while subsection (c)(3) would defer to foreign statutes only if they contained rules specifically applicable to the security interests of the governmental unit.[16] Indiana's revised Article 9 eliminates both of these provisions.[17] As such, subsection 9-109(c) provides that only federal law preempts Article 9.

B. Creation and Attachment of the Security Interest

A secured party has two primary concerns. First, the secured party must ensure the enforceability of the security interest against the debtor—through creation of a security interest and attachment. Second, the secured party must ensure the priority of his interest against other third parties—through perfection. Generally, attachment and perfection are accomplished through the use of two forms: the security agreement, an agreement between the debtor and the secured party; and the financing statement, a filed form announcing the secured parties'

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12. U.C.C. § 9-109(d)(8) (2001).

13. IND. CODE § 26-1-9.1-109(a)(7) (Supp. 2001).

14. No other state has made a comparable change to its Article 9 scope provision. *See* PENELOPE L. CHRISTOPHOROU ET AL., UNDER THE SURFACE OF REVISED ARTICLE 9: NON-UNIFORMITY AND FILING OFFICE PROCEDURES 3-18 (2001).

15. U.C.C. § 9-109(c)(2)-(3) (2001).

16. *See id.* cmt. 9.

17. Florida, Nevada, and West Virginia made comparable changes. *See* CHRISTOPHOROU ET AL., *supra* note 14, at 6, 11, 17-18.

security interest to the rest of the world.

Security interests "attach" when they become enforceable against the debtor with respect to the collateral specified in the security agreement.[18] The requirements for attachment are set out in Indiana Code section 26-1-9.1-203(b)-(c) (Supp. 2001). Those provisions provide:

> (b) Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:
>
> (1) value has been given;
>
> (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) one (1) of the following conditions is met:
>
> (A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned.
>
> (B) The collateral is not a certificated security and is in the possession of the secured party under IC 26-1-9.1-313 pursuant to the debtor's security agreement.
>
> (C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under IC 26-1-8.1-301 pursuant to the debtor's security agreement.
>
> (D) The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under IC 26-1-9.1-104, IC 26-1-9.1-105, IC 26-1-9.1-106, or IC 26-1-9.1-107 pursuant to the debtor's security agreement.

As the official comments state, a valid security agreement requires the creditor give value, the debtor retains rights in the collateral, and an agreement plus "satisfaction of an evidentiary requirement."[19] The failure to properly attach results in an unsecured status for the creditor.

Section 1-201(44) provides the definition of "value."[20] Any consideration sufficient to support a simple contract and a preexisting debt satisfy the requirement of value, but attachment will not occur by gift. Because the security agreement involves a conveyance of a property interest, the debtor must also have some rights in the collateral. Section 9-204 provides that both after-acquired property clauses (a present loan for future collateral) and future advance clauses (present collateral for a future loan) are permissible.[21] Nevertheless, no attachment occurs until either the debtor acquires an interest in the property or the secured party gives value.

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18. U.C.C. § 9-203(a) (2001).

19. *Id.* cmt. 2.

20. IND. CODE § 26-1-1-201(44) (1998).

21. Section 9-204(b) is an exception for after-acquired property clauses. In the case of consumer goods or commercial tort claims, the debtor must generally acquire rights in them within ten days after the secured party gives value. *Id.* § 26-1-9.1-204(b) (Supp. 2001).

The final "evidentiary requirement" can be accomplished in a number of ways. The first and simplest would be the secured party's actual possession of the collateral.[22] A pawnshop would be a good example of this situation. As is discussed later, possession also works to perfect a secured party's security interest, so possession can work the two-fold purpose of enforcement of a security interest and perfection. Second, if the collateral is deposit accounts, electronic chattel paper, letter-of-credit right, or investment property, the security agreement may be evidenced by "control."[23] The third and most common way to satisfy this evidentiary requirement is through a security agreement.

A security agreement is "an agreement that creates or provides for the security interest."[24] It is both a contract and a deed conveying a property interest.[25] Third parties look to the security agreement to determine what collateral is covered, and therefore encumbered, and what collateral is available. The sufficiency requirements of the collateral's description in the security agreement, governed by section 9-108, is different than that in the financing statement, governed by section 9-504.[26] The description is sufficient if it "reasonably identifies what is described" or is "objectively determinable."[27] Listing the type of collateral (i.e., consumer goods, inventory, etc.) is sufficient, but super-generic descriptions such as "all the debtor's assets" are deficient.[28]

In addition to a sufficient description, a security agreement must also be "authenticated."[29] As defined by section 1-201(39), "signed" includes "any symbol executed or adopted by a party with present intention to authenticate a writing." As set out in section 9-102(a)(7), to "authenticate" includes the definition of "signed," but is expanded to allow for electronic and other non-written forms of security agreements.

Indiana made no material amendments to the uniform Revised Article 9. Following these procedures will establish a secured party's rights against the debtor. The additional step of perfection is required to establish lien priority against third parties.

C. Perfection

Following the creation of a security interest and attachment, the secured party must then ensure perfection. Relevant only to third parties, perfection is the process by which secured parties, either through filing a finance statement, taking possession of the collateral, or taking "control" of the collateral, establish

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22. *See id.* § 26-1-9.1-203(b)(3)(B).

23. *See id.* § 26-1-9.1-203(b)(3)(D).

24. U.C.C. § 9-102(a)(73) (2001).

25. *See* WHITE & SUMMERS, *supra* note 3, at 34.

26. *See id.* at 74. The description requirements for security agreements are more stringent than those for financing statements. *See id.* at 75.

27. *See* IND. CODE § 26-1-9.1-108 (Supp. 2001).

28. *See id.*

29. *See id.* § 26-1-9.1-203(b)(3)(A).

lien priority. In specific instances, perfection is automatic. The rules for perfection are generally found between U.C.C. sections 9-308 and 9-316.

1. Automatic Perfection.—Indiana Code section 26-1-9.1-309 provides that certain security interests are perfected automatically upon attachment. The most important of which is a purchase money security interest (PMSI) in consumer goods. A PMSI is created when a secured party provides money to the debtor that is used to acquire an interest in the collateral, and consumer goods are defined as "goods that are used or bought for use primarily for personal, family or household purposes."[30] Other important security interests that are automatically perfected include the sale of payment intangibles or promissory notes and assignments of accounts, health care insurance receivables, or payment intangibles.[31]

2. Perfection by Possession.—Subsection 9-313(a) provides that a secured party can perfect a security interest in negotiable instruments, goods, instruments, money, or tangible chattel paper through possession.[32] Perfection of a security interest in certified securities is accomplished by taking delivery of the certified

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30. *Id.* § 26-1-9.1-102(23).

31. *See id.* § 26-1-9.1-309. That section reads as follows:

The following security interests are perfected when they attach:

(1) A purchase-money security interest in consumer goods, except as otherwise provided in IC 26-1-9.1-311(b) with respect to consumer goods that are subject to a statute or treaty described in IC 26-1-9.1-311(a).

(2) An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles.

(3) A sale of a payment intangible.

(4) A sale of a promissory note.

(5) A security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services.

(6) A security interest arising under IC 26-1-2-401, IC 26-1-2-505, IC 26-1-2-711(3), or IC 26-1-2.1-508(5), until the debtor obtains possession of the collateral.

(7) A security interest of a collecting bank arising under IC 26-1-4-210.

(8) A security interest of an issuer or nominated person arising under IC 26-1-5.1-118.

(9) A security interest arising in the delivery of a financial asset under IC 26-1-9.1-206(c).

(10) A security interest in investment property created by a broker or securities intermediary.

(11) A security interest in a commodity contract or a commodity account created by a commodity intermediary.

(12) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder.

(13) A security interest created by an assignment of a beneficial interest in a decedent's estate.

Id.

32. *Id.* § 26-1-9.1-313.

securities.[33] Logically, possession is ineffective for certain categories of collateral such as accounts and general intangibles because the law does not recognize their embodiment in a tangible thing. Subsection 9-313 is a complex provision, and because possession comports poorly with modern commercial transactions, the reader is left to parse out perfection by possession elsewhere.

3. Perfection by Control.—Control is roughly the equivalent of possession described above. Under subsection 9-310(b)(8), a secured party is permitted to control deposit accounts, electronic chattel paper, investment property, and letter-of-credit rights for purposes of perfection. Generally speaking, control is the exclusive means for perfecting security interests in deposit account and letter-of-credit rights. Subsections 9-104 through 9-107 describe the procedures to acquiring "control" of these types of collateral.

4. Perfection by Filing.—The last and by far the most common method for perfecting a security interest is by filing a financing statement. White and Summers estimate that over ninety percent of security interests are perfected by filing a financing statement.[34] Subsections 9-502, 9-516 and 9-520 are the key provisions covering financing statements.

Subsection 9-502 sets out the three pieces of information that are essential to make the financing statement effective. They are (1) the name of the debtor, (2) the name of the secured party, and (3) a description of the collateral covered by the financing statement.[35] It is no longer essential that a financing statement include the debtor's signature or the addresses of the parties, as did former subsection 9-402(1). These three pieces of information are the absolute requirements of any financing statement; deficiency in any will result in an ineffective filing.

Indiana made two non-uniform changes to section 9-502. First, 9-502(e) states that to the extent other provisions of the Indiana Code require the identification of the preparer of the financing statement, "the failure of the financing statement to identify the preparer does not affect the sufficiency of the financing statement."[36] Second, section 9-502(f) requires that the secured party provide the debtor with a copy of the financing statement within thirty days of

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33. *See id.*

34. WHITE & SUMMERS, *supra* note 3, at 102.

35. IND. CODE § 26-1-9.1-502(a) (1998). Subsection 9.1-502(b) provides additional requirements to cover real property related collateral (e.g., fixtures). For this collateral, the financing statement must also:

> (1) indicate that it covers this type of collateral;
>
> (2) indicate that it is to be filed in the real property records;
>
> (3) provide a description of the real property to which the collateral is related that is sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and
>
> (4) if the debtor does not have an interest or record in the real property, provide the name of a record owner.

Id.

36. *Id.* § 26-1-9.1-502(e).

filing. But again, a secured party's failure to meet this requirement does not affect the sufficiency or effectiveness of the financing statement.[37]

Subsection 9-503 provides what is required of a financing statement to give the name of the debtor.[38] For registered organizations, the financing statement is sufficient "only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized."[39] In most other cases, the financing statement is sufficient: "(A) if the debtor has a name, only if it provides the individual or organizational name of the debtors; and (B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor."[40] Because the filings are indexed according to the debtor's name, a precise recitation of the debtor's name is absolutely crucial to provide adequate notice to third parties. Subsection 9-503(c) provides that trade names are insufficient, although if a search using the filing office's standard search logic would turn up the debtor's name, it would be sufficient.[41] The test for determining whether an error in the debtor's name is fatal is whether the error makes the financing statement "seriously misleading."[42] Importantly, section 9-507 provides that a financing statement must only satisfy the requirements of 9-502 *at the time of filing*. Subsequent events that cause the financing statement to become seriously misleading generally do not affect the financing statement's effectiveness.[43]

Subsection 9-504, establishing the requirements for a financing statement's description of the collateral, adopts the standard from section 9-108, covering security agreements, with one important caveat.[44] If the financing statement provides that it "covers all assets or all personal property" of the debtor, it is sufficient.[45] Otherwise, applying the standard set forth in section 9-108, a description of collateral is sufficient if it "reasonably identifies what is

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37. *Id.* § 26-9.1-502(f).

38. *Id.* § 26-1-9.1-503.

39. *Id.* § 26-1-9.1-503(a)(1).

40. *Id.* § 26-1-9.1-503(a)(4).

41. *See id.* § 26-1-9.1-506(c). This provision may save an otherwise insufficient financing statement.

> (c) If a search of the records of the filing office under the debtor's correct name, using the filing office's search logic, if any, would disclose a financing statement that fails to sufficiently provide the name of the debtor in accordance with IC 26-1-9.1-503(a), the name provided does not make the financing statement seriously misleading.

Id.

42. *Id.*

43. *See id.* § 26-1-9.1-507. Nevertheless, if the debtor changes his name after filing, a financing statement is effective to perfect a security interest in collateral acquired within four months after the name-change. An amendment to the financing statement must be filed to perfect collateral acquired after the four-month window. *See id.* § 267-1-9.1-507(c).

44. *See id.* §§ 26-1-9.1-108, 26-1-9.1-504.

45. *See id.* § 26-1-9.1-504(2).

described."[46]

Section 9-516(b) sets out additional information that the financing statement should include. The secured party, in addition to the requirements of section 9-502, is required to:

> (A) provide a mailing address for the debtor;
> (B) indicate whether the debtor is an individual or an organization; or
> (C) if the financing statement indicates that the debtor is an organization, provide:
> (i) a type of organization for the debtor;
> (ii) a jurisdiction of organization for the debtor; or
> (iii) an organizational identification number for the debtor or indicate that the debtor has none.[47]

Nevertheless, if the filing office accepts a financing statement that fails to meet the requirements of section 9-516 but satisfies section 9-502, the financing statement will be valid. But the opposite is not true. Any deficiency in section 9-502 requirements will render the financing statement ineffective. Moreover, if a filing statement satisfies the requirements of both 9-502 and 9-516(b) and the filing office refuses to accept it, an effective filing has occurred despite the rejection against everyone except "a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files."[48]

Subsection 9-501 specifies the appropriate filing locations. Generally speaking, the appropriate location for filing a financing statement is with the office of the secretary of state unless the collateral is real estate related, in which case the secured party should do a local filing.[49] Indiana made one non-uniform change to this section. Section 9-501(c)-(k) generally provides that until July 1, 2002, a secured party is allowed to make a local filing for farm products, farm equipment and accounts, or general intangibles arising from or relating to the sale of farm products.[50]

The adoption of Revised Article 9 represents a major challenge for Indiana practitioners. In addition to several non-uniform changes peculiar to Indiana, Revised Article 9 makes several significant changes to the prior version. By the time of this Article's publication, the transition rules will have likely worked their course. While Revised Article 9 is now the most complete and thorough U.C.C. section, practitioners should look to the appellate courts over the coming months to begin to tackle Article 9's difficult provisions.

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46. *See id.* § 26-1-9.1-108(a).
47. *Id.* § 26-1-9.1-516(b).
48. *Id.* § 26-1-9.1-516(d).
49. *Id.* § 26-1-9.1-501.
50. *Id.* § 26-1-9.1-501(c)-(k).

II. OTHER COMMERCIAL AND CONSUMER LAW DEVELOPMENTS

A. Indiana Supreme Court

The Indiana Supreme Court handed down a major decision against short-term, consumer loan businesses operating in Indiana. In *Livingston v. Fast Cash USA, Inc.*,[51] the United States District Courts for the Northern and Southern District of Indiana[52] certified the following question to the Indiana Supreme Court: "[I]s the minimum loan finance charge permitted by Indiana Code section 24-4.5-3-508(7), when charged by a licensed supervised lender, limited by Indiana Code section 24-4.5-3-508(2) or Indiana Code section 35-45-7-2?"[53] The Court answered in the affirmative. Justice Rucker authored the majority decision, in which Justice Boehm concurred in a separate opinion. Chief Justice Shepard filed the "loan" dissenting opinion.

While the facts of the case were not difficult, the interpretation of the badly worded statute was. The plaintiffs were consumers who had taken out short-term loans (anywhere from seven days to two weeks) ranging between fifty to $400 from businesses engaged in providing "payday loans."[54] The borrowers wrote post-dated checks for the principal and a fixed finance charge, ranging from fifteen to thirty-three dollars. Borrowers would incur another charge if they had insufficient funds when the loan came due.[55]

Plaintiffs brought suit against the lenders in federal court, alleging that although the lenders charged the minimum loan finance apparently permitted by Indiana Code section 24-4.5-3-508(7),[56] the finance charge exceeded the maximum annual percentage rated allowable under either Indiana Code section 24-4.5-3-508(2)[57] or section 35-45-7-2.[58] In other words, the plaintiffs argued

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51. 753 N.E.2d 572 (Ind. 2001).

52. Contrary to the court's opinion, the cases pending in the Southern and Northern District Courts were dismissed without prejudice. *Livingston* was dismissed without prejudice on March 9, 2001. The parties had forty-five days to re-open the case following the supreme court's decision on the certified question. The lead case of *Livingston v. Fast Cash USA, Inc.* was re-opened on September 13, 2001, and the case is again pending before Magistrate Judge Godich. Case information is available at http://www.insd.uscourts.gov/caseinfo.htm (last visited May 28, 2002).

53. 753 N.E.2d at 574.

54. *See id.*

55. *See id.* For instance, if the borrower took out a two-week loan and could not cover her check when due, the lender would issue a new loan for another two weeks (essentially for the money previously loaned) with additional finance charges. *See id.*

56. Regarding supervised loans not made pursuant to a revolving loan account, Indiana's Uniform Consumer Credit Code (U.C.C.C.) states that a "lender may contract for and receive a minimum loan finance charge of not more than thirty dollars." IND. CODE § 24-4.5-3-508(7) (1998). This statute is indexed for inflation, and at the time of suit, the figure had an adjusted value of thirty-three dollars.

57. The statute states the following:

(2) The loan finance charge, calculated according to the actuarial method, may not

that charging a thirty-three dollar finance charge on a two-week loan far exceeded the allowable loan finance charge annual percentage rate (APR), thirty-six percent, for loans under three hundred dollars.

Two seemingly conflicting provisions governing the finance charge lenders can assess are at the root of the argument, one limiting the APR and the other allowing a specific minimum finance charge. The applicable provision of subsection 3-508(2) states, "The loan finance charge, calculated according to the actuarial method, may not exceed the equivalent of the greater of . . . thirty six percent (36%) per year on that part of the unpaid balances of the principal which is three hundred dollars ($300) or less . . . ."[59] But in subsection 3-508(7), the statute goes on to provide: "With respect to a supervised loan not made pursuant to a revolving loan account, the lender may contract for and receive a minimum loan finance charge of not more than thirty dollars ($30)."[60]

In reconciling these two provisions, the court took three opposing views. The majority opinion reasoned that subsection 3-508(7) was based on the assumption that loans would last at least one year, thus short-term lenders are prevented from taking advantage of this subsection.[61] Justice Boehm agreed that the statute was based upon an assumption, but instead reasoned that the provisions first assumes lawful loans (i.e., that lenders cannot contract for loan finance charges greater than those set by subsection 3-508(2) then seek refuge in subsection 3-508(7)).[62] Chief Justice Shepard, in dissent, took the most straightforward view of the statute. He reasoned that the legislature intended that

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exceed the equivalent of the greater of either of the following:

(a) the total of:

(i) thirty-six percent (36%) per year on that part of the unpaid balances of the principal which is three hundred dollars ($300) or less;

(ii) twenty-one percent (21%) per year on that part of the unpaid balances of the principal which is more than three hundred dollars ($300) but does not exceed one thousand dollars ($1,000); and

(iii) fifteen percent (15%) per year on that part of the unpaid balances of the principal which is more than one thousand dollars ($1,000); or

(b) twenty-one percent (21%) per year on the unpaid balances of the principal.

Id. § 24-4.5-3-508(2).

58. Indiana's loansharking statute states the following:

A person who, in exchange for the loan of any property, knowingly or intentionally receives or contracts to receive from another person any consideration, at a rate greater than two (2) times the rate specified in [Indiana Code section] 24-4.5-3-508(2)(a)(i), commits loansharking, a Class D felony. However, loansharking is a Class C felony if force or the threat of force is used to collect or to attempt to collect any of the property loaned or any of the consideration for the loan.

Id. § 35-45-7-2.

59. *Id.* § 24-4.5-3-508(2).

60. *Id.* § 24-4.5-3-508(7).

61. Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572, 576-77 (Ind. 2001).

62. *Id.* at 578-79 (Boehm, J., concurring).

"if the loan period is so short or the loan so small that [the loan finance] rate might produce just a few dollars, a minimum of $33 may be charged."[63] In one of the most quotable lines of the survey period, Chief Justice Shepard expressed the court's frustration in parsing through this badly crafted statute. He proposed: "It has been awhile since we last encountered a statute in such serious need of revision. Our federal cousins might take comfort in knowing that, like them, we found the task of parsing its various provisions very difficult (but had nowhere else to send out for help)."[64]

To understand the disagreement among the opinions, it is necessary to frame these two conflicting provisions in their historical context. Curiously, none of the three opinions discussed the road subsection 3-508(7) traveled before settling in its present position. From 1971 until today, the basic idea encompassed by 3-508(7) has taken on various forms and appeared in different provisions of the U.C.C.C.

Indiana's U.C.C.C. was enacted in 1971. As originally enacted, subsection 3-508 contained only a provision governing maximum loan finance charge percentage rates.[65] Instead, the provision capping a specific finance charge dollar amount was found in the U.C.C.C.'s prepayment section.[66] In pertinent part, it stated:

> [T]he lender may collect or retain a minimum charge within the limits stated in this subsection if the loan finance charge earned at the time of prepayment is less than any minimum charge contracted for. The minimum charge may not exceed the amount of loan finance charge contracted for, or five dollars ($5) in a transaction which had a principal of seventy-five ($75) or less, or seven dollars and fifty cents ($7.50) in a transaction which had a principal of more than seventy-five dollars ($75).[67]

From its beginning, this provision worked to guarantee a minimum finance charge to lenders, either the "loan finance charge contracted for" or in the event of prepayment, a set dollar amount.

In 1982, subsection 3-508(7) was crafted by the Indiana General Assembly. In whole the section stated:

> Notwithstanding subsection (2) [subsection 3-508(2)], with respect to a supervised loan not made pursuant to a revolving loan account, the lender may contract for and receive a minimum loan finance charge of not more than five dollars ($5) when the original principal balance of the

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63. *Id.* at 580 (Shepard, C.J., dissenting). He went on to say, however, that the practice of charging a new fee each time a loan rolled over violated Indiana Code § 24-4.5-3.509, prohibiting sequential fee-charging practices. *Id.* at 581.

64. *Id.*

65. *Id.* § 24-4.5-3.508 (1971).

66. *Id.* § 24-4.5-3-210 (1971) (amended 1972).

67. *Id.* § 24-4.5-3-210(2).

> obligation does not exceed seventy-five dollars ($75), or not more than seven dollars fifty cents ($7.50) when the original principal balance of the obligation exceeds seventy-five dollars ($75).[68]

As initially drafted, subsection 3-508(7) acted as an explicit exception to 3-508(2)'s percentage limit on loan finance charges. Subsection 3-210(2) regarding prepayment remained the same. As such, the two provisions worked together. For loans over seventy-five dollars, lenders could impose a minimum finance charge of $7.50, *regardless of the duration of the loan*. Accordingly, under subsection 3-210(2), lenders could collect up to this $7.50 figure in the event of prepayment.

For ten years, these two provisions co-existed. In 1992, both were amended. Subsection 3-210(2) was completely reworked to its present form. It reads:

> Upon prepayment in full of a consumer loan, refinancing, or consolidation, other than one (1) under a revolving loan account, if the loan finance charge earned is less than any permitted minimum loan finance charge (IC 24-4.5-3-201(6) or IC 24-4.5-3-508(7)) contracted for, whether or not the consumer loan, refinancing, or consolidation is precomputed, the lender may collect or retain the minimum loan finance charge, as if earned, not exceeding the loan finance charge contracted for.[69]

In the same year, subsection 3-508(7) was amended to the following: "Notwithstanding subsection (2), with respect to a supervised loan not made pursuant to a revolving loan account, the lender may contract for a minimum loan finance charge of not more than thirty dollars ($30)."[70] The two provisions were changed significantly in 1992, but their basic effect remained the same. One stood as a clear exception to subsection 3-508(2)'s APR percentage limitation by establishing a specific dollar amount which lenders could collect, *regardless of amount or duration*. The other provided that, in the event of prepayment, lenders could collect the lesser of the amount contracted for or $30, but recognized the lenders' ability to charge up to this maximum dollar amount.

The latest amendment to these two provisions occurred in 1994. The General Assembly, most likely acting under the auspices of Legislative Services, made a few changes to the language of the entire subsection 3-508, all of which appear to be minor word and nonsubstantive changes. One of these changes was to subsection 3-508(7). The words "notwithstanding subsection (2)" were deleted.[71] The whole of the other changes made to subsection 3-508 were very

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68. 1982 Ind. Acts 149, sec. 4.

69. 1992 Ind. Acts 14, sec. 30 (codified as amended at IND. CODE § 24-4.5-3-210(2) (1998)).

70. *Id.* at 4.

71. IND. CODE ANN. § 24-4.5-3-508 (West 1998). The historical and statutory notes in West's Annotated Code state that the 1994 changes "amended the section by deleting notwithstanding IC 24-4.5-1-106(1), from Subsec. (6); deleting notwithstanding subsection (2), from Subsec. (7), and making other nonsubstantive changes." *Id.*

minor, deleting gender specific pronouns and unnecessary cross-references. It seems highly unlikely that the changes made to 3-508(7) were ever intended to change the substantive meaning of the provision.

So what was the purpose and effect of this amendment? First, it is most probable that Legislative Services thought that the "notwithstanding subsection (2)" language was superfluous, and did not fully recognize the effect this amendment would have. However, one does not delete an exception simply by deleting its reference point. For instance, if "rule one" says "the sky is blue" and "rule two" says "notwithstanding rule one, the sky is pink on Sunday," the force and effect of "rule two" is not lessened by deleting reference to "rule one."

Both before and after the 1994 amendment, subsection 3-508(7) acts as an exception to 3-508(2). For nearly twenty years, the two provisions have acted harmoniously to set a specific, minimum dollar amount for loan finance charges, which is then cross-referenced in the prepayment provision. Deleting the language "notwithstanding subsection (2)" from 3-508(7) along with other minor and nonsubstantive language changes should not have meant an end to the general exception to 3-508(2). Remarkably, the majority of the court thought it should.

The majority turned the seemingly clear meaning of the two provisions on its head and said that these two provisions anticipated only one-year or longer loans, which in essence limits 3-508(7) to 3-210(2)'s construction and function, rather than the other way around. The major fallacy in the majority's opinion is a comparison of the 1971 U.C.C.C. with its present form without sufficient analysis of the effects the various amendments worked during the interceding thirty years. From its inception, 3-508(7) has been an exception to 3-507(2), unaffected by the language of 3-210(2). Justice Rucker, writing for the majority, offered:

> Subsection 3-508 has been amended three times since 1971. However, each amendment has referred to the prepayment section 3-210. At present, subsection 3-508 as well as subsection 3-210 works substantially the same as it has always worked: a lender is allowed to charge up to the amount specified in subsection 3-508(7), limited by the total finance charge that was originally provided for in the contract. Hence, a two-week $200 loan still generates $2.77 in maximum interest.[72]

In this, I would respectfully argue that the majority is wrong. Subsection 3-210(2) states that if the loan finance charge actually earned is less than the minimum loan finance charge (set by 3-508(7)), the lender can collect or retain a *minimum loan finance charge* in the event of prepayment, not to exceed *the finance charge contracted for.*[73] In the example Justice Rucker provides, he incorrectly limits the amount collectable by the permissible APR requirements of subsection 3-508(2) rather than *the finance charge actually contracted for.*

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72. Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572, 576 (Ind. 2001) (footnote omitted).

73. IND. CODE § 24-4-5-3-210(2) (1998).

Thus, if the original agreement called for a set $33 finance charge, following 3-10(2)'s wording, a lender could collect $33 from the borrower in the event of prepayment.

While Justice Boehm in a separate concurring opinion justifies the majority's decision on separate grounds, he too is dogged by a failure to fully to grasp the actual wording and historical context of subsections 3-210(2), 3-508(2), and 3-508(7). As Justice Boehm framed the issue: "As I see it, the issue is whether the $33 minimum loan finance charge provided by subsection 508(7) is collectible if it exceeds the loan finance charge allowed under subsection 508(2) for the loan as written for its full term."[74] Although Justice Boehm recognizes that subsection 3-508(7) "sets the amount of the minimum charge," he believes that it does not constitute an independent exception to 3-508(2)'s limits.[75] He argues that 3-508(2) alone caps the permissible finance charge. Like the majority, Justice Boehm fails to reconcile the historical framework of these subsections. As section 3-508(7) was originally enacted and continues to function, it acts as a specific exception to the APR limitations of section 3-508(2) and establishes a minimum dollar amount that can be assessed as a finance charge.

Without doubt, both the majority and concurring opinions set forth plausible policy arguments why such short-term lenders should be prohibited from collecting these exorbitant finance charges. In truth, I too find much that is abhorrent about this industry. But whatever one's view is of this industry—whether it is a predatory lending institution, whether it targets the poor and uneducated—to find it violates a section of Indiana Code requires a violation of the language of the statute. In this case there is no such violation.

At the heart of both the majority's and Justice Boehm's argument is the basic premise that the General Assembly never contemplated such a system of small amount, short-term loans. Fair enough. But what should the court do when faced with this question of statutory construction? As it has said many times, "The primary rule in statutory construction is to ascertain and give effect to the intent of the legislature. 'The best evidence of legislative intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless otherwise indicated by statute.'"[76]

The opinion that most held true to these cardinal rules of statutory construction was Chief Justice Shepard's dissenting opinion. He wrote:

> I read subsection 508(7) to mean what it says, in straightforward terms . . . . [S]ubsection 508(7) [i]s an exception to subsection 508(2), and it makes $33 a true "minimum loan finance charge" using the common meaning of the words . . . . Although subsection 3-508(7) does perform this additional function [i.e., providing loan prepayment limitations], I

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74. *Livingston*, 753 N.E.2d at 578 (Boehm, J., concurring).

75. *Id.*

76. Chambliss v. State, 746 N.E.2d 73, 77 (Ind. 2001) (citing Bartlett v. State, 711 N.E.2d 497, 501 (Ind. 1999)).

still find its primary purpose in its plain language.[77]

Unfortunately, his more straightforward, and what I consider correct, view could find no support among his colleagues, and three members of the court settled upon a much more strained, tenuous interpretation of the statute.

What are the effects of the supreme court's decision? A class action lawsuit is currently proceeding in federal district court, and according to J. Phillip Goddard, deputy director and chief counsel for the Indiana Department of Financial Institutions, borrowers who were charged more than thirty-six percent APR on these short-term loans should be entitled to restitution.[78] From the businesses' standpoint, while there were early reports of some payday loan companies going out of business, several have affiliated themselves with national banks organized in other states with higher or no interest rate limitations, thereby allowing them to bypass Indiana law.[79]

In another case, the Indiana Supreme Court addressed a difficult issue concerning express warranties under Indiana's version of the U.C.C. In *Rheem Manufacturing Co. v. Phelps Heating & Air Conditioning, Inc.*,[80] Phelps Heating & Air Conditioning ("Phelps") was a central Indiana contractor that installed Rheem furnaces in several new homes. Several of the furnaces malfunctioned, requiring Phelps to incur considerable expense repairing them, an estimated $40,000 to $65,000. Phelps sued, alleging breach of implied and express warranties. Rheem expressly warranted its furnaces against "failure under normal use and service," but limited the warranty to replacement parts, specifically disclaiming consequential damages, incidental damages, and costs of servicing the furnaces.[81]

At trial, Rheem sought summary judgment on the warranty claims alleging that damages were precluded because of the limitations under the express warranty and because of lack of privity under the implied warranties. The trial court denied this motion. On interlocutory appeal, the court of appeals affirmed the denial of summary judgment.[82] The supreme court accepted transfer and reversed as to the express warranty issue.[83]

Rheem first argued that summary judgment should have been granted as to the claim for lost profits because the warranty excluded consequential damages. Both parties agreed that the warranty's remedy, repair and replacement, failed of its essential purpose, but disagreed as to the construction of Indiana Code sections 26-1-2-719(2) and (3). Section 2-719(2) provides "[w]here circumstances cause an exclusive or limited remedy to fail of its essential

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77. *Livingston*, 753 N.E.2d at 580 (Shepard, C.J., dissenting).

78. *See* Denise G. Callahan, *Payday Decision Not Final*, IND. LAWYER, Aug. 29, 2001, at 1.

79. *Id.* at 22.

80. 746 N.E.2d 941 (Ind. 2001).

81. *Id.* at 944.

82. Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc., 714 N.E.2d 1218 (Ind. Ct. App. 1999), *vacated by* 746 N.E.2d 941 (Ind. 2001).

83. *Rheem Mfg. Co.*, 746 N.E.2d at 956.

purpose, remedy may be had as provided in IC 26-1."[84] Section 2-719(3) provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not."[85]

Arguing a literal reading of section 2-719(2), Phelps contended that when a remedy fails of its essential purpose, any remedy provided by 26-1 may be had, including consequential damages. This is known as the "dependent" view that overrides a contract's consequential damage exclusion.[86] On the contrary, Rheem argued that the two subsections operated "independently" and that the consequential damage exclusion survived the failure of the warranty's essential purpose. This is known as the "independent" view of subsections 2-719(2) and 2-719(3).[87]

The supreme court found the independent view more soundly reasoned and held that subsection 2-719(2) "does not categorically invalidate an exclusion of consequential damages when a limited remedy fails of its essential purpose."[88] The court gave four reasons for this conclusion. First, the court found the two subsections contemplated different legal standards.[89] Second, the independent view upheld the statutory construction maxim of giving full effect to every term.[90] Third, the independent view furthered the underlying legislative purposes of the U.C.C.[91] And finally, the court felt the independent view supported the policy of favoring the parties' freedom of contract.[92]

The supreme court next moved on to a discussion of Phelps' claim for labor expenses incurred while fixing the defective furnaces. Phelps claimed that it lost nearly $100,000 as a result of servicing the furnaces. Notwithstanding the contract's express warranty excluding the recovery of labor expenses, Phelps argued that the warranty failed of its essential purpose and was therefore entitled to collect all damages.[93]

In determining whether the warranty failed of its essential purpose, the court first had to determine what the essential purpose was. The applicable warranty

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84. IND. CODE § 26-1-2-719(2) (1998).

85. *Id.* § 26-1-2-719(3).

86. *Rheem*, 746 N.E.2d at 947 (citing Middletown Concrete Prod. v. Black Clawson Co., 802 F. Supp. 1135, 1151 (D. Del. 1992)).

87. *Id.* (citing Waters v. Massey-Ferguson, Inc., 775 F.2d 587, 592-93 (4th Cir. 1985)).

88. *Id.* (citing Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991)).

89. *Id.* at 948 ("A limited remedy will be struck when it fails of its essential purpose; an exclusion of consequential damages fails when it is unconscionable.").

90. *Id.* at 948-49.

91. *Id.* at 949. The purposes are: "(a) to simplify, clarify, and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; (c) to make uniform the law among the various jurisdictions." IND. CODE § 26-1-1-102 (1998).

92. *Rheem*, 746 N.E.2d at 950.

93. *Id.* at 953.

provision provided that "[u]nder this Warranty, R[heem] will furnish a replacement part that will be warranted for only the unexpired portion of the original warranty."[94] Further, the warranty provided that "[t]his Warranty does not cover any labor expenses for service, nor for removing or reinstalling parts. All such expenses are your responsibility unless a service labor agreement exists between you and your contractor."[95] Additionally, officers of both Rheem and Phelps testified regarding the customary practice of furnace manufacturers and dealers. Both testified that it was custom for manufacturers to provide a one-year warranty on parts while the dealer typically provided a one-year warranty on labor.[96]

Looking at the record, the court determined that the purpose of the limited warranty was "to maintain a reasonable division of responsibilities between the manufacturer and the contractor when consumers experienced problems."[97] The court then moved on to determine if the remedy failed of this purpose. It found the warranty served its purpose (i.e., Rheem supplied the parts for the malfunctioning furnaces and Phelps supplied the manpower to fix them). The court concluded that Phelps accepted this allocation of responsibility by dealing in Rheem furnaces.[98]

While the court stated that "a limited remedy fails when its application operates to deprive either party of the substantial value of the bargain,"[99] the court believed failure occurs only in "unusual circumstances" and in "relatively few situations."[100] The court described a failure of a warranty's essential purpose as occurring "when an unexpected circumstance arises and neither party accepted the risk that such circumstance would occur."[101] This seems like an appropriate rule in commercial sales where the loss is almost entirely economic, but it could work harsh results in a consumer sales context. It appears the court left open the possibility of a different result in the area of consumer sales.[102]

The court went on to find that Phelps was not entitled to collect direct warranty damages because of its position as an intermediate seller.[103] Rather, Phelps' claim sounded in indemnity and subrogation for the damages suffered by its customers. The supreme court remanded the case for determination of whether Phelps could recover on an indemnity theory.[104]

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94. *Id.* at 944.
95. *Id.*
96. *Id.* at 953.
97. *Id.* at 954.
98. *Id.* at 955.
99. *Id.* (quoting IND. CODE § 26-1-2-719 cmt. 1 (1998)).
100. *Id.* at 954 (citations omitted).
101. *Id.* at 955.
102. *See id.* (quoting V.M. Corp. v. Bernard Dist. Co., 447 F.2d 864, 865 (7th Cir. 1971)) ("2-719 was intended to encourage and facilitate consensual allocations of risk associated with the sale of goods. This is particularly true where commercial, rather than consumer sales are involved.").
103. *Id.* at 956.
104. *See id.*

B. Court of Appeals' Decisions

The Indiana Court of Appeals was active on a number of fronts in the areas of commercial and consumer law. In *Walker v. McTague*,[105] the secured party, Walker, who had sold business properties to the McTagues, reassumed management and control of the businesses after the McTagues filed for bankruptcy. The McTagues owed Walker over $250,000. To satisfy the outstanding loan, Walker offered the business properties for sale via a sealed bid auction by placing notices in Lafayette and Indianapolis newspapers. This was the only notice of sale the McTagues received. The sole bid on the property was $50,000, placed by a company controlled by Walker.[106] Walker then sought a deficiency judgment against the McTagues for the balance. After a bench trial, the trial court entered judgment for Walker in an amount of only $7,400, representing two months unpaid rent still owed by the McTagues, and Walker appealed.

The court of appeals determined that advertisement through newspapers is not sufficient to satisfy the notice requirement to defaulting debtors.[107] It then applied a two-prong test for determining whether a sale is commercially reasonable following a deficient notice. The effect of Walker's failure to give the McTagues notice was "to require [Walker] to prove that the reasonable value of the collateral at the time of the sale was less than the amount of the debt and that the sale was performed in a commercially reasonable manner."[108] As to the first prong, the creditor must present "credible, independent evidence that the sale price of the collateral was equal to the fair value of the collateral, but was less than the indebtedness."[109] For the second prong, the court laid out multiple factors for determining if a sale was commercially reasonable. These factors include: (1) the price received by the secured party, (2) whether the collateral was sold retail or wholesale, (3) the total number of bids solicited and received, and (4) whether the time and place of sale were reasonably calculated to result in a reasonable number of bidders.[110]

While Walker presented evidence that the value of the business properties was $250,000, because the sale resulted in only one bid, originated from Walker and was $200,000 below the market value of the properties, the court of appeals held that the trial court did not err in concluding "that the sale was not conducted in a commercially reasonable manner."[111]

In *E & L Rental Equipment, Inc. v. Wade Construction, Inc.*,[112] the court of appeals was presented with a barter agreement in which E & L Rental Equipment

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105. 737 N.E.2d 404 (Ind. Ct. App. 2000).
106. *Id.* at 406-07.
107. *Id.* at 409.
108. *Id.* at 409-10 (citation omitted).
109. *Id.* at 410.
110. *Id.*
111. *Id.* at 411.
112. 752 N.E.2d 655 (Ind. Ct. App. 2001).

(E & L) argued that the value of Wade Construction's performance was deficient and demanded additional payment. Pursuant to an agreement whereby E & L promised to provide Wade Construction with the use of construction equipment and various goods including sand, limestone and gravel in exchange for Wade Construction's promise to provide E & L with recycling services, E & L provided Wade Construction with $83,646 worth of goods and rental equipment between 1994 and 1997. In exchange, Wade Construction provided E & L with $18,000 worth of recycling services.[113]

E & L argued first that the agreement was a lease and not a barter. Looking to the evidence, the court of appeals found several factors indicative of a barter agreement. First, E & L did not invoice Wade Construction for use of its rental equipment until twenty-six months after performance under the contract began. The court also found that the U.C.C.'s definition of "lease," "a transfer of the right to possession and use of goods *for a term* in return for consideration," helpful.[114] Not only did E & L not specify a specific period for the transfer of right to possession, but E & L would also occasionally retrieve its equipment from Wade Construction for its own use.[115]

In the alternative, E & L argued that the part of the agreement dealing with goods—that is, the sand, limestone and gravel—was covered by Article 2 of the U.C.C. The court of appeals concluded that Article 2 was applicable, but found the trial court's conclusion was no different.[116] Both parties had fully performed their obligation, and it was only because the value of Wade Construction's performance was significantly less that E & L's that E & L was complaining. In essence, E & L entered into a bad agreement and sought to be bailed out by the courts, an invitation the appellate court declined.[117]

In *Pioneer Hi-Bred International, Inc. v. Keybank National Ass'n*,[118] the court of appeals was faced with a federal statute preempting Article 9's regulations of secured transactions in agricultural products. In the case, farmers in Shipshewana executed several promissory notes in exchange for which they granted Keybank a security interest in their real and personal property, including the products of their land. Subsequently, the farmers obtained an additional loan from Pioneer, and Pioneer took a security interest in the proceeds from the sale of the farmers' crops. Pioneer did not file a financing statement.[119] When the farmers renewed their loans with Keybank, Keybank sent notice of their secured status to all parties, including Pioneer. After the farmers harvested and processed their crops, the proceeds of the sale were given to Pioneer. Later the next year, the farmers defaulted, and Keybank filed suit to collect on the proceeds of the

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113. *Id.* at 657.
114. *Id.* at 659 (emphasis in original) (citing IND. CODE § 26-1-2.1-103 (1998)).
115. *Id.*
116. *Id.* at 660.
117. *Id.* at 660-61.
118. 742 N.E.2d 967 (Ind. Ct. App. 2001).
119. *Id.* at 968-69.

previous year's crops.[120]

The court of appeals found that Indiana's Article 9 was preempted by federal regulations. The regulation provides that a buyer of farm products takes subject to a security interest if the buyer receives notice of another party's security interest within one year before the sale.[121] In this case, Pioneer received notice of Keybank's security interest on August 16, 1997, and Pioneer purchased the farmer's farm products on December 18, 1997.[122] The court held that Pioneer took subject to the security interest and was accountable to Keybank for the amount it paid to the farmers.[123]

In *Time Warner Entertainment Co. v. Whiteman*,[124] customers filed a class action against Time Warner alleging that the late fees it assessed were "excessive, unreasonable, and a penalty."[125] Time Warner charged $4.65 to its customers who failed to pay by a certain date. The class action plaintiffs sought money damages and injunctive relief, and Time Warner argued that the voluntary payment doctrine barred relief for money damages. The trial court denied Time Warner's motion for summary judgment, and an appeal ensued to the court of appeals.

The court of appeals found that summary judgment was appropriate based upon the voluntary payment doctrine, which provides that "'a voluntary payment made under a mistake or in ignorance of law, but with a full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back.'"[126] The court determined that the two key factors under the voluntary payment doctrine are the payor's knowledge and fraud or imposition by the payor.[127]

As to the first factor, the court held that the "onus is upon the party making the payment to inquire about the reasonableness of the charge before making the

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120. *Id.* at 970.

121. The regulation reads as follows:

> (d) Except as provided in subsection (e) and notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.
>
> (e) A buyer of farm products takes subject to a security interest created by the seller if—
>
> (1)(A) within 1 year before the sale of the farm products, the buyer has received from the secured party or the seller written notice of the security interest . . . .

Id. at 971 (quoting 7 U.S.C. § 1631 (1985)).

122. *Id.* at 969, 972.

123. *Id.* at 972.

124. 741 N.E.2d 1265 (Ind. Ct. App. 2001).

125. *Id.* at 1267.

126. *Id.* at 1270 (quoting City of Evansville v. Walker, 318 N.E.2d 388, 389 (1974) (citation omitted)).

127. *Id.* at 1270-71.

payment, or perhaps before signing the contract that specifies the late charge."[128] As to the second factor, the court determined that "'in order to render payment compulsory, there must have been some necessity and such pressure must be brought to bear upon the person paying as to interfere with free enjoyment of his rights of person or property.'"[129] The court of appeals held that potential loss of cable service or the threat of litigation does not rise to the level of compulsion necessary to satisfy the second factor of the voluntary payment doctrine.[130] Accordingly, the court found that summary judgment was appropriate as to the money damages claim.[131] Because a dispute existed on whether Time Warner's late fee was disproportionate to its actual loss, the court determined that a genuine issue of material fact was in dispute and summary judgment was inappropriate.[132] The Indiana Supreme Court heard oral argument on the case, but denied transfer.

CONCLUSION

It was an eventful survey period in the areas of consumer and commercial law. The new and highly technical Revised Article 9 finally arrived. Moreover, the supreme court and court of appeals issued a number of noteworthy decisions. As of May 2002, it appears that the supreme court has issued the last of the direct criminal appeals that have hampered its ability to address many areas of civil law, including commercial and consumer law. With this newfound docket freedom, Indiana practitioners should look to the supreme court for greater guidance and development in these areas.

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128. *Id.* at 1272.
129. *Id.* (quoting Smith v. Prime Cable of Chicago, 658 N.E.2d 1325 (Ill. App. Ct. 1995)).
130. *Id.*
131. *Id.*
132. *Id.* at 1275.

STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

ROSALIE BERGER LEVINSON*

INTRODUCTION

This Article explores state and federal constitutional law developments over the past year. Parts I-III examine both U.S. Supreme Court cases and significant Indiana state and lower federal court cases addressing federal constitutional issues. Part IV will focus on state civil constitutional law cases.

I. FIRST AMENDMENT SPEECH CASES

During the 2000 term the U.S. Supreme Court decided several cases raising First Amendment issues. In addition, both the district courts in Indiana and the Seventh Circuit Court of Appeals were called upon to assess First Amendment challenges to Indiana statutes. A recurring theme is the extent to which government may regulate speech in order to protect children.

A. Regulating Commercial Speech to Protect Minors

In *Lorillard Tobacco Co. v. Reilly*,[1] the tobacco industry successfully challenged various Massachusetts regulations governing the advertising of tobacco products. State regulations, promulgated by the Attorney General, prohibited the outdoor advertising of smokeless tobacco or cigars within 1000 feet of a school or playground.[2] Further, they proscribed indoor, point-of-sale advertising of cigars and smokeless tobacco "placed lower than five feet from the floor of any retail establishment which is located within a thousand foot radius" of any school or playground.[3] Despite the state's obviously strong interest in protecting its children from the ills of tobacco use, the Court reasoned that the regulations went too far.

After striking the cigarette advertising regulations on pre-emption grounds,[4] Justice O'Connor applied a four-prong analysis established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[5] to test the smokeless tobacco regulations. Under the first prong, the court determines whether the expression is protected at all, since the state may ban commercial speech if it is

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1. 533 U.S. 525 (2001).

2. *Id.* at 545.

3. *Id.* at 566 (quoting MASS. REGS. CODE tit. 940, §§ 21.04(5)(b), 22.06(5)(b) (2000)).

4. *Id.* at 553-57. The Court relied on the Federal Cigarette Labeling and Advertising Act, which prescribes mandatory health warnings for cigarette packaging and advertising. The Court rejected the Attorney General's argument that pre-emption should not apply because the regulations targeted youth exposure to tobacco, rather than the health-related content of advertising. The Court found the two concerns "intertwined." *Id.* at 526-27.

5. 447 U.S. 557 (1980).

false, deceptive, or misleading, or if it concerns unlawful activity.[6] The second prong asks whether the asserted governmental interest is substantial.[7] The third and fourth prongs require the court to determine whether the regulation directly advances the asserted governmental interest and whether the regulation is more extensive than necessary to serve that interest.[8] The first two prongs were conceded by the parties and the Court found "ample documentation" of a problem with underage use of smokeless tobacco and cigars, which could be ameliorated by preventing campaigns targeted at juveniles.[9] The Court concluded, however, that the ban on outdoor advertising failed the fourth prong because it was more extensive than necessary to advance the state's interest in preventing underage tobacco use.[10] The Court expressed concern that the regulations made no distinctions based on the size of the sign, nor did the regulations differentiate between rural, suburban, or urban locales, which "demonstrates a lack of tailoring."[11] The Court noted that in some areas the regulations "would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."[12] The Court reiterated the firmly established principle that the government's interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults."[13]

As to the prohibition on indoor point-of-sale advertising, the Court concluded that this regulation failed both the third and fourth prongs of the *Central Hudson* analysis because it neither advanced the goal of preventing minors from using tobacco products, nor curbed the demand for such activity.[14] The five-foot rule would not curb demand for the product since children can obviously look up and see the ads, and there was not a "reasonable fit" between the restriction and the goal of targeting advertising that entices children.[15] Further, the Court rejected a "de minimis" exception for even limited restrictions on advertising, where the restrictions lack sufficient tailoring.[16]

The concurring opinions of Justices Kennedy, Scalia, and Thomas expressed concern with the *Central Hudson* test. Justice Kennedy, joined by Justice Scalia, opined that "the test gives insufficient protection to truthful, nonmisleading

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6. *Id.* at 566.
7. *Id.*
8. *Id.*
9. *Lorillard*, 533 U.S. at 563.
10. *Id.* at 566.
11. *Id.* at 564.
12. *Id.*
13. *Id.* at 565 (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997)).
14. *Id.* at 566. The Court, however, did sustain regulations requiring "tobacco retailers to place tobacco products behind counters and require customers to have contact with a sales-person before they are able to handle a tobacco product." *Id.* at 568.
15. *Id.* at 567.
16. *Id.*

commercial speech."[17] Justice Thomas flatly stated that he would subject all advertising regulations that restrict truthful speech to strict scrutiny analysis.[18] As to the state's interest in protecting minors, Justice Thomas emphasized that the state did not focus its ban on "youthful imagery."[19] More basically, he emphasized that the state cannot pursue its interest in regulating speech directed at children "at the expense of the free speech rights of adults."[20]

Justice Stevens, joined by Justice Ginsberg and Justice Breyer, would have remanded the case for a trial to better assess whether the measures were properly tailored to serve the government's compelling interest in "ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance."[21] Because there was some doubt in the record as to the impact the advertising ban would have, particularly in the state's largest cities, the breadth of the ban was potentially problematic. However, the dissenters would have upheld the point-of-sale advertising restrictions as not significantly implicating First Amendment concerns.[22]

Lorillard is significant for several reasons. The decision triggered nine separate opinions, including four rather convoluted concurring opinions. Nonetheless, *Central Hudson* remains intact, despite the urging of some members of the Court that truthful, nonmisleading commercial speech should enjoy the full First Amendment protection afforded non-commercial speech. On the other hand, the decision indicates that the *Central Hudson* test is not toothless and that the government will not be permitted to impose broad advertising bans to discourage the use of legal but disfavored products, even where a child welfare argument is invoked.[23] Either government must enact generally applicable

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17. *Id.* at 570 (Kennedy, J., concurring). *But see* Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 233 F.3d 981, 994 (7th Cir. 2000) ("The government can directly regulate deceptive advertising without any further justification.").

18. *Lorillard*, 533 U.S. at 570 (Thomas, J., concurring).

19. *Id.* at 574.

20. *Id.* at 575-76.

21. *Id.* at 587 (Stevens, J., concurring in part and dissenting in part).

22. *Id.* at 590.

23. The Supreme Court's strict analysis of advertising bans is also reflected in *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002). The Court ruled 5-4 that the government could not prohibit the advertising of compounded drugs even when the government, in return, exempted such drugs from FDA standard drug approval requirements. The Court conceded that the prohibition on wide advertising of compounded drugs where such drugs did not first undergo safety testing might advance the government's interest in discouraging broad use of such drugs. However, the new law failed to meet *Central Hudson*'s requirement that the means be no more restrictive than necessary: "If the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 1506. Again the Court reiterated the principle that government cannot halt the dissemination of truthful commercial information simply to keep members of the public from making bad decisions with this information. *Id.* at 1507.

zoning ordinances that apply to all products, or it must take special care that its restrictions are limited to advertising with special appeal to minors in especially problematic geographical locations, in order to meet the narrow tailoring requirement.

B. Regulating to Protect Minors from Violence

It is well established that obscene materials are unprotected by the First Amendment. Further, even material that does not meet the adult standard of obscenity may be proscribed for minors based on the potential harm such material might cause to the psychological or ethical development of children.[24] On the other hand, the Supreme Court has never addressed the constitutionality of laws aimed at shielding minors from depictions of graphic violence, despite a growing body of evidence that such material is also harmful to minors. In *American Amusement Machine Ass'n v. Kendrick*,[25] the Seventh Circuit was called upon to address this issue in the context of an Indianapolis ordinance aimed at limiting children's access to video games that depict violence.

Under an Indianapolis ordinance, establishments which feature five or more coin-operated arcade games containing graphic violence or strong sexual content were required to both segregate such games to ensure access only by adults and to obtain parental consent prior to allowing a minor to play such games.[26] The ordinance specifically targeted amusement machines that predominantly appeal "to minors' morbid interest in violence or minors' prurient interest in sex, [that are] patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years," and that lack "'serious literary, artistic, political or scientific value as a whole for persons under' that age."[27] The portion of the ordinance aimed at sexually explicit material closely tracks a similar statute that was sustained by the Supreme Court in 1968.[28] The plaintiffs, manufacturers of video games and their trade association, challenged only the "graphic violence" aspect of the ordinance, which targeted "an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration [disfigurement]."[29] Violations triggered potential

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24. *See* Ginsberg v. New York, 390 U.S. 629, 639-43 (1968).

25. 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2001).

26. *See id.* at 573.

27. *Id.* (quoting INDIANAPOLIS, IN, CITY-COUNTY GENERAL ORDINANCE No. 72, § 831.1 (2000)).

28. In *Ginsberg*, the Court upheld a statute that forbade any representation of nudity that "predominantly appeal[ed] to the prurient, shameful or morbid interest of minors," that was "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors" and that was "utterly without redeeming social importance for minors." *Ginsberg*, 390 U.S. at 633.

29. *Am. Amusement Mach. Ass'n*, 244 F.3d at 573 (alteration in original) (quoting

suspension or revocation of the right to operate the machines as well as monetary penalties.[30]

The district court upheld the Indianapolis ordinance.[31] It applied a rational basis analysis and concluded that empirical studies by psychologists, which found that playing violent video games tends to make young persons more aggressive in their attitudes and behaviors, sufficiently justified the enactment.[32] Further, the district court believed that the fact that the ordinance tracked the conventional standard for obscenity eliminated any due process vagueness concerns.[33]

The Seventh Circuit rejected both the district court's analysis and its conclusion. It reasoned that the ordinance had to be subjected to strict scrutiny and, because it found that Indianapolis could not meet this heightened standard, it ordered entry of a preliminary injunction prohibiting enforcement of the law.[34]

A core question in the case was whether the city appropriately relied on the analogy to obscene material. Arguably, depictions of violence may be even more harmful to minors than sexually explicit material and, thus, if the former may be regulated, why not the latter? Judge Posner rejected the city's attempt "to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity."[35] He reasoned that the U.S. Supreme Court has sustained regulation of obscenity not on grounds that it is harmful, but on grounds that it is offensive.[36] Government need not prove that obscene material is likely to affect anyone's conduct before the material can be proscribed, because it is sheer offensiveness that justifies the restriction.[37] On the other hand, because the city argued a link to harmful consequences as the basis for restricting violent speech, it was required to present some proof of a causal connection to some harm.[38] While conceding that "protecting people from violence is at least as hallowed a role for government as protecting people from graphic sexual imagery," the court found that the city had failed to create a record demonstrating that violent video games led youthful players to breach the peace.[39]

Judge Posner found the psychological studies relied on by the city unpersuasive because they failed to show that violent video games are any more harmful to the public safety than violent movies or other violent entertainment readily accessible to minors.[40] He reasoned that video games are no different

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INDIANAPOLIS, IN, CITY-COUNTY GENERAL ORDINANCE, No. 72, § 831.1 (2000)).

30. *Id.*

31. *See* Am. Amusement Mach. Ass'n v. Cottey, 115 F. Supp. 2d 943 (S.D. Ind. 2000).

32. *Id.* at 964-66.

33. *Id.* at 978-81.

34. *Am. Amusement Mach. Ass'n*, 244 F.3d at 580.

35. *Id.* at 574.

36. *Id.*

37. *Id.* at 575.

38. *Id.* at 576.

39. *Id.* at 575.

40. *Id.* at 578-79.

from literature; many games have story lines and even ideologies, just as books and movies do.[41] The facts that violent video games constitute a "tiny fraction" of the media violence to which American children are exposed and the characters in the video games are "cartoon characters" who could not be mistaken for real people further persuaded Judge Posner that the ordinance's curtailment of free expression could not be offset by any justification "'compelling' or otherwise."[42] Although access to such games was permitted when minors were accompanied by their parents, the court concluded that the parental accompaniment requirement would deter children from playing games and that most parents were simply too busy to accompany their children, even if they thought their children could be exposed to violent video games without suffering any harm.[43]

The Indianapolis ordinance was addressed in the context of a preliminary injunction, and, thus, the court did not discuss whether a more narrowly drawn ordinance might survive a constitutional challenge. Judge Posner, however, implied that a sufficiently narrow statute must restrict itself to games that use actors in simulated real death and mutilation convincingly or to games that lack any story line and instead consist merely of "animated shooting galleries."[44] It can be questioned, however, whether strict scrutiny must be the analysis applied when government seeks to protect children. Certainly, as Judge Posner conceded, the Supreme Court has allowed greater government regulation where speech is targeted at children.[45] Further, the Court has applied a somewhat more deferential approach where the speech has little communicative value and appears to lie at the periphery of the First Amendment. For example, the Court has allowed much greater regulation of sexually explicit material, even where such material does not meet the strict legal definition of obscenity.[46] Arguably,

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41. *Id.* at 578.

42. *Id.* at 579.

43. *Id.* at 578.

44. *Id.* at 579.

45. For discussion of *Ginsberg*, see *supra* note 28.

46. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), a plurality held that a city's concern for the highly detrimental effects of lewd, immoral activities justified a ban on nudity as applied to nude dancing. The plurality specifically rejected the suggestion that the city had to develop a more specific evidentiary record of harm in order to justify its statute. *Id.* at 299-300. Similarly, in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the Court upheld restrictive zoning of adult establishments, based on the alleged secondary effects associated with such businesses, without mandating that the city conduct its own new studies proving adverse secondary effects. The Court found that it sufficed that the studies relied on were "reasonably believed to be relevant to the problem" addressed. *Id.* at 51-52.

Further, in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002), the Court in a 5-4 ruling held that a city could reasonably rely on studies correlating crime patterns with the concentration of adult businesses in single-use establishments to support an ordinance prohibiting more than one adult entertainment business in the same building. The Ninth Circuit held that the lack of more specific empirical data regarding multiple-use adult establishments was fatal to the zoning ordinance. 222 F.3d 719 (9th Cir. 2000). Relying on *Renton*, Justice O'Connor criticized

violent video games can be said to fall within this less protected category.

Judge Posner asserted that the ordinance could not meet even a lesser standard because "[c]ommon sense says that the City's claim of harm to its citizens from these games is . . . at best wildly speculative."[47] He did so, however, only after flatly rejecting the psychological studies, because the games used in the studies were purportedly not similar enough to those marketed in game arcades in Indianapolis, and because the studies found only that the games triggered aggressive feelings, but not necessarily violent conduct.[48] Judge Posner's concept of "common sense" may not necessarily comport with that of other reasonable minds. He claims that children cannot "become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble[,]"[49] but common sense does not dictate that the development of minors will be impeded or that minors will be left "unequipped to cope with the world as we know it,"[50] simply because they are denied access to violent video games unless accompanied by an adult. Although concerns for the First Amendment perhaps warrant a closer analysis than the reasonable basis test imposed by the district court, it is difficult to understand the notion that

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the court below for setting too high a bar on municipalities that were simply addressing the secondary effects of protected speech. *Id.* at 1736. *Renton* required only that the city's evidence "fairly support the municipality's rationale for its ordinance." *Id.* Justice O'Connor cautioned that cities could not rely on "shoddy data or reasoning" to enact zoning ordinances, but concluded that plaintiffs must cast doubt on the city's rationale by either demonstrating that its evidence does not support its rationale or by furnishing evidence that disputes the city's factual findings. At least at the summary judgment stage, plaintiffs had not produced such evidence and the city, therefore, met *Renton*'s evidentiary requirement. *Id.* In a concurring opinion, Justice Kennedy emphasized that in the zoning context, cities have significant power to target the secondary effects of speech, and provided the purpose of the ordinance is "to limit the negative externalities of land use," the usual presumption that content-based restrictions on speech are unconstitutional does not apply. *Id.* at 1741; *see also* Blue Canary Corp. v. City of Milwaukee, 270 F.3d 1156 (7th Cir. 2001). The Seventh Circuit held the city's denial of a permit for nude dancing at a burlesque theatre in a residential district did not violate the First Amendment because it only barred the operation in proximity to a residential neighborhood, leaving abundant convenient locations within the city. Further, the court rejected the argument that the zoning commissioner was given too much discretion in administering the zoning law, reasoning that "some degree of discretion is an unavoidable feature of law enforcement." *Id.* at 1158. In an earlier ruling upholding the city's refusal to renew the plaintiff's liquor license, the court reasoned that "[t]he impairment of First Amendment values is slight to the point of being risible, since the expressive activity involved in the kind of striptease entertainment provided in a bar has at best a modest social value." Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1124 (7th Cir. 2001). Although the subsequent request did not involve the sale of alcohol, the court still found the same minimal impairment of free speech. *See Blue Canary Corp.*, 270 F.3d at 1157.

47. *Am. Amusement Mach. Ass'n*, 244 F.3d at 579.

48. *Id.* at 578-79.

49. *Id.* at 577.

50. *Id.*

government has a sufficiently important interest in restricting the exposure of juveniles to sexually explicit material, but cannot restrict their access to video games that depict graphic violence. Concerns of vagueness are always an issue in the First Amendment context but, as the district court appropriately noted, the Indianapolis ordinance tracks the definition for regulating sexually explicit material aimed at minors that has been sustained by the Supreme Court. Further, the definition of proscribed material is quite detailed.

Judge Posner concluded that the ordinance was overly broad because it was not restricted to games using more realistic actors and more realistic depictions of death and mutilation, or games lacking any story lines.[51] Further, he contended that the ordinance was under-inclusive because it was aimed only at video games and not at violent movies and television.[52] Concerns of over and under-inclusiveness are a well established aspect of strict scrutiny analysis; however, the Supreme Court has been less apt to apply this stringent analysis when the speech is targeted only at minors and has limited First Amendment value, and the state is exercising its power to protect minors.[53] Further, his analogy to violent movies and television is inapt. Unlike television, it is feasible for a city to restrict access to violent video games without affecting adult access,[54] and movies already have a rating system that denies minors access to unsuitable films. The fact that parental rights are protected by allowing access when children are accompanied by their parents, similar to the motion picture industry, further supports the validity of the ordinance. Indianapolis appealed the ruling, but its certiorari petition was denied.[55] The issue, however, is unlikely to go away, as many state legislatures and municipalities have either enacted or are in the process of enacting similar legislation.[56]

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51. *Id.* at 579-80.

52. *Id.* at 578-79.

53. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 633-34 (1979) (four-Justice plurality recognizing that the rights of minors cannot be equated with those of adults due to their peculiar vulnerability, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing).

54. Unlike the cigarette advertising ban previously discussed, this ordinance need not adversely affect the rights of adults. *See* discussion *supra* Part I.A.

55. *See* Kendrick v. Am. Amusement Mach. Ass'n, 122 S. Ct. 462 (2001).

56. The Connecticut legislature passed similar legislation in May 2001, that was vetoed by the governor. *See* S.B. 119, 2001 Gen. Assem., Reg. Sess. (Conn. 2001). A bill targeting business owners who allow children to operate video games with "point and shoot" simulated firearms is pending in the New York Assembly. *See* A.9019, 224th Leg., Reg. Sess. (N.Y. 2001). Tennessee has recently amended its statute governing the sale, loan, or exhibition to minors of material that depicts sexual conduct to include "excess violence." TENN. CODE ANN. §§ 39-17-911, 39-17-914 (2000). Similar legislation is pending in Oklahoma, Minnesota, Chicago and Honolulu. Indiana is considering enacting a similar provision. *See* H.R. 1649, 112 Leg., First Session (Ind. 2001) (referred to Senate on March 6, 2001). Finally, St. Louis County, Missouri, is currently defending an ordinance which requires parental permission for children to buy violent or sexually explicit video games. *See* Interactive Digital v. St. Louis Co., No. 00-CV-2030, 2000 WL 826822 (E.D.

The First Amendment has also posed an obstacle to Indiana lawmakers seeking to protect children from violence through curfew laws. In July 2000, a federal district court ruled that Indiana's first attempt to enact such a statute was unconstitutional because it interfered with the First Amendment rights of minors.[57] Although the statute created certain exceptions for work, school events and religious activities, the court found that it did not allow for other important, protected activities that take place after hours.[58] The court reasoned that "without a general First Amendment activities exception, a curfew law is overbroad."[59]

In response, the Indiana Legislature redrafted the law in May 2001 and broadened the exceptions in order to avoid intrusion on the First Amendment rights of minors. The new statute allows all First Amendment activity (free speech, the right of assembly, and freedom of religion) to be asserted as a defense to an arrest under the curfew statute.[60] The Indiana Civil Liberties Union has challenged the new law as an even greater intrusion on First Amendment rights, because it requires minors to come forward and assert a defense.[61] It contends that the possibility of arrest will deter youths from exercising their federally protected rights during curfew hours.[62] A district court last fall refused to enjoin enforcement of the statute.[63] Judge Tinder reasoned that the ICLU failed to show "a realistic threat" that minors would be arrested on curfew violations when they were exercising their First Amendment rights.[64] Judge Tinder agreed that an exception for First Amendment activity was constitutionally mandated.[65] The judge, however, was not troubled by the fact that the exemption in the ordinance appeared as an affirmative defense, rather than as an exception, since state and federal law requires an arresting officer to consider the totality of circumstances, including the First Amendment activity defense.[66] Further, he ruled that, even if the law burdened some First Amendment conduct, the ordinance was narrowly

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Mo. 2002).

57. *See* Hodgkins v. Goldsmith, No. IP99-1528-C-T/G, 2000 WL 892964 (S.D. Ind. July 3, 2000).

58. *See id.* at *9-10.

59. *Id.* at *16. Subsequently, in *Hodgkins v. Peterson*, No. IP00-1410-C-T/G, 2000 WL 33128726 (S.D. Ind. 2000), the court rejected a challenge based on the substantive due process rights of parents to raise and control their children without undue government interference. Although the court applied intermediate scrutiny, it concluded that, at the preliminary injunction stage, the parents had not made a clear showing that the ordinance was invalid in light of the city's substantial interests in protecting its youth from victimization and protecting the city from crimes committed by youth during curfew hours. *See id.* at *13-15.

60. *See* IND. CODE § 31-37-3-3.5 (2001).

61. Hodgkins *ex rel.* Hodgkins v. Peterson, 175 F. Supp. 2d 1132 (S.D. Ind. 2001).

62. *Id.* at 1145.

63. *Id.* at 1167.

64. *Id.* at 1149.

65. *Id.* at 1140-44.

66. *Id.* at 1147.

tailored to serve the government's interest "in providing for the safety and well-being of its children and combating juvenile crime."[67]

In addition, the district court rejected the argument that the law interfered with the parents' right to guide the upbringing of their children, reasoning that "a parent's right to allow his or her minor children to be in public with parental permission during curfew hours" should not be viewed as a fundamental privacy right.[68] The court applied the "intermediate scrutiny" standard of review, because of the significance of the parental rights at stake, but concluded that the curfew law was substantially related to the city's interests in "protecting its youth from victimization and protecting others from crimes committed by youth during curfew hours."[69] Indeed, the court concluded that the curfew law would also satisfy strict scrutiny.[70] The judge's decision has been appealed to the Seventh Circuit.

Several cities have enacted similar legislation, and the litigation demonstrates that the lower courts are divided as to both the standard of review that should apply to such laws and as to the core question of whether the state's interest in protecting juveniles from crime on the streets outweighs any potential First Amendment harm.[71] In general, however, curfew laws that do not broadly exempt First Amendment activity have been disallowed, whereas ordinances that insulate First Amendment activity have been sustained.[72]

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67. *Id.* at 1150.

68. *Id.* at 1161.

69. *Id.* at 1164.

70. *See id.* at 1166.

71. *See, e.g.*, Hutchins v. Dist. of Columbia, 188 F.3d 531, 534 (D.C. Cir. 1999) (finding that a curfew statute with an explicit First Amendment exception does not implicate any fundamental rights of minors or their parents, but ordinance could be sustained even under strict scrutiny analysis); Schleifer v. City of Charlottesville, 159 F.3d 843, 847-49 (4th Cir. 1998) (holding that, because minors' rights are not co-extensive with those of adults, the appropriate standard to use is intermediate scrutiny, and that the city was justified in believing the curfew ordinance advanced the state's interest); Qutb v. Strauss, 11 F.3d 488, 492-96 (5th Cir. 1993) (holding that, because freedom of movement is a fundamental right under the Equal Protection Clause, strict scrutiny applies, but the ordinance was narrowly tailored to meet the state's compelling interest in protecting juveniles from crime on the streets, especially in light of the exemptions for First Amendment activities and traveling); *cf.* Nunez v. City of San Diego, 114 F.3d 935, 949 (9th Cir. 1997) (applying strict scrutiny because fundamental rights are implicated, and finding that the city could not show its curfew law to be narrowly tailored, because it included few exceptions for otherwise legitimate First Amendment activity).

72. Note that the curfew laws upheld in *Hutchins*, *Schleifer*, and *Qutb*, *supra* note 71, all contained this exemption, contrary to the law struck in *Nunez*. The laws in *Hutchins* and *Qutb* also used the term "defense," but, unlike the Indianapolis ordinance, required the arresting officer to specifically determine that no defense existed before making an arrest. *See Hutchins*, 188 F.3d at 535; *Qutb*, 11 F.3d at 490-91.

C. Regulating Access to Public Forums

The Supreme Court this term revisited the question of how to resolve the conflict that occurs when religious groups seek access to government-owned property. In *Capitol Square Review and Advisory Board v. Pinnette*,[73] the Court in 1995 ruled that prohibiting the Ku Klux Klan from erecting a large Latin cross in the park across from the Ohio State House violated the Klan's free speech rights and that allowing the religious display on public property would not violate the Establishment Clause. The Court emphasized that government cannot discriminate based on the content of the speech or the identity of the speaker in a public forum that is open to everyone.[74] Even where government has not indiscriminately opened its property for public use, and thus needs not allow persons to engage in every type of speech, the Court has ruled that any regulation in a so-called "limited public forum" must be reasonable and viewpoint neutral.[75] In two recent cases the Supreme Court has ruled that discrimination against religious groups seeking the use of a limited public forum is impermissible viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District*,[76] the Court held that a school district violated the First Amendment by precluding a group from presenting films at the school after school hours based solely on the religious perspective of the films. Similarly, in *Rosenberger v. Rector & Visitors of University of Virginia*,[77] the Court held that the university violated the First Amendment by refusing to fund a student publication solely because it addressed issues from a religious perspective.

Despite these earlier rulings, the Milford Central School District denied the request of the Good News Club, a private Christian organization for children ages six to twelve, to hold weekly after-school meetings in the school cafeteria. Because there are some 4600 local clubs and approximately 500 of these meet on public school property, the Court's ruling in *Good News Club v. Milford Central School*[78] is significant. The Good News Clubs are sponsored by a national organization called Child Evangelism Fellowship, which states that its mission is to evangelize boys and girls with the gospel of the Lord Jesus Christ. The Milford Central School District adopted a community use policy allowing residents to use the school for "social, civic, and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community,"

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73. 515 U.S. 753 (1995).

74. *Id.* at 761.

75. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993); Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Note that the requirements of reasonableness and viewpoint neutrality apply even to the regulation of speech in non-public forums, i.e., government property that has not been opened for First Amendment activity.

76. 508 U.S. 384 (1993).

77. 515 U.S. 819 (1995).

78. 533 U.S. 98 (2001).

but it prohibited uses that involved religious worship.[79] The school determined that the activities of the Good News Club were the equivalent of religious instruction and worship.[80] The district court and the Second Circuit had both ruled that the school could deny the club access without engaging in unconstitutional viewpoint discrimination because the school had never allowed other groups to provide religious instruction and because the meetings here were "quintessentially religious," and thus fell outside the bounds of pure moral and character development from a religious perspective.[81]

The Supreme Court, in a 6-3 opinion, rejected the analysis of the lower courts. First, the Court assumed that the school was a limited public forum and thus was not required to "allow persons to engage in every type of speech."[82] The school could reserve use of its property for certain groups or certain topics provided, however, that it did not discriminate on the basis of viewpoint and that the restrictions were reasonable in light of the purpose of the forum.[83] The Court then concluded that the exclusion of the Good News Club was impermissible viewpoint discrimination.[84] Affirming its earlier holdings, the Court stated that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[85] Justice Thomas reasoned that, like other permitted users such as the Boy Scouts and the 4-H Club, the Good News Club was engaged in teaching morals and character, but was excluded simply because its viewpoint was religious: "we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."[86] The Court expressly disagreed with the idea that something that is "quintessentially religious" cannot also be characterized as the teaching of morals and character development from a particular viewpoint.[87]

Assuming the existence of viewpoint discrimination, Milford nonetheless argued that its interest in not violating the Establishment Clause outweighed the club's interest in gaining equal access to the school's facility.[88] The Supreme Court in recent years has failed to agree on how to analyze Establishment Clause

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79. *Id.* at 102.

80. *Id.*

81. *Id.* at 99.

82. *Id.* at 106.

83. *Id.*

84. *Id.* at 107.

85. *Id.* at 112.

86. *Id.* at 111.

87. *Id. See also* DeBoer v. Village of Oak Park, 267 F.3d 558, 568 (7th Cir. 2001) (holding that the village engaged in impermissible viewpoint discrimination by refusing to allow use of the village hall for residents participating in a National Day of Prayer; the village's belief that prayer and singing hymns could not be viewed as a civic activity violated the speech rights of those who use these forms of expression to convey their viewpoint on matters relating to government).

88. *Good News Club*, 533 U.S. at 113.

claims. While some Justices contend that the clause is violated only where the government exercises coercive pressure or discriminates among religious organizations,[89] others, led by Justice O'Connor, assert that the appropriate inquiry is whether the government has endorsed or demonstrated affirmative approval of religion.[90] In rejecting the school's Establishment Clause defense, Justice Thomas invoked both of these "tests," while also emphasizing a neutrality or equal access principle that he would have the Court adopt.[91]

Justice Thomas focused on the facts that "the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent."[92] He then reasoned that allowing the club to use the facilities would ensure, rather than threaten, neutrality toward religion.[93] As to the coercion argument, Justice Thomas observed that, because the children could not attend without their parents' permission, there could not be coercion to engage in the club's religious activities.[94] Finally, as to the endorsement test, Justice Thomas reasoned that, even if elementary school children are more impressionable than adults, the danger of children misperceiving the endorsement of religion was no greater than the danger of their perceiving a hostility toward religious viewpoints were the club excluded from the school.[95]

Justice Scalia would paint with a broader brush; he asserted that there is no Establishment Clause issue where the speech is purely private and occurs in a public forum open to all on equal terms.[96] In sharp contrast, Justice Stevens, in dissent, argued that government is permitted to distinguish between religious speech that is simply about a particular topic from a religious point of view and religious speech that amounts to worship or proselytizing.[97] Justice Stevens concluded that a school district should be permitted to allow the first type of religious speech while disallowing the second.[98] Similarly, Justice Souter, joined by Justice Ginsberg, stated that it was clear that the Good News Club intended to use public school premises "for an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[99] Justice Souter's dissent also emphasized that only four outside groups met at the school and that the Good News Club was the only one whose instruction followed immediately on conclusion of the school day, thus raising a concern of endorsement.[100]

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89. Lee v. Weisman, 505 U.S. 577 (1992) (opinion written by Justice Kennedy).
90. Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985) (O'Connor, J., concurring).
91. *Good News Club*, 533 U.S. at 114.
92. *Id.* at 113.
93. *Id.* at 113-14.
94. *Id.* at 115.
95. *Id.* at 117-18.
96. *Id.* at 120-21 (Scalia, J., concurring).
97. *Id.* at 130 (Stevens, J., dissenting).
98. *Id.* at 130-31 (Stevens, J., dissenting).
99. *Id.* at 138 (Souter, J., dissenting).
100. *Id.* at 144 (Souter, J., dissenting).

Good News Club is significant for several reasons. First, it establishes that government aid to even "pervasively sectarian" or religious practices will not inevitably be impermissible; rather, neutrality and equal access appear to be the watchwords of this Court. Second, the majority noted that it "would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the [benefit] at a particular time."[101] Both of these determinations may be critical in assessing the validity of school vouchers, an issue currently pending before the Supreme Court.[102] Third, the decision extends the equal access principle to include use of facilities where young children are involved, despite the argument that they may erroneously assume that everything that occurs in a school is done under the auspices of school authority.

Justice Thomas emphasized that the club reached students only after school hours, with parental permission, and in the context of sharing facilities with other groups, such as 4-H Clubs and the Scouts.[103] Further, Justice Thomas found no evidence in the record that children misperceived the club's activities as school sponsored and stated that such a belief was unlikely because meetings were held not in classrooms but in a special education room, public school teachers did not participate as instructors, and children in the club were not of the same age as in the normal classroom setting.[104] Although these factors leave open the possibility that "endorsement" could pose a problem in a different context and that more than "neutrality" may be required on the part of government, it is significant to note that five Justices were willing to assess this question in the context of a summary judgment motion. Justice Breyer parted company with the majority, opining that the majority assumed facts not in evidence and that the endorsement question should have been remanded for a fuller factual development.[105]

This same clash between First Amendment values and the Establishment Clause arose in a somewhat unique context at Indiana University-Purdue University Ft. Wayne, when the University gave its permission for use of its studio theater for a student-directed play, titled *Corpus Christi.* In *Linnemeier v. Indiana University-Purdue University Ft. Wayne*,[106] the plaintiffs sought to enjoin the production, contending that the play constituted an "undisguised attack on Christianity and the founder of Christianity, Jesus Christ," and that allowing this production violated the Establishment Clause.[107] In response, the university argued that the studio theater was a limited public forum and that denying access

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101. *Id.* at 119.

102. *See* Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001).

103. *Good News Club*, 533 U.S. at 136.

104. *Id.* at 118.

105. *Id.* at 128-29 (Breyer, J., concurring in part).

106. 155 F. Supp. 2d 1034 (N.D. Ind. 2001), *motion for stay denied*, 260 F.3d 757 (7th Cir. 2001).

107. *Id.* at 1035-36.

would be viewpoint discrimination in violation of the First Amendment.[108]

In denying the plaintiffs' motion for a preliminary injunction, Judge Lee agreed with the university that exclusion of this play would constitute impermissible viewpoint discrimination.[109] Further, he rejected the plaintiffs' argument that performance of the play would send a message of government endorsement.[110] Judge Lee cautioned that courts must distinguish between the government's permitting speech and endorsing speech.[111] The endorsement argument was weakened by a disclaimer in the playbill, which read "[t]his play was selected for its artistic and academic value. The selection and performance of the play do not constitute an endorsement by Indiana University Purdue University Fort Wayne or Purdue University of the viewpoints conveyed by the play."[112] The court distinguished recent cases involving display of the Ten Commandments, where an Establishment Clause violation was found, by emphasizing that this was a university setting, "a place citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth."[113]

II. FIRST AMENDMENT RELIGION CASES

A. Government Display of Religious Symbols

As discussed in the previous section, the key Supreme Court decision last term addressing the Establishment Clause arose in the context of a school district's denying access to its facilities based on a concern that allowing religious worship to occur on school premises would violate the Establishment Clause. In *Good News Club* the Supreme Court rejected the notion that allowing access to religious groups, in the context of a limited public forum open to a variety of groups and subject matters, would send a message of government endorsement of religion.[114] Where, however, it is government itself that is sponsoring the religious observance or display, arguably a more difficult Establishment Clause question is raised. Two recent Indiana cases address this question in the context of the government's display of the Ten Commandments.

The Seventh Circuit, in *Books v. City of Elkhart*,[115] ruled that displaying the Ten Commandments near the entrance of the city hall in Elkhart violated the Establishment Clause because it had both the purpose and the effect of impermissibly endorsing religion. In finding a religious purpose, the court relied on the dedication ceremony in 1958, wherein religious leaders urged the people

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108. *Id.* at 1037 n.5.
109. *Id.* at 1041.
110. *Id.* at 1041-42.
111. *Id.* at 1042-43.
112. *Id.* at 1043.
113. *Id.* at 1042. The Ten Commandments cases are discussed *infra*, Part II.A.
114. *Supra* notes 78-105 and accompanying text.
115. 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

of Elkhart to embrace the religious code of conduct taught in the Ten Commandments.[116] As to the effect prong of the analysis, Judge Ripple expressed his view that displaying religious symbols at the seat of government must be subjected to particularly careful scrutiny, especially where the symbol represents a permanent fixture, rather than a mere seasonal display.[117]

The appellate court's decision was appealed to the U.S. Supreme Court, but the certiorari petition was denied.[118] The denial, however, triggered comments by three Supreme Court Justices who vehemently criticized the Seventh Circuit's analysis of the Ten Commandments issue. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, argued that the Court should have taken the case "to decide whether a monument which has stood for more than 40 years, and has at least as much civic significance as it does religious, must be physically removed from its place in front of the city's Municipal Building."[119] In response, Justice Stevens wrote that the graphic emphasis of the words "THE TEN COMMANDMENTS—I AM the LORD thy God," which appear at the top of the monument and "in significantly larger font than the remainder," is "rather hard to square with the proposition that the monument expresses no particular religious preference."[120]

At the same time that *Books* was making its way through the courts, the Indiana General Assembly adopted a statute, which authorized the display of the Ten Commandments on real property owned by the state or a political subdivision as part of an exhibit displaying "other documents of historical significance that have formed and influenced the United States legal or governmental system."[121] The law took effect on July 1, 2000, and the Governor of Indiana immediately announced his intent to erect a seven-foot limestone monument of the Ten Commandments, which was to be donated to the state, on the state house lawn. In compliance with the state statute, the monument was designed as a four-sided structure, displaying the Ten Commandments, the Federal Bill of Rights, and the Preamble of the 1851 Indiana Constitution. Although the state argued that the display was intended to serve only as a reminder of the nation's core values and ideals, the district court enjoined the Governor from moving forward with his plans, finding that the state was unable to cite any historical link between most of the Ten Commandments and "ideals

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116. *See id.* at 303.

117. *Id.* at 305-06.

118. City of Elkhart v. Books, 532 U.S. 1058 (2001). Note that the Seventh Circuit remanded with instructions that the district court should fashion a remedy that would not intrude on the authority of local government, while at the same time correcting the condition that offended the Constitution. *See Books*, 235 F.3d at 308-09. The Seventh Circuit also stayed the district court's mandate while the issue was appealed to the U.S. Supreme Court. Books v. City of Elkhart, 239 F.3d 826, 829 (7th Cir. 2001).

119. *Books*, 532 U.S. at 1063 (Rehnquist, C.J., dissenting).

120. *Id.* at 1059. Because only three Justices voted in favor of granting certiorari and the vote of a fourth is required, the Court skirted the issue for now.

121. *See* IND. CODE § 4-20.5-21-2 (2000).

animating American government."[122] Last summer the Seventh Circuit affirmed this ruling.[123]

In *Indiana Civil Liberties Union, Inc. v. O'Bannon*,[124] the Seventh Circuit agreed that the state's articulated purpose could not be viewed as secular, even if some of our secular laws parallel the Ten Commandments.[125] Further, the fact that secular text would be displayed together with the Ten Commandments did not lead the court to find a secular purpose, because the Ten Commandments is an "inherently religious text."[126] This case could not be distinguished from *Books*, where the city alleged that providing a "Code of Conduct" constituted a secular purpose. The court reasoned that the Ten Commandments indisputably addresses subjects that were beyond the scope of any government and involve instead the relationship of the individual and God.[127] Further, since the display of the Ten Commandments would actually stand apart from the other secular texts, the design belied any suggestion that the texts were all presented simply to "remind viewers of the core values and legal ideals of our nation."[128]

Focusing on the endorsement test, the court found that in light of the permanence of the exhibit as well as its content, design, and context, a reasonable person would believe that the display amounted to an endorsement of religion.[129] Factors supporting this conclusion were that the state house grounds are the seat of Indiana government, the limestone display would stand seven feet tall, six feet, seven inches wide, and four feet, seven inches deep, and the limestone blocks are tablet-shaped. These factors suggested the religious nature of the monument to observers even from a distance, and the lettering of the Ten Commandments would be larger than that of the Bill of Rights inscribed on the other side.[130] Since the secular text would appear on different sides of the monument, observers would be inhibited from visually connecting the texts, and nothing else in the context of the monument or the surrounding grounds mitigated the religious message conveyed.[131] Further, an observer who viewed the entire monument might reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 preamble are located so close to the sacred text, thus sending a message of endorsement.[132]

The ruling in *O'Bannon* was not surprising in light of *Books*. On the other hand, the U.S. Supreme Court has taken a contextual, highly fact-specific

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122. Ind. Civil Liberties Union, Inc. v. O'Bannon, 110 F. Supp. 2d 842, 851 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766 (7th Cir. 2001), *cert. denied by* 122 S. Ct. 1173 (2002).

123. Ind. Civil Liberties Union, Inc. v. O'Bannon, 259 F.3d 766 (7th Cir. 2001).

124. *Id.*

125. *Id.* at 771.

126. *Id.*

127. *Id.*

128. *Id.* at 771-72.

129. *Id.* at 772-73.

130. *Id.*

131. *Id.* at 773.

132. *Id.*

approach in assessing Establishment Clause cases and in determining whether a reasonable person would see a particular government display of religion as an endorsement. Since the central theme in *Books* was that the Ten Commandments is a religious document, it was apparent that the State of Indiana in *O'Bannon* carried a heavy burden in demonstrating that the religiosity had been overcome. In essence, the location of the monument at the seat of all branches of state government made this display more problematic than that in *Books*. Nonetheless, Judge Coffey argued in dissent that the monument would serve "as a well-deserved recognition of our country's legal, historical, and religious roots."[133] Judge Coffey emphasized that any endorsement was muted by the fact that the monument appeared on the state house lawn with at least twelve other secular monuments recognizing historic figures, such as Christopher Columbus, George Washington, former Indiana governors, and significant historic events, including the Civil War.[134]

Although only three justices appear ready to address this issue, it is unlikely to go away. The Elkhart display was one of hundreds donated by the Fraternal Order of the Eagles (FOE) in the 1950s.[135] The planned display in *O'Bannon* was intended to replace a similar FOE display that was on the state house grounds in Indianapolis until its destruction by vandals in 1991, and a similar display triggered litigation in Lawrence County.[136]

B. Government Entanglement with Religion

In addition to the cases involving display of the Ten Commandments, Indiana courts tackled Establishment Clause issues in two other contexts. In *Moore v. Metropolitan School District of Perry Township*,[137] a district court judge enjoined Perry Township from continuing its religious education program, which allowed students in grades four and five to leave school for approximately thirty minutes per week to attend religious instruction. Students who chose not to attend remained at school with a teacher, and they were not permitted to do schoolwork, purportedly because parents who sent their children for religious instruction expressed concern that their children might fall behind in their studies.[138] The

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133. *Id.* at 781 (Coffey, J., dissenting).

134. *Id.* at 778-79.

135. *See* Ind. Civil Liberties Union v. O'Bannon, 110 F. Supp. 2d 842, 844 (S.D. Ind. 2000).

136. Kimberly v. Lawrence County, 119 F. Supp. 2d 856, 873 (S.D. Ind. 2000). *See also* ACLU of Ky. v. McCreary County, 145 F. Supp. 2d 845 (E.D. Ky. 2001) (ordering immediate removal of Ten Commandments from display entitled "The Foundations of American Law and Government Display," which included Magna Carta, Declaration of Independence, the Bill of Rights to the U.S. Constitution, Star Spangled Banner, Mayflower Compact of 1620, National Motto and Preamble to Kentucky Constitution; reasoning that use of Ten Commandments was permissible only in displays that demonstrate respect for law givers, and this display did not qualify).

137. 2000 WL 243292 (S.D. Ind. 2001).

138. *Id.* at *5.

court held that this restriction was motivated by a desire to encourage participation in the religious program, and thus violated the first prong of the *Lemon* test,[139] which mandates that any government program have a secular purpose.[140] In addition, the court determined that a reasonable person would perceive the township's insistence on the silent reading program as an endorsement of religion, in violation of the second prong of the *Lemon* test.[141] At least at the preliminary injunction stage, the evidence suggested some likelihood of success on the merits.[142]

The court also ruled that the township's practice of allowing the religious program to take place in trailers on school property and then paying the electric bills for at least some of the trailers violated both the Establishment Clause as well as Indiana law, which specifically prohibits the expenditure of public funds for religious instruction.[143] Although the township agreed to move the trailers off school property by March 1, 2001, the court enjoined the practice for the remaining one month period.[144]

In the second case, *Brazauskas v. Ft. Wayne-South Bend Diocese, Inc.*,[145] the Indiana Court of Appeals ruled that the First Amendment barred a former diocese employee from bringing suit against the diocese and parish priest for various claims, including blacklisting and tortious interference with a business relationship. The court relied upon well-established law that prohibits the judiciary from resolving doctrinal disputes or determining whether a religious organization acted in accordance with its canons and bylaws.[146] The court recognized that it may apply neutral principles of law to churches without violating the First Amendment, but in this case it would be required to actually interpret Catholic precepts and procedures to determine whether the tortious behavior was undertaken in compliance with religious teaching.[147] The defendants argued that religious doctrine commands that church officials remain "in close communion"[148] with one another, and that the conduct of church officials in urging Notre Dame not to hire the plaintiff had "an ostensibly ecclesiastical basis," which is not subject to judicial review.[149] The court reasoned that since the defendants presented ostensibly ecclesiastical justifications for their actions, it lacked subject matter jurisdiction over the claims.[150] The Indiana Supreme Court has granted transfer and vacated the

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139. Lemon v. Kurtzman, 403 U.S. 602 (1971).
140. *Moore*, 2000 WL 243282 at *5.
141. *Id.*
142. *Id.*
143. *Id.* at *4.
144. *Id.*
145. 755 N.E.2d 201, 208 (Ind. Ct. App. 2001).
146. *Id.* at 205.
147. *Id.*
148. *Id.* at 208.
149. *Id.*
150. *Id.*

decision.[151]

C. *The Free Exercise of Religion*

The previous discussion suggests that the Supreme Court has moved toward a more "accommodationist" approach regarding claims brought under the Establishment Clause. A majority of the Justices would allow greater interaction between church and state, allowing, for example, religious groups access to government forums.[152] On the other hand, the Court has exhibited a much more restrictive approach when the group seeking accommodation is a minority faith bringing claims under the Free Exercise Clause. Purportedly, this dichotomy is reconciled by the theory of neutrality. Where government allows religious groups to use its facility in conjunction with other speakers, it has simply adopted a neutral stance towards religion. In *Employment Division, Department of Human Resources v. Smith*,[153] the Supreme Court, in 1990, held that when government enforced neutral laws of general applicability, it was adhering to the same position of neutrality—even where such laws significantly infringed upon the free exercise rights of minority faiths. In *Smith*, the Supreme Court ruled that facially neutral laws are constitutional provided government has a rational basis. Government need not meet the strict scrutiny standard applied to laws that intentionally burden fundamental rights or even the intermediate scrutiny test applied in the free speech context with regard to government statutes not intended to burden freedom of expression, but which have this effect.[154]

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151. 2002 Ind. LEXIS 350 (Ind. May 3, 2002).

152. *See supra* notes 78-95 and accompanying text. The government aid issue will be revisited by the Supreme Court this Term. Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted* 122 S. Ct. 23 (2001). The Sixth Circuit struck down Ohio's school voucher program primarily because the program provided no means of guaranteeing that the state aid, derived from public funds, would be used for exclusively secular purposes. In addition, no public schools chose to participate in the program, and the overwhelming majority of private school participants were sectarian.

153. 494 U.S. 872 (1990).

154. *See, e.g.*, Hill v. Colo., 530 U.S. 703, 719 (2000) (holding that where a statute is a content neutral restriction on speech the government must show a substantial interest and narrowly tailored means, rather than the compelling interest and no less speech restrictive alternatives standard imposed where government is regulating in order to suppress a particular message or a particular speaker). *But see* Cosby v. State, 738 N.E.2d 709 (Ind. Ct. App. 2000) (rejecting a free exercise claim where the accused was charged with driving without a license on his way to church); United States v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001) (rejecting a religious-based claim brought by the Indianapolis Baptist Temple that it should not have to file federal employment tax returns or pay federal employment taxes). The court in *Cosby* determined that this was a neutral law of general applicability, enacted for reasons of public safety rather than for the purpose of restraining persons from traveling to their place of worship, and thus the rational basis standard applied and was met. *Cosby*, 738 N.E.2d at 711-12. Relying on *Smith*, the court in *Indianapolis Baptist Temple* concluded that tax laws are neutral laws of general

In adopting the rational basis analysis in *Smith*, Justice Scalia distinguished earlier free exercise cases that utilized a strict scrutiny approach by contending that in those cases other "constitutional protections" were asserted in conjunction with the free exercise claim.[155] For example, cases brought by Jehovah's Witnesses challenging licensing systems or taxes on the dissemination of religious ideas also raised free speech questions.[156] Similarly, a case invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school also raised the right of parents to direct the upbringing of their children.[157] This so-called hybrid claim exception to *Smith* was addressed by the Indiana Supreme Court in the case of *City Chapel Evangelical Free, Inc. v. City of South Bend*.[158]

City Chapel filed suit against South Bend after it instituted condemnation proceedings to acquire the church's property for redevelopment. The City of South Bend argued that the condemnation proceedings represented a "permissible use of religious-neutral laws of general applicability,"[159] and thus under *Smith* it was not required to demonstrate a compelling government interest. City Chapel contended that its claim was based on the Free Exercise Clause in conjunction with the right to freedom of association, and thus it fell within the hybrid exception to *Smith*.[160] South Bend's taking of its church building was therefore governed by the compelling interest test.[161] Although several courts have recognized this hybrid exception,[162] others have rejected it outright pending further clarification by the Supreme Court,[163] or have rejected it where the companion claim did not involve a fundamental right.[164] South Bend relied on a Third Circuit decision that held that freedom of association to worship was

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application that did not run afoul of the Free Exercise Clause even if they burden religious practices. Last fall, Judge Barker issued an order for the church to surrender its property to satisfy this judgment, and the Seventh Circuit refused to intervene. United States v. Indianapolis Baptist Temple, 2000 WL 1449856 (S.D. Ind. 2000).

155. *Smith*, 494 U.S. at 881.

156. *Id.* (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

157. *See id.*

158. 744 N.E.2d 443, 451 (Ind. 2001).

159. *Id.*

160. *Id.*

161. *Id.*

162. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998) (recognizing hybrid claim where free exercise and parental rights were asserted, but concluding that claim failed because parental right to direct school criteria did not present a colorable claim); Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995) (recognizing hybrid claim where free exercise rights were asserted in conjunction with the parental right to direct upbringing of children).

163. *See, e.g.*, Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (declining to recognize hybrid claim exception until clarified by Supreme Court).

164. *See, e.g.*, Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) (recognizing hybrid claim, but holding that companion claim must be a violation of a fundamental right).

merely a derivative right of the free exercise of religion and not a separate right that can be used to trigger the hybrid exception.[165] Chief Justice Shepard and Justice Boehm agreed with the Third Circuit approach, while Justice Rucker and Justice Dickson agreed with City Chapel that it qualified for the hybrid claim exception. Justice Sullivan broke the tie by siding with the City of South Bend, but not on grounds of the hybrid exception, which he did not address.

Justice Dickson carefully traced the language in *Smith*, which specifically envisioned a hybrid case where freedom of association grounds would reinforce the Free Exercise Clause claim. More specifically, *Smith* referred to an earlier case that cited freedom to worship as an example of the right of expressive association.[166] Justice Dickson, joined by Justice Rucker, concluded that there was no basis in *Smith* for disqualifying hybrid exception claims where freedom of expressive association was linked to religious expression.[167]

Chief Justice Shepard, joined by Justice Boehm, agreed instead with the Third Circuit that "assembling for purposes of worship is a derivative of free exercise of religion," and thus City Chapel was not entitled to a higher level of First Amendment protection.[168]

Justice Sullivan failed to break the 2-2 split on the issue. He reasoned that City Chapel only asked that a hearing be conducted wherein it could raise its First Amendment claims, but then it failed to provide a basis for a hearing under any body of law, federal or state.[169] Justice Sullivan argued that there was no reason to address free exercise rights if City Chapel was not entitled to a hearing.[170] Further, any arguments City Chapel would make at this hearing had already been raised during oral argument on the original motion for an evidentiary hearing.[171] Justice Sullivan could see no point in granting an additional hearing.[172] Unfortunately, Justice Sullivan's opinion leaves litigants in the dark as to whether hybrid claims will be recognized by Indiana courts. At minimum, the debate among the justices demonstrates the need to characterize a free association claim as a separate, additional right, rather than linking it to worship or religious expression.

III. THE DUE PROCESS CLAUSE

Although the text of the Due Process Clause appears to ensure only procedural fairness, the U.S. Supreme Court has long recognized that it also contains a substantive component that bars arbitrary, wrongful conduct. Further,

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165. City Chapel Evangelical Free, Inc. v. City of South Bend, 744 N.E.2d 443, 453 (Ind. 2001) (citing Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183 (3d Cir. 1990)).

166. *Id.* at 452.

167. *Id.* at 454.

168. *Id.* at 455 (Shepard, C.J., concurring in part and dissenting in part).

169. *Id.* (Sullivan, J., dissenting).

170. *Id.*

171. *Id.*

172. *Id.* at 456.

where the government interferes with a fundamental right, the Court has demanded that the government meet a heightened scrutiny standard. Both of these aspects of substantive due process were raised by Indiana litigants this last term.

A. Regulation of Abortion and Pregnancy

In *Roe v. Wade*,[173] the Supreme Court characterized the woman's right to terminate a pregnancy as a fundamental right protected by the Due Process Clause from any legislation that fails to meet strict scrutiny analysis. In a 1992 decision, however, the Court ruled that a state may regulate the abortion decision so long as the regulation did not impose an undue burden, which the Court defined as regulation having the purpose or effect of placing a substantial obstacle in a woman's attempt to obtain an abortion.[174] Subsequently, in *Stenberg v. Carhart*,[175] the Supreme Court, in a controversial 5-4 decision, found that a Nebraska statute barring so-called partial-birth abortions imposed an undue burden because it lacked any exception for the preservation of a mother's health, and its definition of the proscribed procedure was so broad that it included the most frequently used second-trimester abortion method.[176]

Applying this analysis, the district court, in *A Woman's Choice-East Side Women's Clinic v. Newman*,[177] ruled that a provision in Indiana's abortion law that required medical personnel to provide state-mandated information about abortion and its alternatives "in the presence" of the pregnant woman at least eighteen hours before an abortion, imposed an undue burden on a woman's constitutional right to choose to end a pregnancy, and thus it violated the Due Process Clause.[178]

The court reasoned that Indiana's "in the presence" stipulation effectively required two trips to an abortion clinic, thus placing a substantial obstacle in the path of a woman seeking abortion of a non-viable fetus.[179] The Seventh Circuit earlier upheld a Wisconsin statute that forced abortion patients to make two trips to a clinic,[180] and a similar Pennsylvania statute was upheld by the U.S. Supreme Court in 1992.[181] Nonetheless, the district court noted that both the Seventh Circuit and the Supreme Court decisions left open the possibility that additional

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173. 410 U.S. 113, 164-65 (1973).

174. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 878 (1992).

175. 530 U.S. 914 (2000).

176. *Id.* at 930. *See also* Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001) (holding that partial-birth abortion statutes in Illinois and Wisconsin were unconstitutional in light of the *Stenberg* opinion).

177. 132 F. Supp. 2d 1150 (S.D. Ind. 2001).

178. *Id.* at 1181.

179. *Id.* at 1151. This requirement mandated that medical personnel provide advanced information eighteen hours before an abortion in the presence of the pregnant woman. *Id.*

180. *See* Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).

181. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

empirical evidence establishing an undue burden could alter this result. Relying on *Casey*, the court stated that the critical inquiry was whether the abortion regulation would "operate to place a 'substantial obstacle' in the path of 'a large fraction' of the women for whom the law operates as a restriction."[182] The court then critically examined the new empirical data—a study that demonstrated that abortion rates in Mississippi declined between ten and thirteen percent after the two-trip law took effect, and data that the two-trip law caused a thirty-seven percent increase in the number of Mississippi residents who went to other states to obtain abortions. Statistics from Utah, which adopted a similar restriction, showed a 9.3% decline in the abortion rate and a thirty-three percent decrease in non-residents coming to the state to obtain abortions. Based in part on this data, which was part of a study published in the *Journal of the American Medical Association*, the court concluded that Indiana's requirement was likely to prevent abortions for approximately ten to thirteen percent of Indiana women who would otherwise chose to terminate a pregnancy.[183]

The U.S. Supreme Court has distinguished abortion regulation likely to have a "persuasive effect" on the abortion decision, which is permissible, from regulation likely to impose an undue burden.[184] The district court nonetheless concluded that there was no evidence that requiring this state-mandated information in advance actually persuaded women to choose childbirth over abortion.[185] Further, the court was skeptical of the state's proffered purpose for the provision, namely to guard against telephonic impersonation of healthcare professionals.[186] The case is currently on appeal to the Seventh Circuit. It is noteworthy that the court reached its conclusion only after a lengthy hearing where the state presented experts who challenged the credibility of the plaintiffs' statistician. Arguably, the appellate court should defer to the trial court's weighing of the credibility of the experts in the case and affirm its ruling.

In a case of first impression, the Indiana Court of Appeals considered the right to procreate in the context of a trial court ordering a woman not to become pregnant as a condition of probation. In *Trammell v. State*,[187] the defendant was charged with neglecting her infant son, who died of emaciation and malnutrition. She was found guilty but mentally ill due to her mental retardation, and she was sentenced to eighteen years in prison, eight of which would be served on

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182. *A Woman's Choice—East Side Women's Clinic*, 132 F. Supp. at 1159.

183. *Id.* Although the statistician who appeared before the district court judge was the same person whose statistical flaws were highlighted in the earlier Seventh Circuit ruling, the data was revised and the new study was published in the *Journal of the American Medical Association. See id.* at 1160-75. The new data convinced Judge Hamilton that women were indeed deterred by the Indiana law. *Id.* at 1175.

184. *Planned Parenthood*, 505 U.S. 833 at 886 ("[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.").

185. *A Woman's Choice—East Side Women's Clinic*, 132 F. Supp. at 1175.

186. *Id.* at 1179.

187. 751 N.E.2d 283, 285-86 (Ind. Ct. App. 2001).

probation. She challenged the no pregnancy condition as an unconstitutional deprivation of her right to privacy.[188]

The court acknowledged that the right to beget or bear a child has been recognized as "at the very heart of this cluster of constitutionally protected choices."[189] On the other hand, those convicted of a crime do not have the same rights as others. Probation conditions that impinge on constitutionally protected rights are permitted provided they are reasonably related to the treatment of the accused and the protection of the public.[190] The court must balance "(1) the purpose to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement."[191]

Here the court found that the no pregnancy condition did not serve any rehabilitative purpose since it would not improve Trammell's parenting skills.[192] Further, the state's interest in preventing injury to unborn children would be better served "by alternative restrictions less subversive of appellant's fundamental right to procreate," namely requiring Trammel to enroll in a prenatal or neonatal treatment program if she becomes pregnant.[193] It is clear that in balancing the competing interests, the court gave significant weight to the privacy right at stake. Although finding that the condition served no discernible rehabilitative purpose, the court proceeded to hold that the condition excessively impinged on the privacy right of procreation because the state's goal could be accomplished by less restrictive means—an analysis reserved for government regulation that interferes with fundamental rights.[194]

B. Substantive Due Process as a Limitation on Punitive Damages Awards

In the absence of a fundamental right, the Supreme Court has shown a great reluctance to sanction government conduct under the rather nebulous, open-ended notion of substantive due process. The one notable exception to this involves damages awarded by juries. In *BMW of North America, Inc. v. Gore*,[195] the Supreme Court held that a two million dollar punitive damages award was grossly excessive and violated substantive due process limits. The Court outlined

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188. *Id.* at 288.

189. *Id.* at 290.

190. *Id.* at 288 (citing Carswell v. State, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999)).

191. *Id.*

192. *Id.* at 289.

193. *Id.*

194. *Id. Compare Doe v. City of Lafayette*, 160 F. Supp. 2d 996, 1001-03 (N.D. Ind. 2001), where the court upheld the city's action in permanently banning a convicted sex offender from all city parks. The court determined that the defendant did not have a fundamental liberty interest in wandering through the city parks, and it refused to acknowledge intrastate travel as a fundamental right. Applying rational basis analysis, the court ruled that the ban was rationally related to the city's interest in protecting the welfare of its children from sexual predators.

195. 517 U.S. 559, 574-75 (1996).

three criteria that should be examined in determining whether a punitive damage award should be deemed unconstitutionally excessive: the reprehensibility of the conduct, in particular, whether only economic harm is involved; the relation between compensatory and punitive damages; and the relation of the damages to other civil remedies authorized or imposed in comparable cases.[196]

Applying this standard, the Indiana Court of Appeals rejected the constitutional challenge to a $1.64 million punitive damage award in *Executive Builders, Inc. v. Trisler*.[197] The court began its analysis by declaring that when a judgment was the product of fair procedures—impartial jurors were selected, they heard all the evidence presented by both sides, the trial court properly instructed them, and it upheld the punitive award after considering its constitutionality—there was a strong presumption that the award was constitutional.[198] The court then applied the three guideposts set forth in *BMW*, and concluded that the punitive damages award did not violate substantive due process.[199]

IV. STATE CONSTITUTIONAL LAW DEVELOPMENTS

Under the tutelage of Chief Justice Randall T. Shepard, the Indiana Supreme Court has re-examined the Indiana Constitution as a potential source for the protection of civil liberties.[200] Although the Indiana Supreme Court has made it clear that it is not anxious to usurp the legislative role of the General Assembly and has repeatedly cautioned that state statutes will be presumed constitutional, it has also noted that state constitutional provisions will be interpreted independently of their federal constitutional counterpart. The court will examine the text and the history regarding the state constitutional provision as well as early decisions interpreting the state constitution under this analysis.[201] These core principles are reflected in the state constitutional cases decided this term.

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196. *Id.* at 575, 580-81, 583-84.

197. 741 N.E.2d 351, 359-61 (Ind. Ct. App. 2000).

198. *Id.* at 360.

199. *Id.* at 360-61. *See also* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (holding that in determining whether a punitive damage award is unconstitutionally excessive, appellate courts should apply a de novo standard of review because a jury's award does not constitute a finding of fact that is entitled to deference on appeal); *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (the punitive damages award of $5 billion in this maritime tort suit was disproportionate to the compensatory damages award of $287 million or to the potential criminal fine of $1 billion, and thus was excessive in violation of the Due Process Clause).

200. *See* Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

201. *See, e.g.*, Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994) (privileges and immunities clause of the Indiana Constitution imposes duties independent of those required by the Fourteenth Amendment to the U.S. Constitution).

A. Religion Clauses

Unlike the Federal Constitution, which includes only the Establishment and Free Exercise Clauses, the Indiana Constitution guarantees religious liberty through seven distinct and separate provisions. Article I, section 2 insures that "[a]ll people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences."[202] Article I, section 3 bars any law that might "control the free exercise" of religion, and also prohibits enactments that "interfere with rights of conscience" or the "enjoyment of religious opinions."[203] Article I, section 4 reads that, "No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent."[204] In *City Chapel Evangelical Free, Inc. v. South Bend*,[205] City Chapel invoked all three of these provisions as a defense to a condemnation proceeding brought by the City of South Bend to take its building for redevelopment.

Although the Indiana Supreme Court rejected City Chapel's federal free exercise claim,[206] it ruled, 3-2, that the framers of the 1851 Indiana State Constitution did not simply paraphrase the language in the Bill of Rights and that City Chapel indeed stated a separate, viable state constitutional law claim. The majority relied heavily on an earlier Indiana Supreme Court decision, which involved the free speech provisions of the Indiana Constitution. In *Price v. State*,[207] the court held that political speech was a core value embodied in the Indiana Constitution and, as such, the state could not punish political speech even when offensive words were uttered in the context of resisting arrest. The court in *Price* reasoned that government may not impose a material burden upon a constitutionally protected core value.[208]

In this case, City Chapel contended that religious liberty was a core value, and it asserted that the taking of its property would materially burden this value because it threatened to "destroy the church."[209] It urged that South Bend be enjoined from taking the Chapel's building without a hearing where South Bend would be required to prove that the need to exercise the police power of eminent domain outweighed the restrictions imposed on Chapel's fundamental rights.[210] Relying on *Price*, the court determined that the key question was whether the condemnation proceedings would amount to a material burden upon a core

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202. IND. CONST. art. 1, § 2.

203. IND. CONST. art. 1, § 3.

204. IND. CONST. art. 1, § 4.

205. 744 N.E.2d 443 (Ind. 2001).

206. *See supra* notes 158-69.

207. 622 N.E.2d 954, 962-63 (Ind. 1993).

208. *Id.* at 960. *See also* City Chapel Evangelical Free, Inc. v. South Bend, 744 N.E.2d 443, 446-47 (Ind. 2001) (discussing the material burden analysis).

209. *City Chapel*, 744 N.E.2d at 445.

210. *Id.*

value.[211] The court explained that this analysis "looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue."[212] Using the historical approach affirmed in previous cases, Justice Dickson rejected the city's argument that the state constitution was intended to guarantee only the "personal devotional aspect of religion."[213] Instead, the court concluded that "[s]ections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons."[214] In short, because the City of South Bend sought to take property that might have materially burdened City Chapel's rights embodied in the core values of sections 2, 3, and 4 of article I, City Chapel was entitled to an opportunity to present its claim.

On the other hand, Justice Dickson emphasized that the condemnation procedure would be presumed constitutional, that City Chapel must clearly overcome that presumption, and that all doubts would be resolved against it.[215] The church would have to show that taking its building would burden its members' right to worship according to the dictates of conscience or their right to exercise religious opinions or to be free from a government preference for a particular religious society. Further, the effect of the taking must constitute a material burden, not merely a permissible qualification.[216] Chief Justice Shepard and Justice Rucker concurred with this analysis of the state constitutional claim, thus creating a three-judge majority in favor of City Chapel.

Justice Boehm, in dissent, agreed that the religion clauses in the Indiana Constitution prevent the state from imposing material burdens on the exercise of religious practice and that this protection included the public and group activities associated with religious practices.[217] However, Justice Boehm reasoned that City Chapel failed to present any evidence that South Bend's exercise of its right of eminent domain materially burdened any religious activity. There was no claim that the downtown site had "an independent religious significance."[218] Rather, City Chapel argued only the difficulty of finding another home at an affordable price. This suggests that under takings law, South Bend might be required to pay a higher price as just compensation, but this was not a basis for prohibiting the city from acting: "Given the Chapel's representation that this is a dispute over money, not religious principle, even if the Chapel proves all it claims, the solution is in dollars, not injunctive relief."[219] Justice Boehm concluded that since City Chapel presented no evidence that would bar the taking, but only evidence that might relate to establishing just compensation, it

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211. *Id.* at 446.
212. *Id.* at 447.
213. *Id.* at 448.
214. *Id.* at 450.
215. *Id.* at 450-51.
216. *Id.*
217. *Id.* at 456 (Boehm, J., dissenting).
218. *Id.* at 457.
219. *Id.* at 458.

failed to show the necessity for a hearing.[220]

Justice Sullivan agreed with Justice Boehm's conclusion that City Chapel was not entitled to a hearing; however, he did not feel there was a need to address the state religion clauses at all. He reasoned that City Chapel's entitlement to a hearing was an entirely separate issue from whether City Chapel's religious rights were violated by South Bend's exercise of its eminent domain powers.[221] City Chapel "failed to assert adequately a right to a hearing under any body of law,"[222] but instead tried to skip to the merits of the issues it would raise at a hearing. Justice Sullivan's final justification for refusing the state constitutional issues was that City Chapel failed to show the utility of an evidentiary hearing, since its brief cited only to evidence already in the record, and thus Justice Sullivan was not willing to decide the state constitutional issues.[223]

City Chapel is significant in establishing a separate role for the state religion clauses, especially in the wake of the watered-down version of the Federal Free Exercise Clause in *Employment Division, Department of Human Resources v. Smith*.[224] Many litigants in other states have turned to state constitutional provisions to secure religious liberty.[225] It remains to be seen, however, whether protection under Indiana's religion clauses will be significant, given Justice Dickson's caveat regarding the difficulty of meeting the material burden standard. Justice Boehm's dissenting opinion persuasively argues that City Chapel will not meet this standard on remand unless it comes up with new evidence as to how moving the church to a new location will materially burden its right to worship. Nonetheless, the case establishes the principle that neutral government action that has a significant negative impact on religious liberty might be prohibited by the Indiana Constitution, even if such conduct is permitted under the Federal Free Exercise Clause.

B. Due Course of Law and Equal Privileges Clauses

Article I, section 12 of the Indiana Constitution guarantees that a remedy "by due course of law" is available to a person "for injury done to him and his person, property or reputation."[226] In most cases, Indiana courts have reasoned that the analysis under section 12 parallels that under the Federal Due Process Clause.[227]

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220. *Id.*

221. *Id.* at 455 (Sullivan, J., dissenting).

222. *Id.*

223. *Id.* at 456.

224. 494 U.S. 872 (1990).

225. *See, e.g.*, Jeffery D. Williams, Humphry v. Lane: *The Ohio Constitution's David Slays the Goliath of* Employment Division v. Smith, Department of Human Resources of Oregon, 34 AKRON L. REV. 919 (2001).

226. IND. CONST. art. I, § 12.

227. *See, e.g.*, G.B. v. Dearborn County Div. of Family and Children, 754 N.E.2d 1027, 1031 (Ind. Ct. App. 2001) ("Federal and state substantive due process analysis is identical"; although the

Article I, section 23 of the state constitution provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[228] The Indiana Supreme Court, in a 1994 decision, held that this provision should not be interpreted in the same manner as the Federal Equal Protection Clause.[229] After thoroughly investigating the text and the history of this provision, the court set forth a two-prong test, which first requires that any disparate treatment by government be reasonably related to inherent characteristics that distinguish the unequally treated classes. Further, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.[230] Most attempts to invalidate state legislative enactments under this provision have been unsuccessful because the Indiana Supreme Court requires that substantial deference be given to the legislative judgment. Only where the legislature draws lines in an arbitrary and manifestly unreasonable manner will the judiciary invalidate its laws.[231]

Despite this deferential approach, the Indiana Supreme Court, in *Martin v. Richey*,[232] held that Indiana's two-year occurrence-based medical malpractice statute of limitations[233] was unconstitutional as applied to a plaintiff who suffered from a medical condition with a long latency period that prevented her from discovering the alleged malpractice within the two-year period. The court left the statute intact on its face, but held that its application to Martin's situation violated both article I, section 23 and article 1, section 12.

Since the 1999 decision, however, the court has shown reluctance to expand

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right to family integrity is fundamental, Indiana statute, which prescribes exceptions to the requirement that government make reasonable effort to reunify and preserve family, satisfies substantive due process requirements because the exceptions are narrowly tailored to protect the welfare of children from parents who neglect, abuse, or abandon their children); M.G.S. v. Beke, 756 N.E.2d 990 (Ind. Ct. App. 2001) (the same analysis applies to both federal and state due process claims and, in a case of first impression, court holds that father's due process rights were not violated by the implied consent provision in Indiana's adoption law that requires father to file a paternity action within thirty days of notice if he wishes to protect his parental rights); Lake of the Woods v. Ralston, 748 N.E.2d 396 (Ind. Ct. App. 2001) (court uses federal procedural due process balancing standard and finds no violation of state or federal constitutional due process).

228. IND. CONST. art. I, § 23.

229. Collins v. Day, 644 N.E.2d 72, 73 (Ind. 1994).

230. *See id.* at 78-79.

231. *Id.* at 80. *See also* Lutz v. Fortune, 758 N.E.2d 77, 84 (Ind. Ct. App. 2001) (adoptee who sought to be declared remainder beneficiary of testamentary trust could not state viable claim under Indiana Privileges and Immunities Clause because such a claim requires state action, and here plaintiff's exclusion occurred as the result of testate succession, not a legislatively created rule of law or state action).

232. 711 N.E.2d 1273, 1279 (Ind. 1999).

233. *See* IND. CODE § 34-18-7-1(b) (1998) (statute of limitations begins to run at the time the alleged malpractice occurred, rather than when victim discovers the alleged harm).

Martin. In *Boggs v. Tri-State Radiology, Inc.*,[234] the court held that a person who discovers the malpractice within the two-year period, but files outside the limitations period, loses her claim even if the filing occurs within two years of discovery. The court reasoned that as long as the plaintiff has a meaningful opportunity to bring her claim, there is no violation of the due course of law provision.[235]

Relying on *Boggs*, the Indiana Court of Appeals, in *Hopster v. Burgeson*,[236] rejected the argument that the statute of limitations is unconstitutional as applied to persons who suffer a delayed injury. The plaintiff contended that it was not until an autopsy was performed that he realized that the defendants had misdiagnosed his wife's condition. He filed his lawsuit two years after her death, and the trial court agreed that since he could not have discovered the alleged malpractice until his wife's death, the action should proceed. On appeal, the defendants argued that the case was not controlled by the *Martin* exception because the physicians treated the plaintiff's wife within two years of her death, and nothing prevented him from filing suit within the two-year statutory period.[237] Indeed, the court in *Boggs* held that, "[a]s long as the claim can reasonably be asserted before the statute expires, the only burden imposed upon the later discovering plaintiffs is that they have less time to make up their minds to sue."[238] *Boggs* acknowledged that there may be situations where discovering and presenting the claim within the time demanded by the statute might not be reasonably possible, but it concluded that the plaintiff's eleven-month window to file did not present this situation.

The husband in *Hopster* asked the court to reevaluate *Boggs*, opining that it creates a system whereby determinations must be made on a case-by-case basis as to whether plaintiff had a reasonable amount of time remaining to file suit prior to the expiration of the statute.[239] The appellate court agreed that the current state of the law creates three different classes of medical malpractice plaintiffs. Those who discover the alleged malpractice on the date it occurs have two years to file suit; those who discover the alleged malpractice after the expiration of the statute of limitations and have no opportunity to file suit prior to the expiration will have a reasonable time to file; and those who, like this plaintiff, discover the alleged malpractice after it occurs but prior to the expiration of the two-year statute of limitations are bound by the two-year rule.[240] It means that those who suffer immediate injury due to malpractice will have a full two years to file suit, while those who suffer delayed injury will have less than two years.[241] Nonetheless, the court felt constrained by the Indiana Supreme

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234. 730 N.E.2d 692, 696-97 (Ind. 2000).

235. *Id.* at 698.

236. 750 N.E.2d 841, 849 (Ind. Ct. App. 2001).

237. *Id.* at 848.

238. *Id.* at 849 (citing *Boggs*, 730 N.E.2d at 697).

239. *Id.* at 850.

240. *Id.*

241. As to the family practitioner, for example, the husband would have had to sue within five

Court's decision in *Boggs*.[242] Ironically, in this case, the law allowed the plaintiff to maintain his claim against the physician who treated his wife almost six years prior to filing the lawsuit since he could not with due diligence have filed within the two-year period, but it prohibited him from pursuing his claims against the physicians who treated his wife more recently, because the claims arose within two years of the limitations period.[243]

Other Indiana litigants fared no better under the state constitution. In *Indiana Patient's Compensation Fund v. Wolfe*,[244] the court rejected a claim brought by parents who challenged their inability to bring suit to recover excess damages from the Indiana Patient's Compensation Fund. The statute[245] limits recovery to patients and was interpreted to exclude a parent with a derivative claim. The court ruled that this did not violate article 1, section 12, because the limitation on recovery under Indiana's Medical Malpractice Act was a rational means of achieving the legislature's goal of protecting the healthcare industry and insuring the availability of services for all citizens.[246] Further, the interpretation did not violate article I, section 23, because each patient under the Act was entitled to seek damages up to the statutory cap, and any subclassification created by the definition of patient furthered the legislature's goal of maintaining medical treatment and lowering medical costs in Indiana.[247]

Innovative attempts to use article I, section 23 by criminal defendants have been similarly unsuccessful. In *Ben-Yisrayl v. State*,[248] the court upheld the Indiana statute that excludes prospective jurors who have a conscientious opposition to the death penalty. Since differential treatment need only be reasonably related to inherent characteristics that distinguish the unequally treated class, the court had little difficulty affirming the reasonableness of excluding from a jury those "who so inherently opposed to the death penalty that they could not recommend a death sentence regardless of the facts or the law."[249] Further, the court reasoned that the law treats all jurors who express this conviction the same.

Similarly, in *Cowart v. State*,[250] the court ruled that Indiana's child molestation statute did not violate section 23, even though it provided for harsher

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months of his wife's death to preserve his claim. *See id.* at 845. The other health professionals cared for the wife within three months of her death, thus giving Mr. Hopster a much longer window within which to file his suit.

242. *Id.* at 850.

243. *Id.* at 851.

244. 735 N.E.2d 1187 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1261 (2000).

245. IND. CODE § 34-18-14-3(a) (1998).

246. 735 N.E.2d at 1193.

247. *Id.* at 1193-94. *See also* Land v. Yamaha Motor Corp., U.S.A., 272 F.3d 514, 518 (7th Cir. 2001) (Indiana has expressly held that its Statute of Repose contained in its Products Liability Act does not violate article I, section 12 or section 23 of the state constitution).

248. 753 N.E.2d 649 (Ind. 2001).

249. *Id.* at 656.

250. 756 N.E.2d 581, 586 (Ind. Ct. App. 2001).

punishment for defendants who were twenty-one years of age or older, than to offenders between eighteen and twenty years old. Applying *Collins v. Day*,[251] the court reasoned that the increased punishment for child molesters who are at least twenty-one years old is reasonably related to the inherent characteristics which distinguish the two age groups at issue, namely the different intellectual and emotional maturity and the fact that the greater age difference between the perpetrator and the victim might arguably intensify the fear of the victim and therefore justify a more severe punishment.[252] Further, because the statute applies equally to all persons who are at least twenty-one years old, there is no disparate treatment among those who fall within the classification.

Finally, in *Teer v. State*,[253] the court rejected an equal privileges challenge to the state's violent felon statute that distinguishes serious violent felons from the general class of felons by listing serious violent felonies rather than articulating a general definition. Again the court emphasized that a classification need have only a reasonable basis, and the fact that the statute omitted a few arguably violent crimes does not render the statute unconstitutional.[254] All of these cases suggest that attorneys seeking to invoke section 12 or section 23 have an uphill battle to fight in light of the significant deference the court gives to legislative enactments.

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251. 644 N.E.2d 72 (Ind. 1994).

252. *Cowart*, 756 N.E.2d at 584-86.

253. 738 N.E.2d 283 (Ind. Ct. App. 2001).

254. *Id.* at 288-89.

RECENT DEVELOPMENTS IN THE INDIANA LAW OF CONTRACTS AND SALES OF GOODS

HAROLD GREENBERG*

INTRODUCTION

Article 2 of the Uniform Commercial Code[1] has supplemented or, in some instances, has replaced the common law of contracts with respect to the sale of goods. Therefore, it is appropriate for this Article to discuss important cases arising under Article 2 as well as those arising under the common law during this survey period.

I. THE INDEPENDENCE OF U.C.C. § 2-719(3) FROM U.C.C. § 2-719(2)

An issue not previously raised in Indiana, which has caused a split among the courts of other states, is whether an exclusion of consequential damages for breach of warranty, as permitted in section 2-719(3), is independent of section 2-719(2), which authorizes all Code remedies if a limited remedy fails of its essential purpose.[2] If dependent, the failure of essential purpose of a limited

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1. IND. CODE § 26-1-2 (1998). This Article will use the generic section numbers to refer to Indiana's Uniform Commercial Code. For example, this article will cite to 2-719 instead of IND. CODE § 26-1-2-719 (1998) unless the version of the Code enacted in Indiana differs from the current official draft.

2. U.C.C. § 2-719 (1999) provides:

> (1) Subject to the provisions of subsections (2) and (3) of IC 26-1-2-718 on liquidation and limitation of damages:
>
> > (a) The agreement may provide for remedies in addition to or in substitution for those provided in IC 26-1-2 and may limit or alter the measure of damages recoverable under IC 26-1-2, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
> >
> > (b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in IC 26-1.
>
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not.

Compare Chatlos Sys., Inc. v. Nat'l Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980); and Am. Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D.N.Y. 1976) ("independent" cases), *with* R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985) and Adams

remedy under section 2-719(2) automatically entitles the plaintiff to all Code remedies, including the recovery of consequential damages. If independent, the failure of essential purpose does not automatically invalidate an exclusion of consequential damages.

In *Rheem Manufacturing Co. v. Phelps Heating & Air Conditioning, Inc.*,[3] the Indiana Supreme Court ruled that the exclusion of consequential damages subsection, 2-719(3), should be construed and applied independently of the prior subsections of section 2-719. Based on this construction, the court reversed the denial of defendant Rheem's motion for summary judgment on the issues of limitation of remedies and exclusion of damages.[4]

Since the case was based on an interlocutory appeal from the denial of a motion for summary judgment, there should have been no facts in dispute, and all facts should have been viewed in the light most favorable to the nonmoving party,[5] plaintiff Phelps. However, as discussed below, the case may not have been the best vehicle for the supreme court's decision. The facts were somewhat unusual and the case left many unresolved questions. Indeed, the court may have resolved the main issue prematurely.

Rheem manufactures furnaces for use in homes and offices and, at the relevant times, sold them through a distributor, Federated Supply Corporation ("Federated").[6] Phelps, a heating and air conditioning contractor, purchased Rheem furnaces from Federated for resale to home builders or to private home owners and for installation by Phelps.[7] For approximately four years, substantially all of Rheem's high efficiency furnaces were defective, failed to function properly, and required many service calls and repairs by Phelps at substantial cost to it.[8] Rheem was unable to correct the initial problems with its furnaces for at least three and one half years but did supply replacement parts.[9] In addition, allegedly as a result of the poor performance record of the Rheem furnaces, Phelps also lost contracts for the sale and installation of furnaces in new housing developments.[10] In an action against Rheem and Federated, Phelps

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v. J.I. Case Co., 261 N.E.2d 1 (Ill. App. Ct. 1970) ("dependent" cases).

3. 746 N.E.2d 941 (Ind. 2001) [hereinafter *Rheem II*]. This case is also the subject of brief commentary elsewhere in this survey issue. *See* Matthew T. Albaugh, *Indiana's Revised Article 9 and Other Developments in Commercial and Consumer Law*, 35 IND. L. REV. 1239, 1255-57 (2002).

4. *Rheem II*, 746 N.E.2d at 955.

5. *Id.* at 946.

6. *Id.* at 944.

7. Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc., 714 N.E.2d 1218, 1219 (Ind. Ct. App. 1999) [hereinafter *Rheem I*]. The Indiana Supreme Court referred readers to the court of appeals' decision for a more complete discussion of the facts. *Rheem II*, 746 N.E.2d at 944.

8. *Rheem II*, 746 N.E.2d at 944-45. Phelps incurred expenses of approximately $100,000 in servicing defective Rheem high efficiency furnaces. *Id.* at 953.

9. *Rheem I*, 714 N.E.2d at 1220.

10. *Rheem II*, 746 N.E.2d at 945; R. 22, 225.

sought to recover two basic types of damages: the expenses incurred in repairing the defective furnaces purchased by its customers and the profits it lost because of canceled sale and installation contracts. The former may be characterized as direct damages flowing naturally from the defects in the furnaces[11] and the latter as consequential damages.[12]

Every box in which a Rheem furnace was shipped contained a pre-printed warranty captioned "Limited Warranty—Parts." This document expressly warranted the component parts of the furnace against failure for a particular term, limited the duration of the implied warranties of merchantability and fitness for particular purpose, limited the buyer's remedy for breach of warranty to the furnishing by Rheem of replacement parts, and excluded both the cost of labor to install the replacement parts and the recovery of incidental and consequential damages.[13]

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11. *See* U.C.C. § 2-714(2) (1999). "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *Id.*

12. *See id.* § 2-715(2)(a). "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . ." *Id.*

In a footnote, the court stated: "While Phelps seeks both consequential and incidental damages, the same analysis applies to each and we will discuss only consequential damages." *Rheem II*, 746 N.E.2d at 946 n.2. This statement ignores both the differentiation between incidental damages and consequential damages in U.C.C. section 2-715 and the language of U.C.C. section 2-719(3) that refers only to consequential damages. That there is a difference between the two is illustrated by Commonwealth Edison Co. v. Allied Chem. Nuclear Prods., Inc., 684 F. Supp. 1429 (N.D. Ill. 1988), in which the contract expressly excluded consequential damages, but one party recovered storage charges (incidental damages) of almost $300 million.

13. *Rheem II*, 746 N.E.2d at 944. The pertinent provisions of the typical Rheem warranty were as follows.

> GENERAL: Manufacturer, RHEEM AIR CONDITIONING DIVISION, warrants ANY PART of this furnace against failure under normal use and service within the applicable periods specified below, in accordance with the terms of this Warranty. Under this Warranty, RHEEM will furnish a replacement part that will be warranted for only the unexpired portion of the original warranty . . . .
>
> HEAT EXCHANGER: RHEEM warrants the heat exchanger for a period of TEN (10) YEARS commencing from the date of original installation and operation . . . . In the event of heat exchanger failure during the warranty period, RHEEM will furnish a replacement heat exchanger. If not available for any reason, RHEEM shall have the right to instead allow a credit in the amount of the then current suggested retail selling price of the heat exchanger (or an equivalent heat exchanger) towards the purchase price of any other RHEEM gas or oil furnace.
>
> ANY OTHER PART: If any other part fails within ONE (1) YEAR after original installation and operation, RHEEM will furnish a replacement part . . . .

Notwithstanding the exclusion of labor costs, during the problematic four-year period, Rheem issued numerous repair bulletins and allowed monetary credits to contractors making the necessary repairs.[14] After meetings with Rheem

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> SHIPPING COSTS: You will be responsible for the cost of shipping warranty replacement parts from our factory to our RHEEM distributor and from the distributor to the location of your product . . . .
>
> SERVICE LABOR RESPONSIBILITY: This warranty does not cover any labor expenses for service, nor for removing or reinstalling parts. All such expenses are your responsibility unless a service labor agreement exists between you and your contractor.
>
> HOW TO OBTAIN WARRANTY PERFORMANCE: Normally, the installing contractor from whom the unit was purchased will be able to take the necessary corrective action by obtaining through his RHEEM air conditioning distributor any replacement parts. If the contractor is not available, simply contact any other local contractor handling RHEEM air conditioning products . . . .
>
> MISCELLANEOUS: . . . ANY IMPLIED WARRANTIES, INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, SHALL NOT EXTEND BEYOND THE APPLICABLE WARRANTY PERIODS SPECIFIED ABOVE. RHEEM'S SOLE LIABILITY WITH RESPECT TO DEFECTIVE PARTS SHALL BE AS SET FORTH IN THIS WARRANTY, AND ANY CLAIMS FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES ARE EXPRESSLY EXCLUDED.
>
> . . .
>
> RHEEM suggests that you immediately complete the information on *the reverse side* and retain this Warranty Certificate in the event warranty service is needed. Reasonable proof of the effective date of the warranty must be presented, otherwise the effective date will be based upon the date of manufacture plus 30 days . . . .

Id. at R. 105 (emphasis in original). Rheem's "90 Plus" furnaces had a lifetime warranty which contained the following language:

> HEAT EXCHANGERS: RHEEM warrants the primary heat exchanger and the secondary heat exchanger (condensing coil) to the Original Owner for his or her lifetime, subject to proof of purchase, provided the furnace is installed and used in the Original Owner's principal residence. For any subsequent owner (or the original owner where the above lifetime warranty conditions are not or cease being met), . . . RHEEM will warrant the primary heat exchanger and the secondary heat exchanger (condensing coil) for a period of TWENTY (20) YEARS commencing from the date of original installation and operation . . . . In the event of heat exchanger failure during the warranty period, RHEEM will furnish a replacement heat exchanger. If not available for any reason, RHEEM shall have the right to instead allow a credit in the amount of the then current suggested retail selling price of the heat exchanger (or an equivalent heat exchanger) toward the purchase price of any other RHEEM gas furnace.
>
> INTEGRATED IGNITION CONTROL: RHEEM warrants the integrated ignition control for a period of FIVE (5) YEARS commencing from the date of original installation and operation. In the event of an integrated control failure during the warranty period, RHEEM will furnish a replacement integrated ignition control.

Id. at R. 117.

14. *See, e.g., id.* at R. 353. Bulletin #SR-134 for Rheem Air Conditioning Division to All

representatives failed to yield results satisfactory to Phelps, Phelps brought suit against both Rheem and Federated for breaches of express warranty and of the implied warranties of merchantability and fitness for particular purpose.[15] Following some discovery, Rheem moved for summary judgment on the theories "that the damages sought by Phelps were excluded by the service labor exclusion, consequential damages exclusion, and incidental damage exclusion of Rheem's written limited warranties."[16] Rheem also asserted that a lack of privity with Phelps entitled it to summary judgment on the implied warranty claims.[17]

The trial court denied Rheem's motion with regard to all the warranty claims.[18] Subsequently, the trial court granted Rheem's motion to certify its ruling for interlocutory appeal.[19] As stated in the court of appeals' opinion, the pertinent questions certified were:

> Whether the failure of essential purpose of a limited warranty remedy under [Indiana Code section 26-1-] 2-719(2) is independent from [Indiana Code section 26-1-] 2-719(3) which reads consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable and whether, because the tests for the two subsections are different, a limited remedy of repair or replacement survives under subsection (2) unless it fails of its essential purpose, but a limitation of consequential damages survives under subsection (3) unless it is unconscionable.
>
> Whether an intermediate reseller of goods can avail itself of the doctrine of failure of essential purpose under 2-719(2) where the intermediate reseller has sold and therefore no longer owns the goods, and where the intermediate reseller has created additional express warranties with remedies of greater scope than that of the defendant manufacturer.[20]

The court of appeals ruled that, in accord with the "majority" view, sections

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Air Conditioning Distributors (July 15, 1992); Letter from Micheal D. Kaasa, Rheem Vice President, Sales, to Michael D. Phelps, President, Phelps Heating & Air Conditioning, Inc. (July 12, 1994) (R. 390). In his letter, Mr. Kaasa stated: "We must acknowledge that the Update Program of the past two years placed an unwanted burden on the entire Rheem distribution network. At the onset, we made every effort to arrive at labor allowance levels that would minimize the costs to the dealer." *Id.*

15. *Rheem I*, 714 N.E.2d 1218, 1221 (Ind. Ct. App. 1999). Phelps also sued the defendants for negligence. *Id.* The trial court's ruling on the negligence issue is not part of this appeal.

16. *Id.*

17. *Id.*

18. *Id.* at 1221-22.

19. *Id.* at 1222.

20. *Id.* The grant of summary judgment in favor of Federated against Phelps and its principals on Federated's counterclaim for failure to pay an account due of approximately $106,000 was not part of the appeal and thus not a part of the supreme court's decision. Federated also filed a cross-claim against Rheem. *Id.* at R. 28-32.

2-719(2) and 2-719(3) should be read independently, with the former being governed by a standard of failure of essential purpose of the limited remedy and the latter by a standard of unconscionability.[21] The court did not rule on the unconscionability of the exclusion but remanded for a determination of fact: "whether the cumulative effect of Rheem's actions was commercially *reasonable*."[22]

With respect to Rheem's assertion that the absence of privity with Phelps precluded recovery for breach of implied warranties, the court of appeals stated that perfect vertical privity is not required, particularly when the distributor with whom the buyer is in privity acts as the agent of the manufacturer, as Phelps had alleged.[23] Whether Federated was Rheem's agent was a question of fact to be determined at trial.[24]

The supreme court, in a 3-1 decision,[25] granted transfer, declared that sections 2-719(2) and 2-719(3) should be read independently, summarily affirmed the court of appeals as to the implied warranty claims, held that the language of the express warranty precluded Phelps from recovering its labor expenses or incidental and consequential damages, and observed that Phelps may still have a valid claim for breach of implied warranty or indemnity.[26]

Reasonable judicial minds may differ on whether sections 2-719(2) and 2-719(3) were intended by the Code drafters to be construed dependently or independently. The current trend favors independence, and the court in *Rheem* followed that trend. However, independence still requires a consideration of all of the surrounding circumstances, including the failure of the essential purpose of the limited remedies. The court should have simply declared its construction of the relationship between sections 2-719(2) and (3), as requested by the trial court, and should have remanded for further proceedings.

II. THE INDEPENDENCE ISSUE

As both courts observed, there has been a split among the decisions in other states on the question of whether sections 2-719(2) and 2-719(3) should be read dependently or independently.[27] The supreme court stated that "[i]n light of the depth of disagreement among the courts that have faced this issue, it is evident

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21. *Rheem I*, 714 N.E.2d at 1227.

22. *Id.* at 1228 (emphasis in original).

23. *Id.* at 1228-31.

24. *Id.* at 1231. This author has previously urged that Indiana should abolish the requirement of vertical privity in implied warranty cases. *See* Harold Greenberg, *Vertical Privity and Damages for Breach of Implied Warranty under the U.C.C.: It's Time for Indiana to Abandon the Citadel*, 21 IND. L. REV. 23 (1988).

25. Justice Dickson dissented and filed a short opinion. *Rheem II*, 746 N.E.2d 941, 956-57 (Ind. 2001) (Dickson, J., dissenting). Justice Rucker did not participate because he was a member of the court of appeals that previously decided *Rheem I*. *Id.* at 956.

26. *Rheem II*, 746 N.E.2d at 944, 948, 956.

27. *Id.* at 947; *Rheem I*, 714 N.E.2d at 1223; *see, e.g.*, cases cited *supra* note 2.

that the UCC is ambiguous on this point."[28] The court also noted that the "modern trend" appears to be that the two sections should be read independently of each other.[29]

After a discussion of the rules of statutory construction and the justifications for both views, the supreme court ruled, as had the court of appeals, that Indiana should follow the majority position and adopt the independent view.[30] The court stated:

> [T]he legislature's intent to follow the independent view is also supported by the UCC's general policy favoring the parties' freedom of contract . . . . [T]he independent view refuses to override categorically an exclusion of consequential damages and will give effect to the terms of the contract. Indeed, consistent with the principle of freedom of contract, the independent view allows the parties to *agree* to a dependent arrangement.[31]

The court expressly rejected the "commercial reasonableness" test of the court of appeals and, without discussion of whether Rheem's exclusion of consequential damages was unconscionable or whether Phelps had ever agreed to the exclusion other than by purchasing the furnaces for resale, reversed the trial court's denial of Rheem's motion for summary judgment on Phelps's claim for incidental and consequential damages.[32] The court declared that Phelps could not "escape the conclusion that these goods were relatively sophisticated and flowed between businesses [sic] entities."[33] In support, the court cited *S.M. Wilson & Co. v. Smith International, Inc.*,[34] a case involving the negotiation of specifications for the design, construction, and delivery of a $550,000 tunnel boring machine, the installation of which was to be supervised by an expert provided by the seller.[35] The court also relied on and quoted one of the leading cases supporting the independent view, *Chatlos Systems, Inc. v. National Cash Register Corp.*[36] In *Chatlos Systems*, the limitation of remedy and exclusion of consequential damages terms were in a contract that was negotiated over a period of months for a complex computer system expressly designed for Chatlos and to be installed and tested over an extended period of time.[37] The *Rheem II* court stated:

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28. *Rheem II*, 746 N.E.2d at 948.

29. *Id.* at 950; *see* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-10(c) (4th ed. 1995).

30. *Rheem II*, 746 N.E.2d at 948-50.

31. *Id.* at 950 (emphasis in original).

32. *Id.* at 952.

33. *Id.* at 951.

34. 587 F.2d 1363 (9th Cir. 1978).

35. *Id.* at 1365-67.

36. 635 F.2d 1081 (3d Cir. 1980).

37. *See id.* at 1083-84.

> The limited remedy of repair and consequential damages exclusions are two discrete ways of attempting to limit recovery for breach of warranty. The Code, moreover, tests each by a different standard . . . . We therefore see no reason to hold, as a general proposition, that the failure of the limited remedy provided in the contract, without more, invalidates a wholly distinct term in the agreement excluding consequential damages. The two are not mutually exclusive.[38]

The court also relied upon Professors White and Summers.[39] They stated that the leading case supporting the independent view, and with which they agree, is *American Electric Power Co. v. Westinghouse Electric Corp.*[40] That case involved "a commercial agreement painstakingly negotiated between industrial giants" for a "highly complex, sophisticated, and in some ways experimental piece of equipment . . . . It is for this very reason that the . . . contract incorporates within it the limitation on the Seller's liability."[41] The contract itself was negotiated over a period of two years.[42] The contrast between the goods involved in these three cases and the prepackaged Rheem furnaces with their enclosed preprinted warranties is striking.

Furthermore, in *S.M. Wilson*, the court said the "holding [was] based upon the facts of this case as revealed by the pleadings and record and [was] not intended to establish that a consequential damage bar always survives a failure of the limited repair remedy to serve its essential purpose. Each case must stand on its own facts."[43] In *Chatlos*, the court stated:

> The repair remedy's failure of essential purpose, while a discrete question, is not completely irrelevant to the issue of the conscionability of enforcing the consequential damages exclusion. The latter term is "merely an allocation of unknown or undeterminable risks." U.C.C. § 2-719, Official Comment 3 . . . . Recognizing this, the question here narrows to the unconscionability of the buyer retaining the risk of consequential damages upon the failure of the essential purpose of the exclusive repair remedy.[44]

In these leading "independent" cases, the provisions of sections 2-719(2) and 2-719(3) were not totally independent of each other but the latter section was construed and applied in the context of the former, notwithstanding the differing standards by which each section is judged.

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38. *Rheem II*, 746 N.E.2d 941, 948 n.6 (Ind. 2001) (quoting *Chatlos*, 635 F.2d at 1086).

39. *Id.* at 951.

40. 418 F. Supp. 435 (S.D.N.Y. 1976). *See* WHITE & SUMMERS, *supra* note 29, § 12-10(c). White and Summers suggest that the *American Electric* analysis should also apply in consumer cases. *Id.* This is briefly discussed in the text accompanying *infra* notes 45-46.

41. *Am. Elec. Power Co.*, 418 F. Supp. at 458.

42. *Id.* at 439.

43. 587 F.2d 1363, 1375-76 (9th Cir. 1978).

44. 635 F.2d 1081, 1086-87 (3d Cir. 1980) (internal citation omitted).

The court also relied on *Schurtz v. BMW of North America, Inc.*,[45] which reconciled the split between the "independent" and "dependent" cases on a contextual basis.

> In cases where the buyer is a consumer, there is a disparity in bargaining power, and the contractual limitations on remedies, including incidental and consequential damages, are contained in a preprinted document rather than one that has been negotiated between the parties, the courts have held uniformly that if the limited warranty fails of its essential purpose, the consumer should be permitted to seek incidental and consequential damages. The courts usually reach this result by reading the two subparts [of 2-719] dependently.... On the other hand, in cases where the parties are operating in a commercial setting, there is no disparity in bargaining power, and the contract and its limitations on remedies are negotiated, most courts have concluded that if a limited warranty fails of its essential purpose, any contractual limitation on incidental and consequential damages is not automatically void. The subparts are read independently and the surviving limitation ... remains valid absent a showing of unconscionability.[46]

The difficulty that *Rheem II* presents is that it falls somewhere between the two examples just posited. The transaction was commercial, but the warranty and its limitations and exclusions were found in a preprinted form inside the box that likely would not be opened until delivery at the ultimate buyer's residence or office. Nevertheless, the court assumed throughout its opinion that Rheem and Phelps were of equal bargaining power and had negotiated the terms of the warranty.

Unfortunately, *Rheem II* is made even more difficult by the court's observation, based on a reference to Phelps's brief, that "Phelps does not argue that the clause at issue was unconscionable."[47] The Code, however, states that unconscionability becomes an issue and evidence on it is required "[w]hen it is claimed or appears to the court that the contract any clause thereof may be unconscionable."[48] Phelps's failure to use the term "unconscionable" is

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45. 814 P.2d 1108 (Utah 1991), *cited in Rheem II*, 746 N.E.2d 941, 947 (Ind. 2001).

46. *Schurtz*, 814 P.2d at 1113-14.

47. *Rheem II*, 746 N.E.2d at 947 n.5 (stating, *see, e.g.*, Appellee's Br. at 25-28).

48. U.C.C. § 2-302 (1999) states:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

regrettable. The tone of Phelps's various briefs, however, emphasized the unfairness of the exclusion, particularly in the light of Rheem's inability to produce a defect free furnace for almost four years and the apparent assumption by both parties throughout this phase of the litigation that the limited remedy failed its essential purpose. Although neither the trial court nor the court of appeals used the term "unconscionable," it is evident that both courts were concerned with the inherent unfairness of the exclusion on the facts as they had been developed as of the time of the motion for summary judgment.

In addition, throughout its opinion, the supreme court emphasized the freedom of the parties to negotiate, to set contract terms, and to allocate risks. The facts of the case do not reflect that Rheem and Phelps engaged in any negotiation and discussion of allocation of risk, particularly allocation of the risk that Rheem would be unable to manufacture furnaces that worked properly.

The consequence of *Rheem II* appears to be that in Indiana, whenever the transaction is between business entities of whatever size, the exclusion of consequential damages will be effective regardless of the failure of the essential purpose of the limited remedy and without the further factual analysis that the leading cases appear to require. Even following the line of cases established by *Chatlos* and *American Electric Power*, the question in *Rheem II* which the supreme court should have permitted to be resolved after the taking of evidence, was whether, in light of the failure of the limited remedy as assumed by the parties, it was unconscionable for Phelps to be financially responsible for Rheem's extended failure to manufacture defect-free furnaces.

In the words of the supreme court in a prior decision, "[a] substantively unconscionable contract is one that no sensible man would make and such as no honest and fair man would accept."[49] Perhaps this is what the court of appeals had in mind when it remanded for a finding of whether the exclusion was "commercially reasonable": In the light of Rheem's inability to produce defect-free furnaces, would a sensible contractor undertake the repair costs on all the furnaces for four years and would a fair manufacturer accept that undertaking?

Although the issue of unconscionability under section 2-302 is for the court to determine, the parties "shall be afforded a reasonable opportunity to present evidence."[50] Section 2-302 deals expressly with what happens "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made."[51] Section 2-719(3) "makes it clear that [the limitations of remedies or exclusions of damages] may not operate in an unconscionable manner."[52] The plain implication is that the existence of unconscionability that would negate an exclusion of consequential damages under section 2-719(3) is to be determined after the failure of the essential purpose of the limited remedy under section 2-719(2) and in light of that failure.

Having interpreted the statute at the request of the trial court rather early in

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49. Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078, 1087 (Ind. 1993).

50. U.C.C. § 2-302(2) (1999).

51. *Id.* § 2-302(1).

52. *Id.* § 2-719 cmt. 3.

the life of the litigation, the supreme court should have remanded for further proceedings that would have permitted Phelps to introduce evidence to demonstrate that the exclusion was unconscionable or perhaps did not apply to Phelps at all, as discussed in the next section. Thus, even under the independent view of section 2-719(3), the trial court's denial of Rheem's motion for summary judgment appears to have been correct.

III. WAS PHELPS BOUND BY THE LIMITATION OF DAMAGES AND THE EXCLUSION OF CONSEQUENTIAL DAMAGES?

A significant issue in *Rheem II* on which the court declined to express an opinion was whether Phelps was bound at all by the limitations and exclusions found in the warranty documents.[53] The language of those documents indicates that they were directed to the buyers, not to an intermediary, such as a distributor or contractor.

The court's reluctance to resolve whether the limitations and exclusions applied to Phelps is understandable. Phelps never raised the issue directly but seemed to argue around it. Phelps had based a major part of its claim on breach of express warranty. However, Phelps did argue that the transactions were not sophisticated and "that the warranties were simply found inside of the furnace box and were not the product of detailed negotiations."[54] The court responded that "Phelps's argument here may prove too much, i.e., that only the ultimate consumer, and not Phelps at all, was to benefit from the warranty,"[55] but that both parties "appear to assume" that Phelps was a beneficiary of the warranty.[56] Moreover, in discussing whether the essential purpose of the limitation to the furnishing of replacement parts and the exclusion of labor costs failed, the court stated very clearly: "The limitation is addressed to the end-user, warning them that they must look to the contractor for repairs: 'All such expenses are your responsibility unless a service labor agreement exists between you and your contractor.'"[57] Thus, the supreme court was aware that the issue, though not clearly delineated, was present in the case.

A reading of each of the warranties as a whole reveals that the entire warranty and its limitations and exclusions were directed toward the end-user-home-owner, not to any intermediate contractor. The length of the warranty period was to begin on the date of original installation and operation, not on the date of purchase by a contractor, and was to last for a period of years thereafter. The lifetime warranty on the "90 plus" series of furnaces ran "to the Original Owner for his or her lifetime . . . provided the furnace is installed and used in the Original Owner's principal residence."[58] And in the event Rheem could not

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53. *Rheem II*, 746 N.E.2d 941, 947 n.4 (Ind. 2001).

54. *Id.* at 951.

55. *Id.*

56. *Id.*

57. *Id.* at 953. See *supra* note 13 for the language of the warranty.

58. *Rheem II*, 746 N.E.2d at R.117; *see supra* note 13.

furnish a replacement of a defective heat exchanger, it would "allow a credit in the amount of the then current suggested retail selling price of the heat exchanger . . . toward the purchase price of any other RHEEM . . . furnace."[59] It would have made no sense for Rheem to give credit for the retail price to a contractor such as Phelps. The logical allowance would be the wholesale price unless Rheem intended to give the contractor an allowance for loss of profit, a consequential damage for which Rheem had excluded liability. The court of appeals, commenting on Rheem's brief, stated that Rheem characterized the labor cost exclusion as being between itself and the home owner.[60]

Nor can it be claimed that Phelps was an intended beneficiary of the Rheem warranty. In most "pass-through" warranties,[61] the manufacturer states that the product is warranted for a specific time, that repairs of defects will be made at no cost to the buyer, and that the buyer should take the product to or call an authorized service facility for repairs.[62] In such situations, there is either an agreement between the manufacturer and the service facility for reimbursement to the latter of its costs of repair or the service facility can be considered an intended third-party beneficiary of the warranty agreement. The Rheem warranty made clear that Rheem did not intend to pay any costs of repair or to incur any obligation beyond furnishing the replacement parts to the ultimate buyer for installation at her own costs by her contractor.[63]

As noted earlier, the court emphasized agreements between two sophisticated business entities and an apportioning of the risk. In view of the language of Rheem's express warranties, one wonders whether there was ever any negotiation or discussion of risk apportionment. In its discussion of the limitation of remedy, the court did note a possible usage of trade[64] in the gas furnace industry,[65] but the issue of the details of that usage and its applicability to the case at hand is one usually left to the fact finder, not an issue decided by an appellate court.

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59. *Id.*

60. *Rheem I*, 714 N.E.2d 1218, 1220 (Ind. Ct. App. 1999).

61. A "pass-through" warranty is "an express warranty packaged with the goods." Gary L. Monserud, *Blending the Law of Sales with the Common Law of Third Party Beneficiaries*, 39 DUQ. L. REV. 111, 142 (2000); *see* Harry M. Flechtner, *Enforcing Manufacturers' Warranties, "Pass Through" Warranties, and the Like: Can the Buyer Get a Refund?*, 50 RUTGERS L. REV. 397 (1998).

62. *See* Flechtner, *supra* note 61, at 398. The most frequent and difficult question that arises in connection with pass-through warranty litigation is whether the ultimate purchaser can revoke her acceptance and obtain a refund from the manufacturer whose warranty was passed through but with whom she in not in privity. *See id.*

63. *Rheem I*, 714 N.E.2d at 1220.

64. "A usage of trade is any practice or method of dealing having such regularity of observance . . . as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts . . . ." U.C.C. § 1-205(2) (1999).

65. *Rheem II*, 746 N.E.2d 941, 953-54 (Ind. 2001).

IV. THE FAILURE OF ESSENTIAL PURPOSE

A further problem arises from several observations by the court early in part one of its opinion regarding the issue of the independence of section 2-719(3). The court stated that both Rheem and Phelps "appear[ed] to accept that the remedy provided by Rheem failed of its essential purpose"[66] under section 2-719(2);[67] that the trial court did not certify "the question of whether the [limited] remedy actually failed of its essential purpose and Rheem concedes that this issue 'is not in debate'";[68] and that both parties assumed "that the warranty and its remedy limitations are applicable,"[69]—all issues on which the court declined to express an opinion.[70] Nevertheless, in part two of its opinion, the court specifically ruled that the remedy limitation—covering replacement parts but excluding the cost of installation of those parts did not fail of its essential purpose and, therefore, Phelps was not entitled to its repair costs.[71]

Having found that the exclusion of consequential damages precluded Phelps from recovering its lost profits from canceled contracts,[72] the court turned to the question of whether Phelps was entitled to any other damages. Since section 2-719(3) relates only to exclusion of consequential damages, whether Phelps was entitled to any other damages depended on whether the limitation of remedies solely to Rheem's furnishing of replacements of defective parts failed of its essential purpose pursuant to section 2-719(2).[73] The drafters defined such a failure as occurring "where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain . . . ."[74] Notwithstanding the court's observations that the trial court had not certified the question of whether the remedy actually failed of its essential purpose, that Rheem conceded that the issue was not in debate,[75] and that a jury may determine "[w]hether a limited remedy failed of its essential purpose,"[76] the court proceeded to decide that the limited remedy and labor cost exclusion did not fail of its essential purpose.[77]

The court followed the analysis used in *Martin Rispens & Son v. Hall Farms, Inc.*,[78] stating

> that the method used to decide whether a particular limitation fails of its

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66. *Id.* at 946.
67. *Id.*
68. *Id.* at 947 n.4.
69. *Id.*
70. *Id.*
71. *See id.* at 954-55.
72. *See id.* at 952.
73. *Id.* at 947.
74. U.C.C. § 2-719 cmt. 1 (1999).
75. *Rheem II*, 746 N.E.2d at 947 n.4.
76. *Id.* at 948.
77. *Id.* at 954-55.
78. 621 N.E.2d 1078 (Ind. 1993).

> essential purpose is to identify the purpose underlying the provision and determine whether application of the remedy in the particular circumstances will further that purpose. If not, and only then, is there a failure of essential purpose.[79]

However, the *Rheem* court's application of Professor Eddy's analysis is incomplete. At the conclusion of his article, Professor Eddy suggests a three-step analysis:

> The first, the most important, and the most ignored step is to examine carefully the context of a particular transaction and to seek from an understanding of the transaction some further understanding of what purpose a given type of limited remedy might serve in it. The second step is to determine whether application of the limited remedy to the particular situation before the court furthers that essential purpose. If the remedy's purpose may no longer be furthered by its application, it remains for the court thoughtfully to fashion, from the Code's generally available remedies, relief that will most closely reproduce the contours of the parties' original bargain. Finally, even if the remedy's essential purpose calls for application, a third step is required: scrutiny of the remedy clause under the Code's unconscionability provision.[80]

These issues are fact sensitive and should be determined by a trial court, not on appeal. Moreover, "[l]imitations of remedy are not favored in Indiana and are strictly construed against the seller on the basis of public policy."[81]

Martin Rispens involved a single sale of diseased watermelon seeds. The court limited the buyer's remedy to return of the purchase price and excluded any incidental or consequential damages.[82] The court rejected the buyer's argument that the presence of the disease "was a novel circumstance not contemplated by the parties"[83] and stated that the parties could have allocated the risk of disease as part of their bargain.[84] Later, however, the *Martin Rispens* court stated:

> Left unanswered, however, is whether the parties in fact agreed to redistribute the risk of a latent defect in the seed. The question is whether there was mutual assent to the limitation of liability contained on the . . . can [of seeds] and the . . . purchase order. Contract formation requires mutual assent on all essential contract terms . . . . Assent to a limitation of liability may be assumed where a knowledgeable party enters into the contract, aware of the limitation and its legal effect

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79. *Rheem II*, 746 N.E.2d at 954 (quoting *Martin Rispens*, 621 N.E.2d at 1085-86 (citing Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28, 36-40 (1977))).

80. Eddy, *supra* note 79.

81. *Martin Rispens*, 621 N.E.2d at 1085.

82. *Id.* at 1086.

83. *Id.*

84. *Id.*

> without indicating non-acquiescence to those terms. However, the intention of the parties to include a particular term in a contract is usually a factual question determined from all of the circumstances.[85]

Accordingly, the court remanded for further proceedings on Rispens' warranty claims.[86]

Whether Phelps ever agreed to the warranty and its limitations has already been discussed.[87] Even if Phelps had agreed, the court all but ignored the contention that neither party ever contemplated that Rheem would be unable to produce defect-free furnaces for four years.[88] The court noted that Phelps either gave its own warranties to its customers or sold them extended warranties.[89] The court concluded that this practice assured Rheem that "it would not be obligated to make repairs,"[90] and that "[i]t was reasonable for Rheem to expect Phelps to use . . . [its own manpower and facilities] to go into local homes and offices to fix the furnaces,"[91] thus apparently allocating the risk of labor expenses.[92] However, the court's conclusion does not follow from its statement. Manufacturers frequently do not make repairs themselves but rely on others, whether independent contractors or franchisees, to make repairs to defective goods on their behalf.

The interesting feature of Rheem's warranty is that Rheem's only promise was to furnish replacement parts, and nothing more. It is as if Rheem was saying to the buyer, "Here are the parts; you fix it." However, as noted by Professor Eddy, "the typical limited repair warranty embodies an exclusive remedy of repair or replacement and an exclusion of consequential damages."[93] Section 2-719(1)(a) approves of "limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts."[94] The official comments note that "it is of the very essence of a sales contract that at least minimum adequate remedies be available"[95] and that there

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85. *Id.* at 1087 (citations omitted).

86. *Id.* at 1091.

87. *See supra* Part II.

88. An interesting question is why Phelps continued to purchase Rheem furnaces during the entire four-year period. After a year, Phelps was certainly aware of Rheem's position as to remedies. Perhaps Phelps continued the purchases because of continued assurances from Rheem that the problems had been solved, thereby creating additional warranties. This is a factual issue for resolution at trial. Another question is whether, by reimbursing the costs of contractors installing and then repairing the defective furnaces, Rheem had actually waived the limitation of remedy. *See* discussion accompanying *infra* notes 99-101.

89. *Rheem II*, 746 N.E.2d 941, 954 (Ind. 2001).

90. *Id.*

91. *Id.* at 955.

92. *Id.* at 954.

93. Eddy, *supra* note 79, at 61.

94. U.C.C. § 2-719(a) (1999).

95. *Id.* § 2-719 cmt. 1.

must be "at least a fair quantum of remedy for breach."[96] Again, in the Phelps context, these appear to be issues of fact for a fact finder.

The *Rheem* court looked at the purpose of the limited remedy, decided that its purpose was to insulate Rheem from the costs of repairs, and concluded that the limitation served its essential purpose.[97] If the essential purpose of a limited remedy were only to insulate the warrantor from exposure to damages, no limited remedy would ever fail of its essential purpose. However, the limited remedy must also leave the buyer with a minimum adequate remedy, one that will give the buyer what was bargained for, namely, goods that are defect free and perform as they are supposed to perform.[98]

A further question not addressed by the court, and perhaps not ripe for discussion because of the procedural posture of the case, is whether Rheem waived the limitation of remedy when it engaged in its "furnace update program," which included the cost to contractors of making repairs to the defective furnaces. This conduct could have been a course of dealing that would have furnished a basis for interpreting the contracts pursuant to which Phelps purchased the furnaces[99] or to a course of performance that would have amounted to a waiver or modification of the labor exclusion.[100] "[W]hether there has been a waiver of a contract provision is ordinarily a question of fact."[101] However, by reversing the denial of summary judgment, the court foreclosed any discussion of this issue.

V. THE RIGHT TO DIRECT DAMAGES OR INDEMNITY

A further interesting point is that the court's statement that even if the limited remedy did fail of its essential purpose, Phelps would not be entitled to the costs incurred in repairing the defective furnaces.[102] The court observed that the cost of repair is the common measure of damages for breach of warranty[103] but concluded, without any citation of authority in support, that because Phelps was no longer in possession of the goods, this measure of damages would be inapplicable.[104] Instead, the court concluded that Phelps may have a cause of

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96. *Id.*

97. *Rheem II*, 746 N.E.2d 941, 954-55 (Ind. 2001).

98. *See* U.C.C. § 2-719 cmt. 1 (1999).

99. *Id.* § 1-205.

100. *See id.* §§ 2-208, 2-209. "Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." *Id.* § 2-208(3).

101. Harrison v. Thomas, 761 N.E.2d 816, 820 (Ind. 2002).

102. *Rheem II*, 746 N.E.2d 941, 955 (Ind. 2001).

103. *Id.* "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate warrant damages of a different amount." U.C.C. § 2-714(2) (1999).

104. *Rheem II*, 746 N.E.2d at 956.

action against Rheem sounding in indemnity or subrogation.[105]

"'A right of indemnity exists where a party is compelled to pay damages that rightfully should have been paid by another party.'"[106] In determining whether Phelps has any claim for indemnity, the trial court would have to determine whether the home owners who purchased Rheem furnaces for installation by Phelps had any claims for damages against Rheem which were satisfied by Phelps. In order for the ultimate buyers to have any such claims, the trial court will have to find that the limitations and exclusions that the supreme court held to be effective against Phelps were not effective against the ultimate buyers. This would require a ruling that with respect to the ultimate buyers, the limited remedy and labor cost exclusion failed their essential purpose; otherwise, there would be no damages that rightfully should have been paid by Rheem. Since the indemnification issue was not before the court, there is no hint in the opinion whether these limitations and exclusions could be valid against one party, as the court found with respect to Phelps, and invalid against the ultimate consumer-buyer.[107]

The court also stated that Phelps may have a claim for breach of implied warranty.[108] It is unclear whether the court meant that Phelps may have such a claim against Rheem or against Federated, the distributor from which Phelps purchased the furnaces. If the court meant that Phelps may still have such a claim against Rheem, the fact there may have been implied warranties that Rheem breached will be of little comfort to Phelps in view of the court's construction and application of the limitation of remedies and exclusions of damages. The limitations and exclusions found in the printed Rheem warranties were expressly intended to apply equally to those express warranties and to the implied warranties of merchantability and of fitness for particular purpose.[109] Section 2-719 is intended to permit sellers to limit their liability for damages that flow from warranties that they have made, whether express or implied.[110]

VI. COVENANTS NOT TO COMPETE

During the survey period, the Indiana Court of Appeals decided two cases that dealt with covenants not to compete. The first, *Kladis v. Nick's Patio, Inc.*,[111] arose out of an agreement for the sale of a business. The second, *Burk v. Heritage Food Service Equipment, Inc.*,[112] arose out of contracts of employment. Although neither case breaks new ground in the law of Indiana, they are of

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105. *Id.*

106. *Id.* (*referring to* Black v. Don Schmid Motor, Inc., 657 P.2d 517, 529 (Kan. 1983), quoting 41 AM. JUR. 2D Indemnity § 20 (1995)).

107. *See supra* notes 45-46 and accompanying text.

108. *Rheem II*, 746 N.E.2d at 944.

109. *See supra* Part III.

110. *See* WHITE & SUMMERS, *supra* note 29, § 12-9.

111. 735 N.E.2d 1216 (Ind. Ct. App. 2000).

112. 737 N.E.2d 803 (Ind. Ct. App. 2000).

interest because of the clarity with which they explain the applicable law.

A. The Scope of Noncompetition Agreements in Contracts for the Sale of a Business

In *Kladis,* Kladis, a restauranteur, sold his restaurant business to Samoilis and Radokis. In order to preserve the goodwill built up by Kladis over the years, the agreement of sale provided that Kladis would not engage as an employee, agent, or owner of any competing restaurant business located within a radius of five miles of his former restaurant.[113] Subsequently, Samoilis bought out Radokis' interest, but Radokis did not sign a noncompetition agreement. Thereafter, Radokis opened a competing restaurant within the five mile radius and hired Kladis to do roofing work and landscaping.[114]

Samoilis filed an action against both Kladis and Radokis seeking preliminary and permanent injunctions, damages, and a declaratory judgment with respect to Kladis' noncompetition agreement.[115] The trial court found that Kladis had assisted Radokis in opening the competing restaurant by performing landscaping services and roofing work, directing a laborer with respect to work being done inside the building, and meeting with Radokis on the premises, thereby threatening harm to Samoilis in violation of the noncompetition agreement.[116] The trial court entered a preliminary injunction against both Kladis and Radokis, from which Kladis and Radokis filed an interlocutory appeal.[117]

The court of appeals reversed and remanded for trial.[118] At the outset of its discussion of the merits, the court reiterated the essential difference between covenants not to compete in employment agreements and agreements for the sale of a business. Although both restrain trade to some degree, the former "are not favored in the law . . . [and] are strictly construed against the employer,"[119] in part because of unequal bargaining power between employer and employee.[120] Noncompetition provisions in the latter agreements, however, are not as "ill-favored"[121] because of more equal bargaining power between the parties and the

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113. *Kladis,* 735 N.E.2d at 1218.

114. *Id.*

115. *Id.* The named plaintiff was the corporation owned by Samoilis; however, for purposes of simplicity, the plaintiff is referred to as Samoilis.

116. *Id.* at 1218-19.

117. *Id.* at 1219.

118. *Id.* at 1221. It should be noted that Samoilis failed to file a brief for the appellee. Although the court of appeals was not required to develop appellee's argument, and could have reversed if it had found that the appellants made a *prima facie* showing of trial court error, it used its discretion to consider the merits of the case. *Id.* at 1219.

119. *Id.* at 1220 (citations omitted).

120. *See id.* For further discussion of employment of non-compete agreements, see *infra* Part VI.B.

121. *Kladis*, 735 N.E.2d at 1220 (quoting Fogle v. Shah, 539 N.E.2d 500, 502 (Ind. Ct. App. 1989)).

business buyer's legitimate desire to preserve the goodwill of the business for which he paid by preventing the seller from competing for the same (and the latter's former) customers.[122]

Kladis agreed that Samoilis had a protectible interest in the goodwill of the restaurant.[123] However, the factual issue was, in the court's words, whether Kladis had "reentered the market to compete for the same customers."[124] The court concluded that the activities in which the trial court found Kladis had engaged, without more, did not demonstrate that Kladis had reentered the restaurant business to compete for his former customers and, therefore, did not come within the prohibition of the noncompetition agreement.[125]

With respect to Radokis, the court stated that under Indiana law, "one not a party to a noncompetition agreement may be enjoined from assisting a party to such an agreement from breaching" that agreement.[126] Since Samoilis had failed to demonstrate that Kladis had breached the agreement, the preliminary injunction against both Kladis and Radokis could not stand.[127]

B. The "Blue-Pencil" and Noncompetition Agreements in Employment Contracts

In *Burk v. Heritage Food Service Equipment, Inc.*,[128] a former employer (Tri-State) brought an action to enjoin and to recover damages from two former employees (Burk and Rody) and their new employer (Bowman Aviation), for their alleged violation of noncompetition and confidentiality agreements contained in the employees' contracts of employment with Tri-State.[129] At the very outset of its opinion, the court described its task as being "to revisit the complexities of restrictive covenants in employment agreements."[130]

As conditions of their respective employments at Tri-State, both Burk and Rody signed identical noncompetition and confidentiality agreements.[131] In the noncompetition agreements, the employees agreed, in essence, that for a period

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1221.

126. *Id.*

127. *Id.*

128. 737 N.E.2d 803 (Ind. Ct. App. 2000). The plaintiff-former employer did business as Tri-State Business Services and is referred to throughout the court's opinion as "Tri-State." In order to avoid confusion for readers of the opinion, this discussion will also refer to plaintiff as "Tri-State."

129. *Id.* at 810. Tri-State also sought damages for tortious interference with a contractual relationship, and defendants-former employees counterclaimed for violation of the Indiana Blacklisting Statute, IND. CODE § 22-5-3-2 (1998). *Id.* at 816-19. Neither of these issues is discussed here.

130. *Burk*, 737 N.E.2d at 807-08.

131. *Id.* at 808-09.

of two years following the termination of employment for whatever reason, he or she would not work for any competitor of Tri-State, would not solicit or acquire any current or past customers of Tri-State, and would not disclose, copy, or use any of Tri-State's marketing plans, ideas, product research or other trade secrets.[132] In the confidentiality agreement, the employee agreed that all information, training procedures and customer information was of a proprietary nature and that he or she would keep all such information confidential.[133]

Tri-State was in the electronic data storage business. Burk had worked for Tri-State as a clerical employee. Her duties included feeding documents into a computer scanner, but "she did not have access to or knowledge of Tri-State's customer pricing information."[134] She left Tri-State and became the office manager of its competitor, Bowman, where her duties varied considerably from those at Tri-State.[135] The trial court did not enter an injunction against Burk; her appeal was based on issues not pertinent to the present discussion.[136]

Rody, as a salesman for Tri-State, had "significant contact with Tri-State's past, current, and prospective customers," had access to customer lists, and was trained in Tri-State's marketing procedures.[137] Following his termination, he was hired by Bowman as its national sales manager and was ultimately charged with developing and selling Bowman's new electronic record storage services that

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132. *Id.* The pertinent parts of the employment agreement were as follows:

> 2. Covenants Against Unfair Competition and Disclosure of Confidential Information.
> a) Employee agrees that during the term of employment, and for a period of two (2) years following the termination of Employment for whatever reason by any party thereto, Employee will not, directly or indirectly, do any of the following:
> i) Own, manage, control or participate in the ownership, management or control of, or be employed or engaged by or otherwise affiliated or associated as a consultant, independent contractor or otherwise with any corporation, partnership, proprietorship, firm, association or other business entity which competes with, or otherwise engages in any business of the Corporation . . . ;
> ii) Induce, solicit or acquire any current or past customers of the Corporation in the territory where the Corporation has or is currently conducting business as of the date of the execution of this Agreement for the purpose of engaging or soliciting sales, selling or competing with the Corporation in its business; . . .
> v) Disclose, divulge, discuss, copy or otherwise use or suffer to be used in any manner in competition with, or contrary to the interests of the Corporation, the marketing plans or strategies, inventions, ideas, discoveries, product research or engineering data, if any, or other trade secrets, pertaining to the business of the Corporation . . . .

Id.

133. *Id.* at 809.

134. *Id.*

135. *Id.*

136. *See supra* note 129.

137. *Burk*, 737 N.E.2d at 809.

competed with Tri-State's business. One of Bowman's new customers had been a prospective customer of Tri-State during Rody's prior employment and had become a customer of Tri-State after Rody had left.[138] The trial court enjoined Rody and Bowman from providing data storage services to entities that had been customers during Rody's employment at Tri-State.[139]

In reviewing the decision of the trial court, the court of appeals set forth what may be described as an outline of the law of enforceability of employees' covenants not to compete. Such covenants are in restraint of trade, are not favored in the law, are to be construed most strictly against the employer, and are to be enforced only if reasonable.[140] A finding with respect to reasonableness is to be based on whether the employer has a legitimate, protectible interest, whether the scope of protection is reasonable as to time, geography, and type of activity prohibited, and whether "'the former employee has gained a unique competitive advantage or ability to harm the employer . . . .'"[141] Using a process called "blue-penciling," "if a covenant is clearly divisible into parts, and some parts are reasonable while others are unreasonable, a court may enforce the reasonable, severable parts"[142] by striking the severable, unreasonable parts.[143] However, the court may not redraw unreasonable provisions to make them reasonable under the guise of interpretation or "blue-penciling," "'since this would subject the parties to an agreement they have not made.'"[144]

Applying the foregoing analysis, the court of appeals found that the noncompetition clause in paragraph 2(a)(i) of the employment agreement was overbroad and unenforceable because it prohibited Rody from working for any competitor of Tri-State in any capacity whatever. In an effort to interpret the clause so as to furnish reasonable protection to the former employer, the trial court had impermissibly rewritten the clause by adding a term and narrowing its scope to a restriction of employment in any "'competitive capacity.'"[145]

Turning its attention to the trade-secrets clause in paragraph 2(a)(v) of the employment agreement, the court noted the four general characteristics of a protectible trade secret: "1) information; 2) deriving independent economic value; 3) not generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) the subject of efforts, reasonable under the circumstances to maintain its secrecy."[146] Although the trial court had found that the identities of Tri-State's customers were easily ascertainable from the telephone directory, publicly known, and, therefore, not trade secrets, that court also found that Rody had breached the trade secrets

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138. *Id.* at 810.
139. *Id.*
140. *Id.* at 811.
141. *Id.* (quoting Silsz v. Munzenreider Corp., 411 N.E.2d 700, 705 (Ind. Ct. App. 1980)).
142. *Id.*
143. *Id.*
144. *Id.* (quoting Smart Corp. v. Grider, 650 N.E.2d 80, 83 (Ind. Ct. App. 1995)).
145. *Id.* at 812.
146. *Id.* at 813.

clause by using the marketing information and sales strategy he had learned while employed at Tri-State.[147] Notwithstanding the apparent conflict between these two findings, the court of appeals ruled that one of them was sufficient to support the trial court's injunction against Rody from using any of Tri-State's marketing information or sales strategy.[148]

Finally, with respect to the nonsolicitation clause in paragraph 2(a)(ii) of the employment agreement, the court of appeals ruled that the trial court had properly "blue-penciled" the clause.[149] As originally written, the clause would have prohibited Rody from soliciting and selling to Tri-State's former or present customers any goods or services even if unrelated to Tri-State's business. The use of the "blue pencil" to delete the phrases "or past" "engaging or soliciting sales," or "selling" which the court of appeals deemed severable, meant that the overbreadth of the clause was eliminated and that Rody and Bowman would be prohibited for fourteen months from competing for the business of entities who had been customers of Tri-State during Rody's employment with Tri-State.[150]

Courts and scholars have hotly debated the use of the "blue pencil" in employment contract cases.[151] The dispute usually revolves around the issue of whether employers will draft overbroad restrictions to act *in terrorem* in order to discourage litigation by former employees without true regard for the protectible interest of the employer.[152] Some states have refused to follow the "blue pencil" rule even in cases of clear severability or the presence of severability clauses.[153] However, it has also been acknowledged that it is difficult for employers to draft individually appropriate noncompetition agreements for each employee based on his or her duties at the time of employment, or as those duties change thereafter.[154] It has been suggested, therefore, that if the interest of the employer merits protection and the employer appears to have acted fairly, the covenant should be "tailored" to give reasonable protection to the employer with minimum inconvenience to the employee.[155] However, this approach will likely act even more *in terrorem* than the "blue pencil" approach because employers will draft the broadest restrictions with the knowledge that the court will modify the contract if necessary.[156]

Without engaging in a lengthy analysis of the law of noncompetition

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147. *Id.* at 813-14.

148. *Id.* at 814.

149. *Id.* at 814-15.

150. *Id.* at 815-16.

151. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 681-82 (1960).

152. *Id.*

153. *See, e.g.*, Gary P. Kohn, Comment: *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635, 693 (1982).

154. *See* Blake, *supra* note 151, at 683.

155. *See id.*; *see also* Kohn, *supra* note 153, 694-98.

156. *See* E. ALLEN FARNSWORTH, CONTRACTS § 5.8, at 357 (3d ed. 1999).

provisions in employment agreements,[157] it appears that Indiana has followed a reasonable approach. The heavy burden remains on the employer to demonstrate that it has a protectible interest and that the former employee has threatened to violate that interest. If the employer has overreached by requiring an agreement more broadly drafted than necessary to protect its interest, the court should not rewrite that agreement. "Blue penciling" should be limited to clearly severable provisions, and the burden will also be on the employer to demonstrate that severability will not do violence to both its interest and the understanding of the parties.

157. For a more complete discussion of covenants not to compete in Indiana, see John W. Bowers et al., *Covenants Not to Compete: Their Use and Enforcement in Indiana*, 31 VAL. U. L. REV. 65 (1996).

CORPORATE LAW: A YEAR IN THE LIFE OF INDIANA CORPORATE LAW

LEAH M. CHAN*

INTRODUCTION

The area of corporate law is a broad area, as it can expansively be defined as the law that affects incorporated businesses. Within this definition, other areas of law such as contract, agency and tort law are included because corporations are affected by these laws in one form or other. However, this Article will address only a narrow slice of corporate law, including issues of shareholder lawsuits, the well-established corporate doctrine of piercing the corporate veil, sections of the Indiana Business Corporation Law and sections of the Indiana Securities Act.

I. SHAREHOLDER ACTIONS

One of the more dynamic issues in corporate law is the area of shareholder actions. In 1995 and again in 1998, Congress passed legislation intending to reform the area of securities litigation, with the goal of protecting defendant-corporations from their overly litigious shareholders (and their equally overly-eager lawyers).[1] These reforms, although they apply to both public and closed corporations, were aimed at curbing frivolous lawsuits brought against public corporations.[2] The focus in Indiana for the past few years, however, has been on closed corporations and defining the ways in which the shareholders of such corporations may bring suit.

In general, a shareholder is required to file a derivative action when actions taken by the corporation itself, or taken by the officers or directors on behalf of the corporation, resulted in harm to the corporation. The reasoning behind the derivative action is that the cause of action the shareholder is alleging is one that belongs to the corporation, not to the shareholder individually.[3] This separation of rights can become confusing, especially if the rights seemingly arise from violations of both shareholders' rights and corporation rights.

There are special procedural steps a shareholder must take to perfect the derivative action.[4] One of these steps requires the shareholder to make a demand on the board of directors to bring suit. The shareholder must allege that she has

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1. *See* 15 U.S.C. § 78u-4 (2001); *see also* Dominic Bencivenga, *Appeal Reveals Reform Act's Tortured History*, N.Y.L.J., June 11, 1998, at 5; Elizabeth Strong, *How the Courts & Congress Are Changing Securities Litigation*, N.Y.L.J., Mar. 4, 1999, at 1.

2. Bencivenga, *supra* note 1, at 5.

3. G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 234 (Ind. 2001).

4. *See* IND. R. TRIAL P. 23.1.

made this demand in her complaint.[5] In addition, should the corporation establish a committee of disinterested directors or persons to investigate the corporation's rights and remedies,[6] the court may suspend proceedings on the underlying derivative action until the investigation is completed.[7] If the committee finds that there have been no violations, or finds that the lawsuit is not in the best interest of the corporation, the court "shall" presume these findings conclusive as to the suing shareholders.[8] Unless the shareholder can prove that the committee members were either not disinterested or the investigation was not conducted in good faith, the shareholder will find herself without recourse.[9]

Compliance with these procedures is appropriate when the corporation is a public company, with its shares traded on a national market. After all, if the shareholder is dissatisfied at any point in the process, the shareholder can simply sell her shares on the market. However, withdrawal is not so easy for an unhappy shareholder in a closed corporation. The Indiana Supreme Court gave recognition to this aspect of closed corporations in its 1995 decision, *Barth v. Barth*.[10]

The court in *Barth* held that there are certain situations when a shareholder of a closed corporation should be allowed to bring a direct action, instead of a derivative one.[11] In deciding to do this, the court followed a nationwide trend and a path also suggested by the American Law Institute.[12] *Barth* stated that in a closed corporation, shareholders are "more realistically viewed as partners, and the formalities of corporate litigation may be bypassed."[13] There are three situations in which a direct action can proceed, instead of a derivative one. A direct action will be allowed when (1) such an action will not unfairly expose the corporation or other defendants to several lawsuits; (2) the direct action will not "materially prejudice the interests" of the corporation's creditors; or (3) the action will not interfere with a "fair distribution" of any recovery "among all interested persons."[14] It appears from the case law applying the rule of *Barth* that a finding of any one of these situations can preclude a direct action.[15] In this survey period, there have been three cases that have dealt with this issue and

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5. *Id.*; *see also* IND. CODE § 23-1-32-2 (1998).

6. IND. CODE § 23-1-32-4 (1998).

7. *Id.* § 23-1-32-2.

8. *Id.* § 23-1-32-4(c).

9. *Id.* The official comments cite the business judgment rule as the underlying rationale for presuming the disinterested committee's findings as conclusive, analogizing the decision to pursue legal claims to "other questions of corporate policy and management." *Id.* at official cmt.

10. 659 N.E.2d 559 (Ind. 1995).

11. *Id.* at 561.

12. *Id.* at 562; *see also* G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 236 (Ind. 2001).

13. *Barth*, 659 N.E.2d at 561.

14. *Id.* at 562.

15. *See, e.g.*, Riggin v. Rea Riggin & Sons, Inc., 738 N.E.2d 292, 308 (Ind. Ct. App. 2000) (applying the multiplicity of lawsuits situation).

Barth.[16]

A. A Reaffirmation of Barth *and Available Remedies:* G & N Aircraft, Inc. v. Boehm

In the early 1990s, G & N Aircraft was a closely held Indiana corporation with five shareholders.[17] Paul Goldsmith, the founder, and his son, owned about thirty-two percent; Eric Boehm owned thirty-four percent and Richard Gilliland and James McCoy each owned 16 2/3%.[18] The five shareholders served as the board of directors for G & N, and Goldsmith, Boehm and Gilliland served as officers, with Goldsmith and Boehm as employees of G & N.[19] Goldsmith was also the sole-owner of other corporations that dealt with G & N, in addition to being G & N's landlord.[20]

In the mid 1990s, Goldsmith's other corporations, and himself personally, were in financial difficulty.[21] Goldsmith attempted to consolidate his corporations with G & N as a way to lighten his financial burden.[22] Goldsmith had G & N appraised, and its value was approximated at $961, 000.[23] His initial attempt to consolidate failed because a bank rejected his application for a loan to buy out the other shareholders.[24] A year later, Goldsmith again initiated a consolidation effort.[25] In 1995, Goldsmith took coercive steps to force Gilliland, McCoy and Boehm to sell their shares to Goldsmith.[26] One of these tactics included an eviction threat from Goldsmith, as landlord of G & N, to evict them from this hangar.[27] This persuaded Gilliland and McCoy to sell their shares to Goldsmith, but they remained on the board.[28]

Goldsmith had become the majority shareholder of G & N, but he could not get Boehm to sell his shares. Goldsmith then tried other methods to force Boehm to sell his shares by threatening Boehm with the fact that when G & N consolidated with Goldsmith's other companies, G & N would suffer a financial loss.[29] Goldsmith also cut off cash distributions from G & N and ultimately fired

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16. *G & N Aircraft, Inc.*, 743 N.E.2d at 227; Hubbard v. Tomlinson, 747 N.E.2d 69 (Ind. Ct. App. 2001); *Riggin*, 738 N.E.2d at 292.

17. *G & N Aircraft, Inc.*, 743 N.E.2d at 232.

18. *Id.*

19. *Id.*

20. *Id.* at 232.

21. *See id.* at 232-33.

22. *Id.*

23. *Id.* at 232.

24. *Id.* at 232-33.

25. *Id.* at 233.

26. *Id.*

27. *Id.*

28. *Id.* at 232-33.

29. *Id.*

Boehm and changed Boehm's office locks.[30]

Boehm filed an action against Goldsmith and G & N for both direct and shareholder derivative claims.[31] The trial court found for Boehm in a four-day bench trial and awarded Boehm a variety of remedies, including a forced sale of Boehm's shares to Goldsmith, interest on back dividends, punitive damages, and attorney's fees.[32] In a unanimous decision, the supreme court affirmed in part and reversed in part.[33]

As an initial matter, the court clarified the rights held by the corporation and those held by an individual shareholder in the contexts of direct and derivative actions. The court, adopting a New York-type definition, found that the rights held by each dictate the type of action to bring.[34] A direct action should be based on the rights the shareholder finds in the corporation's articles of incorporation, bylaws or in state corporate law.[35] In contrast, a derivative action should be brought by the shareholder on behalf of the corporation for a right that the corporation has failed to act upon.[36] The court then reaffirmed *Barth*, restating the three situations where a direct action was not appropriate in a closed corporation.[37]

The court divided Boehm's claims into three categories,[38] the division of which center around Goldsmith in his different capacities at G & N and the alleged breach in his fiduciary duties to G & N and/or Boehm. The first of the three are Boehm's claims that Goldsmith as an officer and director breached his fiduciary duties to G & N.[39] These claims are derivative because G & N itself could have brought action against Goldsmith.[40] Goldsmith argued that the trial court erred by allowing Boehm to proceed on a direct action that was based on derivative claims.[41] However, because G & N was a closed corporation controlled by Goldsmith, such a lawsuit would be unrealistic.[42] But Goldsmith argued that each of the situations outlined in *Barth* apply so that Boehm's direct action should be dismissed.[43] The court analyzed each of these, finding that none of the situations were present and the *Barth* exception applied to Boehm's

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30. *Id.* at 233.
31. *Id.*
32. *Id.* at 234.
33. *Id.* at 246.
34. *Id.* at 235 (citing Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106, 112 (S.D.N.Y. 1951)).
35. *Id.*
36. *Id.*
37. *Id.* at 236.
38. *Id.*
39. *Id.*
40. *Id.* at 237.
41. *Id.*
42. *Id.*
43. *Id.*

lawsuit.[44] The second and third categories of Boehm's claims alleged that Goldsmith breached his fiduciary duty to Boehm as an officer and director and also as a majority shareholder.[45]

The court found no merit in Boehm's allegation that Goldsmith breached his duties to G & N as an officer and director.[46] Although his transactions taken with respect to G & N were self-interested transactions, these actions were not concealed and there was no evidence to suggest that these actions harmed G & N.[47] This finding comports with Indiana's highly deferential business judgment rule.[48]

The second and third categories alleged breaches of fiduciary duty by Goldsmith, in his capacities of officer, director, and majority shareholder, to Boehm as a minority shareholder.[49] The court recognized that Goldsmith's actions were taken wearing his different hats—as landlord, majority shareholder, and officer and director.[50] But the court clumped together Goldsmith's roles and addressed his actions in two parts—the first, before Goldsmith became a controlling shareholder and the second, actions taken as a majority shareholder.[51]

Prior to gaining control of G & N, Goldsmith made an offer for Boehm's shares, and Boehm alleged that this price was significantly less than the appraised value of Boehm's shares and less than what Boehm originally paid to purchase the shares.[52] In and of itself, the court found that there is no duty to purchase shares at a fair price.[53] If, on the other hand, there were nondisclosure, fraud or oppression, then Boehm would have a claim based on the low price Goldsmith offered for Boehm's shares.[54] Even though Goldsmith did not actually succeed in forcing Boehm out of G & N, Goldsmith did succeed in gaining control of the corporation, and the actions taken to force Gilliland and McCoy to sell their shares were wrongs to Boehm.[55]

The court agreed with the trial court that the eviction notice after Goldsmith resigned as president of G & N was a sham.[56] This eviction threat and Goldsmith's entire plan to gain total ownership of G & N was an abuse of Goldsmith's office.[57] The actions taken by Goldsmith as an officer and director

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44. *Id.* at 237-38.

45. *Id.* at 236.

46. *See id.* at 238-40.

47. *Id.* at 239.

48. *Id.* at 240. As discussed in Part IV, *infra*, directors can be held liable in very limited situations.

49. *G & N Aircraft, Inc.*, 743 N.E.2d at 236.

50. *Id.* at 241.

51. *Id.* at 241-44.

52. *Id.* at 241.

53. *Id.*

54. *Id.*

55. *Id.* at 242.

56. *Id.*

57. *Id.*

were not for any "proper business purpose" designed to benefit the corporation, but rather to force Boehm out so that Goldsmith could finalize his consolidation plans.[58] As a result, Boehm had a valid claim with respect to these actions. Goldsmith's actions taken after he became a majority shareholder were to render Boehm's shares worthless.[59] Therefore, Goldsmith had breached his fiduciary duty by subordinating the corporation's interests to his own.[60]

Finally, the court discussed the remedies available to Boehm. As the "shareholder derivative action is a creature of equity"[61] in Indiana, the court saw no reason why trial courts cannot be flexible when fashioning remedies for close corporation wrong-doings.[62] Therefore, the court upheld the forced sale of Boehm's shares to Goldsmith that the trial court ordered.[63] But the court cautioned future application of this remedy, as "[t]his remedy should be exercised only after careful thought. It amounts to a forced withdrawal of capital from the enterprise if the enterprise itself is the only realistic source of funding the buyout."[64]

Judicially ordered dissolution is a drastic remedy, and one commentator describes this holding as "sweeping change to established law regarding shareholder disputes."[65] Prior to *G & N Aircraft, Inc.*, the proper remedy was damages, and in cases of mergers and take-overs, the only remedy was under the dissenters' rights statute.[66] This same commentator predicts that this decision might have a "drastic impact" on future dealings between shareholders in a closed corporation.[67]

The court also upheld the punitive damages awarded because of Goldsmith's deliberate actions which were also found to be malicious and oppressive.[68] In addition, Boehm was awarded attorney's fees but only as to the frivolous counterclaim asserted by Goldsmith.[69] However, Boehm was not entitled to attorney's fees for the derivative claims because the court upheld Boehm's

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58. *Id.*

59. *Id.* at 242-43.

60. *Id.*

61. *Id.* at 243-44.

62. *Id.* at 244.

63. *Id.* at 243.

64. *Id.* at 244.

65. Leanne Garbers, *One Bad Apple: How One Evil Actor Can Rewrite Corporate Law*, IND. LAW., Aug. 29, 2001, at 25.

66. *Id.*

67. *Id.* This prognosis seems a bit pessimistic. Situations analogous to the facts of this case are few and far between. It is rare to see a corporate officer, director and shareholder act in such a coercive manner and with a disregard for corporate formality like Goldsmith did in this case. For other situations where there is no malicious intent, the business judgment rule will generally apply to deny a remedy to unhappy shareholders.

68. *G & N Aircraft, Inc.*, 743 N.E.2d at 245.

69. *Id.*

actions as direct claims, not derivative ones.[70]

B. When Barth *Does Not Apply:* Hubbard v. Tomlinson[71]

This is a straight-forward case involving the application of *Barth* and *G & N Aircraft, Inc.* Eli Tomlinson was a shareholder of Multimedia, a closely-held bankrupt corporation, consisting of five shareholders.[72] Tomlinson filed suit against Joseph Hubbard, another shareholder, and S & A, an accounting firm that had provided the corporation services.[73] Tomlinson alleged that Hubbard had breached fiduciary duties, and had conspired with S & A to "'loot' the corporation."[74] The trial court denied S & A's motion for summary judgment, and the court of appeals accepted jurisdiction of S & A's interlocutory appeal of this denial.

The court of appeals reversed, holding that Tomlinson had to bring his claims as a derivative action, as he was alleging harms to the corporation from an outside party, namely S & A.[75] Furthermore, the court conducted a *Barth* analysis and found that all three situations existed in Tomlinson's case—(1) there were three other shareholders who could conceivably bring suit against Multimedia, subjecting it to several lawsuits; (2) Multimedia had more than fifty creditors, and their interests would be harmed by a direct action since Multimedia was insolvent; and (3) Tomlinson requested that the recovery be directly awarded to him, and not the corporation or shareholders.[76]

C. When Does a Class Action Plaintiff in a Derivative Suit Fairly and Adequately Represent Similarly Situated Shareholders?: Riggin v. Rea Riggin & Sons, Inc.[77]

Riggin addressed several issues, many procedural, in the context of a shareholder derivative and direct action. Although a procedural matter, one of the important parts of this case was the discussion of when a shareholder, bringing a derivative action on behalf of the corporation and all other similarly situated shareholders, can be deemed to fairly and adequately represent the class.[78] This was a matter of first impression for the Indiana Court of Appeals and is fairly relevant to corporate litigation.[79]

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70. The court briefly discusses Boehm's vicarious liability claims against G & N for Goldsmith's actions. The court did not hold G & N liable under this theory, finding that the logic behind it became circular. *Id.* at 245-46.

71. 747 N.E.2d 69 (Ind. Ct. App. 2001).

72. *Id.* at 70.

73. *Id.*

74. *Id.*

75. *Id.* at 72.

76. *Id.*

77. 738 N.E.2d 292 (Ind. Ct. App. 2000).

78. *See id.* at 302-04.

79. The other procedural issues raised in the case, such as contempt, paying witness fees, and

Rea Riggin & Sons, Inc. was formed in 1927 by Rea and Nellie Riggin.[80] Since that time, the board of directors has always consisted of Riggin family members.[81] In 1997, there were twenty-nine shareholders, including Richard Riggin.[82] Richard, unhappy with the actions of the board and other shareholders, filed both a derivative action and a direct action against Rea Riggin & Sons, Inc. and the board members individually.[83] After Richard suffered a series of mishaps involving attorneys wishing to withdraw from representation, the trial court finally granted summary judgment in favor of the corporation. Richard was also found in contempt of court for not paying deposition fees of the corporation's accountant and was in the custody of the Delaware County Sheriff until he paid the fee.[84] On appeal, Richard contended that the grant of summary judgment in favor of the corporation was improper.[85]

As a preliminary matter, the court of appeals considered the burden of proof required of Trial Rule 23.1, which governs derivative shareholder actions, as opposed to Trial Rule 23, which governs class actions.[86] Relying on an interpretation of the Federal Rules of Civil Procedure by the Fifth Circuit,[87] the court of appeals held that in a derivative shareholder action, the burden of proof was on the defendants to show that the plaintiff-shareholder did not fairly and adequately address the interests of similarly situated shareholders.[88]

Next, the court divided its inquiry of this issue into two parts—first, the court defined what constituted similarly situated shareholders, and second, the court set out factors to consider whether the plaintiff fairly and adequately represented the class. As to the first prong of the inquiry, the court rejected both the corporation's suggested meaning (all the shareholders of the corporation should be similarly situated in order to have a proper class) as well as Richard's proposed meaning (those shareholders who support the lawsuit).[89] The court instead adopted several factors used by federal courts in similar situations.[90]

The court instructed trial court judges, when defining the class of similarly situated plaintiffs, to exclude two types of shareholders: those named as

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motions for continuance will not be discussed in this Article.

80. *Riggin*, 738 N.E.2d at 299.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 299-301.

87. The court of appeals, explaining its reason for relying heavily on the interpretation of the Federal Rules of Civil Procedure, stated that "[d]ue to the similarity between T.R. 23.1 and the corresponding Federal Rule, we will utilize federal law in interpreting T.R. 23.1." *Id.* at 300.

88. *Id.* at 301.

89. *Id.* at 302.

90. *Id.* at 303. In his analysis, Judge Sullivan relies heavily on a 1995 article, Mary Elizabeth Matthews, *Derivative Suits and the Similarly Situated Shareholder Requirement*, 8 DEPAUL BUS. L.J. 1 (1995).

defendants in the suit, and those in financial or personal conflict with the corporation.[91] In considering the opposition to the plaintiff-shareholder, the trial court judge should merely look at that as a factor in determining the adequacy of the representation, not in defining the class itself.[92] The shareholders not excluded were then considered the class of similarly situated shareholders.

After defining the class, the court instructed trial court judges to then look at the adequacy of the plaintiff-shareholder representation.[93] As set forth by Trial Rule 23.1, the plaintiff-shareholder must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."[94] The court elected to adopt the eight factor test set forth by the Ninth Circuit in *Larson v. Dumke*.[95] However, the court cautioned that, as with any multi-factor test, the trial court judge should not focus in on one factor to the exclusion of others.[96] The overall goal of the inquiry was to determine adequacy of the representation so that the plaintiff-shareholder's suit may proceed.[97]

The eight factors that the trial court judge should consider were: (1) whether the plaintiff is the true party in interest; (2) whether the plaintiff is familiar with the lawsuit or exhibits unwillingness to become familiar; (3) the degree of control the plaintiff's attorney exercises over the lawsuit; (4) the degree of support the plaintiff receives from the other shareholders; (5) whether the plaintiff is personally committed to the lawsuit; (6) the remedy sought by the plaintiff; (7) the "relative magnitude of the plaintiff's personal interest in the suit as compared to his interest in the derivative action;" and (8) whether there is any vindictiveness on the part of the plaintiff toward defendants. As with any multi-factor test, several factors overlap.[98]

The court applied this test, in light of the evidence presented by both parties in the summary judgment motion. The court eventually concluded that summary judgment was inappropriate because the corporation did not meet its burden of proof in showing that there were no material issues in dispute.[99] The court found that there was an unresolved question of whether Richard was a fair and adequate representative of the putative class of Rea Riggin & Sons' shareholders.[100] Although the corporation had presented evidence that there were some shareholders in the court-defined class who opposed Richard's claims, the court

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91. *Riggin*, 738 N.E.2d at 304.

92. *Id.*

93. *Id.*

94. IND. T. RULE P. 23.1.

95. *Riggin*, 738 N.E.2d at 304 (referencing Larson v. Dumke, 900 F.2d 1363, 1367 (9th Cir. 1990)).

96. *Id.* at 305.

97. *Id.*

98. *Id.* For example, factors (1) and (3) go to the same point—is this the plaintiff's action or another person's action? Factors (2) and (5) are essentially the same questions.

99. *Id.* at 312.

100. *Id.* at 307.

found that this was not sufficient evidence to satisfy whether Richard should proceed as the class representative.[101]

As to Richard's direct claims, the court applied the *Barth* factors after concluding that Rea Riggin & Sons was a closed corporation.[102] The court held that to allow Richard to proceed with his direct claims would unfairly expose the corporation to more than several lawsuits.[103] There were seven named defendants, all of whom were shareholders.[104] Aside from Richard, that left twenty-one shareholders as potential plaintiffs in suits against the corporation. Therefore, the court held that the trial court's grant of summary judgment on this issue was appropriate.[105]

II. DISSENTERS' RIGHTS AND CONTROL SHARE ACQUISITION STATUTES

The Indiana Business Corporation Law ("IBCL") includes several provisions that limit the liability of directors for their transactions taken on behalf of the corporation.[106] These same provisions limit the ability of a shareholder in a publicly traded corporation to object to certain actions taken by their corporation. Two such provisions of the IBCL that have generally been the subject of litigation are the Dissenters' Rights Statute ("DRS"), Indiana Code sections 23-1-44-1 to -20, and the Control Share Acquisitions statute ("CSAS"), Indiana Code sections 23-1-42-1 to -11.

The DRS, and in particular, Indiana Code section 23-1-44-8, is the sole remedy for shareholders in a closed corporation who are unhappy with the corporation's merger, share exchange, a substantial sale of all the corporation's assets, or a control share acquisition under section 23-1-42 (as discussed below). The remedy available to the unhappy shareholder is the right to demand the corporation buy back her shares and to demand an appraisal proceeding if the shareholder does not agree with the valuation of her shares made by the corporation.[107]

Subsection (c) of section 23-1-44-8, the heart of the DRS, makes patently clear that the remedy provided for in the statute is an exclusive one. The shareholder cannot protest the merger or other action in a separate proceeding, and should the shareholder bring such a separate suit, the suit will be barred by operation of the DRS.[108] In addition, any allegations of wrong-doing during the

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101. *Id.*

102. *Id.* at 308.

103. *Id.*

104. *Id.*

105. *Id.*

106. The IBCL, passed by the legislature in 1986, was a wholesale revision of the former General Corporation Act. The official comments, recognized as authoritative, reflect an overall desire to limit director liability. *See* Fleming v. Int'l Pizza Supply Corp., 676 N.E.2d 1051, 1054 (Ind. 1997).

107. IND. CODE § 23-1-44-19 (1998).

108. *See* Young v. Gen. Acceptance Corp., 738 N.E.2d 1079 (Ind. Ct. App. 2000).

execution of the corporation's plan, such as breach of fiduciary duty, must be brought up in the appraisal proceeding.[109] If the shareholder does not bring up these issues in the appraisal proceeding, there will be no other venue for them.[110]

Moreover, shareholders in a publicly traded corporation are not entitled to this remedy. As the official comments state, "the policy reason for this exception is that the market itself establishes both a fair price for the shares and a means by which a 'dissenting' shareholder can sell his shares for that price."[111] An interesting consequence of this preclusion is that since allegations of wrongdoing during the merger must be brought up in the appraisal proceeding, these shareholders might not get their day in court at all on these claims.[112]

The CSAS's purpose is to provide shareholders of a corporation with more than 100 shareholders (and other "substantial ties" to Indiana) a right to vote on an acquisition of stock that would give an entity a controlling portion of the corporation.[113] Control shares are defined in Indiana Code section 23-1-42-1 as shares that would give the acquirer certain voting power in the election of the board of directors in three percentage ranges.[114] The idea behind this right to vote is premised on the traditional right of shareholders to vote on fundamental corporate changes.[115]

However, this statute applies only to just that—a fundamental change. The statute does not apply to shifts in ownership blocks, rather it applies to shifts from a multi-shareholder control of a corporation to a single-shareholder domination.[116] The disinterested shareholders (those not involved in the controlling share acquisition) are permitted to vote on whether the new controlling shareholder will be given those voting rights, that but for the statute, the new controlling shareholder would have. This statute was upheld by the United States Supreme Court in *CTS Corp. v. Dynamics Corp. of America*.[117]

A. Failing to Follow DRS Procedures: Galligan v. Galligan[118]

In late 1996, Irish Park, a family-owned Indiana construction business, was having financial difficulties.[119] To solve these financial troubles, the majority shareholder, Thomas Galligan, who had previously been a director and president

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109. *See id.*; *Fleming*, 676 N.E.2d at 1058; Settles v. Leslie, 701 N.E.2d 849, 853-54 (Ind. Ct. App. 1998).

110. *Fleming*, 676 N.E.2d at 1058.

111. IND. CODE § 23-1-44-8(c) official cmt. (1998).

112. *See* Am. Union Ins. v. Meridian Ins. Group, 137 F. Supp. 2d 1096, 1102-03 (S.D. Ind. 2001).

113. IND. CODE § 23-1-42, official cmt. (1998).

114. *Id.* § 23-1-42-1.

115. *Id.*

116. *See id.*; *see also* Galligan v. Galligan, 741 N.E.2d 1217 (Ind. 2001).

117. 481 U.S. 69, 94 (1987).

118. 741 N.E.2d 1217 (Ind. 2001).

119. *Id.* at 1220.

of Irish Park, decided to sell all of Irish Park's assets to Golden Shamrock, a corporation owned by Larry Rice.[120] Although the court was not entirely sure of Rice's role in Irish Park at the time of the lawsuit, it appeared that Rice had been a long-time employee and member of Irish Park board of directors and possibly the president at the time of the sale. In conducting its sale to Golden Shamrock, Irish Park did not comply with any of Indiana's statutory requirements for a corporation's sale of substantially of all its assets.[121]

Four of Galligan's children were minority shareholders in Irish Park, and three objected to the sale based on a variety of claims, including fraud and breach of fiduciary duty.[122] In response, Galligan sent a notice to all the shareholders indicating that a meeting would be held on March 11, 1998, at which time a new board was to be elected and the sale discussed.[123] On March 11, Galligan was the only shareholder present at this meeting, although the three dissenting minority shareholders had served a "Shareholders' Notice Asserting Dissenters' Right" on all the potential members of the board of directors, including Galligan.[124] At this meeting, Galligan elected himself the sole director of Irish Park, acting as the majority shareholder. Galligan subsequently elected himself as president and secretary of Irish Park, acting as a director.[125] Finally, as the majority shareholder, Galligan voted to ratify the sale of Irish Park to Golden Shamrock.[126]

The court found that although Irish Park's initial actions with respect to the sale of its assets were defective, the ratification of the sale by Galligan as majority shareholder in the March 11 meeting was sufficient to render the sale proper.[127] However, the court went on to find that Irish Park had subsequently failed to follow any of the procedures with respect to its dissenting shareholders.[128] More specifically, Irish Park had failed to send out a notice detailing the steps that the dissenting shareholders needed to take in order to receive payment for their shares, as befitted their only remedy under Indiana's DRS.[129]

This situation was a novel one for the court to consider. The DRS outlines specifically the remedy when dissenters fail to follow procedures: they forfeit their right to receive payment for their shares. However, the statute is silent on remedies when a corporation fails to follow the procedures.[130] The court found that it would be inequitable to keep the dissenters from being paid for their shares as "[t]hey cannot be held to have forfeited their rights by reason of the

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120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1222.
128. *Id.* at 1224.
129. *Id.*
130. *Id.* at 1225; IND. CODE § 23-1-44-13(c) (1998).

corporation's ineptitude."[131]

However, the court was concerned that a consequence of holding that the remedy for the corporation's failure to follow DRS was to allow dissenters to bring an action to compel the corporation to follow DRS procedures. First, this remedy could create a disincentive for the corporation to follow DRS procedures initially. And, as bringing an action to compel the corporation to act incurs legal expenses and fees, the remedy might even be a possible barrier for dissenters to ever receive payment. In order to stop such a fallout from this decision, the court held that should a corporation breach the statutory duty to follow procedures under DRS, like Irish Park did in this case, another cause of action arises from that failure because it is "an independent wrong that is not itself subject to the dissenters' rights provisions."[132]

This cause of action, the court was quick to point out, was not a "new" cause of action, but "[r]ather, we simply apply the commonly accepted principle that the directors may be liable for disregarding a statutory mandate to these unusual facts, where the directors failed to take the steps necessary to enjoy the safe harbor provided by the dissenters' rights statute."[133] In further explanation of its holding, the court stated that the dissenting shareholders in this case could bring an action to force Irish Park to comply with the DRS.[134] As to other remedies the plaintiffs could recover against Irish Park, the court found that if the plaintiffs could show that Irish Park's failure to comply with the DRS caused attorney's fees and other expenses, these could be recovered, including interest.[135] And in the appraisal proceeding, the shareholders could bring up the alleged wrongdoings of Irish Park, but those claims were bound to only the appraisal proceeding, as per *Fleming*.[136] "Finally, if damages can be shown to have been caused by a breach of a statutory duty with respect to the dissenters' rights proceedings, the plaintiffs may bring a separate claim against the persons responsible."[137]

This final suggestion provoked a concurrence by Justice Sullivan who wrote merely to state that majority's recognition of a private cause of action for a breach of statutory duty was not necessary.[138] Instead, Justice Sullivan pointed to common law agency and contract principles cited by the official comments to Indiana Code section 23-1-36-2, which should be sufficient to remedy any breach of a statutory duty in situations such as these.[139]

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131. *Galligan*, 741 N.E.2d at 1225.
132. *Id.* at 1226-27.
133. *Id.* at 1226.
134. *Id.* at 1227.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1228 (Sullivan, J., concurring).
139. *Id.*

B. CSAS and DRS Applicability: Young v. General Acceptance Corp.[140]

The plaintiffs in *Young* brought their action under the CSAS and the DRS.[141] General Acceptance Corp. ("GAC") was a publicly traded corporation, with thirty percent of its outstanding stock publicly held.[142] The rest of the stock was held by the two founding members, Malvin and Russell Algood, and six other Algood family members.[143] In April 1997, GAC and the Algoods entered into a Stockholders' Agreement and Securities Purchase Agreement with Conseco and Capital American Life Insurance Company.[144] The primary purpose of the two agreements was to provide a financing arrangement, and as long as there were debentures outstanding, Conseco would be guaranteed two positions on the GAC board of directors.[145]

This plan was carried out in July 1997. In September 1997 and March 1998, GAC entered into additional financing agreements with Conseco.[146] Sometime after March 1998, Conseco presented a merger proposal to GAC's board, proposing a merger between GAC and a wholly-owned subsidiary of Conseco, CIHC.[147] Shareholders, other than Conseco, would be bought out for thirty cents per share.[148] The common shareholders filed for a preliminary injunction, which was denied, and also filed actions under the CSAS and DRS.[149] The merger was consummated and plaintiffs continued with this suit.[150]

The trial court granted defendant's summary judgment motion on plaintiffs' claims based on breach of fiduciary duty, finding them barred by the DRS.[151] The trial court also granted defendant's motion to dismiss plaintiffs' claims based on the CSAS.[152] The court of appeals affirmed the trial court on all grounds.[153]

The first issue dealt with was the CSAS claim. After reviewing the purposes behind the statute, the court of appeals discussed its applicability. Through a reading of the official comments, and *CTS Corp.*, the court of appeals held that the CSAS was meant to apply in hostile takeover situations.[154] The court found that the transactions between GAC and Conseco were not hostile.[155]

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140. 738 N.E.2d 1079 (Ind. Ct. App. 2000).
141. *Id.* at 1082.
142. *Id.* at 1083.
143. *Id.*
144. *Id.*
145. *Id.* at 1083-84. CALI was a wholly-owned subsidiary of Conseco. *Id.*
146. *Id.*
147. *Id.* at 1084.
148. *Id.* The stock had been trading at $3.25 per share on April 10, 1997. *Id.* at 1083.
149. *Id.* at 1084.
150. *Id.*
151. *Id.* at 1085.
152. *Id.*
153. *Id.* at 1083.
154. *Id.* at 1087.
155. *Id.* at 1088.

Alternatively, the court found that even assuming hostility, there was no fundamental change in GAC's shareholder make-up.[156] The common shareholders had always been a minority in the corporation, whether the majority shareholders were the Algoods or Conseco.[157] In addition, the court reasoned that the acquisition of shares by Conseco did not harm the common shareholders, because the common shareholders were always at a disadvantage in the decision making process of GAC, as the Algoods had been majority shareholders until the 1997 and 1998 transactions.[158]

Interestingly, the court of appeals did not look to the language of the statute to support its holding that the CSAS did not apply. The CSAS provides several exceptions to the applicability of the statute in section 23-1-42-2. Arguably, several of the exceptions could apply to the Conseco-GAC securities purchase agreement, depending on a reading of the agreement and the statute.[159]

The second issue the court of appeals reviewed was the trial court's grant of summary judgment in favor of defendant on plaintiffs' breach of fiduciary duty claims. The trial court found that all ten of plaintiff's contentions were barred by the DRS.[160] Summary judgment was also granted on the basis that plaintiffs' claims were derivative and their direct actions against GAC could not proceed.[161]

Plaintiffs alleged that the DRS should not apply to them for three reasons: the violation of the CSAS voided the merger; the merger was void because of fraudulent statements in the proxy statement; and application of the DRS violated public policy considerations.[162] The court of appeals upheld the application of the DRS to bar plaintiffs' breach of fiduciary duty claims, notwithstanding plaintiffs' three reasons to the contrary.[163] Since the CSAS was addressed in part one of the opinion and was found to have not been violated, the court did not further discuss it in part two.[164] As to fraudulent statements in the proxy statement, the court held that even assuming the statements were fraudulent (as the court could find no support for plaintiffs' contentions that the statements were, in fact, fraudulent or misleading), fraud did not necessarily void a merger, but provided an additional matter to litigate within the DRS proceedings.[165]

Lastly, the court discussed plaintiffs' public policy argument as a basis for the decision not to apply the DRS in plaintiffs' situation.[166] Plaintiffs argued that the actions of GAC and Conseco were so "heinous" that by applying the DRS,

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156. *Id.*

157. *Id.*

158. *Id.*

159. The securities purchase agreement was apparently not made part of the record. *Id.* at 1083.

160. *Id.* at 1089-93.

161. *Id.* at 1089.

162. *Id.* at 1090.

163. *Id.* at 1091-93.

164. *Id.* at 1091.

165. *Id.* at 1091-92.

166. *Id.* at 1092-93.

the court would be sanctioning such heinous behavior.[167] In dismissing this argument, the court provided a lengthy discussion of the public policy behind the statute, the discussion of which did not really reach plaintiffs' contention.[168]

The court correctly acknowledged that the corporation, as the party that must initiate an appraisal proceeding under the statute, was also the party most interested in not paying dissenters anything for their shares.[169] Although this works as a disincentive to hold up the corporation's responsibilities under the statute, the court pointed out that the penalty for not complying with the appraisal proceedings was for the corporation to pay the amount the dissenters demand.[170]

This was all very interesting, but the court seemed to have missed the point of plaintiffs' argument, which was that the statute should not apply at all, and their claims of breach of fiduciary duty by GAC should not be barred. The appraisal portion of the DRS that the court spent time talking about did not answer plaintiffs' argument because the plaintiffs were shareholders in a publicly traded corporation.[171] The right of appraisal is available only for shareholders in a closed corporation, because the ability to withdraw from a close corporation is more difficult to do than in a public company.[172]

In addition, the Indiana General Assembly amended the statute to extend coverage of the sole remedy of dissenting and demanding payment to shareholders of a publicly traded corporation. The official comments to section 23-1-44-8(c) state that the publicly traded company's shareholders were added because the public market was an available outlet for their shares. Therefore, plaintiffs had no right to a direct action at all, only a derivative one, a conclusion that the court finally reached and properly affirmed the trial court's dismissal of plaintiffs' claims.[173]

III. PIERCING THE CORPORATE VEIL

One of the basic premises of business law is that by forming a corporation, it has limited liability for actions taken in furtherance of the corporation's business. The concept of limited liability in the corporate entity has been a part of the United States for over a century.[174] Even if there is only one shareholder, that one person will generally be immune from liability that the corporation may incur during its normal course of business. In Indiana, this rule is codified in the

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167. *Id.* at 1092.

168. *Id.* at 1092-93.

169. *See id.* at 1092.

170. *Id.*; *see* IND. CODE § 23-1-44-19(a) (1998).

171. Unless there is another, undisclosed reason that dissenters' rights would be available to plaintiffs.

172. IND. CODE § 23-1-44-8(b) (1998); Am. Union Ins. v. Meridian Ins. Group, 137 F. Supp. 2d 1096, 1101 (S.D. Ind. 2001).

173. *Young*, 738 N.E.2d at 1093.

174. William J. Rands, *Domination of a Subsidiary by a Parent*, 32 IND. L. REV. 421, 423 (1999).

IBCL.[175] This rule also holds true when a corporation is a wholly-owned subsidiary of another corporation.

The IBCL, unlike the Revised Model Business Code upon which it was based, limits liability of a corporation's directors to situations where directors have willfully or recklessly breached their duties to their corporation.[176] And, officers and employees are subject to common law agency and contract doctrines and do not have a separate standard of conduct to which to conform.[177]

However, there are situations where the corporate entity is used wrongfully as a shield by parent corporations or shareholders against prosecutions from third parties or even its own shareholders. In these situations, courts will pierce the corporate veil and hold the individual shareholder or corporation liable for actions taken by them in furtherance of the corporation's business.[178] Indiana courts, unlike other jurisdictions that generally apply a two or three factor "alter ego test,"[179] apply an eight factor test[180] which was articulated by the Indiana Supreme Court in *Aronson v. Price*.[181] These factors focus on whether "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice."[182]

Since September 2000, one supreme court case and two court of appeals cases dealt with piercing the corporate veil ("PCV"). Although the supreme court case, *Commissioner v. RLG, Inc.*,[183] is not really a PCV case because it handles individual liability under environmental statutory law, it is still relevant to corporate law. The two court of appeals cases, *Smith v. McLeod Distributing,*

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175. IND. CODE § 23-1-26-2(d) (1998).

176. *Id.* § 23-1-36-2.

177. *Id.* at official cmt.

178. For a more in-depth analysis of this issue, see Rands, *supra* note 174.

179. *See* Cynthia Nance, *Affiliated Corporation Liability Under the WARN Act*, 52 RUTGERS L. REV. 495, 507 (2000).

180. The eight factors are:

> (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.

Aronson v. Price, 644 N.E.2d 864, 867 (Ind. 1994). These eight factors are a combination of the two-factor and three-factor tests used in other jurisdictions. *See* Nance, *supra* note 179, at 507 (noting that the two-factor test focusing on "unity of ownership and interest" and fraud or inequity would be a fallout of holding the corporations as separate entities; the three-factor test consists of (1) exercise of excessive control; (2) inequitable or wrongful conduct; and (3) causation).

181. 644 N.E.2d 864, 867 (Ind. 1994).

182. *Id.*

183. 755 N.E.2d 556 (Ind. 2001).

Inc.,[184] and *Apollo Plaza Ltd. v. Antietam Corp.*,[185] are more run-of-the-mill PCV cases.

A. Responsible Corporate Officer Doctrine v. Veil-Piercing: Commissioner v. RLG, Inc.

RLG, Inc. was a corporation in the business of operating a landfill in Wabash, Indiana.[186] Lawrence Roseman was RLG's sole shareholder, director, president, secretary, and treasurer.[187] In 1993, the Indiana Department of Environmental Management ("IDEM") brought suit against both RLG and Roseman for violations at the landfill.[188] RLG negotiated agreements whereby RLG would remedy the wrong done at the landfill, and in return IDEM would drop the lawsuit.[189] Remedial steps were not taken and in 1994, IDEM reinitiated its proceedings. RLG failed to answer the complaint so the court entered a default judgment against RLG for three million dollars.[190] RLG was insolvent at this point.[191] In 1999, Roseman was found to not be personally liable for RLG's debt to IDEM by the trial court, and the court of appeals affirmed this judgment.[192]

The supreme court granted transfer,[193] and Justice Boehm wrote for the unanimous court, holding that Roseman was indeed personally liable for RLG's default judgment award under the doctrine of responsible corporate officer.[194] This doctrine, which is substantively different from the piercing the corporate veil doctrine, has the same effect as veil-piercing in that an individual shareholder is held liable for the actions of the corporation.[195]

The responsible corporate officer doctrine arose out of a 1943 U.S. Supreme Court case and the Court's interpretation of a section of the Federal Food, Drug and Cosmetic Act.[196] The doctrine was upheld and expanded upon by another U.S. Supreme Court case in 1975.[197] The thrust of the responsible corporate officer doctrine was to hold a corporate officer liable, if that officer directed the actions of the corporation, and those actions constituted a public welfare

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184. 744 N.E.2d 459 (Ind. Ct. App. 2000).
185. 751 N.E.2d 336 (Ind. Ct. App. 2001).
186. *RLG*, 755 N.E.2d at 558.
187. *Id.* at 561.
188. *Id.* at 558.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 558-59.
193. Commissioner v. RLG, Inc., 753 N.E.2d 5 (Ind. 2001).
194. *RLG*, 755 N.E.2d at 561-62.
195. *Id.* at 558.
196. *Id.* (citing United States v. Dotterweich, 320 U.S. 277 (1943)).
197. *Id.* (citing United States v. Park, 421 U.S. 658 (1975)).

offense.[198] The *RLG* court adopted this doctrine, as well as the three factors forming the standard to find a corporate officer responsible for the corporation's actions.[199] The court found Roseman liable, in both his capacities as corporate officer and in an individual capacity under the Indiana environmental management laws, finding that Roseman acted in a direct capacity to violate the landfill laws.[200]

RLG mainly deals with a type of corporate liability where public welfare offenses are at issue, whereas PCV cases are not "dependent on the nature of the liability."[201] Therefore, this case will probably not have major consequences for corporations who are not in lines of business similar to RLG. The court draws a distinction between public welfare offense cases where a corporate officer would be held individually responsible and PCV cases, noting that the responsible corporate officer doctrine was more expansive in holding the corporate officer liable.[202] If this were not the case, it would be rare that an officer could be held liable for public welfare offenses, where, as here, there was no wrongful use of the corporate entity.[203]

B. Two Corporations in One: Smith v. McLeod Distributing, Inc.[204]

McLeod Distributing was a corporation in the business of wholesale distribution of carpets and other floor coverings.[205] Michael Smith was the president of Colonial Industrial and Colonial Mat Corporations.[206] Colonial Industrial was incorporated in 1981, and Colonial Mat was incorporated in 1987.[207] Colonial Mat and McLeod began doing business a few months after Colonial Mat was incorporated. In order to obtain a line of credit for Colonial Mat with McLeod, Smith signed a personal guarantee that he would be liable for any debts Colonial Mat would incur.[208]

In 1989, Smith sent McLeod a letter indicating that it would be doing its carpeting business under a different name, Colonial Carpets.[209] McLeod changed Colonial Mat's account name to Colonial Carpets in its internal invoice system, but the original account opened by Smith under the Colonial Mat name was never closed by either Smith or McLeod.[210] Business between the two companies

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198. *Id.* at 560-61.
199. *Id.* at 561.
200. *Id.* at 559-60.
201. *Id.* at 563.
202. *Id.*
203. *Id.*
204. 744 N.E.2d 459 (Ind. Ct. App. 2000).
205. *Id.* at 461.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

remained smooth until 1990, when McLeod stopped deliveries to Colonial Carpets because several invoices sent to Colonial Carpets had not been paid, the total amount coming to over $6000.[211] After several demands for payment went unanswered, McLeod filed a lawsuit against Colonial Mat and Smith in September 1990.[212] In November 1990, Colonial Mat was administratively dissolved by the Secretary of State because Colonial Mat had failed to file an annual report.[213]

The case between McLeod and Smith remained pending in the trial court for ten years, and, finally, McLeod was awarded a judgment for the debt, plus interest of eighteen percent before the judgment and eight percent for after the judgment.[214] Smith and Colonial Mat appealed to the court of appeals on two issues: that Colonial Mat was not the corporation to which McLeod's invoices were addressed and therefore not liable for the judgment, and that Smith himself should not be held personally liable for Colonial Mat's debt because the guarantee agreement was invalid.[215]

As to the first issue, the court of appeals affirmed the long-held principle that piercing the corporate veil is a "fact-sensitive inquiry."[216] As such, the reviewing court should give great deference to the trial court's determination to hold one corporation liable for the debt of a related corporation.[217] Here, the court of appeals took into account several factors, other than the ones listed in *Aronson* by the Indiana Supreme Court,[218] as the court of appeals stated, "[w]e do not believe the eight *Aronson* factors were intended to be exclusive . . . ."[219] The court of appeals distinguished *Aronson* from *McLeod* because in *Aronson*, the court was asked to hold a shareholder liable for the debts of a corporation, whereas in *McLeod*, the court here was being asked to hold a corporation accountable for another corporation's debts.[220]

The additional factors considered by the court of appeals were (1) whether similar names were used by the two corporations; (2) whether the two corporations had similar management personnel (i.e., officers, directors and employees); (3) whether the two corporations were pursuing similar lines of business; and (4) whether the internal office structure and premises were identical (i.e., office phone numbers, business cards, etc.).[221] The court of appeals then applied these additional factors, finding that although McLeod (who as plaintiff had the burden to prove the *Aronson* factors) had not produced much

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211. *Id.*
212. *Id.*
213. *Id.* at 462.
214. *Id.*
215. *Id.*
216. *Id.* (quoting Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1232 (Ind. 1994)).
217. *Id.*
218. *See supra* note 180.
219. *McLeod*, 744 N.E.2d at 463.
220. *Id.* at 464.
221. *Id.* at 463.

evidence, there was sufficient evidence in the record to find that holding Colonial Mat liable for the debts owed to McLeod was equitable.[222] Most notable to the court of appeals was that the Colonial corporations (Colonial Mat and Colonial Industrial) were run from the same office, had the same office manager as the sole employee of both corporations, and had comingled financial accounts.[223]

The second issue on appeal concerned the validity of Smith's personal guarantee to McLeod and dealt with the protocol needed to create an enforceable continuing guarantee agreement in Indiana.[224] This issue is beyond the scope of this Article, as it is better discussed as a contracts issue.

C. "Outside Reverse Piercing": Apollo Plaza Ltd. v. Antietam Corp.[225]

This was not the first time the parties to this dispute had been before the court of appeals. On their first occasion, the court, in a memorandum opinion, affirmed the judgment of the trial court in the litigation matter between Antietam and Alex Shiriaev.[226] In the present matter, the court was called upon to analyze whether Apollo, a corporation wholly owned by Shiriaev, should be pierced to have Antietam's judgment satisfied.[227]

Although not necessarily relevant to the issue of PCV, the background litigation provides an amusing story. Antietam Corporation was a construction business and had borrowed money from Alex Shiriaev, giving as collateral a security interest in a Bobcat that the corporation owned.[228] The Bobcat was ostensibly "stolen" from Antietam in October 1994 and Shiriaev locked Antietam out of its offices and demanded Antietam assign the insurance proceeds from the stolen Bobcat to him.[229] Antietam filed suit against Shiriaev, alleging conversion, and Shiriaev countered with a negligence action with respect to the lost Bobcat.[230] Surprisingly, once the Bobcat was found at the residence of Shiriaev's brother by a private detective, Shiriaev dropped his claims regarding the Bobcat. However, Antietam proceeded to trial with its claims against Shiriaev and was awarded over $130,000, plus legal fees.[231]

Antietam attempted to enforce this judgment and obtain payment by freezing a bank account titled, "Alex Shiriaev d/b/a Apollo Plaza Limited."[232] The trial

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222. *Id.* at 464.

223. *Id.*

224. *Id.* at 465-66.

225. 751 N.E.2d 336 (Ind. Ct. App. 2001).

226. Shiriaev v. Antietam Corp., 733 N.E.2d 542 (Ind. Ct. App. 2000), *trans. denied.*

227. *Apollo Plaza*, 751 N.E.2d at 337.

228. Actually, the corporation was formed a few months after the loan and security interest were given, but after the corporation was formed, all assets of the former sole proprietorship were conveyed to the corporation. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* The court of appeals affirmed this award. *Shiriaev*, 733 N.E.2d at 542.

232. *Apollo Plaza*, 751 N.E.2d at 338.

court conducted a hearing to decide whether Apollo's corporate veil should be pierced to satisfy Antietam's judgment against Shiriaev. The trial court found for Antietam.[233] Apollo appealed, arguing that the trial court conducted an "outside reverse piercing" of Apollo's corporate identity because Apollo never had any dealings with Antietam.[234] In addition, Apollo claimed that Shiriaev was just a minority shareholder.[235] Shiriaev also unsuccessfully tried to convince the judge that he was not involved in Apollo, having recently resigned as president of Apollo in favor of his brother.[236] The court of appeals affirmed the trial court's findings, holding that "a contrary decision by the trial court would have allowed Shiriaev to further a fraud by using Apollo as the means to hide assets in order to avoid paying the legal judgment rendered against him."[237]

IV. INDIANA SECURITIES ACT—FRAUDULENT OR DECEITFUL ACTS

Most securities cases are litigated under the numerous federal securities statutes dealing with fraudulent sales and the like. It is surprising, therefore, to see a case like *Carroll v. J.J.B. Hilliard*,[238] brought solely under Indiana securities law. One of the claims in *Carroll* was premised on Indiana Code section 23-2-1-12,[239] which is almost identical in wording to the Securities Exchange and Commission Rule 10b-5.[240] However, Gertrude Carroll filed a lawsuit against R. Dale Cassiday and his brokerage firm, Hilliard Lyons, under the Indiana Securities Act and not premised on any violations of federal

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233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 339.

237. *Id.* at 340.

238. 738 N.E.2d 1069 (Ind. Ct. App. 2000).

239. Section 12 reads,

> It is unlawful for any person in connection with the offer, sale or purchase of any security, either directly or indirectly, (1) to employ any device, scheme or artifice to defraud, or (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of circumstances under which they are made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

IND. CODE § 23-2-1-12 (2001).

240. It is identical except for the federal jurisdiction requirement in Rule 10b-5: "use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange...." 15 U.S.C. § 78j (1998). As will be discussed below, although Cassiday's presentation to Gertrude was done in person, and therefore the "instrumentality of interstate commerce" requirement might have been in question, there were subsequent phone calls made between Cassiday and Gertrude concerning the investments that might have qualified. But as Gertrude brought her lawsuit solely under Indiana law, this is mere speculation.

securities law.[241]

Carroll was a seventy-five year old woman with the goal of increasing her annual income by changing her stock portfolio.[242] She contacted Cassiday in July 1986 on the recommendation of a friend. Cassiday met with Carroll at her home in August 1986 and discussed her options. After the meeting, Cassiday prepared a detailed memo which summarized his conversations with Carroll.[243] Cassiday met with Carroll on another occasion in late August 1986, and at this meeting, Cassiday proposed a plan to Carroll to meet her goal of increased income.[244] Cassiday suggested she invest in two mutual funds which had histories of having fairly high yearly yields, and each month Carroll would make withdrawals.[245] The overall plan was for the mutual funds to yield a yearly percentage higher than that of Carroll's yearly withdrawals.[246]

Carroll decided to take Cassiday's suggestion.[247] In order to raise the money needed to invest in these mutual funds, Cassiday suggested Carroll sell eight of the stocks in her existing portfolio.[248] Cassiday warned Carroll that she would incur tax liability from the sale of her stocks, but also warned her that he was not an expert on taxes.[249] Carroll gave her authorization to sell on September 2, 1986. All went according to plan. Cassiday sold the eight stocks, which netted Carroll approximately $127,000.[250] Carroll purchased a new portfolio with the two mutual funds suggested by Cassiday and seven common stocks. However, in December 1986, one of Carroll's sons told Carroll that she should no longer conduct business with Cassiday.[251] Carroll terminated Cassiday's and his brokerage firm's services. It was not until Carroll discovered that her tax liability was going to be fifty percent higher than Cassiday had estimated did Carroll look into filing a lawsuit for fraud and violation of securities laws.[252] Carroll filed her lawsuit on February 2, 1990, and died on February 9, 1998. Her sons proceeded with the lawsuit as representatives of Carroll's estate.[253]

Carroll sold her shares in one of the mutual funds that Cassiday suggested in 1991 and, ironically, had Carroll retained these shares, the total return of the fund would have covered Carroll's withdrawals and her investment would have appreciated in value.[254] Carroll retained her shares in the second mutual fund

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241. *Carroll*, 738 N.E.2d at 1071.
242. *Id.* at 1071-72.
243. *Id.* at 1072.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 1073.
248. *Id.* at 1072.
249. *Id.*
250. *Id.* at 1073.
251. *Id.*
252. *Id.*
253. *Id.* at 1072-73.
254. *Id.* at 1074.

suggested by Cassiday and that fund, as well, had a total return that covered Carroll's withdrawals in addition to appreciating in value.[255] Both mutual funds were appropriate vehicles for Carroll to meet her stated goals of increasing her monthly cash flow.[256]

In her lawsuit, Carroll alleged that Cassiday committed fraud and violated the Securities Act with respect to his presentation to her and the sale and purchases of her portfolios.[257] The trial court made several specific findings of fact, and concluded that neither Cassiday nor his brokerage firm were liable to Carroll (now her estate) under any theory alleged.[258] The court of appeals, through Judge Friedlander, affirmed.[259]

The first issue was Carroll's allegations that Cassiday's recommendations and presentation at their second meeting violated 710 Indiana Administrative Code section 1-17-1(d), which defines the unethical practices of broker-dealers or investment advisors in Indiana Code section 23-2-11(a)(6). More specifically, Carroll contended that Cassiday did not sufficiently inform her that the withdrawals from the two mutual funds might consist of principal and interest.[260] This failure, Carroll further contended, violates 710 Indiana Administrative Code section 1-17-1(d), which prohibits an investment advisor from presenting an investment scheme, the return on which would consist of "income and distributions from capital, or any other source."[261] The court found that Cassiday did not violate this section, and furthermore, that this section did not even apply to Cassiday's presentation.[262]

The court pointed to Cassiday's testimony at trial where he described his conversation with Carroll at their second meeting.[263] Cassiday testified that he warned Carroll that should the mutual funds not give a yearly return higher than ten percent, Carroll's withdrawals might include both interest and principal, thereby dwindling the amount left in the fund.[264] However, had Cassiday not given this warning, subsection (d) did not reach Cassiday's actions.[265] The court limits subsection (d) to "Ponzi schemes."[266] As the court described, "the primary purpose of subsection (d) is to prohibit brokers from representing a return on an investment that includes an infusion of capital supplied by later investors in the program in question."[267] And if subsection (d) were to apply to the type of

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255. *Id.* at 1075.
256. *Id.* at 1074-75.
257. *Id.* at 1073.
258. *Id.* at 1075.
259. *Id.* at 1071.
260. *Id.* at 1076.
261. IND. ADMIN. CODE tit. 710 r. 1-17-1(d) (1998).
262. *Carroll*, 738 N.E.2d at 1076.
263. *Id.*
264. *Id.* at 1073.
265. *Id.* at 1076 (referencing IND. ADMIN. CODE tit. 70 r. 1-17-1(d) (1998)).
266. *Id.* at 1077.
267. *Id.* Or in other words, subsection (d) prohibited a pyramid scheme, where one investor

investment vehicle Cassiday suggested, the court added, subsection (e) of the same section would be nullified.[268] Subsection (e) clearly states that an investment advisor must point out to the client that distributions from investments might reduce the value of that investment, the very thing Cassiday had warned Carroll about.[269]

Carroll's second contention was that Cassiday violated section 23-2-1-12 because he failed to inform her of the time period needed to recover her transactional costs.[270] Due to Carroll's age, the time to recover her costs would have been approximately her remaining life expectancy at age seventy-five.[271] Under this section, Cassiday was required to inform Carroll of all material facts about the investment portfolio that he was suggesting so as to not make his presentation misleading.[272] Had Cassiday omitted a fact which would have been "relevant to the investment decision," then Cassiday would have violated the Securities Act.[273]

However, the court found that no material fact was omitted and upheld the trial court's determination by looking at two pieces of evidence.[274] First, the court pointed to Carroll's undisputed goal of meeting with Cassiday and obtaining his advice—to increase her monthly income.[275] Second, the court noted the expert testimony given by a president of a local broker dealer. This expert witness testified that had he been presented with Carroll's stated goal of increase in income, and not investment growth, he would not have made a time-to-recover-costs analysis.[276] The witness also pointed out the fact that there was no regulation, either state or federal, or any industry custom to give such an analysis at all, regardless of the client's stated purpose for her investments.[277] Based on these two factors, the court declined to include within the duties of the broker-dealer a requirement to provide such an analysis.[278]

Lastly, Carroll contended that Cassiday violated subsection (x) of 710 Indiana Administrative Code section 1-17-1 by not conducting a reasonable inquiry into her tax liability.[279] Carroll alleged that Cassiday indicated to her that her tax liability would be approximately $10,000, when she actually had to pay

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brings in two investors, and then those two investors bring in three investors. The creator of the scheme uses the later investors' money to pay "dividends" or distributions on the investment, but there has not really been any investing or growth.

268. *Id.* at 1076.
269. *Id.* at 1076-77.
270. *Id.* at 1077.
271. *Id.*
272. *Id.* (referencing IND. CODE § 23-2-1-12(2) (1998)).
273. *Id.* at 1077.
274. *Id.* at 1077-78.
275. *Id.* at 1077.
276. *Id.*
277. *Id.* at 1078.
278. *Id.*
279. *Id.* (citing IND. ADMIN. CODE tit. 710 r. 1-14-1(x) (1998)).

approximately $17,000.[280] The court held that subsection (x) "requires brokers to conduct a reasonable inquiry into a customer's individual circumstances."[281] The court looked to the testimony of Cassiday and Carroll's accountant, Jim Winemiller. Cassiday testified that during his presentation, he informed Carroll that she would incur tax liability on her sales of stock, but that he was not an accountant and could not be sure whether $10,000 was an accurate figure. Carroll authorized the sale nonetheless.[282] On the day after the sale, she called Winemiller to inform him of the sales and to ask about her tax liability. The court found it to be telling that Carroll continued to sell additional stocks even after her phone call with Winemiller.[283] In short, the court determined that Cassiday conducted a reasonable investigation into Carroll's situation in order to consider all relevant information before suggesting an investment vehicle to Carroll.[284]

Looking at the opinion as a whole, it seems that the court was taken with the fact that Carroll was not an elderly woman who had fallen prey to Cassiday. Throughout the opinion, the court mentions the fact that prior to her dealings with Cassiday, Carroll had contact with other brokers.[285] She had managed her portfolio and although she was not on the level of a stockbroker, Carroll had more than an average understanding of her investments.[286] It was just an unfortunate happenstance that she felt she had been defrauded, although one wonders how she could have felt that way, looking at the returns her investments eventually did yield. But perhaps this is the benefit of hindsight.

CONCLUSION

One survey article cannot come close to discussing all the changes to Indiana corporate law in the past year. This Article has attempted to discuss case law in four different areas of corporate law in an attempt to provide a partial analysis of any shifts in the landscape. The two major shifts this year have been in the area of shareholder suits in closed corporations and suits brought under the DRS. Both *G & N Aircraft, Inc.* and *Galligan* outline remedies to which shareholders can be entitled, which was a slight expansion of the statutory remedies provided for by the IBCL. However, as the majority of the cases discussed in this article were court of appeals cases, the supreme court might decide to grant transfer and change the landscape even further.

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280. *Id.*
281. *Id.* at 1078.
282. *Id.* at 1079.
283. *Id.*
284. *Id.* at 1077.
285. *Id.* at 1072, 1075.
286. *Id.* at 1071-72.

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

The survey period, October 1, 2000 to September 30, 2001, produced legislation and decisional law that both broke new ground and clarified existing confusion. The pages that follow provide a summary of some of the most significant developments in the realm of Indiana criminal law and procedure.

I. LEGISLATIVE ENACTMENTS

The General Assembly enacted a number of bills to define new crimes, toughen penalties for existing crimes, and correct or clarify issues and problems raised in recent court opinions.

A. New or Enhanced Offenses

The General Assembly both created new offenses and amended existing statutes to criminalize previously legal conduct or enhance the penalty for previously illegal conduct.

The new offense of "identity deception," a Class D felony, was created. It occurs when a person "knowingly or intentionally obtains, possesses, transfers, or uses the identifying information[1] of another person: (1) without the other person's consent; and (2) with intent to harm or defraud the other person . . . ."[2] The statute includes a number of exceptions, which apply to underage persons who use false identification to obtain alcohol, cigarettes, pornography, etc.[3] In addition, the legislature created the offense of "Interference with a Firefighter," which can vary from a Class C infraction to a Class D felony, for various forms of conduct that hamper firefighters' ability to perform their duties.[4]

The intimidation statute was amended to criminalize communication of a threat with intent "of causing: (A) a dwelling, a building, or another structure; or (B) a vehicle; to be evacuated . . . ."[5] The base offense is a Class A misdemeanor but becomes a Class D felony if "the threat is communicated using property, including electronic equipment or systems, of a school corporation or other governmental entity."[6] Finally, the battery statute was amended to create a Class A felony offense when the conduct "results in the death of a person less

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1. "Identifying information" is defined broadly to include, among other things, Social Security numbers, fingerprints, and telecommunication identifying information. IND. CODE § 35-43-5-1(h) (Supp. 2001).

2. *Id.* § 35-43-5-3.5(a).

3. *Id.* § 35-43-5-3.5(b).

4. *Id.* § 35-44-4.

5. *Id.* § 35-45-2-1(a)(3).

6. *Id.* § 35-45-2-1(b)(1)(D).

than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age."[7]

B. DNA Evidence

The General Assembly also enacted two bills relating to DNA evidence that highlight such evidence may be a double-edged sword in criminal prosecutions. The first bill allows DNA evidence to be used to lengthen the statute of limitations for certain crimes, while the second bill allows many convicted felons greater access to DNA testing and analysis to exonerate themselves. First, the general statute of limitations of five years for Class B and C felonies was extended in prosecutions

> that would otherwise be barred . . . [to] one (1) year after the earlier of the date on which the state: (1) first discovers the identity of the offender with DNA (deoxyribonucleic acid) evidence; or (2) could have discovered the identity of the offender with DNA (deoxyribonucleic acid) evidence by the exercise of due diligence.[8]

The statute also extended the one-year period to July 1, 2002, for Class B and C felonies "in which the state first discovered the identity of the offender with DNA (deoxyribonucleic acid) evidence after the time otherwise allowed for prosecution and before July 1, 2001 . . . ."[9] The second bill established detailed procedures by which persons convicted of murder or a Class A, B, or C felony can petition the sentencing court to require DNA testing in certain circumstances.[10]

C. Crimes of Violence

In *Ellis v. State*,[11] the defendant was convicted of several crimes, including murder and two counts of attempted murder. He was sentenced to the maximum term of sixty-five years for murder and fifty years for each attempted murder, to be served consecutively. On appeal to the supreme court, he argued that the sentences for his attempted murder conviction could not exceed fifty-five years, the presumptive sentence for the next higher level felony. Indiana Code section 35-50-1-2(c) limits the total of the consecutive terms of imprisonment to which a defendant may be sentenced "for felony convictions arising out of an episode of criminal conduct," except for "crimes of violence," to "the presumptive term for a felony which is one (1) class felony higher than the most serious of the felonies for which the person has been convicted."[12] The court noted that the statute clearly listed "crimes of violence," including murder and aggravated

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7. *Id.* § 35-42-2-1(a)(5).
8. *Id.* § 35-41-4-2(b).
9. *Id.*
10. *Id.* § 35-38-7.
11. 736 N.E.2d 731 (Ind. 2000).
12. *Id.* at 736 (citing IND. CODE § 35-50-1-2(c) (1998)).

battery, but did not include attempted murder.[13] Although aggravated battery is a lesser included offense of attempted murder, the court found this to be of no consequence in the face of the clear statutory language.[14] In addition, the rule of lenity requires that the limitation be interpreted to apply "for consecutive sentences between and among those crimes that are not crimes of violence."[15] Accordingly, the court concluded that Ellis could be sentenced for his two attempted murder convictions to no more than fifty-five years, the presumptive sentence for murder.[16]

Justice Boehm, joined by Justice Dickson in dissent, reasoned that the majority's construction was not consistent with legislative intent, would produce "upside-down or absurd results," and seemed to violate the proportionality requirement of article I, section 16 of the Indiana Constitution.[17] Although a minority view in 2000, Justice Boehm's conclusion became the law in 2001 when the General Assembly made its intent clear and amended Indiana Code section 35-50-1-2(a) to include "attempted murder" as a "crime of violence."[18]

D. Sentencing

During the survey period the General Assembly either corrected or clarified a few statutory provisions regarding sentencing. First, the definition of "minimum sentence" was updated for the offenses of murder (to forty-five years) and Class D felonies (to one-half year) to be consistent with the statutory scheme and the presumptive sentences that had been altered years earlier.[19] Second, the misdemeanor probation statute was amended to clarify that probation for any class of misdemeanor may be one year but "the combined term of imprisonment and probation for a misdemeanor may not exceed one (1) year."[20] Finally, the habitual offender statute was amended, presumably in response to *Ross v. State*[21] and its progeny, as discussed in last year's survey.[22] Subsection (b) of the statute now prohibits the State from seeking to have a defendant sentenced as a habitual offender if "(1) the offense is a misdemeanor that is enhanced to a felony in the

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13. *Id.*

14. *Id.* at 737.

15. *Id.*

16. *Id.*

17. *Id.* at 741 (Boehm, J., dissenting).

18. IND. CODE § 35-50-1-2(a)(2) (Supp. 2001). The statute was also amended to include "sexual misconduct with a minor as a Class A felony (IC 35-42-4-9)" within the definition. *Id.* § 35-50-1-2(a)(11).

19. *Id.* § 35-50-2-1(c).

20. *Id.* § 35-50-3-1(b).

21. 729 N.E.2d 113 (Ind. 2000).

22. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 662-63 (2001). As explained in text, however, the amendment was the opposite of what prosecutors had vowed to seek, as certain offenses and categories of offenses have been removed from eligibility for enhancement under the general habitual offender statute.

same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction; or (2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17."[23] However,

> The requirements in subsection (b) do not apply to a prior unrelated felony conviction that is used to support a sentence as a habitual offender. A prior unrelated felony conviction may be used under this section even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense [except several offenses under Title 9].[24]

II. DECISIONAL LAW DEVELOPMENTS

A. Search and Seizure

Scores of opinions during the survey period addressed issues relating to searches and seizures under the Fourth Amendment, article I, section 11 of the Indiana Constitution, and allied Indiana statutory law. This survey is limited to a few significant cases that either broke new ground or raised issues likely to lead to future litigation.

1. Vehicle Searches and Seizures.—In *Lockett v. State*,[25] the supreme court granted transfer to consider whether the Fourth Amendment[26] prohibits police from routinely inquiring about the presence of weapons during a traffic stop. After reviewing U.S. Supreme Court decisions on the general issues of the length and method of vehicle stops and concerns for officer safety, the court reiterated well-settled Fourth Amendment jurisprudence that allows police to order a motorist stopped for a traffic violation to exit his or her vehicle.[27] The court reasoned that "asking whether the stopped motorist has any weapons is far less intrusive and presents insignificant delay."[28] Although the federal circuits are split on whether the Fourth Amendment permits police to ask questions unrelated to the purpose of the traffic stop, the court found no Fourth Amendment violation in *Lockett*.[29] The court noted that the officer smelled alcohol as he approached the vehicle and asked the occupant if he had any weapons during his investigation of that offense: "The question was justified by police safety concerns, and it did not materially extend the duration of the stop or the nature

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23. IND. CODE § 35-50-2-8(b) (Supp. 2001).

24. *Id.* § 35-50-2-8(e).

25. 747 N.E.2d 539 (Ind. 2001).

26. The defendant waived any claim under the state constitution by failing to cite any authority or independent analysis supporting a standard different from the Fourth Amendment. *Id.* at 541.

27. *Id.* at 542.

28. *Id.*

29. *Id.* at 543.

of the intrusion."[30]

In a separate opinion in which he concurred in the result, Justice Rucker disagreed with the majority's adoption of a bright-line rule that allows officers routinely to ask drivers stopped for traffic violations if they are carrying a weapon.[31] Instead, he would require the officer to have "an objectively reasonable safety concern before making such an inquiry."[32] Quoting from a Tenth Circuit case, he agreed that such routine questioning "could conceivably result in a full-blown search of the passenger compartment of the detainee's vehicle, no matter how minor the traffic infraction that initially prompted the stop, and even if the officer had no reasonable safety concerns when he posed the question."[33]

Although the majority's approach is likely the one more consistent with the Fourth Amendment jurisprudence of the current membership of the U.S. Supreme Court, Justice Rucker's concurring opinion is arguably the better-reasoned approach. It is certainly true that a simple weapon inquiry does not materially extend the duration of a traffic stop or the nature of the intrusion; however, the notion that such an inquiry is "justified by police safety concerns" is not so clear. First, Supreme Court authority allows citizens the right to refuse to answer an officer's questions during a *Terry* stop.[34] Moreover, as Justice Rucker aptly pointed out, "the notion that asking a driver if he has any weapons somehow advances officer safety is suspect. In reality a driver could in fact be heavily armed and simply say no to an officer's inquiry."[35] Indeed, the holding in *Lockett* will likely do little to further the protection of police officers because the average citizen will likely answer truthfully in the negative and those who are illegally carrying guns may well be less forthright than Mr. Lockett, who admitted to having a handgun in his car.[36] Finally, by finding the state constitutional claim waived, the supreme court has left open the possibility of later striking down the practice under the reasonableness test of article I, section 11.[37] However, in light of the court's heavy reliance on officer safety concerns, a state constitutional challenge would appear unlikely to succeed.

Just a month before deciding *Lockett*, the supreme court took a slightly different approach in *Wilson v. State*,[38] in which it addressed the propriety of police officers performing pat-down searches of motorists pulled over for traffic stops before asking them to enter their police vehicle. In *Wilson*, the defendant was pulled over for speeding, and the officer suspected that he was intoxicated.

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30. *Id.*

31. *Id.* at 544 (Rucker, J., concurring).

32. *Id.*

33. *Id.* (quoting United States v. Holt, 229 F.3d 931, 940 (10th Cir. 2000)).

34. *Id.* at 545 n.4 (Rucker, J., concurring) (citing Florida v. Royer, 460 U.S. 491, 497-98 (1983)).

35. *Id.*

36. *See id.* at 541.

37. *See generally* Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995).

38. 745 N.E.2d 789 (Ind. 2001).

Noting that neither the field sobriety tests nor the portable breath test required the motorist to enter the police vehicle and that the officer did not suspect that the motorist was armed, the court concluded that the search violated the Fourth Amendment because "the pat-down search was not supported by a particularized reasonable suspicion that Wilson was armed, and because there was no reasonably necessary basis for placing Wilson in the squad car . . . ."[39]

Wilson is not cited or discussed in *Lockett*, but the two cases can be easily reconciled. In *Lockett* the defendant was not subjected to a *Terry* frisk and therefore, in the majority's view, particularized suspicion was not required as it was in *Wilson*.[40] Although a pat-down *search* is certainly more intrusive than the mere asking of a question, which is not a search or seizure standing alone, the majority opinion in *Lockett* does not base its holding on this distinction but rather on the more dubious issue of officer safety concerns. It would appear that those concerns were equal in both cases of suspected drunk driving. Moreover, the holding in *Lockett* would appear to suggest that officers cannot routinely ask motorists if they have any drugs in their vehicles because such an inquiry would not be justified on officer safety concerns.

Finally, the supreme court and court of appeals addressed two other issues of first impression in the vehicle context. In *Mitchell v. State*,[41] the supreme court held that the Indiana Constitution does not prohibit pretextual stops. The court reasoned that the potential for unreasonable police conduct is most likely to arise "not in the routine handling of the observed traffic violation, but in the ensuing police investigatory conduct that may be excessive and unrelated to the traffic law violation."[42] Although it is certainly true that most constitutional violations will occur during subsequent investigatory conduct, the court did not acknowledge that pretextual stops allow officers to observe potentially incriminating items in plain view and, in light of *Lockett*, ask questions that could lead motorists to incriminate themselves.[43] It would seem that the larger problem with pretextual stops, if they were deemed unconstitutional, would be the means by which a defendant could establish that a valid traffic stop was a pretext for another purpose.[44] Short of an officer's admission that a stop was pretextual, the proof would seemingly come in the form of a pattern of pretextual stops by a certain officer, which might be difficult to establish depending on the specificity

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39. *Id.* at 793.

40. *Compare Lockett*, 747 N.E.2d at 541-43, *with Wilson*, 745 N.E.2d at 793-94. Nevertheless, Justice Rucker's concurring opinion in *Lockett* draws upon *Terry* and other U.S. Supreme Court authority to support his view that a weapon's inquiry should be based on some sort of particularized (and reasonable) suspicion. *See Lockett*, 747 N.E.2d at 544-45 (Rucker, J., concurring).

41. 745 N.E.2d 775, 789 (Ind. 2001).

42. *Id.* at 787.

43. *See generally* Wesley MacNeil Oliver, *With an Evil Eye and Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1416-22 (2000) (reviewing the federal constitutional implications of pretextual stops).

44. *See generally id.* at 1422-25.

of police records and the demographics of an officer's given patrol area.

In *Wilkinson v. State*,[45] the court of appeals held that a random computer check of license plate numbers was not a search under the Indiana Constitution. In that case, the officer ran a random check on the license plate of a truck parked in a convenience store lot and learned that the truck was registered to Wilkinson, who was a habitual traffic violator. Because the driver of the truck matched the physical description provided from the license plate check, the officer stopped the truck as it departed the store lot, and upon confirming the identity of the driver, arrested him.[46] Relying on cases from other states, the court noted that "[a] search connotes prying into hidden places to observe items which are concealed; there is no search attendant to viewing an object which is open to view."[47] Although it affirmed the conviction that resulted from the random license plate check, the court nevertheless noted that it shared the defendant's concern that this procedure "could lead to pretextual stops" and in an unusual display of candor "question[ed] whether random checks of license plates in convenience store parking lots represent[ed] an efficient use of the limited resources of law enforcement agencies."[48]

2. Execution of Warrants and Stale Probable Cause.—In *Huffines v. State*,[49] the court of appeals addressed the interplay of Indiana Code section 35-33-5-7(b), which requires search warrants to be executed within ten days of issuance, with the Fourth Amendment and article I, section 11 of the Indiana Constitution. Adopting the "totality of the circumstances" approach used by federal courts, the court held that the State must demonstrate that the warrant was supported by probable cause at the time of execution.[50] In that case, eight days lapsed between the time the warrant, which sought cocaine evidence and was based on a single observation and purchase, was issued and executed. Additionally, no criminal activity was suspected or corroborated during this time. Therefore, the court held that the search was improper under the Fourth Amendment.[51] After considering Indiana cases of both pre-issuance and pre-execution delay, the court reached the same conclusion under the state constitution, seemingly applying the same requirement that probable cause continue to exist at the time of execution.[52] The court did not specifically address the usual line of inquiry under article I, section 11, i.e., whether the "police behavior was reasonable."[53]

Six months after *Huffines*, the court of appeals in *Caudle v. State*[54] addressed another claim of stale probable cause in a case in which the warrant was executed

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45. 743 N.E.2d 1267 (Ind. Ct. App. 2001).
46. *Id.* at 1269.
47. *Id.* at 1270 (quoting People v. Bland, 390 N.E.2d 65, 67 (Ill. App. Ct. 1979)).
48. *Id.*
49. 739 N.E.2d 1093 (Ind. Ct. App. 2000).
50. *Id.* at 1097.
51. *Id.* at 1097-98.
52. *See id.* at 1098-99.
53. *See generally* Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995).
54. 749 N.E.2d 616 (Ind. Ct. App. 2001).

seven hours before the ten-day statutory period would have expired. Assuming arguendo that the probable cause was stale, the court nevertheless affirmed the trial court's admission of evidence based on the good faith exception to the exclusionary rule.[55] Noting that the search preceded the issuance of the *Huffines* opinion by eighteen months, the court found that the detective was acting in good faith in delaying the execution of the warrant for nine days while he waited to catch the defendant at home.[56] The court acknowledged, however, that after *Huffines* "a question exists about whether or not a police officer can in good faith execute a warrant under circumstances similar to those in *Huffines* because that decision should cause an officer to no longer 'reasonably believe' that such a warrant would be valid" under the constitutional provisions.[57]

On rehearing Caudle argued that federal circuit courts have held that the good faith exception does not apply to errors in the execution of warrants and should not have been applied in his case.[58] Nevertheless, the court of appeals affirmed its earlier opinion, reiterating that the detective was permitted to rely on the ten-day statutory period when executing the warrant "unless the statute was 'clearly unconstitutional.'"[59] Although many circuit courts have held that probable cause must exist at the time of execution of a warrant regardless of a statutory outer limit, some state courts have held that the execution of a warrant within the statutory period is per se timely.[60] Because execution within the statutory period was not "clearly unconstitutional" in the absence of any Indiana authority and conflicting authority from other jurisdictions, the court affirmed the application of the good faith exception and the admission of the evidence seized during execution of the warrant.[61]

In light of *Huffines* and *Caudle*, one would expect that, in the future, law enforcement officers will execute warrants as soon as feasible and well before the ten-day statutory period. If they do not, however, and probable cause has dissipated in the interim, it would appear unlikely that an Indiana court will allow them to seek refuge in the good faith exception. The law is now both clear and simple: the statute sets an outer limit of ten days, but the relevant inquiry is whether probable cause continues to exist at the time of issuance.

B. Confessions

The Indiana Supreme Court addressed several challenges to the admissibility of confessions during the survey period; most of these were resolved in the State's favor in the trial court and affirmed on appeal by application of existing precedent and a highly deferential standard of review. Two opinions stand

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55. *Id.* at 620-22.
56. *Id.* at 622.
57. *Id.*
58. Caudle v. State, 754 N.E.2d 33, 34 (Ind. Ct. App. 2001).
59. *Id.* at 35 (quoting Illinois v. Krull, 480 U.S. 340, 349-50 (1987)).
60. *Id.*
61. *Id.* at 36.

out—one for its holding that significantly clarified the law relating to juvenile confessions and the other for its refusal to modify or reconsider existing law in an area where reconsideration seems appropriate.

In *Stewart v. State*,[62] the supreme court addressed the admissibility of a juvenile's murder confession in the face of a waiver signed by his biological non-custodial father. According to statute, the constitutional rights of an unemancipated person under eighteen may be waived only "by the child's custodial parent, guardian, custodian, or guardian ad litem" if four conditions are met.[63] In relatively short order, the court held that Stewart's biological father was not a custodial parent.

The undisputed facts were that Stewart was born out of wedlock, no court order of custody was admitted at trial or otherwise claimed to exist, and Stewart did not live with his biological father.[64] The court considered a number of statutory provisions that did not provide "a direct answer" to the issue, but which all pointed to the conclusion that the term "custodial parent" applied to "either a person who has been adjudicated by a court to have legal custody of the child, or a parent who actually resides with the unemancipated juvenile."[65] Finally, the court rejected the State's contention, that because of the biological relationship, Stewart's father satisfied the statutory mandate that requires the juvenile's "parent" join in the waiver: "This contention plainly reads 'custodial' out of the statute. It seems clear that the statute contemplates consultation and waiver by a person in the close relationship afforded by either formal custody or actual residence in addition to a biological or adoptive relationship."[66] Because Stewart's father met neither test, the court held that admission of his confession was error.[67] Moreover, because the State's remaining evidence did not directly place Stewart at the scene of the murder, the court was unwilling to find that the error was harmless, that is, that it did not affect Stewart's substantial rights.[68]

Stewart represents an important victory for juvenile defendants by ensuring the voluntariness of their confessions through a requirement that the parent with whom they consult is one that is likely to make the consultation a meaningful one. *Henry v. State*,[69] on the other hand, rejects a requirement that could bolster the reliability of adult confessions.

In *Henry*, the defendant confessed to the murder of an antique storeowner after being told by police that his fingerprints were found at the scene of the

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62. 754 N.E.2d 492 (Ind. 2001).

63. *Id.* at 494 (citing IND. CODE § 31-32-5-1(2) (1998)).

64. *Id.* at 495.

65. *Id.* at 495 & n.2.

66. *Id.* at 496.

67. *Id.*

68. *Id.*; *see also* Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995) (discussing harmless error under Indiana law, which differs from federal constitutional harmless error as explained in *Chapman v. California*, 386 U.S. 18 (1967)).

69. 738 N.E.2d 663 (Ind. 2000).

crime and a person in the store had identified him as the killer.[70] However, "[n]either statement was true";[71] the police had lied to Henry.

Henry challenged the admissibility of his confession in the trial court, but his motion to suppress was denied.[72] On appeal he acknowledged the supreme court precedent of *Light v. State*,[73] which had upheld the admissibility of a confession following a four-hour interrogation punctuated by police conduct involving cursing, lying, and smacking the defendant on the arm,[74] but urged the court to revisit the issue and "announce a bright line rule which would render inadmissible[] a confession obtained solely by deceitful police activity."[75]

The court declined the invitation to revisit *Light*, preferring instead to continue to review each confession based on the "totality of the circumstances" test.[76] Although the court stated that it "continue[s] to disapprove of deceptive police interrogation tactics," it nevertheless upheld the admissibility of Henry's confession because he was a man of average intelligence; the interrogation was brief (one hour); he was Mirandized three times; the police made no threats or promises to him; and he did not ask for an attorney.[77] "Balanced against the officer's obvious deception, these facts tip the scales in favor of the conclusion that Henry's statement was not involuntary."[78]

The court's reasoning is less than compelling. Had Henry asked for an attorney or not been Mirandized, his confession would have been inadmissible as a matter of well-settled federal constitutional law.[79] What remains to support admissibility is Henry's "average intelligence" and the absence of any "threats or promises." If police deception truly "weighs heavily against the voluntariness of the defendant's confession,"[80] it is difficult to understand why police telling two separate lies during a short confession should be disregarded to support admissibility. As the court reiterated in *Henry*, the State must prove beyond a reasonable doubt that a confession was voluntarily given.[81] This differs from the federal constitutional requirement of voluntariness merely by a preponderance of the evidence.[82] If the supreme court is serious about this heightened burden, one might suspect it to find the scales tipped in favor of inadmissibility in some, if not most, cases of police deception. Although the court relied on its opinion in *Light*, *Light* does not discuss the "beyond a reasonable doubt" standard and

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70. *Id.* at 664.
71. *Id.*
72. *Id.*
73. 547 N.E.2d 1073 (Ind. 1989).
74. *Henry*, 738 N.E.2d at 664 (citing *Light*, 547 N.E.2d at 1079).
75. *Id.* (citing Brief of Appellant at 9) (omission in original).
76. *Id.*
77. *Id.* at 665.
78. *Id.*
79. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981).
80. *Henry*, 738 N.E.2d at 665 (citing Heavrin v. State, 675 N.E.2d 1075, 1080 (Ind. 1996)).
81. *Id.* at 664.
82. *Id.* at 664 n.1; *see also* Schumm, *supra* note 22, at 648-51.

was decided well before the court had adopted a consistent view on this heightened requirement.

C. Waiver of the Right to Counsel

In *Poynter v. State*,[83] the supreme court granted transfer to address inconsistencies in its prior opinions and those of the court of appeals regarding the requirements for a valid waiver of the right to counsel before a defendant elects self-representation. The defendant asserted, and the State agreed, that the record must reflect that such a waiver is knowing, intelligent, and voluntary.[84] However, the court in *Poynter* set out to define just what that standard means in practice.

The court began by acknowledging the importance of the right at issue: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[85] To protect this important right, the U.S. Supreme Court has long held that a defendant who asserts his right to self-representation must be told of the "dangers and disadvantages of self-representation,"[86] although there are no prescribed "talking points" that the trial court must include in its advisement.[87] The trial court must make a "considered determination" that the waiver is voluntary, knowing, and intelligent, a determination that is made "with the awareness that the law indulges every reasonable presumption against a waiver of this fundamental right."[88]

At issue in *Poynter* was whether a defendant's conduct in failing to hire counsel, despite warnings and advisements by the trial court, constituted a valid waiver. The court acknowledged that two of its prior cases had reached opposite results, although the latter case did not overrule or even discuss the former one.[89] Seizing the opportunity to clarify this "inconsistent precedent," the court considered the general standards from Supreme Court cases but then seemingly adopted[90] the more specific approach of the Seventh Circuit, which considers four factors: "(1) the extent of the court's inquiry into the defendant's decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the

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83. 749 N.E.2d 1122 (Ind. 2001).

84. *Id.* at 1123.

85. *Id.* at 1125-26 (quoting United States v. Cronic, 466 U.S. 648, 654 (1984)).

86. *Id.* at 1126 (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

87. *Id.*

88. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

89. *Id.* (citing Houston v. State, 553 N.E.2d 117 (Ind. 1990); Fitzgerald v. State, 257 N.E.2d 305 (Ind. 1970)).

90. The court never explicitly adopts the test but states that it "find[s] this approach helpful in analyzing waiver of the Sixth Amendment right to counsel under the facts and circumstances of waiver by conduct cases." *Id.* at 1128.

defendant's decision to proceed *pro se*."[91]

Applying the factors to Poynter's case, the court noted that the trial court had advised him of his trial rights and the procedural outcome of failing to secure counsel but did not advise him of the "dangers and disadvantages of self-representation," a factor that "weighs heavily against finding a knowing and intelligent waiver."[92] The defendant's background and unknown experience with the criminal justice system pointed in neither direction, and his conduct of choosing to go to work instead of hiring an attorney did not result in delays or appear to manipulate the process.[93] Weighing these factors, the court concluded that the record did not support a finding of a knowing and intelligent waiver.[94]

Poynter is significant not only because it clarified contradictory precedent but it also took a seemingly clear path that should be relatively easy to apply in future cases. Indeed, less than three months after *Poynter* was decided, the court of appeals applied it in *Slayton v. State*,[95] a case in which the trial court "made mention of counsel" at three pretrial hearings but never advised the defendant of disadvantages of self-representation. Because the other factors did not weigh in either direction, the court in *Slayton* similarly concluded that there had not been a knowing and intelligent waiver of counsel.[96]

In both *Poynter* and *Slayton*, the trial court failed to advise the defendant of the dangers and disadvantages of self-representation, which proved to be the dispositive factor in finding the purported waivers of counsel invalid. Therefore, the lingering question for future cases is what form that advisement should take and whether a cursory advisement will be assailable on appeal.

D. Statute of Limitations

In *Wallace v. State*,[97] the supreme court granted transfer to address the applicability of the statute of limitations in a child molestation case. The defendant's two daughters testified that he had molested them during a sixteen-month period beginning in the summer of 1988.[98] However, for reasons undisclosed in the record, the State did not file charges—four C felony counts of child molestation—until March of 1998.[99] Although at the time of the offense the applicable statute of limitations for a Class C felony was five years, Wallace did not object to the charges on the basis that the statute of limitations had expired, but rather proceeded to trial by jury and was convicted of three of the

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91. *Id.* at 1127-28 (quoting United States v. Hoskins, 243 F.3d 407, 410 (7th Cir. 2001)).
92. *Id.* at 1128.
93. *Id.*
94. *Id.*
95. 755 N.E.2d 232, 236 (Ind. Ct. App. 2001).
96. *Id.* at 237.
97. 753 N.E.2d 568 (Ind. 2001).
98. *Id.* at 569.
99. *Id.*

counts.[100]

Repeating well-established legal precepts, Justice Rucker, writing for the three-justice majority, observed that the applicable statute of limitations is "that which was in effect at the time the prosecution was initiated,"[101] and "the statute to be applied when arriving at a proper criminal penalty is that which was in effect at the time the crime was committed."[102] Because a "statute of limitations might be construed narrowly and in a light most favorable to the accused," the court rejected the State's argument that the extended statute of limitations from another subsection of the statute should apply to Wallace's crimes.[103] Reiterating the primary purpose of the statute of limitation as ensuring against the "inevitable prejudice and injustice to a defendant that a delay in prosecution creates,"[104] the supreme court reversed Wallace's convictions because the State had not filed charges within the applicable five-year limitation period.[105]

Justice Boehm, joined by Justice Dickson in dissent, did not disagree with anything in the majority's opinion, save its conclusion. Relying on Indiana Trial Rule 8(c) and federal precedent, the dissent opined that defendants should be required to raise a statute of limitations defense in a pretrial motion or forfeit the claim on appeal.[106] It reasoned that this view was also consistent with policy considerations: "A criminal defendant, like a civil defendant, should not be able to sit on a statute of limitations defense until long after trial is completed. The result is a waste of taxpayer funds and court time."[107] Moreover, because many other "more fundamental" constitutional and statutory rights may be waived by criminal defendants either affirmatively or by failure to assert them, the dissent found no reason to accord more favorable treatment to a statute of limitations defense.[108]

Although the dissent's view is arguably the better reasoned one, it correctly recognized its practical limitations. "In this case, affirming the conviction obviously sets the defendant up for an ineffective assistance of counsel claim, and the end result of my view may be the same as the majority's."[109] Moreover, it is questionable whether the dissent's approach would actually save judicial resources. It is unlikely that competent defense counsel, who realizes that raising a statute of limitations defense in a pretrial motion would lead to immediate dismissal of the charges, would nevertheless choose to proceed to trial to attempt to secure an acquittal with the knowledge that, should this effort fail, a guilty verdict would be set aside on appeal when the statute of limitations issue was

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 570.
104. *Id.* (quoting Kifer v. State, 740 N.E.2d 586, 587 (Ind. Ct. App. 2000)).
105. *Id.* at 570-71.
106. *Id.* at 571-72 (Boehm, J., dissenting).
107. *Id.* at 572 (Boehm, J., dissenting).
108. *Id.*
109. *Id.*

raised. A defendant charged with any crime—most of all child molesting as in *Wallace*—would certainly prefer the quickest resolution of the case; lingering charges and an eventual trial are likely to take a serious toll on the defendant and his reputation in the community. It is hard to imagine a scenario where failing to raise the defense would be tactical, but rather, it would seem to be a classic example of deficient performance, which, when coupled with the obvious prejudice, constitutes an archetypical case of ineffective assistance.

E. Voluntary Intoxication

In 1996, the U.S. Supreme Court held in *Montana v. Egelhoff*[110] that, consistent with the Due Process Clause, a state could prohibit a defendant from offering evidence of voluntary intoxication to negate the requisite mens rea of a criminal offense. Although the Indiana Supreme Court had struck down a legislative attempt to limit the use of voluntary intoxication as a defense in *Terry v. State*[111] in 1984, after *Egelhoff* the court noted that the *Terry* doctrine was "no longer good law"[112] insofar as it was grounded in the federal constitutional guarantee of due process. In response to *Egelhoff*, the General Assembly in 1997 enacted Indiana Code section 35-41-2-5, which provides: "Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense . . . ."[113]

In *Sanchez v. State*,[114] the Indiana Supreme Court granted transfer to address whether the 1997 statute violated various provisions of the Indiana Constitution. In addressing the claimed violation of article I, section 12 (the due course of law provision), the court reiterated that the first sentence of that provision applies only in the civil context,[115] but held that the second sentence, although not identical with the federal right to due process, included the "basic concepts of fairness that are frequently identified with 'due process' in the federal constitution."[116] However, recognizing that the General Assembly "redefined the mens rea element in Indiana to render irrelevant" evidence of voluntary intoxication, the court found no due course of law violation.[117] The court also held that the statute did not violate article I, section 13 because that provision "does not require that any specific claim of a defense be recognized by Indiana law," and "[i]f the substantive law renders the evidence irrelevant . . . there is no

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110. 518 U.S. 37 (1996).

111. 465 N.E.2d 1085 (Ind. 1984).

112. State v. Van Cleave, 674 N.E.2d 1293, 1302 n.15 (Ind. 1996).

113. IND. CODE § 35-41-2-5 (1998).

114. 749 N.E.2d 509 (Ind. 2001).

115. *Id.* at 514.

116. *Id.* at 515. The second sentence provides: "Justice shall be administered freely and without purchase; completely, and without denial; speedily, and without delay." IND. CONST. art. 1, § 12.

117. *Sanchez*, 749 N.E.2d at 515.

right under Article I, Section 13 to present it."[118] In addition, the court found no violation of the jury's right to determine the law and facts under article I, section 19 because "[t]he voluntary intoxication instruction does not unconstitutionally compel the jury to make a finding of intent."[119] Finally, the court found no violation of the equal privileges and immunities clause of article I, section 23 because the statute makes distinctions that are rationally related to legislative goals and a permissible balancing of the competing interests involved.[120]

Justice Sullivan, joined by Justice Rucker, concurred in the result, reasoning that the "principles underlying *Terry* remain sufficiently viable that we must *adhere* to this well-settled precedent," but nevertheless reached the same result because the erroneous refusal of the intoxication instruction was harmless beyond a reasonable doubt.[121]

F. Jury Instructions on Flight from Crime Scene

Sorting though a decade of wishy-washy pronouncements on flight instructions, the supreme court in *Dill v. State*[122] finally resolved long-standing confusion by holding that it is per se erroneous for trial courts to give an instruction that "flight and other actions calculated to hide a crime, though not proof of guilt, are evidence of consciousness of guilt and are circumstances which may be considered by [the jury] along with other evidence."[123]

The confusion began with *Bellmore v. State*,[124] in which the supreme court found that the standard flight instruction did not violate the defendant's right to due process. However, the court recommended against future use of the instruction without articulating the reasons for its recommendation or otherwise providing guidance for alternative instructions.[125] Post-*Bellmore* cases found no error in the giving of flight instructions but repeated the cautionary warning against such instructions.[126] "Since *Bellmore*, we have repeatedly noted this recommendation [for disuse] but have not actually applied it to find error."[127]

In *Dill*, the defendant objected to the instruction on several grounds, including the recommendation from *Bellmore* and its progeny, as well as its engendering of confusion and focusing of excessive attention on evidence of flight.[128] "Implementing [its] directive in *Bellmore*," the *Dill* court found that the trial court erred in giving the flight instruction because it was confusing; it

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118. *Id.* at 520-21.
119. *Id.* at 521.
120. *Id.* at 522.
121. *Id.* at 527 (Sullivan, J., concurring) (emphasis in original).
122. 741 N.E.2d 1230 (Ind. 2001).
123. *Id.* at 1231.
124. 602 N.E.2d 111 (Ind. 1992).
125. *Dill*, 741 N.E.2d at 1231.
126. *Id.* at 1231-32.
127. *Id.* at 1231.
128. *Id.* at 1232.

unnecessarily emphasized certain evidence; and it had great potential to mislead the jury.[129] Nevertheless, because the conviction was clearly sustained by the evidence and the jury could not properly have found otherwise, the court found the erroneous instruction to be harmless error.[130]

Chief Justice Shepard dissented, reasoning that putting flight instructions on "the extremely short list" of completely prohibited instructions runs counter to Indiana's trial practice, which includes "scores of instructions about particular aspects of various causes of action, given regularly by trial judges and regularly approved on appeal."[131] In addition, the dissent made clear that the majority's new rule was a minority view, citing numerous state supreme court and federal circuit court opinions that have upheld properly worded flight instructions supported by sufficient evidence.[132] Chief Justice Shepard concluded his dissent by noting that in the future he "would not be surprised to see defense counsel now begin to tender their own instructions on flight as a way to safeguard their clients against the possibility that the prosecutor might oversell the matter during final argument."[133]

The majority's opinion in *Dill*, although likely foreclosing the State from tendering or trial courts from giving flight instructions in the future, seems to give the green light to the State admitting evidence of flight at trial and arguing its significance in closing argument.[134] Without an instruction that places this evidence in some perspective, it seems entirely possible that a jury of laypersons untrained in the law will attach greater weight to the defendant's flight than it would if a proper, carefully-worded instruction had been given. Thus, as the dissent noted, defense counsel likely will want to craft an instruction that limits the significance of flight evidence in those cases where the trial court deems it admissible. Trial judges would seemingly be willing to give such an instruction when supported by the evidence, in part, because if tendered by the defendant, it would foreclose any claim of error on appeal. Refusing such an instruction, however, could present a viable issue for appeal, especially if the defendant could show that the prosecutor was overzealous in arguing the significance of flight in closing argument or that the evidence of flight admitted at trial was not relevant—issues that are likely to be fleshed out in future cases, the sorting out of which "should prove challenging."[135]

G. Limits on Retrials After Hung Juries

In *Sivels v. State*,[136] the supreme court addressed limitations on retrials after

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129. *Id.*
130. *Id.* at 1233.
131. *Id.* at 1234 (Shepard, C.J., dissenting).
132. *Id.* at 1234-35 (Shepard, C.J., dissenting).
133. *Id.* at 1235 (Shepard, C.J., dissenting).
134. *See id.* at 1232.
135. *Id.* at 1235 (Shepard, C.J., dissenting).
136. 741 N.E.2d 1197 (Ind. 2001).

repeated hung juries. In that case, the defendant was charged with murder, felony murder, and robbery. He was acquitted of the felony murder and robbery charges in his first trial, but the jury could not reach a unanimous verdict on the murder charge.[137] A second trial also resulted in a mistrial due to a hung jury, and the defendant then filed a motion to dismiss, alleging that the multiple prosecutions violated his right to due process.[138] The trial court agreed with Sivels that it had the inherent authority to dismiss the case on this basis, but denied the motion on its merits.[139]

On direct appeal the supreme court agreed that the trial court possessed this authority to dismiss the case. After reviewing cases from several other jurisdictions, the court noted that "[w]hile different jurisdictions refer to different sources of the trial court's authority to dismiss after multiple mistrials, the majority of the appellate courts rely on precepts of fundamental fairness and notions of fair play and substantial justice."[140]

The supreme court proceeded to adopt guidelines for future use when trial courts are confronted with such a challenge. These include:

> (1) the seriousness and circumstances of the charged offense; (2) the extent of harm resulting from the offense; (3) the evidence of guilt and its admissibility at trial; (4) the likelihood of new or additional evidence at trial or retrial; (5) the defendant's history, character, and condition; (6) the length of any pretrial incarceration or any incarceration for related or similar offenses; (7) the purpose and effect of imposing a sentence authorized by the offense; (8) the impact of dismissal on public confidence in the judicial system or on the safety and welfare of the community in the event the defendant is guilty; (9) the existence of any misconduct by law enforcement personnel in the investigation, arrest, or prosecution of the defendant; (10) the existence of any prejudice to defendant as the result of passage of time; (11) the attitude of the complainant or victim with respect to dismissal of the case; and (12) any other relevant fact indicating that judgment of conviction would serve no useful purpose.[141]

In addition, the court should consider "the number of prior mistrials and the outcome of the juries' deliberations, as known" and "the trial court's own evaluation of the relative strength of each party's case . . . ."[142] The court declined to adopt a categorical rule limiting retrials to a specific number but instead held that trial courts are in the best position to weigh the relevant factors and that abuse of discretion is the appropriate standard for appellate review of the

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137. *Id.* at 1198-99. Several months earlier, a jury was selected and dismissed (before being sworn) because of a continuance. *Id.* at 1198.

138. *Id.*

139. *Id.* at 1202.

140. *Id.* at 1201.

141. *Id.* (quoting State v. Sauve, 666 A.2d 1164, 1168 (Vt. 1995) (citations omitted)).

142. *Id.* (quoting State v. Abbati, 493 A.2d 513, 521-22 (N.J. 1985)).

trial court's decision.[143]

In reviewing the relevant factors in *Sivels*, the supreme court noted that the charged offense involved the beating and shooting of an unarmed man during the commission of a robbery.[144] The first two trials ended in juries that voted 7-5 and 9-3 in favor of acquittal, and the defendant had been incarcerated without bond for two and a half years.[145] Perhaps most significantly, however, the trial court had indicated its own evaluation of the strength of the State's case and its belief that Sivels had committed the charged offense.[146] Based on these considerations, the supreme court found no abuse of discretion in allowing the State to retry its case for a third time.[147]

Although a fifteen-factor test may appear at first blush to be inadvisable, the test adopted by the supreme court in *Sivels* will likely be easily applied in future cases because, although it includes all the relevant considerations, generally only few will apply in a given case. More importantly, the supreme court properly gives the authority to dismiss charges to the trial court, whose time and docket is at the mercy of the State's repeated retrials in such cases. If repeated retrials result in hung juries and the trial court finds the State's evidence less than compelling, one would expect most trial judges to exercise the authority to dismiss a case. However, if the trial court declines to do so, the issue is now one that can be easily and meaningfully raised and reviewed on appeal.

H. Appellate Review of Sentences

This year's survey concludes, as did last year's, with a review of the morass of appellate sentence review. As predicted, the constitutional amendment that eliminated the mandatory jurisdiction of the supreme court in all but death penalty and life without parole cases[148] has, when combined with the court of appeals' new membership, led to the court of appeals' newfound role as the primary arbiter of appellate sentence review.[149]

Although several court of appeals opinions during the survey period reduced sentences as being manifestly unreasonable, the supreme court's newly-discretionary docket not surprisingly led to only two sentence reductions: one on direct appeal and one on transfer. On direct appeal, the supreme court, in *Winn v. State*,[150] took the unusual action of finding that a thirty-year habitual offender enhancement added to a fifty-year sentence for rape was manifestly

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143. *Id.* at 1202.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. The constitutional amendment limited mandatory jurisdiction to death penalty cases but the supreme court retained jurisdiction for life without parole cases by rule. *See* IND. APPELLATE RULE 4(A)(1)(a).

149. Schumm, *supra* note 22, at 669.

150. 748 N.E.2d 352, 360 (Ind. 2001).

unreasonable. *Winn* is unusual because the defendant did not challenge, and the court did not evaluate, the *aggregate sentence* as being manifestly unreasonable, as in most previous cases addressing such claims. Rather, the defendant requested that the habitual offender enhancement be attached to a crime other than the rape count and that his enhancement therefore be reduced from thirty to ten years because the two prior felony convictions that formed the basis for the enhancement were non-violent Class D felonies.[151] In addressing this claim, the court summarized the relevant factors of the nature of the offense (the defendant confronted the victim with a deadly weapon, struck her, threatened her, and required her to submit to more than one sexual act) and the character of the offender (an Operation Desert Storm veteran with a non-violent criminal history of misdemeanor or D felony offenses).[152] In light of these considerations and the trial court's imposition of the maximum sentences for rape and criminal deviate conduct, the court concluded that imposing the maximum habitual enhancement by attaching it to the rape conviction was manifestly unreasonable and therefore ordered that the enhancement be reduced to ten years and attached to one of the class B or C felony counts, thereby reducing the aggregate sentence by twenty years.[153]

In *Walker v. State*,[154] the supreme court granted transfer to address a claim that the "aggregate sentence" of eighty years for two counts of A felony child molesting was manifestly unreasonable.[155] The court began by tracing the origins of article VII, section 4 of the Indiana Constitution, noting that the framers "had in mind the sort of sentencing revision conducted by the Court of Criminal Appeals in England."[156] In England, the appellate court

> shall, if they think a different sentence should have been passed, quash the sentence passed at trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, and in any other case shall dismiss the appeal.[157]

Despite having its origins in such a liberal standard, Indiana appellate courts have exercised their responsibility "with great restraint, recognizing the special expertise of the trial bench in making sentencing decisions."[158] Although the deferential standard of review "means that trial court decisions will be affirmed on the great majority of occasions," the appellate courts should revise sentences when they are "manifestly unreasonable in light of the nature of the offense and

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151. *Id.*
152. *Id.* at 361.
153. *Id.*
154. 747 N.E.2d 536 (Ind. 2001).
155. *Id.* at 538.
156. *Id.* at 537-38.
157. *Id.* at 538 (quoting Criminal Appeal Act, 1907, 7 Edw. 7, ch. 23 § 4(3) (Eng.)).
158. *Id.*

the character of the offender."[159]

In applying the standard to Walker's case, the supreme court noted that although he did not have a history of criminal behavior, he had molested the same child twice without physical injury, was on probation, and had fled the jurisdiction.[160] Weighing these considerations the court found that "this is some distance from being a worst offense or the most culpable offender" and ordered Walker's two forty-year sentences to be served concurrently.[161]

Following *Walker* or other precedent, the court of appeals reduced sentences as being manifestly unreasonable in five cases during the survey period.[162] Relying heavily on *Walker*, the court of appeals in *Perry v. State*[163] held that consecutive sentences for dealing and conspiracy to deal cocaine were manifestly unreasonable because Perry's prior felony convictions were used as the aggravating circumstance to justify consecutive sentences and formed the basis of the habitual offender charge.[164] Accordingly, the case was remanded for the imposition of concurrent sentences.[165] In a similar vein, in *Simmons v. State*[166] the court ordered a reduction of the defendant's maximum fifty-year sentence for Class A felony child molesting to forty years because the defendant's "criminal history was not lengthy, did not demonstrate a tendency toward violence or a propensity to commit sexual acts, and was the only proper aggravating factor considered by the trial court . . . ."[167]

In *Love v. State*,[168] the court of appeals reduced the defendant's maximum sentence of fifty years for possession with intent to deliver cocaine to the presumptive term of thirty years. The court based its decision on the defendant's lack of a violent criminal history and his youthful age of nineteen: "In sentencing Love to fifty years' imprisonment, the trial court has effectively determined that Love is beyond rehabilitation at age nineteen."[169]

In contrast, in *Peckinpaugh v. State*[170] the court reduced a sentence for

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159. *Id.*

160. *Id.*

161. *Id.*

162. This number does not include *Mann v. State*, 742 N.E.2d 1025 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 13 (Ind. 2001), cited in *Walker* as an example of a sentence properly reduced as manifestly unreasonable. Although Judge Baker noted in his dissent that he would have reduced the sentence under the manifestly unreasonable doctrine, *id.* at 1028-29 (Baker, J., dissenting), the majority relied on procedural sentencing doctrine in remanding "to the sentencing court with instructions to impose the forty-five year sentence it deemed appropriate after identifying and balancing the aggravating and mitigating circumstances." *Id.* at 1028.

163. 751 N.E.2d 306 (Ind. Ct. App. 2001).

164. *Id.* at 311.

165. *Id.*

166. 746 N.E.2d 81 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d (Ind. 2001).

167. *Id.* at 93.

168. 741 N.E.2d 789 (Ind. Ct. App. 2001).

169. *Id.* at 795.

170. 743 N.E.2d 1238 (Ind. Ct. App. 2001).

burglary from the maximum of twenty years to the presumptive sentence of ten because of the nature of the offense. The court found the crime not to be a "particularly egregious example" of burglary and noted that no injury was attempted against the occupant and no damage was caused to the dwelling.[171] The court, however, upheld the maximum sentence of eight years for stalking because it was based on repeated harassment in the face of several warnings by law enforcement.[172] The court also affirmed the decision to order the sentences served consecutively because of the defendant's need for an extended incarceration in a penal facility.[173]

Finally, in *Biehl v. State*[174] the court of appeals broke new ground in finding a presumptive sentence to be manifestly unreasonable. *Biehl*, unlike the previously-discussed cases, presented both a mitigated nature of the offense and a sympathetic character of the offender. As to the nature of the offense, the court noted that the victims had to some extent sought out the defendant when they entered the barn where he was living, threw bricks and boards at him, and refused to leave when asked.[175] As to the character of the offender, the court noted that the defendant, who was thirty-five years old, had no criminal history and had been suffering from a longstanding and severe mental illness.[176] Weighing these considerations, the court found that the presumptive sentence of thirty years for voluntary manslaughter was manifestly unreasonable and ordered the sentence to be reduced to the minimum of twenty years.[177] Not only did the supreme court deny the State's petition for transfer in *Biehl*; it also cited the case with approval several months later in *Walker*.[178]

Although substantive sentence review in Indiana continues to challenge the appellate courts in large part because the unique nature of sentencing decisions which defy easy quantification, these opinions suggest a recognition of the important goal of consistency that has not been a constant feature in prior years. As highlighted in many of these opinions, the appellate courts seem especially concerned by consecutive sentences and appear more inclined to reduce a sentence when a defendant is given enhanced sentences for more than one offense and ordered to serve the counts consecutively, as in *Walker* and *Perry*. The *Winn* opinion also suggests that the same principle may begin to be applied to habitual offender cases; although the habitual offender enhancement is not a separate charge, it nevertheless represents the same sort of "piling on" as in consecutive sentencing cases. *Winn* also suggests somewhat of a departure from the usual considerations by looking at the predicate offenses that formed the basis of the habitual offender charge instead of the aggregate sentence.

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171. *Id.* at 1243.
172. *Id.* at 1243-44.
173. *Id.* at 1244.
174. 738 N.E.2d 337 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 3 (Ind. 2001).
175. *Id.* at 339.
176. *Id.* at 339-40.
177. *Id.* at 341.
178. *See* Walker v. State, 747 N.E.2d 536, 538 (Ind. 2001).

Beyond these limitations, the remaining cases suggest a greater appreciation and depth of review for the relevant calculus of the "nature of the offense" and "character of the offender." In *Peckinpaugh* the court considered the specifics of the burglary offense and found that it did not call for a sentence beyond the presumptive. However, analysis of "nature of the offense" represents only half of the equation, and most cases have turned in larger part on the "character of the offender." The most salient attributes, as evidenced by the cases decided during the survey period, appear to be a lack of or minimal criminal history, a defendant's youthful age, and long-standing mental illness.

Biehl is perhaps the most significant of these opinions because it represents the first successful challenge to a presumptive sentence. Previously, most successful challenges have been to sentences at or near the maximum and have led to reductions to the presumptive sentence (or above). The court of appeals' opinion in *Biehl*, and the supreme court's later approval of it, makes clear that any sentence may be successfully challenged under the manifestly unreasonable doctrine. Although many, if not most, challenges to the presumptive sentence will likely prove unfruitful, a particularly mitigated nature of the offense or sympathetic character of the offender could lead to a reduction. However, reduction to the minimum sentence as in *Biehl* would appear unlikely unless both factors are particularly strong.

In short, both the supreme court and court of appeals issued opinions that have begun to shape a landscape for consistency in substantive sentencing challenges. Many of the court of appeals' opinions relied heavily on and reconciled themselves with existing authority. Although these decisions have not taken the form of explicit sentencing principles, these recent cases represent a useful and large step in the direction of consistency in sentencing.

SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION: NATIONAL TRENDS AND DEVELOPMENTS

One immediate reaction to last year's terrorist attacks on the United States was an upsurge in religious observance and expression.[1] Issues of religious accommodation and tolerance in the workplace are therefore very much in the public eye. Ironically, it was on September 11, 2000 that the Seventh Circuit heard oral arguments in *Anderson v. U.S.F. Logistics (IMC), Inc.*,[2] the "Have a Blessed Day"[3] case.

The controversy began when a representative of U.S.F.'s largest customer, Microsoft, complained about Elizabeth Anderson's use of this phrase in business communications.[4] Anderson twice ignored her supervisor's instruction not to use the phrase in correspondence to Microsoft.[5] In a meeting called to discuss the situation, Anderson offered to refrain from using the phrase with any individuals who took offense, but her supervisor did not respond to the proposed accommodation.[6]

The next step was a written reprimand and distribution of a company policy to all Indianapolis employees instructing them to refrain from using "additional religious, personal or political statements" to communications with customers.[7] Although the policy also prohibited such communications with co-workers, Anderson was allowed to continue wishing her fellow employees blessed days.[8]

Anderson took the matter public and a local newspaper published an article that quoted a Microsoft spokesperson as saying Microsoft had no objection to the phrase.[9] Based on her reading of the article, Anderson decided she could resume using the phrase. The day after the article appeared, Anderson again used the

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1. *See* Laurie Goodstein, *As Attacks' Impact Recedes, a Return to Religion as Usual*, N.Y. TIMES, Nov. 26, 2001, at A1.
2. 274 F.3d 470 (7th Cir. 2001).
3. *Id.* at 473.
4. *Id.*
5. *See id.*
6. *Id.*
7. *Id.* at 474.
8. *Id.*
9. *Id.*

"Blessed Day" closing in a communiqué to Microsoft.[10] U.S.F. did not push the issue by imposing further discipline but did not retract the previous reprimand.[11]

For several months Anderson refrained from using the "Blessed Day" phrase. She then sent an e-mail to Microsoft with the phrase "HAVE A BLESSED DAY" in capital letters, surrounded by quotation marks. She received another reprimand.[12]

More than six months later, Anderson brought suit under Title VII of the Civil Rights Act of 1964[13] (Title VII), claiming failure to reasonably accommodate her religious practice and seeking injunctive relief.[14] Judge John Daniel Tinder of the Southern District of Indiana denied a preliminary injunction, concluding that it was unlikely Anderson would succeed on the merits.[15] Anderson filed an interlocutory appeal with the Seventh Circuit, which affirmed on December 14, 2001.[16]

Judges Cudahy, Easterbrook and Williams all agreed that because Anderson used the phrase only sporadically and had no religious commitment or requirement to use the phrase all the time, "an accommodation that allows her to use the phrase with some people but not with everyone could be a reasonable accommodation."[17] The court also noted that the employer had not sought "to denigrate" Anderson's belief.[18] In fact, U.S.F. had invited her to open a company-sponsored event by saying a prayer over the loudspeaker and allowed her to use the "Blessed Day" phrase with co-workers, display religious sayings in her work area, and listen to religious radio broadcasts at her work station.[19]

The *Anderson* decision may help employers and employees better understand religious accommodation. An employer's obligation to provide reasonable religious accommodations is measured differently than under the ADA. Employers may legally refuse, as an undue hardship, religious accommodations that would involve more than *de minimis* cost.[20]

An important point, not raised in *Anderson*, is that Title VII's requirement of reasonable religious accommodation applies to any sincerely held religious belief, not merely traditional Judeo-Christian beliefs.[21] On November 19, 2001,

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10. *Id.*

11. *Id.*

12. *See id.*

13. 42 U.S.C. § 2000e (1994).

14. *Anderson*, 274 F.3d at 474.

15. Anderson v. U.S.F. Logistics (IMC), Inc., 2001 U.S. Dist. LEXIS 2807, *45-46. (S.D. Ind. 2001).

16. *Anderson*, 274 F.3d at 470.

17. *Id.* 476.

18. *Id.*

19. *Id.* at 476-77. Note that the court did not say these accommodations were required, but it considered them as evidence of the employer's tolerance toward expressions of faith. *Id.*

20. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.").

21. *See* Bushouse v. Local Union 2209 UAW, 164 F. Supp. 2d 1066, 1072 n.14 (N.D. Ind.

the Equal Employment Opportunity Commission (EEOC) and U.S. Departments of Justice and Labor issued a joint statement reaffirming their commitment to combat workplace discrimination based on religion, ethnicity, national origin or immigration status.[22] The statement urged victims of workplace bias to promptly report incidents to allow timely investigation.[23] The statement specifically refers to acts directed toward individuals who are, or are perceived to be, Arab, Muslim, Middle Eastern, South Asian or Sikh.[24]

The EEOC has therefore put employers on renewed notice that adverse actions or harassment based on religious or national affiliation, physical or cultural traits and clothing, perception and association may violate Title VII.[25] As of December 6, the EEOC had already logged 166 formal workplace discrimination complaints specifically related to the September 11 attacks.[26]

Another tolerance-related issue on the rise is disability harassment.[27] This has become the fourth most frequent form of harassment claim (following racial, sexual, and national origin harassment), with 2,400 complaints logged annually.[28] A New Jersey man with dyslexia and other neurological impairments recently won a six-figure jury award.[29] Other cases have involved allegations of horseplay targeting a mentally retarded restaurant worker, hostility toward and ostracism of an HIV-infected woman, and taunting of a man with bipolar illness

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2001).

22. Press Release, U.S. Equal Employment Opportunity Commission, EEOC and Departments of Justice and Labor Issue Joint Statement Against Workplace Bias in Wake of September 11 Attacks, *at* http://eeoc.gov/press/11-19-01.html (last visited Nov. 19, 2001).

23. *Id.*

24. *Id.*

25. *See* U.S. Equal Employment Opportunity Commission, Employment Discrimination Based on Religion, Ethnicity, or Country of Origin, *at* http://eeoc.gov/facts/fs-relig_ethnic.html (last visited Dec. 12, 2001).

26. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Confers with Minority Groups on Combating September 11 Backlash Discrimination, *at* http://eeoc.gov/press/12-12-01.html (last visited Dec. 12, 2001).

27. *See* Reed Abelson, *Employers Increasingly Face Disability-Based Bias Cases*, N.Y. TIMES, Nov. 20, 2001, at C1. Note that the Seventh Circuit has yet to decide in favor of a plaintiff on a disability harassment claim. In each case raising such a claim, the court has therefore assumed without deciding that the claim is cognizable under the Americans with Disabilities Act (ADA). *See, e.g.*, Casper v. Gunite Corp., 2000 U.S. App. LEXIS 16241, *12 (7th Cir. 2000) (unpublished opinion); Silk v. City of Chicago, 194 F.3d 788, 803-04 (7th Cir. 1999). The Seventh Circuit has signaled its receptivity to such claims by noting that a cause of action for disability harassment appears to exist based on ADA language prohibiting discrimination in any "term, condition, or privilege of employment"—language that parallels Title VII. *Casper*, 2000 U.S. App. LEXIS 16241 at *12-13. During the survey period, the Fourth and Fifth Circuits, which are usually considered relatively conservative, recognized claims of hostile environment based on disability. *See* Marcia Coyle, *New Tool for Job Bias Suits*, NAT'L L.J., May 14, 2001 at A1.

28. Abelson, *supra* note 27.

29. *Id.*

as a "psycho" and "freak."[30]

Employees who are appropriately sensitive to issues of race and gender may not be as well educated when it comes to disabilities. These issues become more complicated when an employer is entrusted with medical information about an employee because, for example, the employee has submitted a certification in support of a request for leave under the Family and Medical Leave Act (FMLA). Employers must protect the disabled individual's privacy by strictly limiting disclosure of information regarding the disability to those with a legitimate need to know.[31]

These privacy concerns have been affected by the September 11 attacks. On October 31, 2001, the EEOC issued technical assistance to employers concerned about special needs of disabled employees in the event of an emergency evacuation.[32] According to the EEOC, when an employer knows of an employee disability, it may inquire about special emergency assistance needs. However, the EEOC cautions that employers should not assume that all disabled individuals require special help, but should rather consult the individuals who are best able to assess their own situations. The information also helps employers determine how much medical information they may request, and with whom they may share it.[33]

The remainder of this Article will review some of the survey year's most significant and interesting legal developments affecting Indiana employers and employees. It begins by looking at Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and other federal law developments. It continues with a summary of worker's compensation and other state law developments, followed by a brief update on the force and effect of arbitration agreements. It concludes by mentioning three pending cases worth monitoring.

I. TITLE VII

A. What Qualifies as an Adverse Action?

Under *McDonnell Douglas*' burden-shifting method of proof,[34] a plaintiff establishes a prima facie case of discrimination by showing she was a protected class member who performed satisfactorily but suffered some adverse employment action to which others outside the class were not subjected.[35] Similarly, a party claiming retaliation under Title VII must show that because he

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30. *Id.*

31. *See* 42 U.S.C. § 12112(d)(3)-(4) (1994).

32. U.S. Equal Employment Opportunity Commission, EEOC Provides Technical Assistance to Employers on Requesting Medical Information as Part of Emergency Evacuation Procedures, *at* http://eeoc.gov/press/10-31-01.html (last visited Oct. 31, 2001).

33. *Id.*

34. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

35. Grube v. Lau Indus., 257 F.3d 723, 728 (7th Cir. 2001).

engaged in a protected activity he suffered an adverse employment action.[36]

A key issue in several recent cases has been whether the alleged action was legally adverse (sometimes referred to as a "tangible employment action").[37] In *Stutler v. Illinois Department of Corrections*, the court provided a brief recap of some Seventh Circuit holdings on this point.[38] The court requires a "'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'" that materially alters the terms and conditions of employment.[39] Negative performance evaluations, job title changes, greater travel distance to work and/or loss of a telephone or workstation do not qualify standing alone.[40] Retaliatory harassment by a supervisor or co-workers may qualify but only if it is sufficiently severe.[41] Here, the court held that neither Stutler's lateral transfer with no loss of benefits or responsibilities nor an "unpleasant" working environment qualified as a legally adverse action.[42]

In *Molnar v. Booth*,[43] the court took a more liberal view in a case involving a junior high school principal who allegedly propositioned a teaching intern.[44] On the intern's first day on the job, the principal "ogled her and made appreciative noises," then took her into his office and suggested that he could provide permanent room space and supplies not normally available to junior teachers.[45] In ensuing weeks he did other things that Molnar perceived as advances, such as calling her to his office to discuss personal matters and inviting her out on his boat.[46] Molnar's rejection of these offers led to retraction of the art supplies and the offer of an art room, plus a negative evaluation (later retracted) that could have kept Molnar from receiving her teaching license.[47]

A jury awarded Molnar $500 in actual damages and $25,000 in punitive damages.[48] The Seventh Circuit affirmed, calling the tangible employment action issue close but concluding that confiscation of essential supplies and a negative evaluation were sufficiently adverse.[49] Although the criticism was temporary, it

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36. Stutler v. Ill. Dep't of Corr., 263 F.3d 698, 702 (7th Cir. 2001).

37. *See, e.g.*, Haugerud v. Amery Sch. Dist., 259 F.3d 678, 698 (7th Cir. 2001) (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

38. *Stutler*, 263 F.3d at 703 (citations omitted).

39. *Haugerud*, 259 F.3d at 698 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); citing Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996)).

40. *Stutler*, 763 F.3d at 703 (citing Hill v. Am. Gen. Fin., Inc., 218 F.3d 639, 645 (7th Cir. 2000); Place v. Abbott Labs., Inc., 215 F.3d 803, 810 (7th Cir. 2000)).

41. *Id.*

42. *Id.* at 702-04.

43. 229 F.3d 593 (7th Cir. 2000).

44. *Id.* at 597.

45. *Id.*

46. *Id.*

47. *Id.* at 597-98.

48. *Id.* at 599.

49. *Id.* at 600.

threatened Molnar's career for a period of time.[50] The court was concerned about allowing supervisors to punish employees and then avoid liability by reversing the action later.[51]

In *Russell v. Board of Trustees*,[52] the court deemed a five-day unpaid suspension materially adverse.[53] Plaintiff Russell claimed a spotless thirty-year employment record.[54] Russell's problem arose when she filled out a time card in advance, anticipating that she would be attending a full day of training.[55] A flat tire caused her to miss the afternoon session of the training, and she failed to correct the entry when she submitted the card the next day.[56] When Russell returned from a two week vacation, her supervisor asked how the seminar went.[57] Russell responded that she only attended the morning session, and immediately acknowledged her error when shown the time card discrepancy.[58]

Russell claimed the resulting five-day suspension was an act of retaliation for her complaints about her supervisor's mistreatment of female employees.[59] The district court held that the suspension was not sufficiently adverse to be actionable.[60] The Seventh Circuit disagreed, finding the entry on a formerly spotless record that Russell committed "theft of services" by "falsif[ying]" a time record even worse than the loss of five days' pay.[61]

Other employees were less successful during the survey period in proving adverse employment actions. In *Haugerud v. Amery School District*,[62] a longtime custodial worker claimed that her employer tried to pressure her into resigning, told male custodians not to help female custodians, gave her additional responsibilities not assigned to males, and intentionally interfered with her work performance.[63] The court concluded that the alleged incidents could collectively constitute a pervasively hostile environment.[64] However, Haugerud was never disciplined, demoted, terminated, denied wage or benefit opportunities or increases, or made to perform more menial tasks.[65] The appeals court therefore affirmed summary judgment for the school district on the sex discrimination

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50. *Id.* at 600-01.
51. *Id.*
52. 243 F.3d 336 (7th Cir. 2001).
53. *Id.* at 341.
54. *Id.*
55. *Id.* at 339.
56. *Id.* at 339-40.
57. *Id.* at 340.
58. *Id.*
59. *Id.* Among other things, the supervisor allegedly said one female employee "dressed like a whore," called another a bitch, and called Russell "grandma." *Id.* at 339.
60. *Id.* at 341.
61. *Id.*
62. 259 F.3d 678 (7th Cir. 2001).
63. *Id.* at 684-87.
64. *Id.* at 698.
65. *Id.* at 692.

claim, although it reversed on the harassment claim.[66]

In *Grube v. Lau Industries*,[67] the plaintiff's complaint arose from a shift reassignment after more than twenty years working the day shift.[68] The court said, "Title VII simply was never intended to be used as a vehicle for an employee to complain about the hours she is scheduled to work or the effect those hours have upon the time an employee spends with family members."[69] The change in working hours was not, therefore, an adverse employment action.[70]

In *Aviles v. Cornell Forge Co.*,[71] the plaintiff argued that "[c]alling the police on someone is always an adverse act."[72] The Seventh Circuit had considered this case in a previous appeal and remanded.[73] On successive appeal, Aviles mischaracterized the earlier Seventh Circuit opinion, which held that a false report that Aviles was armed and lying in wait outside the plant after threatening his supervisor *could* constitute an adverse action.[74] At the ensuing trial, however, it was established that Aviles was escorted by police from the plant after he refused to leave following a suspension.[75] Aviles then ignored police instructions not to return and parked within two blocks of the plant entrance.[76]

Someone from the plant telephoned the police to report Aviles' presence.[77] In response to an officer's question the caller expressed uncertainty but said Aviles might be armed.[78] The police forcibly removed Aviles from the vicinity of the plant but did not arrest him.[79] The appeals court agreed with the district court that Aviles suffered no adverse action, because Aviles did not prove the report false.[80] Furthermore, any injury Aviles incurred was unforeseeable because the company caller had no reason to expect that Aviles would resist or that the police would overreact in removing Aviles from the area.[81]

B. Standards and Methods of Proof

This survey marks the first full year following the Supreme Court's decision

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66. *Id.* at 700.
67. 257 F.3d 723 (7th Cir. 2001).
68. *Id.* at 728.
69. *Id.* at 729.
70. *Id.* at 729-30.
71. 241 F.3d 589 (7th Cir. 2001).
72. *Id.* at 590, 593.
73. Ariles v. Cornell Forge Co., 183 F.3d 598 (7th Cir. 1999).
74. 241 F.3d at 593.
75. *Id.* at 591.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 591-92.
80. *Id.* at 593.
81. *Id.* at 592.

in *Reeves v. Sanderson Plumbing Products, Inc.*,[82] a case many believed would have a significant impact on summary judgment practice in employment discrimination cases.[83] In *Reeves*, the Court resolved a circuit split regarding the standard of proof necessary for a plaintiff to survive a motion for judgment as a matter of law.[84] At issue was whether a trier of fact could infer discrimination from the falsity of the employer's explanation for its action (known as the "pretext" standard) or whether the plaintiff had to present additional evidence of intentional discrimination ("pretext plus").[85] Opting for the lower standard, the Court ruled that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[86]

Reeves was hailed as a major victory for plaintiffs[87] and seemed to signal a sea change in approach to dispositive motions in employment cases. Early predictions were that *Reeves* would make it easier for an employment plaintiff to get to a jury and harder for jury verdicts to be overturned.[88]

Actual experience, however, has proved otherwise. Based on the limited post-*Reeves* data available, several authors have found no significant change in the number of cases being resolved on motion, nor on the fate of summary judgment rulings on appeal.[89]

Seventh Circuit practice seems consistent with this finding. During the survey period, the Seventh Circuit considered appeals of summary judgment rulings in seventy-two employment discrimination cases. The Seventh Circuit affirmed the entry of summary judgment in sixty-two of these cases, affirmed in part in five more, and reversed outright in only five.[90]

An interesting point is that the Seventh Circuit rarely cited the *Reeves* decision in these cases. Only twelve of the summary judgment discrimination

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82. 530 U.S. 133 (2000).

83. *See* Philip M. Berkowitz, *An Early Analysis of the Impact of* Reeves v. Sanderson, N.Y.L.J., Sept. 28, 2000, at 5.

84. *See* Susan W. Kline, *Survey of Employment Law Developments for Indiana Practitioners*, 34 IND. L. REV. 675, 678 (2001).

85. *See* Berkowitz, *supra* note 83.

86. *Reeves*, 530 U.S. at 147.

87. *See, e.g.*, Tim A. Baker, *Supreme Court Decision Eases Burden for Discrimination Plaintiffs*, IND. LAW., July 19, 2000, at 4.

88. *See, e.g.*, Marcia Coyle, *New High Court Bias Ruling May Spark More Jury Trials, Settlements*, NAT'L L.J., June 26, 2000 at B1 ("Employers will likely face more jury trials, increased pressure for settlement and greater caution in making employment-related decisions because of an age bias ruling by the U.S. Supreme Court."); Linda Greenhouse, *The Justices Make It Easier to Win Suits for Job Bias*, N.Y. TIMES, June 13, 2000 at A24; Peter N. Hillman, *Risks of Discrimination Suits Increase for Employers Following Supreme Court Ruling in* Reeves, EMP. LITIG. REP., July 11, 2000 at 3.

89. *See, e.g.*, Tamara Loomis, *Employment Bias; After 'Reeves,' Little Has Changed in the Circuit*, N.Y.L.J., July 5, 2001, at 5.

90. Authors' calculations.

cases decided during the survey period contain any mention of *Reeves*, and most of those cases cite the decision only in passing.[91] The explanation for this omission may be that *Reeves* did not technically change the standards in the Seventh Circuit—which has always been a "pretext" circuit.[92] Thus, pre-*Reeves* case law on summary judgment standards remains viable in this circuit.

One case illustrating the continuity of standards in the Seventh Circuit is *Pugh v. City of Attica*.[93] Pugh, a former city animal control officer, sued the city, alleging discharge due to a perceived disability and retaliation for protesting police harassment.[94] In its motion for summary judgment, the employer presented its explanation for the discharge—that it believed Pugh had misappropriated funds.[95] The trial court granted summary judgment for the city.[96]

On appeal, Pugh attempted to bring the case within the *Reeves* framework by arguing, among other things, that he had not actually committed the misconduct for which he had been fired.[97] In support of this argument, Pugh relied on his own denials and explanation of the incident.[98] Pugh argued that this created a dispute regarding whether the employer's explanation for its decision was "unworthy of credence."[99]

The Seventh Circuit summarily rejected this argument. Relying on pre-*Reeves* case law, the court ruled that the issue on summary judgment was not whether Pugh had actually misappropriated funds, but whether the city had honestly believed that he did so:

> Mr. Pugh's argument is misplaced. By arguing that he did not mishandle funds, he has not cast any doubt on the honesty of the City's belief that he had engaged in such conduct. Mr. Pugh offers no evidence to suggest that the City had additional information or knowledge . . . which would have indicated that the City did not truly believe that Mr. Pugh had misappropriated funds.[100]

Based on the city's evidence explaining its investigation and conclusions, the Seventh Circuit easily found that the city had met this "honest belief" standard.[101]

The plaintiff in *Logan v. Kautex Textron North America*[102] was similarly unable to capitalize on *Reeves*. Plaintiff Logan's six co-workers evaluated her

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91. Authors' calculations.
92. *See, e.g.*, Sheehan v. Donlen Corp., 173 F.3d 1039 (7th Cir. 1999).
93. 259 F.3d 619 (7th Cir. 2001).
94. *Id.* at 621, 624.
95. *Id.* at 624.
96. *Id.*
97. *Id.* at 627.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 629.
102. 259 F.3d 635 (7th Cir. 2001).

performance at the end of her probationary period, and four recommended that she not be offered permanent employment.[103] Logan attributed the decision to retaliation for her complaints about two alleged racial comments and one alleged threat to her job security, all made by one of the voting co-workers.[104] Kautex, according to Logan, attributed its decision to Logan's "bad attitude, sabotaging tanks, performance, and absenteeism."[105] Logan argued that this inconsistency would allow a jury to infer that these proffered reasons were not the actual reasons for her discharge.[106]

The Seventh Circuit disagreed, noting that all the reasons except absenteeism were related and concluding, "no reasonable jury could find that Logan was terminated for any reason other than that she was voted out by her team."[107] The court acknowledged that race discrimination may be camouflaged under the label "attitude," but Logan failed to produce any objective evidence that Kautex was engaging in such a subterfuge.[108]

On the other hand, *Reeves* may have made a difference in a few of the close cases decided during the survey period. For example, in *Bell v. Environmental Protection Agency*,[109] the court showed a willingness to consider the substantive merits of the employment decision in question. There, sixteen candidates applied for four available promotions.[110] All selectees were white, native-born Americans.[111] Two African-American applicants sued claiming racial discrimination, and two other foreign-born applicants sued claiming national origin discrimination.[112]

The selection process included a personal interview and a rating system.[113] Two successful applicants achieved ratings of sixty-nine and two scored a perfect seventy-five.[114] Two plaintiffs achieved perfect scores, one scored sixty-nine, and one scored sixty-three.[115] All four plaintiffs had been employed by the EPA for a longer time than any selectee, and each plaintiff had received more service achievement awards than at least three selectees.[116] The plaintiffs presented statistical data suggesting that the EPA promoted blacks and foreign-born employees less often than non-black and native-born employees, although only

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103. *Id.* at 638.
104. *Id.* at 638, 640.
105. *Id.* at 640.
106. *Id.*
107. *Id.*
108. *Id.* at 640-41.
109. 232 F.3d 546 (7th Cir. 2000).
110. *Id.* at 549.
111. *Id.*
112. *Id.* at 548.
113. *Id.* at 549.
114. *Id.*
115. *Id.*
116. *Id.* at 551.

the data on foreign-born employees qualified as statistically significant.[117] They also presented a memorandum written before the promotion decision was made by one of the interview panelists, expressing the opinion that two plaintiffs were better qualified than two selectees.[118]

The court held that the comparative qualifications evidence and statistics precluded summary judgment on the discrimination claims.[119] It said, "Even if the pieces of evidence were not conclusive by themselves, they sufficiently countered the EPA's assertion that it honestly believed it was promoting the best candidates."[120]

The court was similarly receptive to the plaintiff's arguments in *Gordon v. United Airlines, Inc.*[121] In *Gordon*, a probationary flight attendant on layover in Los Angeles found his hotel room unsatisfactory.[122] The crew desk was closed, so he decided to return home to Chicago to shower and change clothes, then return in time for his next scheduled flight.[123] He checked in at the Chicago crew desk and (by his account) offered to carry out this plan, but was excused from the assignment.[124] United ultimately terminated Gordon for the unauthorized schedule deviation, and he claimed race and age discrimination.[125]

The district court granted summary judgment to United.[126] The Seventh Circuit reversed in a split decision.[127] The majority focused on United's lack of a clear definition of "unauthorized deviation" and noted that it was a rarely-invoked infraction.[128] In addition, it was unclear who decided Gordon should be charged with an unauthorized deviation, and the only other "unauthorized deviation" action on record did not result in the (white female) employee's termination.[129] The court said:

> A reasonable jury could conclude, given United's inconsistent definition of unauthorized deviation, the rarity with which the unauthorized deviation provision was invoked, the disparate ways it was applied when it was invoked in Mr. Gordon's case, and United's inability to identify the management employee responsible for characterizing Mr. Gordon's conduct, that United's stated reason was a pretext for discrimination.[130]

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117. *Id.* at 553-54.
118. *Id.* at 551-52.
119. *Id.* at 554.
120. *Id.*
121. 246 F.3d 878 (7th Cir. 2001).
122. *Id.* at 881.
123. *Id.* at 881-83.
124. *Id.* at 882.
125. *Id.* at 880.
126. *Id.*
127. *Id.* at 893.
128. *Id.* at 890.
129. *Id.* at 891-92.
130. *Id.* at 893.

Judge Easterbrook dissented, saying that the *McDonnell Douglas* approach "has become so encrusted with the barnacles of multi-factor tests and inquiries that it misdirects attention."[131] The proper summary judgment focus, he argued, was whether a reasonable trier of fact could conclude that Gordon was terminated because of his age or race.[132] Unless United's explanation for the discharge was "a fraud on the court—not just an overreaction, but a lie"—summary judgment was proper.[133] Even foolish, trivial or baseless reasons are sufficient, Easterbrook asserted, as long as they are honestly believed and nondiscriminatory.[134] Here, there was no evidence that United tried "to pull the wool over judicial eyes" or "bamboozle the court," and Easterbrook disagreed that "blunders and intra-corporate disarray support an inference of deceit."[135] He characterized the majority view as "'added vigor' in action" and noted that "[s]ummary judgment is a hurdle high enough without 'added vigor'"[136]

The last word on the subject of summary judgment standards during the survey period was *Alexander v. Wisconsin Department of Health & Family Services*.[137] Prompted, most likely, by Judge Easterbrook's dissent in *Gordon*, the Seventh Circuit used the case as a vehicle to address the court's prior use of the phrase "added rigor" in employment cases.[138] In 1992, the court first said it reviewed summary judgment dispositions in such cases with "added rigor" because intent is a central issue, and subjective issues such as good faith and intent are "notoriously inappropriate" questions for summary judgment.[139] Since 1992, the "added rigor" wording has appeared in thirty published Seventh Circuit opinions.[140]

In *Alexander*, the court explained that this phrase merely emphasized that employment discrimination cases usually involve questions of credibility and intent, which are seldom appropriate summary judgment issues.[141] Despite the implication, grants of summary judgment in employment discrimination cases are reviewed under the same standards as all other cases in which summary judgment is granted.[142]

Plaintiff Alexander offered evidence of racially offensive remarks by co-

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131. *Id.*

132. *Id.*

133. *Id.* at 894.

134. *Id.* (quoting Hartley v. Wis. Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997)).

135. *Id.* at 894-95.

136. *Id.* at 896.

137. 263 F.3d 673 (7th Cir. 2001).

138. *Id.* at 680-81.

139. *Id.* at 681 (quoting McCoy v. WGN Cont'l. Broad. Co., 957 F.2d 368, 370-71 (7th Cir. 1992); Stumph v. Thomas & Skinner, Inc., 770 F.2d 93, 97 (7th Cir. 1985)).

140. *Id.* at 681 n.2.

141. *Id.* at 681.

142. *Id.* (citing Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997)).

workers.[143] He offered no evidence, however, that his five-day suspension for a confrontation with a co-worker, his ten-day suspension for insubordination, and his eventual termination for making a threatening gesture were either motivated by discrimination or in retaliation for his complaints of racial discrimination.[144] The court therefore affirmed summary judgment for the employer.[145]

The case trend indicates that, while *Reeves* may have had some impact in the Seventh Circuit, that effect appears modest and somewhat sporadic. Judge Easterbrook's dissent in *Gordon* makes clear that the court is not united in its view of the required proof for summary judgment. This area of law therefore warrants continued monitoring.

Two other cases dealing with standards and methods of proof are worth brief mention, although the Seventh Circuit gave fairly short shrift to the plaintiff's novel burden-of-proof argument in *Price v. City of Chicago*.[146] Price argued that Title VII allows a plaintiff to establish disparate impact liability by showing that the employer refused to adopt an alternative employment practice with a lesser adverse impact.[147] The dispute arose after Price, who is African-American, received the same score on a qualifying examination as another older but equally senior police officer.[148] The older officer got the only promotion available because the city used birth dates to break such ties.[149] Although Price argued that this practice had a disparate impact on African-Americans, the record did not support her assertion.[150] Alternatively, Price argued that her employer should have been required to promote her as well as the older officer as a less discriminatory alternative.[151]

The court made clear that proof of disparate impact is required for the plaintiff's prima facie case.[152] Only after such proof must the employer show that the challenged practice is job-related.[153] If the employer succeeds, the plaintiff may offer evidence that the justification is pretextual because a less discriminatory alternative is available.[154] Price placed the alternatives analysis at the wrong end of the process, and her claim failed.[155]

The final survey period case worth noting dealt with comments as evidence of harassment. In *Mason v. Southern Illinois University*,[156] an African-American

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143. *Id.* at 683.
144. *Id.* at 683-88.
145. *Id.* at 689.
146. 251 F.3d 656 (7th Cir. 2001).
147. *Id.* at 659.
148. *Id.* at 658.
149. *Id.* at 658-59.
150. *Id.* at 659.
151. *Id.* at 660.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 661.
156. 233 F.3d 1036 (7th Cir. 2000).

campus police dispatcher's claim of supervisory harassment was based in part on racist comments by co-workers.[157] The Seventh Circuit held that comments neither Mason nor his supervisor ever heard were properly excluded at trial.[158] The trial court did allow evidence of comments made by the supervisor or in the supervisor's presence.[159] The concurring opinion emphasized that, in order to use co-worker comments to prove harassment by a supervisor, the plaintiff must show that the supervisor was or should have been aware that the words or deeds offered as evidence would lead to co-worker misconduct.[160]

C. The Continuing Violation Doctrine

As a general rule, discrimination charges must be based on alleged misconduct that occurred during specified filing timeframes. Plaintiffs sometimes argue, however, that earlier misconduct should be considered under the continuing violation doctrine. This doctrine allows plaintiffs to link otherwise time-barred acts to acts within the limitations period.[161]

During the survey period, the Seventh Circuit issued two noteworthy opinions discussing this doctrine. In *Sharp v. United Airlines, Inc.*,[162] the airline offered to reinstate fourteen flight attendants who sued on grounds of sex, age, and disability discrimination after they were terminated for exceeding weight restrictions.[163] Plaintiff Sharp turned the offer down because she was pregnant, although she could have accepted and immediately taken maternity leave.[164] She later asked United to renew the offer on the same terms, but United declined to do so despite Sharp's ongoing efforts to persuade various United officials.[165]

Two years after United declined to renew the offer, Sharp brought suit.[166] The Seventh Circuit found the continuing violation doctrine inapplicable and said, "[A]n employer's refusal to undo a discriminatory decision is not a fresh act of discrimination."[167]

The plaintiff in *Shanoff v. Illinois Department of Human Services*[168] was similarly unsuccessful in invoking the continuing violation doctrine.[169] Shanoff

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157. *Id.* at 1039-41.

158. *Id.* at 1045.

159. *Id.* at 1047.

160. *Id.* at 1048 (Ripple, J., concurring).

161. Shanoff v. Ill. Dep't of Human Servs., 258 F.3d 696, 703 (7th Cir. 2001).

162. 236 F.3d 368 (7th Cir. 2001).

163. *Id.* at 369.

164. *Id.* at 370.

165. *Id.*

166. *Id.*

167. *Id.* at 373 (quoting Lever v. Northwestern Univ., 979 F.2d 552, 555-56 (7th Cir. 1992)).

168. 258 F.3d 696 (7th Cir. 2001).

169. *Id.* at 703. Plaintiff Shanoff did succeed in convincing the appeals court to reverse summary judgment for the employer, because a reasonable jury could have found that alleged supervisory remarks made during the limitations period that expressed animosity toward Shanoff's

claimed that he suffered a hostile work environment based on actions by his supervisor such as referring to Shanoff as a "haughty Jew" and threatening to "keep [his] white Jewish ass down."[170] Shanoff first complained internally in November 1997, after several hostile remarks, but was told that the employer would take no action to resolve the situation.[171] At that point, the court held, Shanoff was on notice that he had a substantial claim and the filing clock began to run.[172] Shanoff did not sue until October 1998, so the court only considered allegations that fell within the 300 days prior to that filing date.[173]

Different circuits have adopted varying continuing violation standards.[174] The Seventh Circuit holds that plaintiffs may not procrastinate; they must sue "as soon as the harassment becomes sufficiently palpable that a reasonable person would realize [he] had a substantial claim under Title VII" in order to base claims on conduct prior to the limitations period.[175]

The U.S. Supreme Court may soon shed some light on the continuing violation question. The Court has granted certiorari in *Morgan v. National Railroad Passenger Corp.*[176] Plaintiff Morgan claimed race-based harassment that occurred over a four-year period.[177] The Ninth Circuit held that courts can consider time-barred conduct if "the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period."[178] It found the pre-limitations conduct at issue sufficiently related under the totality of the circumstances to invoke the doctrine.[179]

D. Remedies

The U.S. Supreme Court answered an important question in *Pollard v. E.I.*

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race and religion were sufficiently severe to create a hostile work environment. *Id.* at 706.

170. *Id.* at 698, 700.

171. *Id.* at 699-700. *Compare to* Frazier v. Delco Elec. Corp., 263 F.3d 663, 666 (7th Cir. 2001) (allegedly harassing conduct that occurred while the company said it was investigating Frazier's complaints not time-barred; it is "a principle more fundamental than the doctrine of continuing violation" that an employer "cannot plead for time to rectify a situation of harassment . . . but deny the time to the victim of the harassment to learn that the company has failed to rectify it after all").

172. *Shanoff*, 258 F.3d at 703-04.

173. *Id.*

174. *See* Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531 (2000).

175. *Shanoff*, 258 F.3d at 703 (quoting Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1166 (7th Cir. 1996)).

176. 232 F.3d 1008 (9th Cir. 2000), *cert. granted*, 533 U.S. 927 (2001).

177. *Id.* at 1010-13.

178. *Id.* at 1015.

179. *Id.* at 1017-18.

DuPont de Nemours & Co.[180] by holding that front pay is not an element of compensatory damages under the Civil Rights Act of 1991.[181] Pollard sued for co-worker sexual harassment and received $300,000 (the maximum compensatory damages available to her under the Act) plus additional amounts for back pay, benefits and attorney fees.[182] The district court expressed the view that $300,000 was insufficient to compensate Pollard but followed Sixth Circuit precedent holding that front pay was subject to the cap.[183]

The U.S. Supreme Court looked to the original language of the Civil Rights Act of 1964, which was very similar to the National Labor Relations Act (NLRA) and which provided remedies of injunction and/or reinstatement with or without back pay.[184] The NLRA's back pay provision had consistently been interpreted to allow compensation up to the employee's reinstatement date, even if that occurred after judgment.[185]

In Title VII parlance, post-judgment compensation is considered front pay.[186] After the 1964 Act was expanded in 1972 to allow "any other equitable relief," all circuits that addressed the issue allowed front pay, including front pay in lieu of reinstatement when reinstatement was not a viable option.[187]

The Court concluded in *Pollard* that Congress intended to provide *additional* remedies when it passed the 1991 Act.[188] The 1991 Act therefore expands previously available remedies by allowing compensatory and punitive damages in addition to front pay pending or in lieu of reinstatement.[189]

The Seventh Circuit took this rationale a step farther in *Hertzberg v. SRAM Corp.*[190] A jury awarded Hertzberg $20,000 in punitive damages for sexual harassment, but found for the employer on Hertzberg's retaliatory discharge claim. Despite the latter finding, the district court added equitable relief in the form of back and front pay to the award, reasoning that but for the harassment, Hertzberg would not have left the company.[191]

The Seventh Circuit acknowledged *Pollard*'s holding that the 1991 Act left previously available equitable remedies undisturbed, and reasoned that the required showing for those equitable remedies was also unchanged.[192] Therefore, a plaintiff who leaves her job because of discrimination must prove actual or constructive discharge to earn the equitable remedy of reinstatement or back and

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180. 532 U.S. 843 (2001).
181. *Id.* at 845.
182. *Id.*
183. *Id.* at 846-47.
184. *Id.* at 848.
185. *Id.* at 849.
186. *Id.*
187. *Id.* at 849-50.
188. *Id.* at 851.
189. *Id.* at 853.
190. 261 F.3d 651 (7th Cir. 2001).
191. *Id.* at 654, 657.
192. *Id.* at 659.

front pay in lieu of reinstatement.[193] Hertzberg failed to do so because the only bases for relief she argued were sexual harassment and retaliatory discharge, and the jury rejected the latter claim.[194] The appeals court therefore reversed the lost pay award.[195]

In reaching this conclusion, the Seventh Circuit distinguished "ordinary" sexual harassment, defined as hostile conduct that an employee is expected to endure while seeking redress, from "aggravated" harassment that makes working conditions so intolerable that the employee is forced to resign (i.e., is constructively discharged).[196] Only in the latter case may an employee who quits his job receive post-resignation back and front pay.[197]

Another remedies issue addressed during the survey period was punitive damages. The Seventh Circuit reheard *EEOC v. Indiana Bell Telephone Co.*[198] en banc to consider whether evidence regarding arbitration and a collective bargaining agreement is admissible on the issues of whether an employer responded reasonably to a sexual harassment complaint and whether the employer's state of mind justified punitive damages.[199] The district court had disallowed the evidence for all purposes.[200]

The original Seventh Circuit panel held the evidence admissible on both points.[201] Judge Ilana Diamond Rovner wrote a spirited dissent in which she deplored a "pattern of inaction in the face of . . . unrelenting misconduct" that spanned twenty years, and concluded that "Ameritech has won . . . the right to invoke the collective bargaining agreement as an excuse for sitting on its hands while [employee Gary] Amos kept on terrorizing his female colleagues."[202]

The rehearing inspired four different decisions, with the majority holding arbitration and collective bargaining agreements inadmissible on the question of liability, but admissible as a defense to punitive damages.[203] Judge Easterbrook wrote:

> An employer is entitled to show that things were not as bad as they appeared . . . . The district court's order enabled the EEOC to ask the jury rhetorically why any conscientious employer would have acted as Ameritech did unless it wanted harm to befall female workers, while

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193. *Id.*

194. *Id.* at 661.

195. *Id.*

196. *Id.* at 658.

197. *Id.*

198. 256 F.3d 516 (7th Cir. 2001) (en banc).

199. *Id.* at 519.

200. *Id.*

201. 214 F.3d 813, 825 (7th Cir. 2000), *vacated and reh'g en banc granted by* No. 99-1155, 2000 U.S. App. LEXIS 22797 (7th Cir. Sept. 6, 2000).

202. *Id.* at 826, 836 (Rovner, J., concurring in part and dissenting in part).

203. *Ind. Bell Tel. Co.*, 256 F.3d at 519, 528-29, 531, 537.

disabling Ameritech from giving what may have been its best answer.[204]

Employers will no doubt take issue with some of the court's reasons for disallowing this evidence on the liability issue. A majority of the court agreed that collective bargaining agreements and arbitration systems are not imposed upon employers by forces beyond their control, and called employers "wrong to suppose that an arbitrator is some outside force even ex post its agreement to a given arbitration clause," because the contract defines the arbitrator's authority.[205] Here, if Ameritech feared that Amos' discharge would be overturned by an arbitrator, the majority suggested that it could have "transfer[ed] Amos to an empty room and give[n] him make-work tasks" because "[f]eatherbedding ensues from some collective bargaining agreements, and the lateral arabesque solves many a personnel problem."[206]

Two additional Seventh Circuit survey period cases dealt with punitive damages. In both, the court discussed and applied *Kolstad v. American Dental Association*,[207] a 1999 U.S. Supreme Court case that clarified when punitive damages are available in Title VII cases. To justify punitives under *Kolstad*, an employer must act "in the face of a perceived risk that its actions will violate federal law," but need not be specifically aware that it is engaging in discrimination.[208] The plaintiff must show that the discriminatory actor was a managerial agent acting within the scope of her employment.[209] The employer may avoid punitive damages by proving that it made a good faith effort to implement an antidiscrimination policy.[210]

In *Bruso v. United Airlines, Inc.*,[211] an airline supervisor claimed he was demoted in retaliation for reporting sexual harassment of female employees by a fellow supervisor.[212] The district court granted summary judgment to the airline on the issue of punitives without applying the *Kolstad* framework.[213] The Seventh Circuit reversed, noting that the managerial agents who demoted Bruso were aware of Title VII's antidiscrimination principles and United's zero-tolerance antidiscrimination policy.[214] Bruso presented evidence that the investigation of the alleged harasser's conduct was merely a sham to discredit Bruso and to cover for management's failure to address the harassment sooner.[215] The appeals court therefore found a triable issue on the question of punitive

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204. *Id.* at 528.
205. *Id.* at 521-22.
206. *Id.* at 524.
207. 527 U.S. 526 (1999).
208. *Id.* at 536.
209. *Id.* at 543.
210. *Id.* at 545.
211. 239 F.3d 848 (7th Cir. 2001).
212. *Id.* at 852-53.
213. *Id.* at 859.
214. *Id.* at 859-60.
215. *Id.* at 860-61.

damages.[216]

The court was less receptive to the plaintiff's argument in *Cooke v. Stefani Management Services, Inc.*[217] Plaintiff Cooke, a gay bartender, was fired the day after he rejected his male supervisor's advances.[218] A jury awarded Cooke $7500 in back pay and lost benefits and $10,000 punitive damages.[219]

The employer appealed the punitive damage award,[220] citing *Kolstad*'s good faith effort defense. Stefani had sexual harassment policies, conducted management training, and displayed an anti-harassment poster.[221] Although the reporting policy for harassment lacked a provision allowing the complainant to bypass his or her manager if that manager was the harasser, the court said that Cooke should have exercised common sense and talked to someone higher in the chain of command.[222]

Because the manager committed "rogue acts motivated by a desire to amuse himself, not benefit his employer," the court refused to impute the manager's knowledge of harassment to the company.[223] The court therefore reversed the punitive damages award based on the employer's good faith efforts defense.[224]

Though it does not involve a substantive employment law issue, *Kenseth v. Commission of Internal Revenue*[225] involves taxation of attorneys' fee awards, an issue that can significantly affect remedies available for employment discrimination. In that case, the plaintiff settled an age discrimination suit with his former employer.[226] Pursuant to a contingent fee agreement, the attorney deducted forty percent of the settlement proceeds for his fee, and paid the remainder of the settlement to the plaintiff, who did not report as taxable income the $91,800 deducted by the law firm. [227]

The tax court ruled that the entire amount was taxable as income, and the Seventh Circuit acknowledged a circuit split but found the tax court resolution of the issue "clearly correct."[228] The court reasoned that the attorneys' fees were simply part of the "cost of generating income" and thus part of gross income like other business expenses.[229]

That attorneys' fees are part of gross income does not mean, of course, that they are actually taxed in all cases. As the Seventh Circuit pointed out in

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216. *Id.* at 861.
217. 250 F.3d 564 (7th Cir. 2001).
218. *Id.* at 565.
219. *Id.* at 566.
220. *Id.* at 568.
221. *Id.*
222. *Id.* at 569.
223. *Id.*
224. *Id.* at 570.
225. 259 F.3d 881 (7th Cir. 2001).
226. *Id.* at 882.
227. *Id.*
228. *Id.* at 883, 885.
229. *Id.* at 883-84.

Kenseth, a taxpayer may deduct those fees as a miscellaneous itemized deduction.[230] However, due to limitations on this and other deductions, it is unlikely that the taxpayer will be able to deduct the full amount paid to his or her attorneys. Further, attorneys' fees are not deductible for purposes of the alternative minimum tax.[231]

The practical effect of *Kenseth* may be that it will become more expensive for an employer to settle an employment discrimination case because the employee will seek additional compensation to defray the "tax effect" of the ruling. In Kenseth's situation, the Seventh Circuit's ruling cost the employee an additional $26,992.[232] Ironically, *Kenseth* may have its greatest impact on "nuisance value" settlements, because the tax impact of the settlement may dwarf its value to the plaintiff.

Practitioners may also wish to take note of *United States v. Cleveland Indians Baseball Co.*,[233] a U.S. Supreme Court case dealing with payroll taxes on settlements. The question there was whether Social Security and unemployment taxes are assessed in the year a back pay award is actually paid, or the year the wages should have been paid.[234] The answer made a $100,000 difference in that case because in 1994 a group of former Indians players collected settlements totaling over $2 million for violations of free agency rights that occurred in 1986 and 1987.[235] These players all exceeded the taxable wage ceilings in 1986 and 1987, but they were no longer team employees in 1994.[236] The Court sided with the Internal Revenue Service and held that the tax is assessed when the wages are actually paid.[237]

II. AMERICANS WITH DISABILITIES ACT

A. Substantial Limitation in a Major Life Activity

To qualify for the employment-related protections of the Americans with Disabilities Act, a person must prove an impairment that substantially limits one or more of his major life activities.[238] Regulations define a substantial limitation as the inability to perform a major life function or a significant restriction in the duration, manner or condition under which the plaintiff can carry out the activity

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230. *Id.* at 882.

231. *Id.*

232. Kenseth owed $17,000 in alternative minimum tax. In addition, his deduction was reduced by two percent ($5298) due to the floor on miscellaneous itemized deductions and by $4694 due to the overall limitation on itemized deductions. *Id.* at 882.

233. 532 U.S. 200 (2001).

234. *Id.* at 204.

235. *Id.* at 204, 207.

236. *Id.* at 207.

237. *Id.* at 207-08.

238. 42 U.S.C. § 12102(2) (1994). Alternatively, a plaintiff may show a record of such an impairment or that he was regarded as having such an impairment. *Id.*

compared to the general populace.[239] Some examples of major life activities are walking, seeing, hearing, speaking, breathing, learning, and—according to EEOC regulations—working.[240] A limitation on working must significantly restrict a plaintiff's ability to perform a class of jobs or a broad range of jobs in various classes.[241]

The U.S. Supreme Court recently handed down *Toyota Motor Manufacturing, Inc. v. Williams*,[242] addressing whether a substantial limitation in performing manual tasks due to carpal tunnel syndrome qualifies an employee for reasonable accommodation under the ADA.[243] Williams, an assembly line worker, developed problems gripping tools and working with her arms elevated and outstretched.[244] A reassignment to quality control temporarily resolved the situation, but this solution broke down when additional duties were assigned to quality control workers.[245] Toyota refused to relieve Williams of these additional duties and she sued, asserting that Toyota should have accommodated her carpal tunnel syndrome.[246]

The Sixth Circuit held that Williams was substantially limited in the major life activity of performing manual tasks, and awarded her partial summary judgment on the issue of whether she was disabled under the ADA.[247] Justice O'Connor, writing for a unanimous Court, disagreed, saying "[T]he Court of Appeals did not apply the proper standard . . . it analyzed only a limited class of manual tasks and failed to ask whether respondent's impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives."[248]

In proving a substantial limitation in a major life activity—here, the activity of performing manual tasks—the Court said a plaintiff must offer more than medical diagnosis of impairment.[249] The evidence must show a substantial limitation in the context of the plaintiff's own experience, which requires individualized assessment.[250] This is especially true when dealing with a condition such as carpal tunnel syndrome, which has widely varying symptoms.[251]

In this assessment, the "central inquiry" is how well the plaintiff can perform

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239. *See* 29 C.F.R. § 1630.2(j) (2002).

240. 29 C.F.R. § 1630.2(i) (2002).

241. Webb v. Clyde L. Choate Mental Health & Dev. Ctr., 230 F.3d 991, 998 (7th Cir. 2000).

242. 534 U.S. 184 (2002).

243. Linda Greenhouse, *Justices Try to Determine the Meaning of Disability*, N.Y. TIMES, Nov. 8, 2001, at A18.

244. *Williams*, 534 U.S. at 686.

245. *Id.* at 686-87.

246. *Id.* at 687.

247. *Id.* at 686.

248. *Id.* at 690.

249. *Id.* at 691-92.

250. *Id.* at 692.

251. *Id.* at 693.

tasks that are centrally important to daily life, not just to the plaintiff's particular job.[252] Here, Williams' ability to do personal hygiene tasks and household chores was relevant.[253] Her difficulty with repetitive work requiring elevation of her arms and hands to shoulder level for long periods of time was not.[254] Williams could still brush her teeth, wash her face, bathe, tend a flower garden, prepare breakfast, do laundry, and tidy up her house.[255] She avoided sweeping, occasionally needed help getting dressed, and was less frequently able to play with her children, garden, and drive long distances, but "these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual-task disability as a matter of law."[256] The Court therefore reversed the partial summary judgment Williams won in the Sixth Circuit.[257]

The Court left two significant questions unanswered. First, it expressed no opinion on whether working should be considered a major life activity.[258] Second, the Court noted that the ADA does not authorize any agency to interpret the term "disability," but did not decide whether the EEOC regulations are entitled to any deference because Toyota did not attack the reasonableness of those regulations.[259]

During the survey period, the Seventh Circuit dealt with three other notable cases where substantial limitation in a major life activity was a central issue. In *Contreras v. Suncast Corp.*,[260] the plaintiff's back injury allegedly made him unable to lift more than forty-five pounds for a long period of time, do strenuous work, or drive a forklift more than four hours daily.[261] The court "fail[ed] to see how such inabilities constitute a significant restriction on one's capacity to work, as the term is understood within the ADA" because they would not preclude the plaintiff from performing any broad class of jobs.[262] Other circuits have said that a restriction on lifting as little as twenty-five pounds is not significant under the ADA definition.[263]

Contreras went on to make the novel claim that he was disabled in the major life activities of sexual reproduction and engaging in sexual relations because his

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252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 694.
257. *Id.*
258. *Id.* at 689.
259. *Id.* at 689-90.
260. 237 F.3d 756 (7th Cir. 2001).
261. *Id.* at 763.
262. *Id.*
263. *Id.* (citing, inter alia, Wooten v. Farmland Foods, 58 F.3d 382, 384, 386 (8th Cir. 1995) (holding that plaintiff was not substantially limited in major life activity of working where plaintiff was restricted to light duty with no working in cold environment and no lifting items weighing more than twenty pounds).

ability to engage in intercourse dropped from a rate of twenty times per month before his injury to two times per month after.[264] He pointed out that in *Bragdon v. Abbott*,[265] the U.S. Supreme Court recognized that reproduction is a major life activity and implied that engaging in sexual relations may be as well.[266] However, *Bragdon* dealt with the impact of HIV on reproductive ability.[267] The Seventh Circuit declined to extend that holding and rejected Contreras' argument that his decreased capacity for sex due to his bad back qualified as an impairment substantially limiting a major life activity.[268]

The court found the plaintiff's situation in *Lawson v. CSX Transportation, Inc.*[269] more persuasive. Lawson's diabetes required him to administer insulin injections three times a day, to test his blood sugar four to six times a day, exercise, and to carefully monitor his diet.[270] The court readily determined that this condition was a physical impairment, because it affected Lawson's joints, eyes, and metabolic, vascular, urinary and reproductive systems. The court also accepted that eating is a major life activity under the ADA, because it is central to life.

The more difficult question was whether Lawson's diabetes substantially limited him in the activity of eating, because the U.S. Supreme Court held in *Sutton v. United Airlines, Inc.*[271] that corrective or mitigating measures must be taken into account in this evaluation.[272] This did not require, as the district court concluded, that Lawson's actual physical ability to ingest food be restricted; rather, the analysis considers the difficulties that the treatment regimen caused and the consequences of noncompliance.[273]

Even with the insulin, Lawson's "perpetual, multi-faceted and demanding treatment regime" required constant vigilance.[274] Any breakdown in that regime would have "dire and immediate" consequences including dizziness, weakness, loss of concentration and impairment of bodily functions.[275] Lawson's situation went well beyond mere dietary restrictions; in fact, the treatment itself could cause hypoglycemia and trigger these life-threatening symptoms.[276]

The court acknowledged language in *Sutton* saying "[a] diabetic whose illness does not impair his or her daily activities" would not qualify as disabled

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264. *Id.* at 763-64.
265. 524 U.S. 624 (1998).
266. *Contreras*, 237 F.3d at 763-64.
267. *Id.* at 764.
268. *Id.*
269. 245 F.3d 916 (7th Cir. 2001).
270. *Id.* at 918.
271. 527 U.S. 471 (1999).
272. *Id.* at 482.
273. 245 F.3d at 924.
274. *Id.*
275. *Id.*
276. *Id.* at 924-25.

under the ADA.[277] It noted, however, that *Sutton* requires an individualized inquiry and did not say that diabetes could never qualify as a disability.[278] Not only were Lawson's daily activities impaired even after taking insulin treatment into account, but the life-long duration and severity of the condition further convinced the court that Lawson was entitled to ADA protection.[279] The court therefore remanded for further proceedings.[280]

A final case, *EEOC v. Rockwell International Corp.*,[281] provides insight regarding the evidence required to establish that a condition constitutes a "substantial limitation" on the major life activity of working. Rockwell Corporation required applicants for positions in its plant to undergo "nerve conduction tests."[282] The tests were designed to confirm the presence of neuropathy—a condition characterized by sensory loss and muscle weakness.[283] Rockwell believed that individuals with abnormal test results were more likely to develop repetitive stress injuries, such as carpal tunnel syndrome.[284] The entry-level positions for which Rockwell was hiring—trimmer, finisher, final finisher and assembler—all involved repetitive motion.[285] Therefore, Rockwell refused to hire any nonskilled applicant who scored outside the normal range on the nerve conduction test.[286]

The EEOC brought suit on behalf of seventy-two job applicants rejected on the bases of the test results.[287] Notably, Rockwell stipulated that all of the applicants were otherwise qualified for the positions they sought.[288] In addition, none of the applicants suffered from any impairments at the time that they were turned away by Rockwell.[289] Instead, the EEOC argued that Rockwell had perceived the applicants as disabled—in this case, as unable to perform jobs requiring frequent repetition or the use of vibrating power tools.[290]

Although the case was based on a "regarded as" theory, this did not prove significant to court's analysis. Instead, the court considered whether Rockwell regarded the applicants as suffering from a condition that would, if true, constitute a bona fide disability.[291] Thus, the court's decision turned on whether

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277. *Id.* at 926.

278. *Id.*

279. *Id.*

280. *Id.* at 932.

281. 243 F.3d 1012 (7th Cir. 2001).

282. *Id.* at 1014. *See also infra* Part II.G (discussing EEOC action against employer that conducted genetic testing of employees for susceptibility to carpal tunnel syndrome).

283. *Rockwell Int'l Corp.*, 243 F.3d at 1012.

284. *See id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 1015.

289. *Id.*

290. *Id.* at 1016.

291. *Id.* at 1017.

the inability to perform repetitive motion jobs, such as the jobs at issue, constituted a substantial limitation on the major life activity of working.[292]

In resolving this issue, the Seventh Circuit considered the type of evidence required to meet this definition of disability. Rockwell argued that the EEOC could sustain its burden of proof only by presenting quantitative vocational data regarding the jobs available in the relevant market.[293] The EEOC, on the other hand, suggested that it could prove that Rockwell regarded the applicants as disabled based solely on the Rockwell's admitted perception that the applicants could not perform four specific jobs in its plant.[294]

The Seventh Circuit struck a middle ground between the two approaches. The court stopped short of holding that a plaintiff "cannot prevail without quantitative evidence of the precise characteristics of the local job market."[295] On the other hand, the court suggested that such evidence would almost always be necessary. In affirming the entry of summary judgment for Rockwell,[296] the court held that "this is not one of the *rare cases* in which the claimants' impairments are so severe that their substantial foreclosure from the job market is obvious."[297]

This conclusion seems reasonably consistent with the result of *Toyota v. Williams*. The Seventh Circuit's resolution of *Rockwell* shows that ADA plaintiffs seeking relief based on actual or perceived repetitive stress injuries, particularly carpal tunnel syndrome, face an uphill evidentiary battle.

B. Attendance as a Job Requirement

During the survey period, the Seventh Circuit twice reiterated its stance that most jobs require regular attendance. In *Amadio v. Ford Motor Co.*,[298] an assembly line worker took seventy weeks of sick leave in the three years prior to his termination.[299] The district court rejected his bid for ADA protection in part because his inability to work on a regular basis made him unable to perform all essential job functions.[300] The Seventh Circuit agreed, citing previous holdings that work attendance is an essential employment requirement for clerical workers, teachers, account representatives, production employees, and plant equipment repairmen.[301] The Seventh Circuit stopped short of saying that every

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292. *Id.*

293. *Id.* Due to the district court's rulings regarding expert reports, the EEOC was unable to present evidence from a vocational expert. *Id.* at 1016.

294. *Id.* at 1016-17.

295. *Id.* at 1017.

296. *Id.* at 1018.

297. *Id.* 1017 (emphasis added).

298. 238 F.3d 919 (7th Cir. 2001).

299. *Id.* at 921.

300. *Id.* at 924.

301. *Id.* at 927 (citing Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894 (7th Cir. 2000); Waggoner v. Olin Corp., 169 F.3d 481 (7th Cir. 1999); Corder v. Lucent Tech.,

job requires attendance, but easily concluded that Amadio's position should be on that list because factory maintenance and production require employees to be on the premises.[302]

In *EEOC v. Yellow Freight System, Inc.*,[303] a forklift driver with AIDS-related cancer also had a "woeful" attendance record.[304] As in *Amadio*, the Seventh Circuit emphasized, "[L]et us be clear that our court, and every circuit that has addressed this issue, has held that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability."[305] The plaintiff's job, like Amadio's, required his presence at the employer's work site.[306] Because he was not fulfilling the essential job function of regular attendance, his ADA claim failed.[307]

C. Reasonable Accommodation and Seniority Systems

One difficult area for employers is the interplay between reasonable accommodation and seniority systems. The U.S. Supreme Court has granted certiorari in *US Airways, Inc. v. Barnett*[308] to address this question. In that case, an injured cargo handler was transferred to a mailroom position that did not require heavy lifting.[309] He was then bumped from that job by a more senior employee under the airline's non-union bidding system.[310]

A Ninth Circuit panel originally agreed with the district court that the airline did not violate the law by following its legitimate seniority system.[311] The court later granted rehearing en banc and reversed on this issue, holding that "a seniority system is not a per se bar to reassignment" although it is a factor in evaluating undue hardship on the employer.[312]

D. Direct Evidence of Discrimination in Training

In *Hoffman v. Caterpillar, Inc.*,[313] the Seventh Circuit considered an interesting aspect of the ADA: the prohibition against discrimination in "regard to job application procedures, the hiring, advancement, or discharge of

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Inc., 162 F.3d 924 (7th Cir. 1998); Nowak v. St. Rita High Sch., 142 F.3d 999 (7th Cir. 1998); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995)).

302. *Id.* (citing *Jovanovic*, 201 F.3d at 900).

303. 253 F.3d 943 (7th Cir. 2001).

304. *Id.* at 945-46, 949-50.

305. *Id.* at 948.

306. *Id.* at 949.

307. *Id.* at 948-50.

308. 228 F.3d 1105 (9th Cir. 2000), *cert. granted*, 532 U.S. 970 (2001).

309. *Id.* at 1108.

310. *Id.* at 1109, 1119-20.

311. Barnett v. U.S. Air., Inc., 196 F.3d 979 (9th Cir. 1998), *vacated and rehearing en banc granted*, 201 F.3d 1256 (9th Cir. 2000).

312. 228 F.3d at 1120.

313. 256 F.3d 568 (7th Cir. 2001).

employees, employee compensation, *job training*, and other terms, conditions and privileges of employment."[314] Hoffman, who is missing her lower left arm, indexed documents in Caterpillar's optical services department.[315] She was able to perform all essential functions of that job with accommodations such as a typing stand.[316] She requested training on a high-speed scanner upon which the department's productivity relied.[317] Her supervisor denied the request because he thought that clearing paper jams and straightening documents as they came out of the machine required the use of two hands.[318]

Hoffman lost at the district court level because she failed to show that the supervisor's refusal to train her affected her compensation, benefits, hours, title or promotion potential.[319] She therefore had not shown an adverse employment action, which (as discussed above) is generally required in employment discrimination cases following the *McDonnell Douglas* framework.[320]

The Seventh Circuit questioned the assumption that denial of training must materially affect a disabled individual's employment to be actionable, noting that Hoffman's was the rare case involving direct evidence of discriminatory intent.[321] The court took into account the fact that plaintiffs alleging discrimination in hiring, termination or other statutorily listed actions are not required to separately prove that the action was materially adverse, and concluded, "[W]ith respect to employment actions specifically enumerated in the statute, a materially adverse employment action is not a separate substantive requirement."[322] It remanded the case to allow Hoffman to prove her physical capability to operate the scanner.[323]

E. Direct Threats to Health or Safety

Another interesting ADA provision deals with employees who pose "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[324] In *Emerson v. Northern States Power Co.*,[325] Emerson, a customer service representative, handled mostly routine customer calls, but also spent up to ten percent of her time fielding calls about gas and electrical emergencies.[326] After she fell and hit her head while rollerblading, she experienced occasional panic attacks that required her to take breaks of

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314. *Id.* at 575 (citing 42 U.S.C. § 12112(a) (1994)) (emphasis added).
315. *Id.* at 570.
316. *Id.*
317. *Id.*
318. *Id.* at 571.
319. *See id.* at 574.
320. *Id.* at 574.
321. *Id.* at 576.
322. *Id.* at 575-76.
323. *Id.* at 576-77.
324. 42 U.S.C. § 12111(3) (1994).
325. 256 F.3d 506 (7th Cir. 2001).
326. *Id.* at 508.

indeterminate duration.[327] Northern States Power Co. (NSP) rejected Emerson's request that someone else handle safety-sensitive calls during these episodes because it could not ensure that a co-worker or supervisor would always be available when needed.[328] It eventually terminated her employment after no other mutually agreeable assignment could be found.[329]

NSP defended its action on the basis that Emerson posed a direct threat under the ADA definition.[330] The Seventh Circuit agreed, looking to duration of the risk and the nature, severity, likelihood, and imminence of potential harm.[331] It noted that Emerson had already suffered two panic attacks on the job and agreed that the attacks amounted to a direct threat in a job that required prompt and accurate response to power emergencies.[332] NSP could not sufficiently reduce that risk by any reasonable accommodation.[333]

F. Contingent Workers

The EEOC issued guidance during the survey period on the ADA's applicability to workers provided by staffing firms such as temporary agencies.[334] The agency's position is that these workers frequently qualify as employees of both the agency and the client, so both must offer ADA protections. The guidelines cover several important questions. Disability-related questions and medical examinations are not permissible, according to the agency, until the individual has been offered an assignment with a particular client. Merely adding the individual to an agency roster of available staffers is not enough. The staffing firm bears responsibility for reasonable accommodations in the applications process, but both the firm and client may be responsible for on-the-job accommodations. The guidelines also talk about how undue hardship is measured if both entities provide accommodations.[335]

G. Genetic Testing

Another issue on the EEOC's agenda during the survey period was its first lawsuit challenging genetic testing under the ADA.[336] Burlington Northern Santa

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327. *Id.* at 508-09.

328. *Id.* at 509-10.

329. *Id.* at 510.

330. *Id.* at 513-14.

331. *Id.* at 514.

332. *Id.*

333. *Id.* at 514-15.

334. Press Release, U.S. Equal Employment Opportunity Commission, EEOC, Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms (Dec. 22, 2000), *at* http://www.eeoc.gov/docs/guidance-contingent.html.

335. *Id.*

336. Press Release, U.S. Equal Employment Opportunity Commission, EEOC, EEOC Petitions Court to Ban Genetic Testing of Railroad Workers in First EEOC Case Challenging Genetic Testing Under Americans with Disabilities Act (Feb. 9, 2001), *at* http://www.eeoc.gov/press/2-9-01-c.html.

Fe Railroad allegedly tested blood samples of employees who filed work-related injury claims based on carpal tunnel syndrome, without the employees' knowledge or consent.[337] The EEOC took the position that the ADA forbids genetic testing as a prerequisite of employment, and that tests intended to predict future disabilities are irrelevant to the employee's present job performance capabilities.[338] On April 17, 2001, the railroad agreed to stop the testing program, but stipulated to preserve related evidence pending resolution of discrimination charges that were filed.[339]

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Statistical Evidence

In October 2000, in *Adams v. Ameritech Services, Inc.*,[340] the Seventh Circuit issued an important decision on the role of statistical evidence in age discrimination cases. The plaintiffs, who had been terminated during a company-wide reduction in force (RIF), proffered expert reports that examined correlations between employee ages and termination rates.[341] The district court ruled that the reports were not admissible for several reasons, including unreliability of the underlying information, lack of causation analysis, lack of control for other variables, and the likelihood of jury confusion.[342] It then granted summary judgment to the defendants on all significant issues in the case.[343]

The Seventh Circuit remanded for reconsideration, pursuant to the *Daubert* standard, of whether the expert reports were "prepared in a reliable and statistically sound way, such that they contained relevant evidence."[344] The court held that regression analysis is not a prerequisite to admissibility and that, if bolstered by other evidence, a report may meet the *Daubert* standard even if it merely eliminates the possibility that a RIF's disproportionately adverse effect on Age Discrimination Employment Act (ADEA) protected employees was due to mere chance.[345]

The Seventh Circuit handed down two other decisions during the survey period that dealt with statistical evidence and the ADEA. In *Kadas v. MCI Systemhouse Corp.*,[346] Judge Posner took the opportunity, in affirming summary

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337. *Id.*

338. *Id.*

339. *See, e.g., Settlement with EEOC Requires Employer to Stop Genetic Testing*, EMP. LITIG. REP., May 15, 2001, at 4.

340. 231 F.3d 414 (7th Cir. 2000). The Seventh Circuit does not recognize disparate impact claims of age discrimination. *Id.* at 422.

341. *Id.* at 425.

342. *Id.* at 427.

343. *Id.* at 417.

344. *Id.* at 425.

345. *Id.* at 425, 427-28.

346. 255 F.3d 359 (7th Cir. 2001).

judgment for the employer, to clarify three statistical evidence issues in discrimination cases.[347] First, he addressed dicta that has appeared in opinions from five different circuits suggesting that if the supervisor who "riffed" the plaintiff was older than the plaintiff, that fact would weigh heavily against a finding of age discrimination.[348] Judge Posner offered "counterdictum" that "the relative ages of the terminating and terminated employee are relatively unimportant" for several reasons.[349] He noted that older people often do not feel old and in fact prefer to work with younger people, and might wish to protect themselves against potential age discrimination by proactively winnowing out other older workers.[350] He also noted that people are often oblivious to their own prejudices.[351] In this case, the plaintiff was terminated within months of his hiring, and arguably a discriminatory employer would be much more likely to decline to hire older workers than to invite lawsuits by hiring and then promptly firing them.[352]

Judge Posner's second point dealt with a circuit split on whether statistical evidence is only admissible in proving discrimination if it reaches a five percent significance level, that is, two standard deviations.[353] He described the five percent benchmark as an arbitrary measure adopted by scholarly publishers, and said, "Litigation generally is not fussy about evidence."[354] Under the *Daubert* standard the judge must determine whether the significance level is worthy of the fact-finder's consideration in the context of the case and the particular study.[355]

Finally, Judge Posner discussed another circuit split, on whether statistical evidence alone can establish a prima facie case of intentional discrimination if it is deemed sufficiently significant.[356] He concluded, "Although it is unlikely that a pure correlation, say between age and terminations, would be enough . . . it would be precipitate to hold that it could never do so."[357] He offered the example of a RIF of 100 out of 1000 employees, where all 100 were age forty or

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347. *Id.* at 361-63.

348. *See id.* at 361 (citations omitted).

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 361-62.

353. *Id.* at 362.

354. *Id.*

355. *Id.* at 362-63.

356. *Id.* at 363.

357. *Id. See also* Bell v. Envtl. Prot. Agency, 232 F.3d 546 (7th Cir. 2000). The plaintiffs alleged disparate treatment in promotions based on race and national origin discrimination in violation of Title VII. *Id.* at 548. Their statistical evidence was too broad to establish a prima facie case of systemic disparate treatment, but was admissible as probative evidence of pretext. *Id.* at 553. The national origin data was statistically significant and "suggest[ed] a general pattern of discrimination toward the foreign born." *Id.* at 553-54. The data examining differences based on race was not statistically significant but was nonetheless admissible as circumstantial evidence of possible discrimination. *Id.* at 554.

older and all those retained were under forty, as a case where the statistics alone might justify shifting the burden to the employer to explain.[358]

B. Disparate Impact Claims

The disparate impact theory is widely accepted as a means of establishing employer liability under Title VII, and Congress codified this theory when it amended Title VII in 1991.[359] The ADEA contains no comparable language. In *Adams v. Ameritech Services, Inc.*,[360] the Seventh Circuit acknowledged a circuit split on the cognizability of disparate impact claims under the ADEA and reiterated its stance that "disparate impact is not a theory available to age discrimination plaintiffs in this circuit."[361]

The U.S. Supreme Court has granted certiorari to resolve this issue in *Adams v. Florida Power Corp.*,[362] a case brought by 117 former employees of a Florida utility company.[363] More than seventy percent of the workers terminated in a corporate reorganization were at least forty years old, and therefore protected under the ADEA.[364] They claimed that the corporate environment was "pervaded by ageism" and "subtle systemic bias."[365] With *Adams v. Florida Power Corp.*, the U.S. Supreme Court will decide whether older workers may sue claiming that company layoffs targeted them more heavily than younger workers. This decision could have widespread implications for employers, particularly if troubled economic times, including layoffs, continue.

Indiana employment practitioners should watch for the decision in this case to see if it alters the Seventh Circuit's stance by interpreting the ADEA to prohibit policies that appear neutral but that affect older workers more harshly.

C. Tender Back Rule

On December 11, 2000, the EEOC issued a final regulation[366] on the ADEA "tender back" rule, addressing the U.S. Supreme Court's 1998 decision in *Oubre v. Entergy Operations, Inc.*[367] The Older Workers Benefits Protection Act of 1990 (OWBPA)[368] amended the ADEA and, among other things, permitted

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358. *Kadas*, 255 F.3d at 363.

359. *See* 42 U.S.C. § 12112(b)(3)(A) (1994).

360. 231 F.3d 414 (7th Cir. 2000).

361. *Id.* at 422 (citing Blackwell v. Cole Taylor Bank, 152 F.3d 666, 672 (7th cir. 1998) (citing cases on both sides of issue from various circuits); Maier v. Lucent Techs, Inc., 120 F.3d 730, 735 & n.4 (7th Cir. 1997); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077-78 (7th Cir. 1994)).

362. 255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 643 (2001).

363. Linda Greenhouse, *Judicial Candidates' Speech to Be Reviewed by Justices*, N.Y. TIMES, Dec. 4, 2001, at A16.

364. *Id.*

365. *Id.*

366. 29 C.F.R. § 1625.23 (2000).

367. 522 U.S. 422 (1998).

368. 29 U.S.C. § 626(f) (1998).

employees to waive their ADEA rights in return for consideration such as increased severance or early retirement benefits.[369] Such waivers are, however, governed by specific OWBPA requirements, such as a requirement that the waiver be written in understandable language.[370]

Prior to the regulation, an employee who entered into a waiver agreement but thereafter sought to bring suit under the ADEA faced two obstacles arising out of traditional contract law. First, the "tender back" rule required an individual who wished to challenge a waiver to first repay the consideration received for the waiver.[371] Second, the "ratification" principle provided that an individual who failed to return the payment was deemed to have approved the waiver.[372]

The final EEOC rule directs that neither of these principles applies to ADEA waivers.[373] The new rule provides that any condition precedent or penalty to challenge an ADEA waiver is invalid, including tender-back requirements and provisions that an employer may recover attorney's fees or damages because of the filing of an ADEA suit.[374] Therefore, employees who wish to challenge the validity of their ADEA waivers may do so without first repaying the amount received for signing the waiver. If the employee prevails in overturning the waiver and then proves age discrimination and obtains a monetary award, the employer may, however, be able to deduct the amount paid for the waiver in calculating the amount owed.[375]

IV. OTHER FEDERAL LAW DEVELOPMENTS

A. Family and Medical Leave Act

The U.S. Supreme Court has granted certiorari in its first case involving the Family and Medical Leave Act (FMLA). In *Ragsdale v. Wolverine Worldwide, Inc.*,[376] the plaintiff was entitled to up to seven months of medical leave under the employer's policy.[377] She took time off for cancer treatment, and the company failed to tell her that the time would count toward her FMLA entitlement.[378] When she was unable to return to work at the end of the seven months, the employer terminated her for exhausting all available leave, including FMLA

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369. *Id.*

370. 29 U.S.C. § 626 (f)(1)(A)-(G) (1998).

371. *See* U.S. Equal Employment Opportunity Commission, Questions and Answers: Final Regulation on "Tender Back" and Related Issues Concerning ADEA Waivers, *at* http://www.eeoc.gov/regs/tenderback-qanda.html [hereinafter Questions and Answers] (last visited Dec. 15, 2000).

372. *Id.*

373. 29 C.F.R. § 1625.23(a) (2000).

374. 29 C.F.R. § 1625.23(b).

375. 29 C.F.R. § 1625.23(c); *see also* Questions and Answers, *supra* note 371.

376. 218 F.3d 933 (8th Cir. 2000), *cert. granted*, 533 U.S. 928 (2001).

377. *Id.* at 935.

378. *Id.*

time.[379]

Department of Labor regulations make it "the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee."[380] Employees retain their rights to twelve weeks of FMLA leave if their employers fail to notify them that leave will count under the FMLA.[381]

The Eighth Circuit concluded that this latter regulation creates rights not conferred by statute, and invalidated it.[382] The Sixth Circuit reached the opposite conclusion in *Plant v. Morton International, Inc.*[383] The pending Supreme Court decision should resolve this circuit split.

Two Seventh Circuit cases during the survey period provide a helpful reminder that the proper focus in FMLA cases is whether the employer acted against an employee because he took leave to which he was entitled. In *Gilliam v. United Parcel Service, Inc.*,[384] the plaintiff told his supervisor that he wanted a "few" or a "couple" of days to join his fiancée, who had just given birth to their child.[385] The supervisor allowed him to take Friday off, waiving the collective bargaining agreement's ten-day notice requirement.[386]

Gilliam did not contact the employer again until the following Thursday, when he heard his supervisor was trying to locate him.[387] The union contract required a call by the start of the shift on the third working day of leave, that is, the Tuesday after the Friday he first took leave.[388] UPS terminated Gilliam for abandoning his job.[389] Gilliam argued that he was entitled to leave of up to 120 days under the FMLA without informing UPS of his expected date of return.[390]

The Seventh Circuit affirmed summary judgment for UPS saying, "[T]he FMLA does not provide for leave on short notice when longer notice readily could have been given. Nor . . . does it authorize employees on leave to keep their employers in the dark about when they will return."[391] Because Gilliam did not give the thirty days notice that Department of Labor regulations require for foreseeable leaves, UPS could have insisted that he wait that long to take leave.[392] Furthermore, he was not fired for taking leave, but for failing to let his employer

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379. *Id.*
380. *Id.* at 937 (quoting 29 C.F.R. § 825.208(a) (2001)).
381. *Id.* (quoting 29 C.F.R. §§ 825.208(c), 825.700(a) (2001)).
382. *Id.* at 939.
383. 212 F.3d 929 (6th Cir. 2000).
384. 233 F.3d 969 (7th Cir. 2000).
385. *Id.* at 970.
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.* at 971.
392. *Id.*

know on a timely basis when he expected to return to work.[393]

The plaintiff in *Kohls v. Beverly Enterprises Wisconsin, Inc.*[394] was unsuccessful for a similar reason.[395] Kohls, an activities director at a nursing home, took maternity leave.[396] Shortly before the leave began, she admitted to errors in checking account records she maintained for a resident's trust fund.[397] During her absence, her temporary replacement outshone her in several respects.[398] Kohls was terminated the day she returned from leave based on alleged misappropriation of funds and unsatisfactory job performance.[399]

The Seventh Circuit affirmed summary judgment for the employer, saying that although an employee may not be terminated for taking FMLA leave, she may be terminated for poor performance if the same action would have been taken absent the leave.[400] This is true even if the problems for which the employee is terminated come to light as a result of the employee's absence during the leave.[401] Kohls argued that the reasons given for her firing were pretextual, and that the real reason was that the employer liked the temporary replacement better.[402] The court countered by saying, "Nothing in the record indicates that [the employer] preferred [the temporary replacement] for any reason related to Kohls' taking of leave."[403]

B. State Immunity

On February 21, 2001, the U.S. Supreme Court held in *Board of Trustees of the University of Alabama v. Garrett*[404] that the Eleventh Amendment bars suit in federal court by state employees to recover money damages for the state's failure to comply with title I of the ADA.[405] In the aftermath of *Garrett*, the Seventh Circuit revisited its conclusion in *Varner v. Illinois State University*[406]

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393. *Id.*

394. 259 F.3d 799 (7th Cir. 2001).

395. *Id.* at 801.

396. *Id.*

397. *Id.* at 802. While she was on leave, the employer determined that Kohls did not always record dates and check numbers for transactions; threw away bank statements without reconciling the account; did not record what checks written to "cash" were for; and could not account for a $30.93 check. *Id.*

398. *See id.* The replacement responded to several programming complaints by substantially revamping Kohls' programs. *Id.* Numerous residents, their family members, and co-workers wanted the temporary staff member to stay on permanently in the activities position. *Id.* at 806.

399. *Id.* at 803.

400. *Id.* at 805, 807.

401. *Id.* at 806.

402. *Id.*

403. *Id.*

404. 531 U.S. 356 (2001).

405. *Id.*

406. 226 F.3d 927 (7th Cir. 2000).

("*Varner II*") that the Equal Pay Act (EPA) qualifies as "remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment," so that state immunity is inapplicable.[407] In *Varner II*, which was decided before *Garrett*, the court contrasted the EPA with statutes aimed at age and disability discrimination.[408] The former focuses on gender-based classifications that receive heightened constitutional scrutiny, while the latter types of claims receive only rational basis review.[409]

In *Garrett*, the Supreme Court considered whether Congress had identified "a history and pattern of unconstitutional employment discrimination by the States against the disabled," and concluded that it had not.[410] In *Cherry v. University of Wisconsin System Board of Regents*,[411] an EPA case, the defendant tried to convince the Seventh Circuit that "no abrogation of States' immunity against federal statutory claims is valid without express findings in the statute itself, grounded in sufficient legislative record evidence, that States had engaged in a pattern and practice of committing unconstitutional conduct of the type being prohibited by that statute."[412] The Seventh Circuit disagreed, finding no indication in *Garrett* of a bright-line rule requiring such specific findings, and reaffirmed the holding of *Varner II* that state immunity does not preclude EPA suits.[413]

C. The Fair Labor Standards Act "Window of Correction" for Improper Deductions from Exempt Employees

The Fair Labor Standards Act requires that executive, administrative, and professional employees be paid on a salary basis in order to be classified as exempt from overtime pay.[414] These employees must receive a predetermined compensation amount each pay period that is not subject to reduction based on the quality or quantity of work.[415] Department of Labor regulations offer a "window of correction" for employers to remedy improper deductions.[416] The Seventh Circuit reversed its position regarding when this window of correction is available in *Whetsel v. Network Property Services, LLC*.[417]

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407. *Id.* at 936 (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627, 639 (1999)).

408. *Id.* at 934.

409. *Id.*

410. 531 U.S. at 368.

411. 265 F.3d 541 (7th Cir. 2001).

412. *Id.* at 552.

413. *Id.* at 553.

414. *See* Auer v. Robbins, 519 U.S. 452, 454-55 (1997) (citing Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended in sections of 29 U.S.C.), 29 C.F.R. §§ 541.1-541.3 (1996)).

415. *Id.* at 455 (citing 29 C.F.R. § 541.118(a) (1996)).

416. *See* 29 C.F.R. § 541.118(a)(6) (2001).

417. 246 F.3d 897 (7th Cir. 2001).

Plaintiff Whetsel was one of sixteen employees treated as exempt.[418] She filed suit after leaving the company, claiming that she should have been paid for overtime because the employer had an unwritten policy that subjected her and other exempt employees to possible pay deductions for partial-day absences.[419] She cited four salaried employees allegedly subjected to partial-day deductions on eight occasions.[420] The employer had circulated a memo to all employees acknowledging that partial-day deductions from exempt employee salaries occurred on "isolated occasions," but further saying that past and current policy was not to deduct for partial day absences of salaried employees, even if they had insufficient benefit time available to cover the missed time.[421] It also repaid the four affected salaried employees.[422]

The secretary of the Department of Labor interprets the regulation to deny curative opportunities to employers with policies of deducting pay from exempt employees as a disciplinary measure.[423] In a prior case, the Seventh Circuit had concluded differently, although arguably in dicta.[424] In *Whetsel*, the court overruled this conclusion and adopted the Department of Labor position, "[W]hen an employer has a practice or policy of improper deductions as defined . . . the window of correction provided in 29 C.F.R. § 541.118(a)(6) is not available."[425] It remanded the case to resolve the issue of whether this employer's actions did constitute such a practice or policy.[426]

V. WORKER'S COMPENSATION

A. Employer-Employee Relationship

In *GKN Co. v. Magness*,[427] the Indiana Supreme Court clarified the analysis for determining whether an employer-employee relationship exists for worker's compensation purposes.[428] Magness, a truck driver hired by a subcontractor, suffered injuries while working on a highway construction project and sued GKN, the general contractor.[429] GKN argued that Magness was its employee as well as the subcontractor's employee, so his exclusive remedy was worker's compensation.[430]

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418. *Id.* at 899.
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.* at 899-900.
423. *Id.* at 900-01.
424. *Id.* at 903 (citing DiGiore v. Ryan, 172 F.3d 454, 465 (7th Cir. 1999)).
425. *Id.* at 904.
426. *Id.* at 904-05.
427. 744 N.E.2d 397 (Ind. 2001).
428. *Id.* at 402-03.
429. *Id.* at 399-400.
430. *Id.* at 400.

The supreme court applied the seven-factor analysis of *Hale v. Kemp*,[431] but emphasized that the factors must be weighed in a balancing test and not tallied in a majority-wins approach.[432] Furthermore, the right to exercise control weighs most heavily, rather than intent of the parties, as previous cases had indicated.[433] After applying this revised approach, the court concluded that Magness was not a GKN employee.[434]

The court also clarified the burden of proof in jurisdictional challenges where the employer argues that the trial court lacks jurisdiction because worker's compensation is the plaintiff's exclusive remedy.[435] The employer carries the burden of proving that the complaint falls under worker's compensation unless the complaint itself demonstrates that an employment relationship exists.[436] In the latter case, the burden shifts to the employee to show why worker's compensation would not apply.[437] The court therefore disapproved language in prior cases indicating that if an employer raises the issue of preclusion under the worker's compensation statute, the employee automatically assumes the burden.[438]

The degree of judgment involved in this seven-factor test was illustrated in *Degussa Corp. v. Mullens*.[439] There, the court applied the analysis and split two-to-two on the conclusion.[440] Reasonable minds will often differ when applying the factors to a particular set of facts.

B. Purely Emotional Injury

The Indiana Court of Appeals held in two cases that worker's compensation does not apply to purely emotional injuries. In *Branham v. Celadon Trucking Services, Inc.*,[441] Judge Kirsch prefaced his analysis by quoting, "The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable."[442]

Plaintiff Branham fell asleep during a work break, and a co-worker dropped

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431. 579 N.E.2d 63, 67 (Ind. 1991) (listing the most important factors as right to discharge, mode of payment, supplying tools or equipment, belief of the parties in the existence of employer-employee relationship, control over means used in results achieved, length of employment, and establishment of work boundaries).

432. 744 N.E.2d at 402.

433. *Id.* at 402-03 (citing Rensing v. Ind. State Univ. Bd. of Tr., 444 N.E.2d 1170 (Ind. 1983)).

434. *Id.* at 407.

435. *Id.* at 403-04.

436. *Id.* at 404.

437. *Id.*

438. *Id.*

439. 744 N.E.2d 407 (Ind. 2001).

440. *Id.* at 414. Justice Rucker did not participate. *Id.* at 415.

441. 744 N.E.2d 514 (Ind. Ct. App. 2001).

442. *Id.* at 518 (quoting Kelley v. Post Publ'g Co., 98 N.E.2d 286, 287 (Mass. 1951)).

his own pants so another prankster could photograph the two men in a suggestive pose.[443] Management found out what had happened after the picture circulated among other co-workers.[444] Both perpetrators received a week's unpaid suspension, and the photographer was demoted.[445] Branham was so humiliated by the incident that he left the company.[446]

The court of appeals observed that Indiana's worker's compensation statute covers on-the-job injuries, defined as including disabilities resulting in an injured employee's inability to work and impairments in the form of loss of physical function.[447] Branham's injury was not physical, and he remained fully fit for employment.[448] Therefore, the worker's compensation statute did not preclude Branham's tort claims, although those claims failed on the merits.[449]

A similar result was obtained in *Dietz v. Finlay Fine Jewelry Corp.*[450] Dietz, a sales clerk, sold fine jewelry for a company that leased space in L.S. Ayres retail stores.[451] She gave an unauthorized discount to a customer who had become irritated because Dietz had to seek help in processing her transaction, and the assistance was slow in coming.[452] The store security manager called Dietz in for an hour-long interview during which he allegedly insisted that she stay in the room and accused her of stealing jewelry to support a substance abuse problem.[453] As in *Branham*, the court of appeals held that worker's compensation did not preclude Dietz's tort claims because Dietz alleged no physical injury or loss of physical function.[454] It remanded for consideration of her false imprisonment and defamation charges.[455]

C. When Is Expert Testimony Required?

Two survey period cases provide guidance on the role of expert testimony in worker's compensation cases. The first is *Muncie Indiana Transit Authority v. Smith*,[456] where the issue was whether Smith's carpal tunnel syndrome arose out of his employment as a bus driver.[457] None of the medical records Smith offered

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443. *Id.* at 518-19.
444. *Id.* at 519.
445. *Id.*
446. *Id.*
447. *Id.* at 520 (citing Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1288-89 (Ind. 1994)).
448. *Id.*
449. *Id.* at 520-25.
450. 754 N.E.2d 958 (Ind. Ct. App. 2001).
451. *Id.* at 963.
452. *Id.*
453. *Id.* at 963-64.
454. *Id.* at 965.
455. *Id.* at 971.
456. 743 N.E.2d 1214 (Ind. Ct. App. 2001).
457. *Id.* at 1215.

as evidence contained any opinion as to the cause of this condition, and Smith was the sole witness at the worker's compensation hearing.[458] The court considered guidance from other states regarding what qualifies as competent evidence of causation in worker's compensation cases and concluded that both lay and expert evidence are admissible if "the injury was not caused by a sudden and unexpected external event."[459] If, however, "the cause of the injury is not one which is apparent to a lay person and multiple factors may have contributed to causation, expert evidence on the subject is required."[460] Smith offered no expert evidence, so his claim failed.[461]

In *Schultz Timber v. Morrison*,[462] a truck driver suffered broken bones and a punctured lung when a load shifted, causing his truck to overturn.[463] Thereafter, he experienced severe headaches that were exacerbated by physical activity.[464] Schultz argued that only the testimony of a vocational expert could satisfy Morrison's burden of proof that he could not obtain or perform reasonable types of employment.[465] Schultz's vocational expert testified that Morrison could work an eight-hour day of light or "light plus" duty.[466] Morrison offered only testimony by his two treating physicians, who said that Schultz's expert failed to consider Morrison's level of pain and ability to function with that pain.[467]

The court held, "Although vocational experts are utilized in many workmen's compensation cases, they are not a prerequisite to obtaining total permanent disability payments."[468] Here, Morrison's doctors testified that Morrison could not stand, walk, or read for extended periods of time, could not make repetitive motions with his shoulders and arms, and required pain medication that interfered with cognitive functions.[469] The appeals court upheld the Worker's Compensation Board's four-to-three decision granting Morrison total and permanent disability.[470]

D. Acquiescence

The issue in *Wimmer Temporaries, Inc. v. Massoff*[471] was whether the employer acquiesced in the claimant's violation of a conspicuously posted safety

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458. *Id.* at 1216.
459. *Id.* at 1217.
460. *Id.*
461. *Id.* at 1218.
462. 751 N.E.2d 834 (Ind. Ct. App. 2001).
463. *Id.* at 836.
464. *Id.*
465. *Id.*
466. *Id.* at 837.
467. *Id.* at 836-37.
468. *Id.* at 837.
469. *Id.*
470. *Id.* at 836.
471. 740 N.E.2d 886 (Ind. Ct. App. 2000).

rule.[472] Massoff, a caster working on a temporary basis at a foundry, failed to shut down a piece of equipment before cleaning a spout.[473] This was common practice, although a posted safety notice threatened disciplinary action against anyone found inside the safety enclosure while the equipment was running.[474]

The employer emphasized that no one specifically told Massoff to violate the written rule.[475] The statute denies compensation if an employee knowingly fails to obey a conspicuously posted, reasonable rule of the employer.[476] The court, however, focused on the fact that before the safety rule was posted Massoff was trained to clean with the table in operation, and other employees continued to follow this practice after the rule's posting.[477] Any shutdown slowed production and increased scrap.[478] Six hours before Massoff's accident, a co-worker and a team leader saw Massoff violating the rule and, although both had disciplinary authority, said nothing.[479] The court affirmed the award of benefits to Massoff, finding that the employer acquiesced in the safety violation.[480]

VI. STATE LAW DEVELOPMENTS

A. Indiana's Wage Payment Statute

The Indiana Supreme Court has granted transfer in *St. Vincent Hospital & Health Care Center, Inc. v. Steele*[481] to decide whether the liquidated damages provisions of Indiana's Wage Payment Statute[482] govern the amount of pay as well as the frequency.[483] St. Vincent owed Dr. Steele bi-weekly compensation under an employment agreement.[484] In years three and four of the agreement, St. Vincent began to exclude payment for certain services because it believed the payments were impermissible under proposed Health Care Financing Administration regulations.[485] Steele sued, and the trial court granted him summary judgment. Under the Indiana Wage Payment Statute's treble damages provision, the court awarded Steele $277,812.92 in unpaid wages and

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472. *Id.* at 887.
473. *Id.* at 887-88.
474. *Id.* at 888.
475. *Id.* at 889.
476. *Id.* (citing IND. CODE § 22-3-2-8 (1998)).
477. *Id.* at 892.
478. *Id.*
479. *Id.*
480. *Id.* at 892-93.
481. 742 N.E.2d 1029 (Ind. Ct. App. 2001), *trans. granted and opinion vacated*, 761 N.E.2d 413 (Ind. 2001).
482. IND. CODE § 22-2-5-2 (1998).
483. *St. Vincent Hosp.*, 742 N.E.2d at 1032.
484. *Id.* at 1030.
485. *Id.* at 1031.

$555,625.84 in liquidated damages, plus attorney fees.[486]

St. Vincent appealed, arguing that the statute covers only the frequency, not the amount, of payment.[487] The statute reads, in relevant part:

> Sec. 1. (a) Every person, firm, corporation, limited liability company, or association, their trustees, lessees, or receivers appointed by any court, doing business in Indiana, shall pay each employee at least semimonthly or biweekly, if requested, the amount due the employee . . . .
> (b) Payment shall be made for all wages earned to a date not more than ten (10) days prior to the date of payment . . . .[488]

Alternatively, St. Vincent argued that it had a good faith basis for withholding a portion of Steele's wages.[489]

The court of appeals noted conflicting authority, and was persuaded by Steele's argument that if the statute only deals with frequency of payment, an employer could avoid any penalty by paying a *de minimis* amount at least biweekly, regardless of the amount of salary actually due.[490] It also noted the statutory language "the amount due," and affirmed the trial court's award.[491] It rejected St. Vincent's argument for a good faith exception, because no such exception appears in the statute.[492]

The Indiana Supreme Court granted transfer,[493] thereby vacating this holding, and heard oral argument on September 19, 2001. A decision will be forthcoming in due course.

The court of appeals dealt with another aspect of the Wage Payment Statute during the survey period in *Wank v. St. Francis College*.[494] This time the question was whether severance pay offered in connection with a reduction in force is covered by the statute.[495] Plaintiff Wank's position was eliminated as a result of a merger, and the college offered him a severance package in recognition of his years of service.[496]

Almost immediately thereafter, the college separately advised Wank that the severance bonus package was contingent upon Wank's execution of an agreement releasing the college from liability.[497] When Wank declined to sign the release, the college paid him only wages due, including accrued vacation

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486. *Id.* at 1031-32.
487. *Id.* at 1032.
488. *Id.* (citing IND. CODE § 22-2-5-1 (1998)).
489. *Id.* at 1035.
490. *Id.* at 1033-35.
491. *Id.* at 1035.
492. *Id.*
493. St. Vincent Hosp. & Health Care Ctr., Inc. v. Steel, 761 N.E.2d 413 (Ind. 2001).
494. 740 N.E.2d 908 (Ind. Ct. App. 2000).
495. *Id.* at 909-10.
496. *Id.* at 909.
497. *Id.* at 910.

pay.[498] Wank sued, but the trial court held that Wank had no employment contract and that the severance pay was not a wage under the Wage Payment Statute.[499]

Wank argued on appeal that he earned the severance pay through his years of service, making the amount in effect deferred compensation.[500] The court of appeals disagreed, although it reiterated that merely calling a payment a bonus does not automatically exempt it from the statute.[501] Compensation that accrues during an employee's tenure is a wage, even when payment is deferred, if it relates to work performed.[502]

Here, however, the court concluded that although the severance pay was based on years of service, it was not connected to work performed.[503] Also, the college had no severance pay policy, so the offered amount was an optional bonus in recognition of Wank's past service rather than compensation accrued during employment.[504] Because the package was not a term of Wank's employment, the court concluded, "absent a policy creating an entitlement to severance pay, such compensation is not a wage for purposes of the Wage Payment Statute. The severance package at issue . . . was a discretionary, gratuitous benefit offered to employees as an act of benevolence."[505]

B. Enforceability of Vacation Pay Accrual Policies

Another survey period case applying Indiana law is worth noting. *Damon Corp. v. Estes*[506] dealt with vacation pay liability upon termination.[507] Damon's employee handbook read: "Employees will receive their vacation pay, when eligible, on the regular payday, the week following their anniversary date. An employee does not earn vacation pay each year until his/her anniversary date."[508] Estes, upon termination, claimed entitlement to vacation pay calculated from his most recent anniversary date (August 27, 1999) to his termination date (May 1, 2000).[509] The trial court awarded him $121.14 plus costs.[510]

The court of appeals reversed, accepting Damon's argument that its company

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498. *Id.*

499. *Id.* at 910. The trial court found genuine issues of material fact on St. Francis' promissory estoppel claim, and denied summary judgment on that question. *Id.*

500. *Id.* at 911.

501. *Id.* at 912-13.

502. *See id.* at 913.

503. *Id.*

504. *Id.*

505. *Id.* at 913-14.

506. 750 N.E.2d 891 (Ind. Ct. App. 2001).

507. *See id.* at 892.

508. *Id.*

509. *Id.*

510. *Id.*

policy precluded "accrued" vacation time.[511] The court cited *Die & Mold, Inc. v. Western*,[512] where it characterized vacation pay as "additional wages, earned weekly" but went on to say, "where only the time of payment is deferred . . . *absent an agreement to the contrary*, the employee would be entitled to a pro rata share of it to the time of termination."[513] The court in *Die & Mold, Inc.* went on to say that any agreement or published policy to the contrary would be enforceable.[514] Here, a policy Estes had acknowledged in writing clearly stated that an employee earned no vacation pay until his anniversary date.[515] The court therefore reversed and upheld the policy as written.[516]

VII. THE FORCE AND EFFECT OF ARBITRATION AGREEMENTS

An important and ongoing issue is how far employers may go in requiring employees to agree to arbitrate employment disputes. On March 21, 2001, the U.S. Supreme Court resolved a circuit split by upholding an arbitration agreement in *Circuit City Stores, Inc. v. Adams*.[517] Plaintiff Adams signed a form as part of his application process when Circuit City hired him in 1995, agreeing to submit all employment disputes to binding arbitration.[518] Two years later, he brought suit in state court alleging employment discrimination under California law.[519] The Ninth Circuit interpreted language in the Federal Arbitration Act exempting "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" as excluding virtually all employment contracts from the Act's coverage.[520] It reversed the federal district order compelling arbitration.[521]

The U.S. Supreme Court reversed the court of appeals in a five-to-four decision based upon the text of the statute rather than its legislative history.[522] The majority interpreted the Act's exemption narrowly as excluding only transportation worker employment contracts from coverage.[523] Justice Anthony M. Kennedy, writing for the majority, noted, "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular

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511. *Id.* at 893.

512. 448 N.E.2d 44 (Ind. Ct. App. 1983).

513. *Damon Corp.*, 750 N.E.2d at 893 (quoting *Die & Mold, Inc.*, 448 N.E.2d at 48) (emphasis supplied).

514. *Id.* (quoting *Die & Mold, Inc.*, 448 N.E.2d at 47-48).

515. *See id.*

516. *Id.*

517. 532 U.S. 105 (2001).

518. *Id.* at 109-10.

519. *Id.* at 110.

520. *Id.* at 109 (referring to 9 U.S.C. § 1 (2000)).

521. *Id.* at 124.

522. *Id.* at 119, 124.

523. *Id.* at 119.

importance in employment litigation."[524] The Court was not persuaded by the attorneys general of twenty-two states, who argued as *amici* that the Federal Arbitration Act should not be read to pre-empt state employment laws that protected employees by prohibiting them from signing away their rights to pursue state-law discrimination actions in court.[525]

The decision clarified the overall scope of the Federal Arbitration Act but left many questions unanswered. The Court reiterated a prior holding that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[526] It remains to be seen whether workers who agree to arbitration retain their rights to collect punitive damages and attorney fees, and to pursue class actions. Another open question is how broadly the classes of transportation workers specifically referenced in the statute will be defined.

On June 20, 2001, five Democratic members of the U.S. House of Representatives introduced legislation to amend the Federal Arbitration Act and overturn the holding of *Circuit City*.[527] Sponsor Dennis Kucinich attacked mandatory employment dispute arbitration agreements as depriving employees, who have inferior bargaining power, of their rights to due process, trial by jury, discovery and appeal.[528]

In another recent development, the U.S. Supreme Court has held that an agreement between an employer and an employee to arbitrate employment disputes does not bar the EEOC from pursuing such victim-specific relief as back pay, reinstatement, and damages.[529] The case arose when Eric Baker, who signed a mandatory arbitration agreement as a condition of employment at a Waffle House restaurant, suffered a seizure sixteen days after he began working as a grill operator.[530] He filed a charge with the EEOC after he was discharged, and the EEOC filed an enforcement action.[531]

Justice John Paul Stevens, writing for the six-justice majority, said that Title VII "clearly makes the EEOC the master of its own case" and that the Federal Arbitration Act "does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum."[532] Although the EEOC does not file many lawsuits (fewer than 300 in 2000, compared to

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524. *Id.* at 123.

525. *Id.* at 121-22.

526. *Id.* at 123 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

527. Susan J. McGolrick, *House Democrats Introduce Legislation to Overturn High Court's Circuit City Ruling*, DAILY LAB. REP., June 21, 2001, at A-3.

528. *Id.*

529. EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002).

530. *Id.* at 758.

531. *Id.*

532. *Id.* at 762-63.

nearly 80,000 discrimination complaints received),[533] the Court's conclusion is important because employees with arbitration agreements will likely continue to file discrimination complaints with the EEOC, hoping that the agency will pursue damages on their behalf.

CONCLUSION: THE WATCH LIST

Three noteworthy employment law cases, not discussed above, are pending before the U.S. Supreme Court. In *Edelman v. Lynchburg College*,[534] the Court will consider the validity of the EEOC's regulation permitting individuals to "verify" their charges by signing to affirm that the assertions are true after the filing deadline has passed.[535] The EEOC mailed a draft charge to plaintiff Edelman on March 18, 1998, but he did not file the charge until April 15, which was thirteen days past the filing deadline.[536] Edelman pointed to a signed letter he sent the EEOC the previous November 14, and an EEOC regulation saying "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments . . . will relate back to the date the charge was first received."[537]

The Fourth Circuit concluded that this regulation contravened statutory language limiting the EEOC's authority and establishing certain prerequisites: charges "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."[538] It acknowledged contrary authority from the Fifth, Seventh, Eighth, Ninth and Tenth Circuits but affirmed dismissal of Edelman's charge as untimely filed.[539]

Another case worth watching is *Swierkiewicz v. Sorema*,[540] which deals with Rule 12(b)(6) motions. Plaintiff Swierkiewicz's national origin complaint stated only that he is Hungarian, others employed by Sorema were French, and his termination was motivated by national origin discrimination. He supported his claim of age discrimination only by asserting that the company president said he wanted to "energize" Swierkiewicz's department.[541]

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533. *Id.* at 762 n.7.

534. 228 F.3d 503 (4th Cir. 2000), *cert. granted*, 533 U.S. 928 (2001).

535. Susan McGolrick, *New Term to Begin with Bumper Crop of Employment-Related Cases to Be Heard*, DAILY LAB. REP., Sept. 28, 2001, at B-1.

536. *Edelman*, 228 F.3d at 506.

537. *Id.* at 507 (quoting 29 C.F.R. § 1601.12(b) (2001)).

538. *Id.* at 508 (quoting 42 U.S.C. § 2000e-5(b) (1994)).

539. *Id.* at 510-11 (citing Lawrence v. Cooper Cmtys., Inc., 132 F.3d 447 (8th Cir. 1998); Philbin v. Gen. Elec. Capital Auto Lease, Inc., 929 F.2d 321 (7th Cir. 1991); Peterson v. City of Wichita, 888 F.2d 1307, 1308 (10th Cir. 1989); Casavantes v. Cal. State Univ., 732 F.2d 1441, 1442-43 (9th Cir. 1984); Price v. S.W. Bell Tel. Co., 687 F.2d 74 (5th Cir. 1982)).

540. 2001 U.S. App. LEXIS 3837 (2nd Cir. 2001) (unpublished opinion), *cert. granted*, 533 U.S. 976 (2001).

541. *Id.*

The Second Circuit affirmed the district court ruling granting Sorema's motion to dismiss for failure to state a claim.[542] The U.S. Supreme Court's decision should provide guidance on the subject of what a plaintiff must plead to withstand such a motion to dismiss.

The third case, *Echazabal v. Chevron USA, Inc.*,[543] presents an interesting issue of statutory interpretation under the ADA. The ADA prohibits discrimination against "otherwise qualified" individuals, including "using qualification standards . . . that screen out or tend to screen out an individual with a disability."[544] However, the ADA provides an affirmative defense that allows employers to adopt as a "qualification standard" the requirement that the individual not pose "a direct threat to the health or safety of other individuals in the workplace."[545] At issue in *Echazabal* is whether the employer may also adopt qualification standards to protect the disabled employee from threats to his or her *own* health.[546] The Ninth Circuit ruled that the employer may not adopt such standards, creating a conflict with a prior ruling from the Eleventh Circuit.[547] The Supreme Court has agreed to hear the case.[548]

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542. *Id.* (citing FED. R. CIV. P. 12(b)(6) (1994)).

543. 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, 122 S. Ct. 456 (2001).

544. 42 U.S.C. § 12112(b)(6).

545. *Id.* § 12113.

546. *Echazabal*, 226 F.3d at 1064.

547. *Id.* at 1072, 1075; Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996).

548. 122 S. Ct. 456 (2001).

THE CONTINUING COMPLEXITY OF INDIANA RULE OF EVIDENCE 404(b)

JEFFREY O. COOPER*

INTRODUCTION

Of the numerous provisions in the Indiana Rules of Evidence, few have proved as complicated in application as Rule 404(b). The rule—which provides generally that evidence of crimes, wrongs, or acts other than the conduct that is the subject of the particular case is not admissible as proof of the actor's character, but is admissible for other purposes[1]—has produced challenging cases in each of the years since the Indiana Rules of Evidence went into effect in 1994. This past year was no exception, as decisions of the Indiana Supreme Court and the Indiana Court of Appeals confronted the numerous problems of application raised by the rule.[2] Because the rule remains the subject of confusion eight years after the adoption of the Indiana Rules of Evidence, and more than twenty-five years after the adoption of a parallel provision in the Federal Rules of Evidence, this Article will focus not on the full range of issues addressed by the courts under the Indiana Rules of Evidence during the survey period, but rather will focus on the past year's Rule 404(b) cases.

I. THE SUBSTANTIVE REQUIREMENTS OF RULE 404(b)

Rule 404(b), at its heart, has three substantive requirements. First, the rule's reference to "other crimes, wrongs, or acts" means that the proffered evidence must involve a crime, wrong, or act that is not itself the subject of the case in which the evidence is sought to be introduced. Second, the rule excludes evidence of such acts if offered solely as character evidence to show action in conformity with that character in the events giving rise to the case. In other words, the evidence must not be used to support the "forbidden inference" that, because an individual has engaged in wrongdoing on occasions other than those at issue in the particular case, she must have done so on the occasion pertinent to the case as well.[3] If the evidence is offered for another purpose, however, it

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1. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

IND. R. EVID. 404(b).

2. The survey period for this Article is the year beginning October 1, 2000 and terminating September 30, 2001.

3. *See* Thompson v. State, 690 N.E.2d 224, 233 (Ind. 1997).

may be admitted. Finally, because of the danger that the jury will indulge in the forbidden inference even if the evidence is offered for a proper purpose, the court must engage in a careful Rule 403 balancing to ensure that the probative value of the Rule 404(b) evidence is not substantially outweighed by the danger of unfair prejudice. Each one of these requirements raises difficulties in application.

A. What Are "Other Crimes, Wrongs, or Acts?"

1. "Crimes, Wrongs, or Acts."—Rule 404(b) implicates evidence of "crimes, wrongs, or acts."[4] If the evidence in question does not specifically reference an act, the Indiana Supreme Court has held that Rule 404(b) does not apply. Thus, a witness's statement that she feared the defendant was not barred by Rule 404(b), even though the jury reasonably could infer from the witness's testimony that the defendant had engaged in acts that engendered her fear.[5] In addition, it is not enough that there be evidence of a particular act; the act must also be wrongful in some sense.[6]

The Indiana Court of Appeals reiterated both of these points during the past year. In *Allen v. State*,[7] during the defendant's trial on a charge of burglary, the prosecution sought to introduce evidence that, during questioning by the police, the defendant offered to purchase drugs as a confidential informant and that "[h]e'd done these things in the past."[8] The court initially determined that the reference to "these things" plausibly could be interpreted to mean that the defendant had previously acted as a confidential informant, not that the defendant had previously made drug purchases.[9] Evidence of having acted as an informant, however, would not be barred by Rule 404(b), because there was nothing wrongful about the act.[10] And while evidence of having previously acted as a confidential informant might support an inference that the defendant had previously engaged in misconduct, Rule 404(b) did not bar evidence that merely raised such an inference.[11]

The line thus seems to be drawn clearly: if direct evidence of an act by the defendant is presented, Rule 404(b) is implicated, whereas if the evidence presented requires an inference to support the conclusion that the defendant engaged in an act, the Rule does not apply. One recent decision of the Indiana Supreme Court, however, introduced a note of uncertainty. In *McCarthy v. State*,[12] the defendant, a high school teacher, was charged with sexual misconduct

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4. IND. R. EVID. 404(b).
5. *See* Haak v. State, 695 N.E.2d 944, 947 (Ind. 1998).
6. *See* Allen v. State, 743 N.E.2d 1222 (Ind. Ct. App. 2001).
7. *Id.*
8. *Id.* at 1232.
9. *Id.* at 1232 n.13.
10. *Id.* at 1232.
11. *Id.*
12. 749 N.E.2d 528 (Ind. 2001).

with a minor based on allegations that he had molested two of his students. At trial, the prosecution presented evidence that the defendant had played "strip perdiddle," a sexual game with two other underage girls.[13] The trial court admitted the evidence over the defendant's objection that the evidence was improper under Rule 404(b).[14] The supreme court, concluding that the trial court's decision was correct, questioned whether the evidence of the defendant's participation in "strip perdiddle" even constituted evidence of other acts within the meaning of the Rule.[15]

The court's objection is difficult to fathom. Playing a game that involves removing one's clothes unquestionably constitutes conduct and thus would seem to fit within the Rule. The most likely basis for the court's objection is that the conduct at issue in *McCarthy* was not sufficiently wrongful to fall under the Rule. Again, though, the uncertainty that the court suggests seems unfounded. The inclusion of "wrongs, or acts" in Rule 404(b) suggests that an act need not be criminal to fall within Rule 404(b).[16] And while an adult male teacher who plays a non-contact stripping game with minor females over whom he has authority may not be engaged in criminal conduct, his act certainly is wrongful in the ordinary sense of the word. In any event, the court did not ultimately resolve the issue, resting its decision on other grounds,[17] hence it would seem best not to make too much of this aspect of the opinion.

2. "Other."—Courts commonly refer to Rule 404(b) as addressing evidence of "prior" acts.[18] In many instances, this may simply be because, as a factual matter, the events discussed under Rule 404(b) in the particular cases occurred prior to the events underlying those cases. Repeated use of the word "prior," however, may suggest, at least implicitly, that the rule requires that the acts in question have occurred before the events giving rise to the case.

The rule contains no such requirement, as a case from this past year demonstrates. In *Murray v. State*,[19] the Indiana Supreme Court considered under Rule 404(b) evidence of uncharged conduct that occurred concurrently with the conduct that was the subject of the criminal charge. The defendant, charged with attempted murder following the shooting of an acquaintance, claimed that the shooting had been accidental.[20] To rebut this claim, and as evidence that the defendant had intended to shoot the victim, the prosecution offered evidence that the defendant did not have a license for the handgun used in the shooting. The

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13. *Id.* at 535.

14. *Id.* at 536.

15. *Id.* at 536-37.

16. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 216 (2d ed. 1999).

17. *See infra* notes 23-24 and accompanying text.

18. *See* Dickens v. State, 754 N.E.2d 1, 4 (Ind. 2001) ("Rule 404(b) protects against convictions based on past actions . . . rather than facts relevant to the matter at issue."); Crain v. State, 736 N.E.2d 1223, 1234-35 (Ind. 2000); Allen v. State, 743 N.E.2d 1222, 1232 (Ind. Ct. App. 2001); Atwell v. State, 738 N.E.2d 332, 336 (Ind. Ct. App. 2000).

19. 742 N.E.2d 932 (Ind. 2001).

20. *Id.* at 933.

court, noting that carrying a handgun without a license was a crime, concluded that the evidence was admissible under Rule 404(b) as evidence of an other act relevant to the defendant's intent to engage in the charged conduct: when a person unlawfully in possession of a firearm "openly brandishes" the weapon, "a factfinder could conclude that the person was highly motivated by a specific intent for doing so."[21]

B. Purpose for Offering the Evidence

Rule 404(b) bars evidence of other crimes, wrongs, or acts only when offered for the purpose of showing the actor's character as a means of highlighting that the actor behaved in a manner consistent with that character on the occasion at issue in the particular case. If the evidence is offered for a purpose other than as support for this "forbidden inference," the evidence may be admitted. Because evidence admitted for a proper purpose may be misapplied by the jury in support of the forbidden inference, however, the court is obliged to ensure that the true purpose for offering the evidence is a proper one.

The Indiana Supreme Court and Indiana Court of Appeals have proved receptive to arguments that evidence of other acts is being offered for a purpose other than as character evidence, with one significant exception. Following *Wickizer v. State*,[22] the courts carefully scrutinize other-acts evidence that is offered to show intent. For the most part, though, the cases in this past year demonstrate that reversal on the ground that evidence is offered for an improper purpose under Rule 404(b) is unusual, as is reversal on the ground that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

1. Routine Application.—Many of the instances in which evidence is admitted under Rule 404(b) are routine: the evidence plainly relates to an aspect of the case other than the defendant's character. In *McCarthy v. State*,[23] for example, the defendant, accused of sexual misconduct with a minor, disclaimed

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21. *Id.*

22. 626 N.E.2d 795 (Ind. 1993).

23. 749 N.E.2d 528 (Ind. 2001). The *McCarthy* decision is more notable for the fact that it applies harmless error analysis to a deprivation of the defendant's right to cross-examine witnesses, as guaranteed by the Sixth Amendment of the U.S. Constitution and article 1, section 13 of the Indiana Constitution. *Id.* at 534. In rejecting the defendant's argument that deprivation of the right to cross-examine witnesses should be considered error *per se*, the court discarded court of appeals precedent that had supported the defendant's position. *Id.* at 533-34 (*overturning* Tucker v. State, 728 N.E.2d 261, 262 (Ind. Ct. App. 2000), *trans. denied*; Kleinrichert v. State, 530 N.E.2d 321, 322 (Ind. Ct. App. 1988); Higginbotham v. State, 427 N.E.2d 896, 901 (Ind. Ct. App. 1981), *overruled on other grounds by* Micinski v. State, 487 N.E.2d 150 (Ind. 1986); Pfefferkorn v. State, 413 N.E.2d 1088, 1090 (Ind. Ct. App. 1980); Haeger v. State, 390 N.E.2d 239, 241 (Ind Ct. App. 1979)). The court noted that the U.S. Supreme Court had previously determined that harmless error analysis should be used to assess the impact of violations of the right to impeach for bias. *Id.* at 534 (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

knowledge of the game in which he had allegedly indulged with the minor victim before molesting her. To demonstrate that the defendant did in fact have knowledge of the game, the prosecution introduced evidence from two minor witnesses who testified that the defendant had played the game with them as well. The supreme court held that this use of the evidence to show knowledge was proper.[24]

Prior acts of violence by the defendant against the victim of the charged offense are often admitted to show motive, the idea being that the prior acts demonstrate a hostile relationship between the defendant and the victim, a relationship that in turn explains the charged conduct. This use of the evidence avoids the forbidden inference by focusing not on the defendant's propensity for violence broadly but rather on the particulars of the defendant's relationship with the victim. In *Wrinkles v. State*,[25] for example, the trial court admitted (without objection from defendant's counsel) evidence that, two months prior to murdering his wife and two others, the defendant had pointed a gun at his wife.[26] On collateral review, the Indiana Supreme Court concluded that the failure to object did not deprive the defendant of effective assistance of counsel, because the evidence was properly admissible to show motive.[27]

Cases in which evidence is excluded can be equally clear-cut. In *Buchanan v. State*,[28] a child-molesting case, the trial court admitted over the defendant's objection photographs and drawings seized from his home of children in various states of undress, accepting the prosecution's argument that the materials constituted evidence of the defendant's plan to molest young children. The court of appeals made short work of the argument. To constitute proper evidence of plan, the court asserted, the charged offense and the evidence of other acts "'must . . . be so related in character, time, and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and the charged crime.'"[29] Under this test, the drawings and photographs did not constitute evidence of an overarching plan.

2. Intent.—An effort to show intent is a proper purpose for introducing

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24. *McCarthy*, 749 N.E.2d at 536.

25. 749 N.E.2d 1179 (Ind. 2001). *Wrinkles* is most noteworthy for its conclusion that criminal defendants may not be required to wear stun belts in the courtroom. *Id.* at 1195. The court acknowledged the need for defendants to wear restraints in limited circumstances, but concluded that, unlike shackles and other forms of restraint, stun belts generated a fear in the minds of their wearers that had the potential to chill defendants from participating fully in their own defense. *See id.* at 1194-96. Justice Boehm, concurring in the result, opined that stun belts should not be categorically barred, reasoning that, because they were less visible than shackles and thus were less likely to be observed by the jury, some defendants might prefer them. *See id.* at 1205 (Boehm, J., concurring).

26. *See id.* at 1196 & n.7.

27. *Id.* at 1197.

28. 742 N.E.2d 1018 (Ind. Ct. App. 2001).

29. *Id.* at 1022 (quoting Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992)). *Lannan*, it should be noted, predated the adoption of the Indiana Rules of Evidence.

evidence of other acts under Rule 404(b). Permitting evidence of other acts to be introduced to show intent in criminal cases is problematic, however, in that evidence tending to show intent is almost always relevant in such cases. Moreover, the intent argument, which the rule recognizes as proper, is not far removed in operation from the forbidden inference based on character. Each is in a sense a propensity argument; the intent argument is simply more narrowly focused on a particular aspect of the defendant's state of mind, rather than on his general character.

Recognizing this reality, in the 1993 case of *Wickizer v. State*,[30] the Indiana Supreme Court held that evidence of other acts may not be offered to show intent unless the defendant specifically denies intent. A mere denial of involvement in the offense does not amount to a denial of intent; rather, the defendant must argue that, whatever conduct he may have engaged in, he did not possess the necessary *mens rea* for the offense.[31] In many instances, it is readily apparent that the defendant has made the requisite denial, thus opening the door to other-act evidence probative of intent. In *Crain v. State*,[32] for example, the defendant, charged with murder of his wife, claimed that her death was accidental.[33] This claim allowed the prosecution to introduce evidence of several prior batteries by the defendant against his wife as evidence of the requisite intent.[34] And in *Murray v. State*,[35] when the defendant, charged with attempted murder, claimed that he shot the victim by accident, the Indiana Supreme Court held that the prosecution could properly introduce evidence that the defendant's possession of the firearm was illegal, on the theory that one in possession of an illegal firearm would not casually flaunt it but would reveal it only if there were intent

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30. 626 N.E.2d 795 (Ind. 1993).

31. The federal courts of appeals, applying the parallel federal rule, are divided in their approaches as to whether the defendant must controvert intent before evidence of other acts may be introduced pursuant to Rule 404(b). A number follow an approach similar to that of *Wickizer*. *See* United States v. Karas, 950 F.2d 31, 37 (1st Cir. 1991); United States v. Colon, 880 F.2d 650, 656-57 (2d Cir. 1989); United States v. Walton, 602 F.2d 1176, 1180-81 (4th Cir. 1979); United States v. Silva, 580 F.2d 144, 148 (5th Cir. 1978). Other circuits take the position that, where the crime is a specific intent crime, evidence of other acts may be used to demonstrate intent even if the defendant did not specifically place intent at issue. *See* United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994); United States v. Hadley, 918 F.2d 848, 851-52 (9th Cir. 1990); United States v. Weddell, 890 F.2d 106, 107-08 (8th Cir. 1989); United States v. Mazzanti, 888 F.2d 1165, 1170-71 (7th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990); United States v. Soundingsides, 820 F.2d 1232, 1237-38 (10th Cir. 1987); United States v. Williams, 816 F.2d 1527, 1531 (11th Cir. 1987); United States v. Hamilton, 684 F.2d 380, 384 (6th Cir.), *cert. denied*, 459 U.S. 976 (1982). The position of the D.C. Circuit appears still to be unresolved, although in admitting other-acts evidence to demonstrate intent, the court in one case did note that the defendant had squarely placed his intent at issue. *See* United States v. Watson, 894 F.2d 1345, 1349 (D.C. Cir. 1990).

32. 736 N.E.2d 1223 (Ind. 2000).

33. *Id.* at 1235.

34. *Id.* at 1235-36.

35. 742 N.E.2d 932 (Ind. 2001).

to use it.[36]

Although the *Wickizer* rule is now well established, it sometimes proves troublesome in application. A recent decision of the Indiana Court of Appeals suggests that it can be difficult to determine whether a defendant has placed his intent in issue. In *Werne v. State*,[37] the defendant was charged with molesting a six-year-old child who lived nearby. According to the child-victim, the defendant had touched her several times "on her shorts" in the pelvic area.[38] The defendant's attorney asserted in his opening statement, without explaining the significance of the assertion, that the case "was an over the clothing type touching case."[39] Based on this argument, the trial court concluded that the defendant had denied intent and therefore had opened the door to evidence of a prior incident of molestation.[40]

A divided panel of the court of appeals disagreed. Writing for the majority, Judge Mathias noted that the defendant's opening statement did not explicitly assert that the alleged touching had been inadvertent or accidental; rather, it simply "sought early on to minimize the seriousness of the charge and thus the unfavorable light in which some jurors may have viewed" the defendant.[41] Dissenting, Judge Bailey noted that the defendant "did not deny that the touching took place"; rather, the emphasis on the fact that the alleged touching occurred over the victim's clothes "suggest[ed] inadvertence."[42] The split is perhaps understandable, given the lack of clarity in the defense counsel's argument; the interpretations of both the majority and the dissent seem plausible. The *Werne* decision therefore is somewhat troubling; however, perhaps because of the fact-specific nature of the split in the appellate panel, the Indiana Supreme Court denied transfer.[43]

3. Other Purposes.—Although Rule 404(b) lists a number of purposes for which other-acts evidence may be admissible, it is important to remember that the list set forth in the Rule is not exclusive.[44] Indiana courts are receptive to other-acts evidence offered for purposes other than those listed in the Rule, provided they are satisfied that the proffered purpose is not simply a stand-in for the forbidden inference. Thus, in *Dickens v. State*,[45] a murder prosecution, the fact that the defendant was observed in possession of a handgun two days before

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36. *Id.* at 933.

37. 750 N.E.2d 420 (Ind. Ct. App. 2001).

38. *Id.* at 421.

39. *Id.* at 422.

40. *Id.*

41. *Id.* at 423. The majority further concluded that the trial court's error was not harmless. *See id.* at 423-24.

42. *Id.* at 425 (Bailey, J., dissenting).

43. Werne v. State, 761 N.E.2d 418 (Ind. 2001).

44. Dickens v. State, 754 N.E.2d 1, 4 (Ind. 2001); Atwell v. State, 738 N.E.2d 332, 336 n.4 (Ind. Ct. App. 2000).

45. 754 N.E.2d 1 (Ind. 2001).

the murder was deemed relevant to the issue of opportunity.[46] A somewhat more complicated situation arose in *Atwell v. State*.[47] In *Atwell*, the defendant was charged with attempted murder after shooting a neighbor. The shooting occurred after the victim intervened in an argument between the defendant and the defendant's girlfriend.[48] At trial, the victim acknowledged that he had threatened to hit the defendant prior to the shooting; he explained his threat by saying that, several nights before the shooting, the defendant had hit his girlfriend, and that the victim wanted to prevent that from happening again.[49] On appeal, the court rejected the defendant's argument that the evidence that the defendant had previously hit his girlfriend was inadmissible because it invited the jury to indulge in the forbidden inference; instead, the court accepted the government's argument that the other-acts evidence was properly admitted on the question of whether the victim provoked the shooting in some manner.[50]

C. Rule 403 Balancing

That evidence of other acts is being offered for a proper purpose and is relevant to that purpose is not sufficient to warrant its admission; the court must also determine, pursuant to Rule 403, whether "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[51] Of course, Rule 403 applies generally to all forms of evidence, not simply to those offered under Rule 404(b). The need for balancing is especially acute under Rule 404(b), however, because of the constant danger that the jury will fall prey to the allure of the forbidden inference. The danger of unfair prejudice is always present in Rule 404(b) cases, then; the only question is how that danger compares to the evidence's probative value when considered for its proper purpose.

The Indiana Supreme Court has recognized the importance of Rule 403 balancing in determining admissibility under Rule 404(b), specifically directing courts to undertake the balancing inquiry when considering other-acts evidence.[52] In practice, however, reversals on appeal based on Rule 403 have been rare. In part, this is because of the standard of review: an appellate court will not overturn a trial court's determination that evidence does not violate Rule 403 absent abuse of discretion.[53] Beyond that, though, the Indiana Supreme Court has effectively set the tipping point between probative value and unfair prejudice at such a high level that even highly prejudicial evidence is deemed admissible if

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46. *Id.* at 4.
47. 738 N.E.2d 332 (Ind. Ct. App. 2000).
48. *Id.* at 334.
49. *Id.* at 334-35.
50. *Id.* at 336.
51. IND. R. EVID. 403.
52. Hicks v. State, 690 N.E.2d 215, 221 (Ind. 1997).
53. Crain v. State, 736 N.E.2d 1223, 1235 (Ind. 2000).

it has minimal probative value.

An example from this past year was *Crain v. State*.[54] In *Crain*, the defendant was charged with murder after allegedly beating his wife severely in a motel room and leaving her to die.[55] At trial, the prosecution offered evidence that, at the time of the defendant's arrest, the defendant had four outstanding battery charges involving the victim in the five months prior to her death, as well as two prior battery convictions, one three years old and one six years old, both involving the victim. The prosecution contended, and the trial court agreed, that these charges and convictions were proper other-acts evidence, admissible to show intent by rebutting the defendant's argument that the victim's death had been accidental.[56] On appeal, the supreme court agreed that the evidence was proper to show intent; it also concluded that the evidence withstood Rule 403 scrutiny. The four battery charges, being close in time to the victim's death, had sufficient "probative force" to warrant admission. The two prior convictions were "in the lower range of probative value," given the passage of time and the fact that, with the admission of the four battery charges, the evidence of the prior convictions was cumulative.[57] Nevertheless, the court concluded that the admission of the convictions did not constitute an abuse of discretion.[58]

Crain focuses largely on assessing the probative value of the proffered evidence; it largely fails to consider the extent of the danger of unfair prejudice caused by the evidence. The court acknowledges that "[a]t some point testimony about every incident of violence between the [defendant and the victim] becomes more prejudicial than probative."[59] Beyond that, though, the court has little to say. It briefly suggests that if the testimony about the prior convictions had been both "graphic" and "prejudicial," it might have excluded the evidence.[60] Again, though, the court says virtually nothing about what would make evidence in this context prejudicial. In particular, the failure to acknowledge the inherent unfair prejudice lurking in the forbidden inference undermines the court's own previous insistence on the importance of Rule 403 balancing in the Rule 404(b) context. Given the one-sided nature of the court's inquiry, it is not surprising that, as long as the evidence's probative value is more than *de minimis*, the court concludes that it is not barred by Rule 403.[61]

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54. 736 N.E.2d 1223 (Ind. 2000).

55. *Id.* at 1229.

56. *Id.* at 1235-36.

57. *Id.* at 1236 & n.9.

58. *Id.* at 1236.

59. *Id.* at 1236 n.9 (quoting Hicks v. State, 690 N.E.2d 215, 222 (Ind. 1997)).

60. *Id.*

61. *Crain* dealt with a Rule 403 problem in another portion of the opinion as well. To illustrate expert testimony, the prosecution presented not photographs, video, or charts, but the murder victim's own skull, which the jury was invited to examine up-close. *See id.* at 1233-34. On appeal, the Indiana Supreme Court acknowledged that the use of the victim's skull in this manner was "unsettling," but concluded that "the skull was neither particularly gruesome nor ominous." *Id.* at 1234. Although the court expressed a preference for other means of illustrating

Only once in this past year did the Indiana Court of Appeals conclude that evidence of other acts proffered under Rule 404(b) should be excluded under Rule 403, and the circumstances of that case demonstrate the limited circumstances in which the courts are willing to make such a decision on Rule 403 grounds. In *Buchanan v. State*,[62] the defendant, charged with child molesting, objected to the introduction of photographs of semi-nude children and drawings of nude children seized from his home, claiming that the evidence violated both Rule 404(b) and Rule 403.[63] The government responded that the photographs and drawings were properly admitted under Rule 404(b) as evidence of the defendant's motive and plan.[64] The court of appeals disagreed, concluding that the evidence was relevant to neither motive nor plan.[65] Having reached that conclusion, it further opined that Rule 403 required exclusion of the evidence because "the sheer volume of the drawings and photographs" was "extremely prejudicial."[66] This decision reinforces the impression that the only circumstances in which the Indiana courts are willing to bar Rule 404(b) evidence under Rule 403 are those in which the evidence is not proper under Rule 404(b) to begin with.

II. PROCEDURAL REQUIREMENTS OF RULE 404(b)

Rule 404(b) requires that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature or any such evidence it intends to introduce at trial."[67]

The absence of a firm deadline for the provision of notice under Rule 404(b) occasionally causes difficulties. In *Hatcher v. State*,[68] for example, the prosecution informed the defendant six days before his trial for murder that it intended to offer evidence concerning a protective order that the victim had previously obtained against him.[69] The defendant objected, claiming that six days advance notice was not "reasonable" within the meaning of Rule 404(b) and that the state had failed to demonstrate good cause for its untimely disclosure. The trial court rejected the defendant's contention, and the Indiana Supreme Court affirmed. The purpose of the notice requirement, the court asserted, "'is to reduce surprise and to promote the early resolution of questions of

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the expert's testimony, it ultimately concluded that the use of the victim's skull did not constitute an abuse of discretion. *See id.*

62. 742 N.E.2d 1018 (Ind. Ct. App. 2001).
63. *Id.* at 1021.
64. *Id.* at 1022.
65. *Id.*
66. *Id.* at 1022-23.
67. IND. R. EVID. 404(b).
68. 735 N.E.2d 1155 (Ind. 2000).
69. *See id.* at 1158.

admissibility.'"[70] Neither of these purposes was offended: the emergency protective order that the prosecution sought to introduce had been disclosed to the defendant during discovery, as had the identity of the Rule 404(b) witnesses that the prosecution intended to call. In addition, the trial court was able to resolve the dispute in a timely manner, without disrupting the trial.[71]

Although exclusion for lack of timely notice is relatively unusual, a decision from this past year demonstrated that such a decision has real teeth. In *Johnson v. State*,[72] the trial court found inadequate notice by the government identifying the names of potential Rule 404(b) witnesses but failing to state the general nature of their testimony.[73] The court therefore excluded the other-acts evidence. The prosecution then moved to dismiss the charges and, once that motion was granted, refiled the charges, adding a number of new counts relating to the previously-excluded witnesses.[74] On appeal, the Indiana Supreme Court found the tactic improper, noting: "If the State may circumvent an adverse evidentiary ruling by simply dismissing and refiling the original charge, and also 'punish' the defendant for a successful procedural challenge by piling on additional charges, defendants will as a practical matter be unable to avail themselves of legitimate procedural rights."[75]

CONCLUSION

Rule 404(b) continues to prove among the most troublesome of the Indiana Rules of Evidence, and controversial decisions have been common in the years since the Rule was adopted.[76] This is perhaps not surprising, given the multiple factors at play in any application of Rule 404(b). Yet the decisions applying Rule 404(b) in the past year suggest that the application of the Rule has stabilized in some ways. There remain areas in the application of the Rule that could profit from further explication by the Indiana Supreme Court, particularly in the nature of the Rule 403 balancing that Rule 404(b) requires.[77] But as the courts become more familiar with the contours of the Rule, there is reason to hope that its application will continue to become more consistent.

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70. *Id.* (quoting Abdul-Musawwir v. State, 674 N.E.2d 972, 975 (Ind. Ct. App. 1996)).

71. *See id.* at 1158-59.

72. 740 N.E.2d 118 (Ind. 2001).

73. *See id.* at 119-20.

74. *See id.* at 120.

75. *Id.* at 121.

76. I have discussed Indiana decisions applying Rule 404(b) in my two previous surveys for the *Indiana Law Review*. *See* Jeffrey O. Cooper, *Recent Developments in Indiana Evidence Law*, 32 IND. L. REV. 811, 819-22 (1999); Jeffrey O. Cooper, *Recent Developments Under the Indiana Rules of Evidence*, 30 IND. L. REV. 1049, 1051-56 (1997).

77. *See supra* notes 51-66 and accompanying text.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

JOSEPH R. ALBERTS*

INTRODUCTION

The first year of the Twenty-first Century was a busy one for Indiana judges and practitioners in the area of product liability law.[1] During the 2001 survey period, which is October 1, 2000 to September 30, 2001,[2] state and federal courts in Indiana answered some lingering questions, tackled some new issues, and added to an already impressive body of law interpreting the Indiana Product Liability Act ("IPLA").[3]

This survey does not attempt to address in detail all cases decided during the survey period that apply Indiana product liability law. Rather, it examines selected cases that are representative of the seminal product liability issues that courts applying Indiana law have handled during the relevant time frame. This survey also provides some background information and context where appropriate.

I. CASES INTERPRETING STATUTORY DEFINITIONS

All claims users or consumers[4] file in Indiana against manufacturers[5] and

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1. Many commentators and courts use the term "products liability" when referring to actions alleging damages as a result of defective and/or unreasonably dangerous consumer products. The applicable Indiana statutes, however, utilize the term "product liability" (no "s"). This survey follows the lead of the Indiana General Assembly and likewise employs the term "product liability."

2. This Article includes some cases decided on the periphery of those dates.

3. The Indiana General Assembly first enacted the IPLA in 1978. *See* Pub. L. No. 141, § 28, 1978 Ind. Acts 1298, 1308, *repealed by* 1995 Ind. Acts 4051 (1995). It originally covered claims in tort using both negligence and strict liability theories. In 1983, the legislature amended the statute to apply only to strict liability actions. *See* Pub. L. No. 297-1983, § 1, 1983 Ind. Acts 1815. In 1995, the legislature amended the statute to once again encompass tort theories of recovery based on both strict liability and negligence theories. *See* Pub. L. No. 278-1995, § 1, 1995 Ind. Acts 4051; *see also* Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 487 n.2 (Ind. 2001).

4. For purposes of application of the IPLA, "consumer" means:

> (1) a purchaser; (2) any individual who uses or consumes the product; (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably

sellers[6] for physical harm[7] a product[8] causes are statutory. The IPLA governs all such claims "regardless of the substantive legal theory or theories upon which the action is brought."[9] The 1995 amendments to the IPLA incorporated negligence principles in cases in which claimants base their theory of liability upon either defective design or inadequate warnings.[10] "Strict liability" remains only in cases in which the theory of liability is a manufacturing defect.[11] The 1995 amendments also limited actions against sellers,[12] more specifically defined the circumstances under which a distributor or seller can be considered a manufacturer,[13] converted the traditional state of the art defense into a rebuttable

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expected use.

IND. CODE § 34-6-2-29 (1998). "User" has the same meaning as "consumer." *Id.* § 34-6-2-147.

5. For purposes of application of the IPLA, "manufacturer" means "a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer." *Id.* § 34-6-2-77(a). "Manufacturer" also includes a seller who

> (1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the actual manufacturer.

Id.

6. For purposes of application of the IPLA, "seller" means "a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* § 34-6-2-136.

7. For purposes of application of the IPLA, "physical harm" means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property." *Id.* § 34-6-2-105(a). It does not include "gradually evolving damage to property or economic losses from such damage." *Id.* § 34-6-2-105(b).

8. For purposes of application of the IPLA, "product" means "any item or good that is personalty at the time it is conveyed by the seller to another party." *Id.* § 34-6-2-114(a). The term does not encompass a "transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product." *Id.* § 34-6-2-114(b).

9. *Id.* § 34-20-1-1.

10. *See id.* § 34-20-2-2.

11. *See id.* The editors of Burns Indiana Statutes Annotated have included a title that could be misleading to their readers. The short title the editors have chosen for Indiana Code section 34-20-2-2 is "Strict Liability—Design Defect." IND. CODE ANN. § 34-20-2-2. That title might cause a reader to incorrectly assume that the statute allows a claimant to prove a design defect case without proving as part of that claim that the manufacturer or seller failed to conform to what is really a negligence standard—the exercise of "reasonable care under the circumstances in designing the product." IND. CODE § 34-20-2-2.

12. *See id.* § 34-20-2-3.

13. *See id.* § 34-20-2-4.

presumption,[14] and injected comparative fault principles into product liability cases.[15]

As such, cases interpreting the IPLA are of the utmost importance. The following cases are a sampling of those decided during the survey period that interpret terms the IPLA incorporates.[16]

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14. *See id.* § 34-20-5-1. The presumption is that the product is not defective and that the product's manufacturer is not negligent. *Id.* The IPLA entitles a manufacturer or seller to such a presumption if,

> before the sale by the manufacturer, the product: (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

Id.

15. The 1995 amendments changed Indiana law with respect to fault allocation and distribution in product liability cases. The Indiana General Assembly made it clear that a defendant cannot be liable for more than the amount of fault "directly attributable to that defendant," as determined pursuant to Indiana Code section 34-20-8, nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant." *Id.* § 34-20-7-1.

The 1995 amendments now require the trier of fact to compare "the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm." *Id.* § 34-20-8-1(a). The statute requires that the trier of fact compare such fault "in accordance with IC 34-51-2-7, IC 34-51-2-8, or IC 34-51-2-9." *Id.* The IPLA mandates that

> [i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.

Id. § 34-20-8-1(b).

Practitioners also should recognize that the definition of "fault" for purposes of the IPLA is not the same as the definition of "fault" applicable in actions that the Comparative Fault Act governs. *Compare id.* § 34-6-2-45(a), *with id.* § 34-6-2-45(b). For purposes of the IPLA, the definition of "fault" does not include the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." *Id.*

16. As noted in the opening paragraph of this survey Article, there are several cases that this piece does not address in great detail that are, nevertheless, worthy of special mention. One such case is *Rogers ex rel. Rogers v. Cosco, Inc.*, 737 N.E.2d 1158 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 419 (Ind. 2001), which the Indiana Court of Appeals decided on November 2, 2000. Although that decision technically falls within the survey period for this Article, last year's survey Article fully addressed it. *See* Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 882-86, 917-20 (2001).

In addition to *Rogers*, there are several published state and federal cases that Indiana product liability practitioners may be interested in that are not reviewed in this article because, although they are product liability cases, substantive product liability issues are not the focus of the opinions.

See In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 155 F. Supp. 2d 1069 (S.D. Ind.) (applying Michigan and Tennessee substantive law to claims involving tort, contract, consumer protection, express and implied warranty, and unjust enrichment claims; applying federal law on RICO and Magnuson-Moss warranty issues), *reconsideration granted in part by* 205 F.R.D. 503 (S.D. Ind. 2001), *rev'd in part by* 288 F.3d 1013 (7th Cir. 2002); *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 199 F.R.D. 304 (S.D. Ind. 2001) (allowing plaintiff to voluntarily dismiss federal action and pursue state action if she paid defendants any filing fees they incurred); *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 131 F. Supp. 2d 1027 (S.D. Ind. 2001) (finding plaintiffs entitled to discovery about defendants' motions to dismiss on forum non conveniens grounds); *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 129 F. Supp. 2d 1207 (S.D. Ind. 2001) (determining case management procedures); *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 129 F. Supp. 2d 1202 (S.D. Ind. 2001) (denying plaintiffs' request to join tire dealer who would defeat diversity jurisdiction); *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 198 F.R.D. 654 (S.D. Ind. 2001) (allowing press to intervene in case, but limiting intervention to responses to motions for protective orders); *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 128 F. Supp. 2d 1198 (S.D. Ind. 2001) (denying plaintiffs' motion to remand case to state court); *In re* Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 128 F. Supp. 2d 1196 (S.D. Ind. 2001) (refusing to issue suggestion for remand of case to state court); Szabo v. Bridgeport Machines, Inc., 199 F.R.D. 280 (N.D. Ind. 2001) (addressing, in a case involving the manufacture of an allegedly defective machine, class certification, choice of law, and misrepresentation); Ray-Hayes v. Heinamann, 743 N.E.2d 777 (Ind. Ct. App. 2001) (holding, in product liability case alleging defective passenger vehicle restraint, that trial court erred by dismissing plaintiffs' cause of action despite the fact that the summonses were filed after the expiration of the statute of limitations period), *vacated by* 760 N.E.2d 172 (Ind.), *rev'd on reh'g*, 768 N.E.2d 899 (Ind. 2002); Allstate Ins. Co. v. Dana Corp., 737 N.E.2d 1177 (Ind. Ct. App. 2000) (insured manufacturer did not own contaminated groundwater within the meaning of insurance policy's exclusion), *aff'd in part and vacated in part*, 759 N.E.2d 1049 (Ind. 2001).

There are also several helpful opinions, by federal district judges, that are available from sources other than official reporters. Note that those cases made available to the public only by way of the Southern District of Indiana's web site are not intended for publication either electronically or in paper form. Aside from the law of the case doctrine, federal district judges' decisions have no precedential authority and are not binding on other courts, other judges within the district, or even other cases before the same judge. N.H. Ins. Co. v. Farmer Boy AG, Inc., No. I/P 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *1 n.1 (S.D. Ind. Dec. 19, 2000); *see also* Howard v. Wal-Mart Stores, Inc., 160 F.3d 358, 359 (7th Cir. 1998); Malabarba v. Chi. Tribune Co., 149 F.3d 690, 697 (7th Cir. 1998); Old Republic Ins. Co. v. Chuhak & Tecson, P.C., 84 F.3d 998, 1003 (7th Cir. 1996). There are a number of federal cases that might be helpful to practitioners but are not available in the official reporter system. *See* Chubb Group of Ins. Cos. v. Buddy Gregg Motor Homes, Inc., No. IP 00-1378-C H/G, 2001 U.S. Dist. LEXIS 5040 (S.D. Ind. Apr. 17, 2001) (dismissing manufacturer's cross-claim against seller finding that Indiana allows implied indemnification only under narrow exceptions that the cross-claim did not meet); *In re* Lawrence

A. Recovery of Damage to Defective Product

Two related cases decided on June 6, 2001, by the Indiana Supreme Court reaffirm that the IPLA does not allow a claimant to recover for damages to the defective product itself even when "other property" is damaged in the event or accident that also destroys or damages the defective product.

In the first case, *Progressive Insurance Co. v. General Motors Corp.*,[17] three insurance companies sued General Motors and Ford in subrogation in five separate cases after vehicles were destroyed in fires allegedly caused by defects in the wiring, the fuel lines, and transmission line.[18] Because the vehicles themselves were the only property the fires allegedly damaged, the manufacturers filed motions for summary judgment in the trial court.[19] They argued, in part, that the owners, and therefore their subrogees, may not recover damages in product liability claims under the IPLA.[20] The trial courts granted summary judgments to the manufacturers in two of the cases and denied them in the other three.[21]

Considering itself bound by precedent in *Martin Rispens & Son v. Hall Farms, Inc.*[22] and *Reed v. Central Soya Co.*,[23] the court of appeals affirmed those decisions in the consolidated appeal that ensued.[24] In doing so, the court of appeals, in the language of Justice Boehm, expressed the view that "policy considerations favored the plaintiffs' claims under the [IPLA]."[25] Because the

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W. Inlow Accident Litig., No. IP 99-0830-C H/G, 2001 U.S. Dist. LEXIS 2747, Prod. Liab. Rep. (CCH) ¶ 16,044 (S.D. Ind. Feb. 7, 2001) (discussing indemnification and contribution, compliance with Local Rule 56.1, personal knowledge required for an affidavit, exclusivity provision in the Indiana Worker's Compensation Act, federal preemption pursuant to the Federal Aviation Act, and the quantum of evidence necessary to defeat summary judgment motion); Land v. Yamaha Motor Corp., No. IP 00-220-C H/G, 2000 U.S. Dist. LEXIS 20117 (S.D. Ind. Dec. 20, 2000) (denying plaintiff's attempt to add non-diverse defendants to defeat federal jurisdiction); *N.H. Ins. Co.*, 2000 U.S. Dist. LEXIS 19502 (deciding tort, contract claims arising out of installation of ventilation system in hog breeding facility).

17. 749 N.E.2d 484 (Ind. 2001).

18. *See id.* at 486. The three insurers were Progressive Insurance Co., United Farm Bureau Insurance Co., and Foremost Insurance Co. *See id.* at 486 n.1.

19. *See id.* at 486.

20. *See id.*

21. *See id.* at 491.

22. 621 N.E.2d 1078 (Ind. 1993).

23. 621 N.E.2d 1069 (Ind. 1993), *modified on reh'g*, 644 N.E.2d 84 (Ind. 1994).

24. The court of appeals affirmed the two cases where summary judgment was granted and reversed the three where it had been denied. *See* Progressive Ins. Co. v. Gen. Motors Corp., 730 N.E.2d 218 (Ind. Ct. App. 2000), *vacated*, 749 N.E.2d 484 (Ind. 2001).

25. *Progressive Ins. Co.*, 749 N.E.2d at 486. Although acknowledging the decisions in *Martin Rispens* and *Reed*, the court of appeals nevertheless seemed troubled by the proposition that

issue was "a recurring subject of transfer petitions," the Indiana Supreme Court granted transfer and reaffirmed the position in *Martin Rispens* and *Reed* that there is no recovery under the [IPLA] where the claim is based on damage to the defective product itself.[26]

The IPLA provides, in relevant part:

> [A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if:
>
> (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;
>
> (2) the seller is engaged in the business of selling the product; and
>
> (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.[27]

"Physical harm" for purposes of the IPLA means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. . . . The term does not include gradually evolving damage to property or economic losses from such damage."[28]

Justice Boehm's opinion in *Progressive* framed the issue as whether the IPLA "imposes liability when the 'harm' caused by a 'product' is damage to the product itself, and not personal injury or damage to other property."[29] The insurance companies argued that the term "property" includes the "product," pointing out that the user or consumer "presumably views the product that self-destructs as his or somebody else's property."[30] In response, the court wrote that "[a]lthough it is undoubtedly true that 'products' are ordinarily somebody's 'property,' we think that 'property' as used in the [IPLA] does not embrace the product itself."[31]

In its earlier *Reed* decision, the Indiana Supreme Court concluded that the legislature already had determined that the plaintiff's only remedy lay in contract

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a consumer may not recover under the IPLA for damage caused by a defective product unless the product also damages other property or injures a person. *See Progressive Ins. Co.*, 730 N.E.2d at 220-21. Because the court of appeals recognized its inability to "recast" the *Martin Rispens* and *Reed* opinions, it was constrained to affirm the trial court's entry of summary judgment for GM in two of the cases and to reverse the denials of summary judgment in the other three. *Id.* at 221.

26. *Progressive Ins. Co.*, 749 N.E.2d at 486.

27. IND. CODE § 34-20-2-1 (1998).

28. *Id.* § 34-6-2-105.

29. *Progressive Ins. Co.*, 749 N.E.2d at 487.

30. *Id.*

31. *Id.*

law "where the loss is purely economic,[32] and there is no damage to other property and no personal injury."[33] Also significant to the *Progressive* court was the fact that the General Assembly did not provide for recovery for injury to the product itself even though it amended the IPLA in 1995, well after the Indiana Supreme Court's rulings in *Reed* and *Martin Rispens*:

> [T]he legislature has not acted in the face of two opinions from this Court concluding that the legislature did not intend that damage to the product itself be recoverable under the [IPLA]. That silence is not insignificant.
>
> Rejection of a tort claim for self-inflicted damage to a product is a choice the legislature is plainly free to make. It is grounded in the distinction between tort and contract law. It also involves a number of different policy considerations. As a general matter, when the product does not operate up to expectations and deprives its user of the benefit of the bargain, commercial law sets forth a comprehensive scheme governing the buyer's and seller's rights.[34]

The insurance companies also argued that the fire damage was "sudden" and therefore covered by the IPLA, whereas the injury suffered in *Martin Rispens* (damage to a watermelon crop) developed over time.[35] The *Progressive* court rejected any distinction between the situation before it and the one before the court in *Martin Rispens*. The majority rejected the argument that "the issue turns on whether 'sudden, major' damage is incurred"[36] noting "[t]hat may be the case in many product malfunctions, including those involving no fire or other self-destructive result. It may be a necessary component of a products liability claim, but it is not itself sufficient."[37]

Near the conclusion of the opinion, the *Progressive* court addressed additional policy arguments raised by the insurance companies, including that it

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32. Justice Boehm's majority opinion acknowledges that "'property damage' is distinct from 'economic damage . . .'" from the point of view of the policyholder's insurance coverage. *Id.* at 488. The opinion also notes:

> However, when addressing the validity vel non of a tort or products liability claim based on failure of a product, the self-destruction of the product through property damage, if caused by an external force, is indistinguishable in consequence from the product's simple failure to function. In both cases, the owner's loss is the value of the product. Thus, the United States Supreme Court and others refer to damage to the product itself as "economic loss" even though it may have a component of physical destruction. Viewing such a loss as purely "economic loss" and not personal or property damage loss is consistent with Indiana law in other contexts as well.

Id.

33. *Id.* (citing Reed v. Cent. Soya Co., 621 N.E.2d 1069 (Ind. 1993)).

34. *Id.* at 489.

35. *See id.* at 489-90.

36. *Id.* at 490.

37. *Id.* (footnote omitted).

is simply unfair for them to bear the burden of the cost of compensating consumers for products that are defective. In response, the court observed that:

> [t]he insurers can rewrite their policy exclusions to deal with this if they choose. Presumably competitive forces compel them to cover these risks, but if some insurers seek to write the coverage out of their policies, this is their choice. To the extent insurance regulators insist on such coverage, the fairness of that position is not an issue for this Court. [O]ne efficient way for economic losses to be managed is through insurers because they have the ability to adjust their rates to reflect their loss experience . . . . The legislative policy to favor this means of addressing the problem is entirely rational. If it is to be changed, the General Assembly must make that determination.[38]

Justice Rucker concurred in the result in a separate opinion in which Justice Dickson joined. The concurring opinion merely states that the doctrine of stare decisis compelled the outcome, citing *Martin Rispens* and *Reed*.[39]

In the second case decided on June 6, 2001, *Fleetwood Enterprises, Inc. v. Progressive Northern Insurance Co.*,[40] the court disposed of essentially the same issue as in *Progressive*, but in a case in which the product defect at issue allegedly damaged both the product itself and other property. The *Fleetwood* court held that personal injury and property damage to other property from a defective product are actionable under the IPLA, but that their presence does not create a claim for damage to the product itself.[41]

In *Fleetwood*, a fire destroyed a motor home that Fleetwood manufactured and some of the owner's personal property inside the motor home. Progressive Insurance had issued a homeowner's policy covering the motor home and reimbursed the owner for the value of the motor home and the personal property.[42] As subrogee, Progressive sued Fleetwood under a product liability theory to recover its losses. The trial court refused to give Fleetwood's tendered jury instruction stating that the only amount of damages it could consider was the loss of personal property. Instead, the trial court read the Indiana pattern jury instruction allowing for recovery of fair market value of destroyed property at the time of its destruction.[43] The jury awarded Progressive the full value of the motor home and the personal property plus prejudgment interest.[44]

The Indiana Supreme Court began its discussion by citing *Progressive* for the proposition that the IPLA does not provide recovery when the only damage is to

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38. *Id.* at 491 (citation omitted).

39. *See id.* at 491-92 (Rucker, J., concurring).

40. 749 N.E.2d 492 (Ind. 2001).

41. *Id.* at 493.

42. The homeowner's insurance policy "paid the owner $162,500 for damages to the motor home and $6,587.89 for damages to other personal property in the home." *Id.*

43. *Id.* The trial court chose to read Indiana Pattern Jury Instruction No. 11.40. *Id.*

44. The total judgment for Progressive was $215,969.24. *Id.*

the defective product itself.[45] The court acknowledged, however, that other decisions, including its *Reed* decision, "have discussed that doctrine in language suggesting that damage to the product might be recoverable under a products liability theory if the defective product also causes personal injury or damage to other property."[46] Whether damage to the defective product itself is recoverable in product liability where it is accompanied by damage to other property or personal injury is a question about which the *Fleetwood* court found a paucity of authority. The *Fleetwood* court discussed only one relevant case, *Dutsch v. Sea Ray Boats, Inc.*,[47] an Oklahoma decision in which the court permitted recovery of damage to the defective product when accompanied by damage to other property even though Oklahoma is a state that does not permit recovery when the only damage is to the defective product itself.

In the case before it, the *Fleetwood* court recognized that there was damage to "other" personal property in the motor home. There is no question that the IPLA contemplates recovery for such "other" personal property. "However," the court wrote, "we find no persuasive reason to sustain a products liability claim for damage to the product if it is accompanied by personal injury or damage to other property when there is no products liability claim if that other damage is absent."[48] On that point, the *Fleetwood* court commented that the reason given in *Dutsch* for its contrary finding (avoidance of dual theory trials) did "not seem very forceful."[49] The court, recognizing that a product liability claim in Indiana, unlike Oklahoma, is governed by statute and that there is no support in the IPLA for the result reached in *Dutsch*, reasoned that

> [p]recedent from this Court has not regarded the "product" whose defect gives rise to liability as "property" whose damage gives rise to a claim under the [IPLA]. That result, apparently accepted by the legislature, dictates disallowance of the claim for damage to the defective product, whether or not accompanied by other damage. Thus, for the same reasons given in *Progressive*, we hold that damage caused to other property by a defective product does not create a claim for damage to the product itself. We also think there are other persuasive reasons to reject the *Dutsch* rule. If recovery hinges on the presence of other damage, many cases will be launched into quests for some collateral damage. An oil stain on a garage floor from a failed engine or a burnt blade of grass

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45. *Id.*

46. *Id.* In *Reed*, the court wrote that, "where the loss is solely economic in nature, as where the only claim of loss relates to the product's failure to live up to expectations, and *in the absence of damage to other property or person*, then such losses are more appropriately recovered by contract remedies." Reed v. Cent. Soya Co., 621 N.E.2d 1069, 1074-75 (Ind. 1993), *modified on reh'g*, 644 N.E.2d 84 (Ind. 1994).

47. 845 P.2d 187 (Okla. 1992).

48. *Fleetwood*, 749 N.E.2d at 495.

49. *Id.*

from a fire should not create a claim where none existed.[50]

Accordingly, the court determined that the trial court erred in failing to instruct the jury that damage to the product itself was not recoverable under the IPLA.[51]

As in *Progressive*, Justice Rucker concurred in the result in a separate opinion in which Justice Dickson joined. The concurring opinion states that the doctrine of stare decisis compelled the outcome, citing *Martin Rispens* and *Reed*.[52]

B. Bystanders

The opinion of the court of appeals in *Stegemoller v. ACandS, Inc.*,[53] raised an interesting definitional question and, in the process of answering it, confirmed that the IPLA has subsumed "common law" negligence in Indiana product liability cases. At issue in *Stegemoller* was whether the plaintiff qualified as a "user" or a "consumer" of an allegedly defective product and, if she did not, whether she could maintain a separate "common law" negligence claim, that was not within the IPLA's purview.[54] According to the Indiana Court of Appeals, the answer to both questions is "no."[55] The Indiana Supreme Court has since reversed the court of appeals' opinion.[56] This survey Article reviews the court of appeals decision. The opinion of the Indiana Supreme Court will presumably be treated in next year's survey Article.

In *Stegemoller*, Lee Stegemoller worked for several years as a union insulator for many different companies and, during the course of his career, worked with asbestos products.[57] He and his wife, Ramona, contended that some of the asbestos dust remained on his clothes when he left the various jobsites and that

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50. *Id.* (citation omitted).

51. *See id.* The court determined that the trial court's failure to read the appropriate jury instruction gave the jury "the mistaken impression that it should award full damages for the motor home . . . if it determined that Fleetwood was liable." *Id.* The court ultimately affirmed the jury's award of damages in the amount of $6,587.89 for the personal property, but reversed the damages award in the amount of $162,500 for the motor home. *See id.* at 496.

52. *See id.* (Rucker, J., concurring). The same issues were raised and addressed by the court of appeals in *Hitachi Construction Machinery Co. v. AMAX Coal Co.*, 737 N.E.2d 460 (Ind. Ct. App. 2000). On August 28, 2001, the Indiana Supreme Court denied appellee's and cross-appellant's petition to transfer. *See* Hitachi Constr. Mach. Co. v. AMAX Coal Co., 761 N.E.2d 416 (Ind. 2001).

53. 749 N.E.2d 1216 (Ind. Ct. App.), *trans. granted*, 761 N.E.2d 423 (Ind. 2001), *rev'd*, 767 N.E.2d 974 (Ind. 2002).

54. *See id.* at 1218.

55. *See id.* at 1219-20.

56. *See* Stegemoller v. ACandS, Inc., 761 N.E.2d 423 (Ind. 2001), *rev'd*, 767 N.E.2d 974 (Ind. 2002); *see also* Camplin v. ACandS, Inc., 768 N.E.2d 428, 429 (Ind. 2002); Martin v. ACandS, 754 N.E.2d 52 (Ind. Ct. App. 2001), *trans. granted*, 2002 Ind. LEXIS 158 (Ind. Feb. 15, 2002).

57. *See Stegemoller*, 749 N.E.2d at 1217-18.

she inhaled the dust that he brought home from his workplace.[58] Ramona "was diagnosed with colon cancer, pulmonary fibrosis and pleural thickening," which she alleged was caused by inhalation of asbestos fibers, specifically "as the result of interacting with [her husband] and laundering his work uniforms."[59]

The Stegemollers sued several entities believed to be responsible for Ramona's condition because they were either involved in the manufacture or sale of asbestos-containing products, are the successors-in-interest to such entities, or had some other alleged responsibility for her physical condition.[60] Several of those entities filed motions to dismiss, asserting that Ramona was not a "user" or "consumer" as defined by the IPLA and therefore had no cause of action.[61] The trial court agreed and dismissed her claims because she did not fall within the IPLA and, further, because there is no common law negligence claim for a user or consumer who sues a seller or a manufacturer for that which the IPLA contemplates and governs.[62]

The court of appeals affirmed the trial court's decision on both grounds.[63] With respect to the definitional matter, the salient question was whether Ramona qualified as a "user" or a "consumer" of an asbestos product under the IPLA. For purposes of application of the IPLA, "consumer" means:

> (1) a purchaser;
> (2) any individual who uses or consumes the product;
> (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
> (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.[64]

"User" means the same as "consumer."[65]

Because the Stegemollers did not establish that Ramona either used, consumed, possessed, or controlled any of the asbestos products with which Lee worked, the only claim they could make was that Ramona was a "bystander."[66] In order to be considered a "bystander," however, the *Stegemoller* court recognized that Stegemollers had to prove that Ramona was a person reasonably expected to be in the vicinity of asbestos products during their use in an

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58. *Id.* at 1218.

59. *Id.*

60. Specifically, the Stegemollers argued that the asbestos material originated from the products attributable to those entities or from the premises for which they were responsible. *Id.* They also alleged that some of the defendants "participated in a conspiracy to conceal the known hazards of asbestos from the public." *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1220.

64. IND. CODE § 34-6-2-29 (1998).

65. *Id.* § 34-6-2-147.

66. *Stegemoller*, 749 N.E.2d at 1219.

"industrial setting."[67] She was not. Indeed, the Stegemollers never argued that Ramona was present at any of the sites where Lee came into contact with asbestos or that she was in the vicinity when the products were being used as industrial insulation products in an industrial setting.[68]

The *Stegemoller* court rejected the argument that Ramona may recover simply because the appellees reasonably should have foreseen that she would be in the vicinity of the asbestos-containing products during their expected use in an industrial setting.[69] According to the court, such an argument ignores the plain meaning of the IPLA because Ramona could not "meet the requirement that she was an individual who would have reasonably been expected to be in the vicinity of asbestos-containing insulation material meant for industrial purposes during the reasonably expected use of the product."[70]

Alternatively, the Stegemollers argued that Ramona should be able to maintain "a separate claim under the common law of negligence even though she may not qualify as a user, consumer or bystander" under the IPLA.[71] The court rejected the argument that an independent common law negligence theory is viable in Indiana apart from the IPLA under the circumstances presented.[72] The *Stegemoller* court first pointed out that "the IPLA governs all actions brought to recover for personal injury caused by a product regardless of the substantive legal theory."[73] The court next reviewed two important Indiana cases in this regard, *Dague v. Piper Aircraft Corp.*[74] and *Interstate Cold Storage, Inc. v. General Motors Corp.*[75] The *Interstate* decision makes it clear that the IPLA governs both strict liability and negligence claims.[76]

C. The IPLA's "Product" Requirement

The IPLA governs all claims users or consumers file in Indiana against manufacturers and sellers for physical harm that a product causes. As used in

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* at 1220.

73. *Id.* at 1219 (citing IND. CODE § 34-20-1-1 (1998)). The court also pointed to Indiana Code section 34-6-2-115, which provides that "[p]roduct liability action" means one that is brought "(1) against a manufacturer or seller of a product; and (2) for or on account of physical harm; regardless of the substantive legal theory or theories upon which the action is brought." *Id.* (citing IND. CODE § 34-6-2-115 (1998)).

74. 418 N.E.2d 207 (Ind. 1981). The *Dague* court observed that "it seems clear the legislature intended that the act govern *all* product liability actions, whether the theory of liability is negligence or strict liability in tort . . . . The [IPLA] expressly applies to all product liability actions sounding in tort, including those based upon the theory of negligence . . . ." *Id.* at 212.

75. 720 N.E.2d 727 (Ind. Ct. App. 1999).

76. *See Stegemoller*, 749 N.E.2d at 1220 (citing *Interstate*, 720 N.E.2d at 730).

Indiana Code section 34-20-2-1, a "product" is "any item or good that is personalty at the time it is conveyed by the seller to another party."[77] The term "does not apply to a transaction that, by its nature, involves wholly or predominately the sale of a service rather than a product."[78] Thus, whether the sale of a "product" occurred can be a dispositive threshold question because only manufacturers or sellers who place "products" into the stream of commerce may be liable under the IPLA. Such was the case in *R.R. Donnelley & Sons Co. v. North Texas Steel Co.*,[79] an opinion that is significant to Indiana practitioners for a number of reasons.

The *R.R. Donnelley* case involved the collapse of large metal storage racks at the R.R. Donnelley & Sons Co. ("RRD") facility in Warsaw, Indiana.[80] RRD purchased the racks from Associated Material Handling Industries, Inc. ("Associated"). Associated purchased the racks from Frazier Industrial Co. ("Frazier"). Frazier designed the racks and contracted with North Texas Steel Co. ("NTS") to manufacture the component parts.[81]

> Frazier gave NTS written instructions on how to manufacture [the] parts. NTS received raw steel from the steel mill, and then cut, punched, welded, and painted the steel. Frazier instructed NTS to ship the component parts of the storage racks from its Texas plant to RRD's plant in Warsaw, . . . where the racks were . . . erected. Associated supervised the installation of the racks . . . .[82]

RRD sued NTS, Associated, and Frazier, claiming more than $12 million in economic loss as a result of the collapsed racks and asserting product liability, breach of contract, and negligence claims.[83] Associated and Frazier settled with RRD before trial. The trial court "granted summary judgment to NTS on the breach of contract and negligence claims," leaving the parties to try only the product liability claim against NTS.[84] At trial, RRD argued that NTS defectively welded the rack's component parts.[85] "NTS countered that the welds were sufficient to hold the load" and "did not cause the collapse," and argued that Frazier defectively designed the system.[86] According to the court, the trial

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77. IND. CODE § 34-6-2-114(a) (1998).

78. *Id.* § 34-6-2-114(b).

79. 752 N.E.2d 112 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 433 (Feb. 22, 2002).

80. *See R.R. Donnelley*, 752 N.E.2d at 120. RRD used the racks to store catalogs. The racks collapsed on June 14, 1994, during a shift change. *Id.* Because the accident occurred before June 30, 1995, the 1995 amendments to the IPLA did not apply.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

"amounted to a battle of the experts as to the cause of the accident."[87] The jury returned a defense verdict.[88]

RRD appealed all claims, and NTS cross-appealed regarding the trial court's denial of its summary judgment on the product liability claim.[89] The court of appeals handled the product liability claim first. The "product liability" issue was whether "NTS created a product sufficient to invoke the [IPLA] by cutting, punching, welding and painting" the steel Frazier provided.[90] NTS argued that it merely provided labor and that the work it performed for Frazier "was predominately the sale of a service and, therefore, not subject" to the IPLA.[91] NTS supported its argument by pointing out that it "billed Frazier based on the number of production hours required, and that the purchase order reflected that NTS was billing for 'labor costs.'"[92] Relying on the court of appeals' 1998 decision in *Lenhardt Tool & Die Co. v. Lumpe*,[93] RRD argued that NTS was subject to liability under the IPLA.[94]

The *R.R. Donnelley* court found *Lenhardt* "instructive" and cited it for the proposition that "where an entity reconditions, alters, or modifies a product or raw material to the extent that a new product has been introduced into the stream of commerce, the entity is a manufacturer and provider of products under the [IPLA]."[95] In the court's view, NTS "modified a raw material, steel, to produce the component parts of the RRD rack system" and, in so doing, transformed the steel into a "'new product' that [was] substantially different from the raw material used."[96] Accordingly, the *R.R. Donnelley* court concluded that "NTS introduced a new product into the stream of commerce and provided products," not merely services to RRD.[97]

Judge Tinder's unpublished federal order[98] in *New Hampshire Insurance Co.*

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87. *Id.* at 120-21.

88. *Id.* at 121 n.1.

89. *Id.* at 121. The trial court denied NTS's motion for summary judgment on the product liability issue and, at the same time, granted RRD's cross-motion for summary judgment on the same issue. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* NTS cited deposition testimony by a Frazier employee stating that, when Frazier subcontracts for its work, it buys labor from the contract fabricators. *Id.*

93. 703 N.E.2d 1079 (Ind. Ct. App. 1998).

94. *R.R. Donnelley*, 752 N.E.2d at 121-22.

95. *Id.* at 122 (quoting *Lenhardt*, 703 N.E.2d at 1085). *Lenhardt* involved a plant that "would ship solid blocks of metal" to the defendant along "with drawings and specifications." *Id.* The defendant "would then machine the block of metal into molds per the designs found in the drawings and specifications." *Id.*

96. *Id.*

97. *Id.* Accordingly, NTS was a "manufacturer" and "provider" of products under the IPLA, and the trial court "did not err in denying NTS's Motion for Summary Judgment" on that issue. *Id.*

98. As noted earlier, unpublished federal orders have extremely limited precedential value. *See supra* note 16. Such decisions are included in this survey because they are instructive for

v. Farmer Boy AG, Inc.[99] also is instructive to practitioners on this issue. That order, among other things, reaffirms that a prima facie case under the IPLA requires that the party pursuing the claim show that a "product" is involved.[100] In that case, Clark Electric Heating and Cooling ("Clark") installed a custom ventilation system and related electrical materials at a hog breeding facility. Less than one year later, lightning struck the facility, disabled the ventilation system, and resulted in the loss of 188 pregnant sows. The insurance carrier, as subrogee for the owner of the facility, sued Clark, alleging that its improperly designed electrical system caused the ensuing property loss.[101]

In a similar case, *Sapp v. Morton Buildings, Inc.*,[102] the Seventh Circuit Court of Appeals, applying Indiana law, held that the remodeling of a barn into a stable was a transaction involving predominately the sale of a service rather than a product.[103] In light of *Sapp*, Judge Tinder agreed that Clark's installation of a custom-fit electrical system involved "wholly or predominately the sale of a service rather than a product."[104] It is also interesting to note that Clark argued that it was entitled to summary judgment on the breach of warranty claim to the extent the plaintiffs were pursuing a claim for breach of implied warranty in tort.[105] Judge Tinder agreed, concluding that "[t]he theory of breach of implied warranty *in tort* is a theory of strict liability in tort and, therefore, has been superseded by the theory of strict liability."[106] However, the plaintiff could proceed on a warranty theory so long as it was limited to a contract theory.[107]

D. Strict Liability in Inadequate Warning Cases

Although it is not published in an official federal reporter and has very limited precedential value,[108] Judge Young's decision in *Eve v. Sandoz Pharmaceutical Corp.*[109] illustrates why inadequate warning cases are challenging and confusing when both negligence and strict liability theories are used. Ellen and Matthew Eve claimed that Ellen suffered serious and disabling injuries after she was administered several doses of two pharmaceuticals in the days following the delivery of her second child.[110] Sandoz Pharmaceutical Corp.

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practitioners despite the fact that they may not be binding.

99. No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000).

100. *Id.* at *7.

101. *See id.* at *3-*4.

102. 973 F.2d 539 (7th Cir. 1992).

103. *Id.* at 541.

104. *N.H. Ins. Co.*, 2000 U.S. Dist. LEXIS 19502 at *7-*8 (citation omitted).

105. *See id.* at *9-*10.

106. *Id.* at *9.

107. *Id.* at *10.

108. *See supra* note 16.

109. No. IP 98-1429-C-Y/S, 2001 U.S. Dist. LEXIS 4531 (S.D. Ind. Mar. 7, 2001).

110. Ellen received seven oral doses of Methergine in the hospital in the three days following delivery. *See id.* at *4. Methergine is "used to reduce the size of the uterus and postpartum

(now known as Novartis Pharmaceutical Corp.) manufactured the drugs, both of which contained package inserts containing warnings, precautions, indications, instructions, and other material required and approved by the United States Food and Drug Administration.[111]

Novartis requested partial summary judgment on many of the plaintiffs' claims, one of which was their strict liability claim. Novartis argued that, under Indiana law, product liability failure-to-warn cases are governed by negligence standards, regardless of the causes of action formally pled.[112] Plaintiffs responded by arguing that, "although strict liability product claims and negligence claims involve similar analysis, that fact alone" should not be the basis for summary judgment.[113] After reviewing the briefs and the law, Judge Young concluded that he found "no definitive answer" to the question presented and, accordingly, found "no clear reason" why Novartis' motion should be granted.[114]

With respect to the "law" reviewed in *Eve*, it appears to be limited to case law and, specifically, to *Ortho Pharmaceutical Corp. v. Chapman*.[115] After a brief review of the differences between failure-to-warn cases based on strict liability and failure-to-warn cases based on negligence, the court determined that "'there is no practical difference between the two theories in [the failure-to-warn] context' because the ordinary negligence concept of duty-to-warn governs."[116] Having so stated, Judge Young recognized that the *Chapman* court also referenced an Oregon case that distinguished the two theories and summarized:

> [T]he main difference between the two theories is that with strict liability cases, the dangerousness of the drug is at issue whereas with negligence cases the seller's culpability is at issue, or as it has been described, "the distinction lay in 'the manner in which the decisional functions are distributed between the court and the jury.'" . . . In other words, the difference is that with strict liability cases, "actual or constructive knowledge need not be proved. Otherwise the tests of culpability and dangerousness are identical."[117]

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hemorrhage." *Id.* at *2. Ellen "received six doses of Parlodel in the hospital" and was sent home with more. *Id.* at *5. Parlodel is used to inhibit postpartum lactation. *Id.* at *2.

111. *Id.* at *2, *29-*31.

112. *See id.* at *89-*90.

113. *Id.* at *90.

114. *Id.*

115. 388 N.E.2d 541 (Ind. App. 1979).

116. *Eve*, 2001 U.S. Dist. LEXIS 4531 at *90-*91 (quoting *Chapman*, 388 N.E.2d at 550) (alteration by court).

117. *Id.* at *91-*92 (citations omitted) (discussing *Chapman*'s citation to *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033 (Or. 1974)). The specific language *Chapman* borrowed from *Phillips* is as follows:

> In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warning, while in negligence we are talking about the

The *Chapman* court also cited a California decision stating that strict liability had yet not been applied to a failure-to-warn pharmaceutical case in that state.[118]

Judge Young's order briefly discusses *Chapman*'s explanation about why, from a jury instruction standpoint, it is to a plaintiffs' advantage to bring both a strict liability and a negligence claim, stating that:

> At some points the *Chapman* court indicates it is to plaintiffs' benefit to pursue only one theory and in other points, the court indicates that it is to plaintiffs' benefit to pursue both theories. Thus, the most that can be taken from this opinion is that it may behoove a plaintiff to elect one of the two theories—strict liability failure to warn or negligence—yet the court does not mandate that proposition.[119]

Judge Tinder's opinion, in *Spangler v. Sears, Roebuck & Co.*,[120] appears to admonish counsel against pursuing claims based on both strict liability and negligence in the same case:

> Cases in which recovery is sought under the alternative theories of strict liability and negligence are marked by necessity of confusing and inconsistent jury instructions regarding such matter as comparative fault and the open and obvious danger defense. The failure to elect one or the other of these theories can result in an unnecessarily lengthy trial, a confused and unconvinced jury and a disappointed plaintiff.[121]

Following the lead of Judge Tinder in *Spangler*, Judge Young ultimately concluded in *Eve* that it might be in plaintiffs' best interest to elect to pursue only one theory when the case goes to trial, but that he simply could not grant Novartis' motion for summary judgment at the time it was presented.[122]

Because Judge Young's decision does not specifically address the point, readers must assume that the court and the parties acknowledged that the post-1995 statutory language was inapplicable because Eve's claim accrued in the days after Eve delivered her second child in October 1989, nearly six years

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> reasonableness of the manufacturer's action in selling the article without a warning. The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it.

Phillips, 525 P.2d at 1039.

118. *See Eve*, 2001 U.S. Dist. LEXIS 4531 at *92-*93. The California case cited in *Chapman* is *Love v. Wolf*, 38 Cal. Rptr. 183, 197-98 (Ct. App. 1964).

119. *Eve*, 2001 U.S. Dist. LEXIS 4531 at *95.

120. 752 F. Supp. 1437 (S.D. Ind. 1990), *aff'd on reconsideration*, 759 F. Supp. 1337 (S.D. Ind. 1991).

121. *Eve*, 2001 U.S. Dist LEXIS 4531 at *95-*96 (quoting *Spangler*, 752 F. Supp. at 1441 n.3).

122. *Id.* at *96.

before the 1995 amendments to the IPLA took effect.[123] The General Assembly's 1995 amendments to the IPLA, which eliminate strict liability as a theory of product liability recovery in warning defect and design defect cases, should clear up the confusion in cases such as *Eve*. Indiana Code section 34-20-2-2 now provides that strict liability remains only in cases in which the theory of liability is a manufacturing defect.

II. LIMITATIONS AND REPOSE ISSUES

A. Limitations Issues

A claimant filing a tort-based product liability claim in Indiana must do so within two years after the cause of action "accrues."[124] The IPLA does not define the meaning of "accrues," but Indiana courts have adopted a discovery rule for the accrual of tort-based damage claims caused by an allegedly defective product.[125] Under the discovery rule a cause of action accrues when the claimant knew or should have discovered that he or she "suffered an injury or impingement, and that it was caused by the product or act of another."[126]

On March 16, 2001, the Indiana Supreme Court issued a much-anticipated decision in *Degussa Corp. v. Mullens*.[127] The decision confirms that the date upon which a product liability claim accrues may depend upon a subjective analysis of a patient's communications with his or her doctor about when a causal link between a disease and the defendant's product is established. Lenita Mullens was an employee of an animal feed company,[128] "whose responsibilities

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123. The 1995 amendments to the IPLA apply to causes of action that accrue after June 30, 1995. *See* Pub. L. No. 278-1995, § 16, 1995 Ind. Acts 4051, 4062. The important events triggering the claim in *Chapman* occurred between 1968 and 1970, several years before Indiana first enacted the IPLA in 1978. In deciding the issues before it, the *Chapman* court had to rely entirely upon the Restatement (Second) of Torts and other case law. As discussed above, the IPLA encompassed and governed both strict liability and negligence theories until 1983, when it was amended to govern only strict liability cases. In 1995, the legislature amended the IPLA to once again encompass and govern strict liability theories (for manufacturing defects) and negligence theories (for design defect and inadequate warnings).

124. IND. CODE § 34-20-3-1 (1998).

125. For an excellent discussion of accrual issues, see Nelson A. Nettles, *When Does a Product Liability Claim "Accrue"? When Is It "Filed"?*, IND. LAW., May 9, 2001, at 23.

126. Barnes v. A.H. Robins Co., 476 N.E.2d 84, 87-88 (Ind. 1985).

127. 744 N.E.2d 407 (Ind. 2001).

128. "Mullens began work for Grow Mix, a company formed by Richard Martin and Agritek Bio Ingredients, Inc. . . . to produce feed additive products for Agritek." *Id* at 409. According to the court, there was some dispute about "whether Mullens was employed by Grow Mix or Gro-Tec," two separate companies "housed in the same building." *Id.* at 409 n.1. A significant portion of the opinion is related to Mullens' employment status in connection with application of the exclusive remedy for tort claims provided by the Indiana Worker's Compensation Act. The employment-related issues are not addressed in this survey.

included the physical mixing of liquid and dry ingredients to make animal feeds."[129] Three to four months after starting her job on September 4, 1990, "Mullens experienced a persistent cough that would diminish after she went home from work and on weekends."[130]

Within the next year or so, Mullens sought treatment for what the treating physicians determined was bronchitis.[131] After the antibiotics prescribed during her second trip to the emergency room did not clear up her condition, Mullens saw her general practitioner on March 17, 1992. During that visit, her general practitioner "told Mullens that it was possible that her coughing and breathing problems were work-related, but that there were several other potential causes."[132] A few days later, on March 26, 1992, Mullens saw a pulmonary specialist who repeated that it was possible that work-related chemical exposure "was triggering an injury caused by something else." A follow-up with the same specialist on June 11, 1992, revealed that Mullens' "airflow obstruction and its relationship to her work environment" was still "unclear."[133] Mullens saw yet another pulmonary specialist in June 1992, who repeated what her general physician and her first specialist had said: "that chemical exposure at work *might* be related to her ailments but that other causes were possible."[134]

On March 25, 1994, Mullens filed suit against her alleged employer and manufacturers, sellers, and suppliers of various chemical ingredients used in the animal feed. It was not until March 1994 that Mullens and her attorney "received the first unequivocal statement from any doctor that her lung disease was caused by exposure to chemicals consistent with those" used at her workplace.[135] The defendants joined in a motion for summary judgment, arguing that Mullens failed to assert her claims within the two-year statute of limitations.[136] The trial court

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129. *Id.* at 409.

130. *Id.*

131. *See id.* Mullens was treated for bronchitis in March 1991 and again in February 1992. *Id.*

132. *Id.*

133. *Id.* While Mullens was working with the pulmonary specialist in April of 1992, representatives of Degussa Corporation "visited her at work and told her that their product could not be causing her medical problems." *Id.* Degussa produced "one of the ingredients used in making the feeds." *Id.* at 409 n.2.

134. *Id.* at 409 (emphasis added).

135. *Id.* at 409-10.

136. Agritek also filed a motion to dismiss Mullens' tort claims against it, claiming that Mullens was an employee and, therefore, "the Indiana Worker's Compensation Act provided her exclusive remedies for work-related injuries on the job." *Id.* at 410. The trial court's denial of Agritek's separate motion is also the subject of a large portion of the opinion. Interestingly, Justice Rucker did not participate because he had been part of the court of appeals panel that decided the case at that level. That turned out to be significant because the justices split two to two on the question of whether the Worker's Compensation Act precluded Agritek's tort liability to Mullens. *Id.* at 409. As such, the trial court's denial of Agritek's motion to dismiss was affirmed. *Id.* As explained *supra*, this survey does not address the employment-related issues. *See supra* note 128.

denied the motions, but the court of appeals reversed after concluding that Mullens failed to file her claims within the limitations period.[137] The Indiana Supreme Court affirmed the trial court, concluding that Mullens' timely filed her claim because it accrued sometime after she began seeing the second specialist.[138]

The *Degussa* court began its analysis by drawing a comparison between the facts before it and those presented in recent medical malpractice cases. The court initially agreed with the court of appeals that "a plaintiff need not know with certainty that malpractice caused his injury, to trigger the running of the statutory time period."[139] According to the court, "[o]nce a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."[140] The *Degussa* court further explained that

> [w]hen a doctor so informs a potential plaintiff, the plaintiff is deemed to have sufficient information such that he or she should promptly seek "additional medical or legal advice needed to resolve any remaining uncertainty or confusion" regarding the cause of his or her injuries, and therefore be able to file a claim within two years of being informed of a reasonably possible or likely cause. An unexplained failure to seek additional information should not excuse a plaintiff's failure to file a claim within the statutorily defined time period.
>
> Although "events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that another's" product caused his or her injuries, a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute.[141]

In applying the foregoing standard to the case before it, the court recognized that although Mullens "might have suspected that a chemical from work was the cause of her problems when she first visited" her general practitioner on March 17, 1992, the best that the doctor could do was emphasize that there was "a range of potential causes."[142] Indeed, telling a patient that a particular product or act is but one of several possible causes of an injury triggers a "complex of factually and legally relevant questions about how the physician conveyed the information to the patient and what emphasis the physician placed on the potentially tortious cause over other causes."[143] It was undoubtedly important to the court that Mullens "diligently followed" her doctor's recommendations, "undergoing further tests and attempting to gather information" about her condition and its

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137. *Degussa*, 744 N.E.2d at 410.

138. *Id.* at 408-09.

139. *Id.* at 411.

140. *Id.* (quoting Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999)).

141. *Id.* at 411 (citations omitted).

142. *Id.*

143. *Id.*

possible cause or causes before filing suit.[144] The *Degussa* court concluded that

> [o]n March 17, 1992, Mullens merely suspected that work products had something to do with her illness and [her general practitioner] said nothing to confirm, deny, or even strengthen her suspicions. In light of the ongoing medical consultation that Mullens undertook between March 17, 1992, and March 25, 1994, the date Mullens filed her complaint, we do not believe that the statute was triggered as late as March, 1994, as argued by Mullens. However, we also see nothing in the record to indicate that on March 17, 1992 (or even in the following eight days that would have been outside of the statutory period), Mullens's physicians had yet informed her that there was a reasonable possibility, if not probability, that her ailments were caused by work chemicals.[145]

In addition to the important holding in *Degussa*, practitioners should be aware that judges on the Indiana Court of Appeals continue to disagree about whether the filing of a summons after the expiration of the statute of limitations constitutes the timely filing of the lawsuit. In *Ray-Hayes v. Heinamann*,[146] the parent and natural guardian of a child injured in an automobile accident sued both the driver of the vehicle and two entities allegedly involved in its manufacture and design. The plaintiff alleged that her daughter was injured while riding as a passenger in a 1991 Nissan Sentra driven by the defendant, Heinamann. She contended that Heinamann fell asleep at the wheel, resulting in a collision with a cement culvert wall.[147] The accident occurred on October 21, 1997. Plaintiff filed the initial complaint against Heinamann on July 22, 1998. On September 13, 1999, plaintiff amended her complaint to include two entities alleged to be responsible for a defective restraint system, Nissan North America, Inc. and Nissan Motor Company, Ltd. (the "Nissan defendants"). The summonses for those two defendants were not filed with the court until January 21, 2000.[148]

The Nissan defendants filed a motion to dismiss because Hayes failed to file the summons relating to them until after the statute of limitations had expired (on October 21, 1999). Citing *Fort Wayne International Airport v. Wilburn*,[149] the trial court agreed and dismissed the Nissan defendants. The court of appeals reversed, pointing out that Rule 3 of the Indiana Rules of Trial Procedure provides that "[a] civil action is commenced by filing a complaint with the court or such equivalent pleading or document as may be specified by statute."[150] Because the plaintiff in *Ray-Hayes* filed her complaint within the applicable

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144. *Id.*

145. *Id.* at 411-12.

146. 743 N.E.2d 777 (Ind. Ct. App. 2001), *vacated by* 760 N.E.2d 172 (Ind.), *rev'd on reh'g*, 768 N.E.2d 899 (Ind. 2002).

147. *Id.*

148. *Id.* at 777-78.

149. 723 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).

150. *Ray-Hayes*, 743 N.E.2d at 779-80 (alteration by court).

statutory time period governing accrual of product liability actions,[151] the majority determined that she complied with Rule 3 and that the trial court erred in dismissing her cause of action.[152]

The majority opinion in *Ray-Hayes* is openly at odds with *Wilburn*, which earlier held that a plaintiff must tender the complaint, the summons, and the fee before the statute of limitations expires for the action to be deemed commenced. The dispute centers around the Indiana Supreme Court's decision in *Boostrom v. Bach*.[153] The *Wilburn* court overly relied upon *Boostrom* when it stated that "[t]he plaintiff, of course, controls the presentation of *all the documents necessary to commencement of a suit*: the complaint, *the summons*, and the fee. . . . [Plaintiff] thus filed two of the three items necessary to the commencement of her action."[154] The *Wilburn* court interpreted the *Boostrom* footnote to mean that commencement of all actions requires the presentation of a complaint, summons, and a fee before the statute of limitations expires.[155] The majority in *Ray-Hayes* disagreed, pointing out that *Boostrom* "involved a small claims action" and that it "should be limited . . . to its facts."[156] In addition, the *Ray-Hayes* court recognized that Rule 3 of the Indiana Rules of Trial Procedure contains no language requiring that the summons be filed before the statute of limitations expires.[157]

Judge Sullivan's dissent in *Ray-Hayes* crystallizes the discord because, in his view, it is not within the court of appeals' prerogative to overrule what he termed "a clear and unmistakable ruling of the Indiana Supreme Court."[158] Judge Sullivan wrote that the court in *Wilburn* recognized that *Boostrom* was a small claims matter, but pointed out that the rules governing small claims actions consider the complaint or the notice of claim to be the summons, and, as such, the plaintiff in small claims litigation "is not required to tender a separate summons to the court for issuance by the Clerk."[159]

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151. "[A] product liability action must be commenced: (1) within two (2) years after the cause of action accrues . . . ." IND. CODE § 34-20-3-(b) (1998).

152. *Ray-Hayes*, 743 N.E.2d at 780. The majority in *Ray-Hayes* acknowledged that Rule 4(B) requires the filing of a summons contemporaneously with the filing of a complaint. *Id.* The majority also acknowledged that Ray-Hayes failed to comply with Rule 4(B)'s contemporaneous filing requirement. *Id.* However, the trial court had explicitly dismissed the case pursuant to the holding in *Wilburn* and the court of appeals' failure to tender the summonses within the limitations period was technically not a per se violation of Rules 3 and 4(B). *See id.*

153. 622 N.E.2d 175 (Ind. 1993).

154. 723 N.E.2d at 968 (emphasis and omission by court) (quoting *Boostrom*, 622 N.E.2d at 177 n.2).

155. *See id.*

156. *See Ray-Hayes*, 743 N.E.2d at 779.

157. *Id.* at 779-80.

158. *Id.* at 781 (Sullivan, J., dissenting).

159. *Id.*

Judge Sullivan wrote:

> Nevertheless, our Supreme Court clearly and unmistakably used terminology applicable to commencement of a suit under the Rules of Trial Procedure. In doing so, it left no doubt that in normal civil litigation the 'documents necessary to the commencement of a suit: the complaint, *the summons*, and the fee' must all be filed.[160]

Judge Sullivan concluded that the plaintiff simply failed to commence suit without the tender of a summons to the court for issuance and that the statute of limitations barred plaintiffs' claim because it expired before they "commenced" suit.[161]

On January 2, 2002, the court granted transfer of the *Ray-Hayes* case. The court of appeals' decision in *Ray-Hayes* was vacated, the trial court's dismissal affirmed, and the supreme court reversed itself on rehearing.[162]

B. Repose Issues

Indiana Code section 34-20-3-1 provides, in relevant part, that "a product liability action must be commenced: (1) within two (2) years after the cause of action accrues; or (2) within ten (10) years after the delivery of the product to the initial user or consumer."[163] Practitioners generally refer to the latter of those clauses as the product liability statute of repose. In last year's decision in *McIntosh v. Melroe Co.*,[164] the Indiana Supreme Court held that application of the statute of repose does not violate the Indiana Constitution.[165] In the wake of that landmark pronouncement, several court of appeals opinions addressed statute of repose issues during the survey period. All of those opinions involved product liability cases alleging injury as the result of exposure to asbestos products. In January 2002, the Indiana Supreme Court heard oral argument in the case of

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160. *Id.* (quoting Boostrom v. Bach, 622 N.E.2d 175, 177 n.2 (Ind. 1993)) (emphasis by court).

161. *Id.* at 782 (Sullivan, J., dissenting).

162. *See* 760 N.E.2d 172 (Ind.), *rev'd on reh'g*, 768 N.E.2d 899 (Ind. 2002).

163. IND. CODE § 34-20-3-1(b) (1998). The same section also provides that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." *Id.* § 34-20-3-1. As the statute makes clear, a claimant must bring a product liability action in Indiana within two years after it accrues, but in any event, not longer than ten years after the product is first delivered to the initial user or consumer. Such is true unless the action accrues in the ninth or tenth year after delivery, in which case the full two-year period is preserved, commencing on the date of accrual. Accordingly, the longest possible time period in which a claimant may have to file a product liability claim in Indiana is twelve years after delivery to the initial user or consumer, assuming accrual at some point in the twelve months immediately before the tenth anniversary of delivery.

164. 729 N.E.2d 972 (Ind. 2000).

165. *Id.* at 973.

Allied Signal, Inc. v. Ott. Practitioners anticipate that the *Ott* decision will help resolve the repose issue once and for all. This survey reviews those court of appeals decisions handed down during the survey period. Next year's survey period promises some more definitive answers in this area.

Product liability cases involving asbestos products are unique in several ways, not the least of which is the manner in which the legislature chose to address the applicable repose period. Indiana Code section 34-20-3-2 provides that "[a] product liability action that is based on: (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos; must be commenced within two (2) years after the cause of action accrues."[166] That exception applies, however, "only to product liability actions against: (1) persons who mined and sold commercial asbestos; and (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims."[167]

The crux of the continuing controversy is the phrase "persons who mined and sold commercial asbestos." Plaintiffs argue that the "and" should be read as an "or," while defendants contend that the statute creates an exception to the limitations and repose periods only for claims against those entities that *both* mined *and* sold commercial asbestos.[168] There is also a debate about the intended meaning of the term "commercial asbestos."

In the statute of repose context, courts have answered nearly all of the questions raised in favor of the plaintiffs. *Black v. ACandS, Inc.*,[169] *Poirier v. A.P. Green Services, Inc.*,[170] *Fulk v. Allied Signal, Inc.*,[171] *Parks v. A.P. Green*

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166. IND. CODE § 34-20-3-2(a) (1998). The statute further provides that an action "accrues on the date when the injured person knows that the person has an asbestos related disease or injury" and that the "subsequent development of an additional asbestos related disease or injury . . . is a separate cause of action." *Id.* § 34-20-3-2(a)(2)-(b).

167. *Id.* § 34-20-3-2(d).

168. Three years ago, in *Sears Roebuck & Co. v. Noppert*, 705 N.E.2d 1065 (Ind. Ct. App. 1999), the court of appeals addressed the applicability of the ten-year product liability statute of repose in the context of a claim for alleged exposure to asbestos. The *Noppert* court did so as part of a larger discussion about the timeliness of a motion to correct errors pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure. Part of the *Noppert* court's analysis concluded that, "as a matter of law, the Nopperts [did] not have a meritorious defense" because the exception to the ten-year product liability statute of repose contained in Indiana Code section 34-20-3-2 applies only to claims against persons who mined and sold commercial asbestos and against funds described in that section. *Id.* at 1067-68 & n.6. With respect to the first category of defendants (miners and sellers), the court made it clear that the entities to which the statute applies are entities that both mined *and* sold commercial asbestos, stating that "while courts in Indiana have on occasion construed an 'and' in a statute to be an 'or,' we find that there is no ambiguity in this statute requiring such an interpretation." *Id.* at 1068.

169. 752 N.E.2d 148 (Ind. Ct. App. 2001).

170. 754 N.E.2d 1007 (Ind. Ct. App. 2001).

171. 755 N.E.2d 1198 (Ind. Ct. App. 2001).

Industries, Inc.,[172] and *Allied Signal, Inc. v. Herring*[173] all involve workers or their estates who claimed injury or death as the result of working with or around asbestos-containing products. Those claimants sued sellers of asbestos-containing products, alleging damages caused by inhalation of asbestos dust. In each case, a majority of the judges held that the exception to the IPLA repose period, created by section 34-20-3-2, applies to entities that mine commercial asbestos, even if they do not sell it, and to entities that sell commercial asbestos, even if they do not mine it. The following language from the majority opinion in *Black* provides the underpinning for the rulings:

> Clearly, the intent of the legislature in enacting § 34-20-3-2 was at least in part to acknowledge the long latency period of asbestos-related injuries. Without the § 34-20-3-2 exception, the statute of limitations and statute of repose would be meaningless for the vast majority of people harmed by exposure to asbestos. Asbestos-related injuries would truly be a wrong without a remedy. Equally clear is that the legislature thus could not have intended by enacting § 34-20-3-2 to so severely limit the means of recovery.[174]

Judge Mathias authored a lengthy dissenting opinion in *Black*, concluding that the statute of repose on its face is unambiguous and clearly applies only to those companies who both mined and sold commercial asbestos, not all sellers of asbestos-containing products.[175] In doing so, Judge Mathias found two recent

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172. 754 N.E.2d 1052 (Ind. Ct. App. 2001).

173. 757 N.E.2d 1030 (Ind. Ct. App. 2001).

174. 752 N.E.2d at 154. While the court of appeals was considering the *Black* case, groups interested in the issues raised in that and other related cases sought to address it in the General Assembly. House Bill 1757, first introduced in the Indiana House of Representatives on January 17, 2001, was designed to change the asbestos statute of repose in Indiana Code section 34-20-3-2. The proposed modifications sought to expand the potential pool of asbestos defendants by allowing claims against mere sellers of asbestos containing products as opposed to "persons who mined and sold commercial asbestos." The bill went to House committee where it passed unopposed and then passed the House of Representatives on March 6, 2001. When members of the defense bar learned about the bill, they opposed it in the Senate. The proposed legislation failed in Senate committee.

175. *Id.* at 158 (Mathias, J., dissenting). Judge Mathias wrote:

> The two verbs "mined" and "sold" are conjoined by the coordinating conjunction "and." The use of "and" alone is enough to, and does, conjoin the verbs "mined" and "sold" into a single verb element within the statute's complex noun phrase. The conjoined verbs "mined and sold" modify "persons" through the relative pronoun "who," which specifies the action related to, and thereby helps to define, the "persons" that are the subject of the complex noun phrase. In light of its language and grammatical structure, I conclude that section two is unambiguous.
>
> In contrast, the majority alters the statutory language at issue by inserting the phrase "persons who" before the statute's existing language, "sold commercial asbestos." Only when words are considered to have been palpably omitted should the court add those words into the statute. I cannot reach that conclusion here. The

court of appeals' opinions "instructive,"[176] distinguished an opinion written by the Indiana Supreme Court,[177] and asserted that it was not the court's prerogative to adjudicate legislative policy determinations.[178] In addition, Judge Mathias concluded that Indiana Code section 34-20-3-2 does not violate either article I, section 12 or article I, section 23 of the Indiana Constitution.[179]

Judge Mathias also dissented from the majority's opinions in *Poirier* and in *Fulk* for the same reasons stated in his dissent in *Black*.[180]

The opinion in *Jurich v. Garlock, Inc.*[181] ultimately determines that the statute of repose is inapplicable but gets there in a peculiar way. Although the

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majority's grammatical interpretation is not the product of divination of "clearly contrary legislative intent" so as to properly fall within the extremely limited sanction of *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 526, 418 N.E.2d 207, 211 (1981).

Id. at 158-59 (citations omitted).

176. *Id.* at 159. The two cases that Judge Mathias found "instructive" were *Novicki v. Rapid-American Corp.*, 707 N.E.2d 322 (Ind. Ct. App. 1999), and *Sears Roebuck & Co. v. Noppert*, 705 N.E.2d 1065 (Ind. Ct. App. 1999). The *Noppert* court determined that defendant "Sears was not a miner of asbestos" and that "the statutory exception to the statute of repose for asbestos-related claims applies only when the defendants are 'miners *and* sellers of commercial asbestos.'" *Black*, 752 N.E.2d at 159 (Mathias, J., dissenting) (quoting *Noppert*, 705 N.E.2d at 1068) (emphasis by court). Similarly, the *Novicki* court determined that the asbestos statute of repose applies "'only to cases in which the defendant both mined and sold commercial asbestos.'" *Id.* (quoting *Novicki*, 707 N.E.2d at 324). Judge Mathias disagreed with the majority's characterization of the determinations as "dicta." *Id.*

177. Judge Mathias distinguished *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989), because IND. CODE § 33-1-1.5-5.5 (1993) (the predecessor of IND. CODE § 34-20-3-2 (1998)) went into effect after the facts giving rise to the decision arose and because it was limited by its own terms "'to the precise factual pattern presented,' i.e., an action against an asbestos mining company filed prior to the enactment of [IND. CODE § 34-20-3-2]." *Black*, 752 N.E.2d at 160 (Mathias, J., dissenting).

178. *Id.* On this point, Judge Mathias wrote:

> Neither the majority nor I can rightfully claim to fully know what the General Assembly "clearly" intended when it drafted, considered and enacted the statutory language at issue. However, I must reiterate that when a statute is unambiguous, "we may not ignore the clear language of a statute, regardless of our view as to its wisdom." The legislature has wide latitude in determining public policy, and we may not substitute our own policy judgment for that of the legislature. "To the contrary, it is the duty of the courts to interpret a statute as they find it, without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived."

Id. at 160-61 (citations omitted).

179. *Id.* at 161-62.

180. *See* Fulk v. Allied Signal, Inc., 755 N.E.2d 1198, 1207 (Ind. Ct. App. 2001) (Mathias, J., dissenting); Poirier v. A.P. Green Servs., Inc., 754 N.E.2d 1007, 1013 (Ind. Ct. App. 2001) (Mathias, J., dissenting).

181. 759 N.E.2d 1066 (Ind. Ct. App. 2001).

court recognized as "reasonable" the *Black* majority's conclusion, it disagreed that the defendants sold "commercial asbestos."[182] The *Jurich* court determined that the defendants sold asbestos-containing products, not "commercial asbestos," which, in its view, "refers to either 'raw' or processed asbestos that is incorporated into other products."[183] Accordingly, the *Jurich* court concluded that the General Assembly did not intend the exception to the IPLA's statute of repose to apply to defendants that merely sold asbestos-containing products.[184]

The *Jurich* court nevertheless concluded that the defendants could not use the IPLA's statute of repose to bar the claim because it violates article 1, section 12 of the Indiana Constitution as applied.[185] The salient constitutional question was whether the Jurichs had a vested right in their claim.[186] The *Jurich* court determined that they did, although it recognized what it called the "axiomatic principle" that there is no vested or property right in any common law rule and that "the General Assembly can make substantial changes to the existing law without infringing on citizen rights."[187] The "key distinction," according to the *Jurich* court, was that the Jurichs had a vested right, but "not in a rule of common law in the abstract."[188] Rather, the claim was vested because Nicholas Jurich had been injured by the defendant's products "at a time when Indiana courts recognized common law product liability actions without an equivalent to the later-enacted [I]PLA's statute of repose and thus without reference to the length of time a product had been in the stream of commerce."[189] The court further explained:

> Mr. Jurich allegedly inhaled and was injured by asbestos dust from defendants' products for at least twenty-five years before the [I]PLA's effective date, from 1953 to 1978. During this period of protracted exposure to asbestos, there was no equivalent to the [I]PLA's statute of repose, which places a strict time limitation on bringing product liability claims based on a product's age that did not exist at common law. To the extent his twenty-five years of asbestos exposure before the [I]PLA's effective date contributed to Mr. Jurich's later development of mesothelioma, the statute of repose cannot constitutionally be used to bar claims stemming from that exposure. Otherwise, the Jurichs' valid claims under common law, which could not be known for many years, would be effectively retroactively barred by the [I]PLA and their vested right to a complete tort remedy would be taken away by the legislature. . . . Such a time limitation is an unreasonable legislative impediment

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182. *Id.* at 1069-71.
183. *Id.* 1071.
184. *Id.*
185. *Id.* at 1077.
186. *See id.* at 1074-75.
187. *Id.* at 1075-76 (quoting McIntosh v. Melroe Co., 729 N.E.2d 972, 978 (Ind. 2000)).
188. *Id.* at 1076.
189. *Id.*

> on the bringing of an otherwise valid claim, due to the very long latency period of the development of asbestos-related diseases and the impossibility of the plaintiff's knowing whether such a disease is slowly progressing in his or her body. This represents a denial of justice that is inconsistent with Article I, Section 12 of the Indiana Constitution, as interpreted by *Martin v. Richey*.[190]

As of this writing, these issues are either before the Indiana Supreme Court or are pending a decision on transfer in *Black*, *Jurich*, and *Herring*.[191] As noted earlier, on November 20, 2001, the Indiana Supreme Court in the case of *Allied Signal, Inc. v. Ott*[192] accepted jurisdiction of an Allen Superior Court interlocutory order denying motions for summary judgment after finding, like *Jurich*, that Indiana Code section 34-20-3-2 violates article I, sections 12 and 23, "as applied to asbestos cases only."[193] In light of the reasoning and implications of these decisions, as well as the discord among court of appeals judges, highlighted by Judge Mathias's dissents in *Black*, *Poirier*, and *Fulk*, the Indiana Supreme Court has agreed to consider the constitutionality of the asbestos statute of repose. For those same reasons, it seems likely that the Indiana Supreme Court will consider and resolve the statutory construction issue as well.

Two unpublished federal decisions also may be helpful to Indiana practitioners who have cases that involve repose issues. In the first case, *Miller v. Honeywell International Inc.*,[194] a Bell UH-1 helicopter crashed on March 1, 1997, while on an Indiana National Guard training mission. The plaintiffs are the crew members aboard the helicopter as well as the estate of the pilot killed in the crash. Plaintiffs alleged that "the failure of the forward reduction gear assembly

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190. *Id.* at 1076-77.

191. In *Black*, the court of appeals denied appellees joint petition for rehearing on December 10, 2001, and on January 15, 2002, the case was transmitted on transfer to the Indiana Supreme Court. In *Jurich*, the petition to transfer was filed on November 19, 2001. The court of appeals in *Herring* denied appellants' petition for rehearing on January 14, 2002, and thereafter appellants filed a petition to transfer on February 13, 2002. The same issues are pending transfer in yet another case, *Harris v. A.C. & S., Inc.*, 766 N.E.28 383 (Ind. Ct. App. 2002), a case decided after the survey period.

192. Supreme Court Cause Number 02S04-0110-CV-599; Court of Appeals Cause Number 02A04-0110-CV-462.

193. Order at 1 (Nov. 20, 2001). The trial judge entered his order on July 20, 2001. *Id.* Pursuant to Appellate Rule 14(B)(1), the trial court on September 26, 2001, certified its July 20 order for interlocutory appeal. *Id.* In accordance with Appellate Rules 5(B) and 14(B)(2), Allied Signal filed a motion asking the court of appeals to accept the interlocutory appeal and a petition to have the Indiana Supreme Court assume immediate jurisdiction over the matter pursuant to Appellate Rule 56(A). *Id.* In the supreme court's order accepting jurisdiction, the court noted that had the order "been entered as a final judgment," there would have been jurisdiction pursuant to Appellate Rule 4(A)(1)(b). *Id.*

194. IP 98-1742 C-M/S, 2001 U.S. Dist. LEXIS 5574, Prod. Liab. Rep. (CCH) ¶ 16,095 (S.D. Ind. Mar. 7, 2001).

component of the helicopter's engine" caused the accident.[195] That component contained "three planetary gears, . . . all mounted in a carrier assembly unit."[196] One of the planetary gears allegedly failed, "breaking into several pieces and causing the crash."[197]

Honeywell Corporation is the successor-in-interest to the company that originally built the engine in 1971 and sold it to the U.S. Army.[198] In 1977, the Army inspected the carrier assembly involved in the crash before placing it in inventory until 1990, when the Army installed it in the helicopter that crashed during a rebuild of the engine.[199] The Missouri National Guard overhauled the engine again in 1996, installing "new planetary gears and roller bearings."[200]

Honeywell argued first that it could not be held liable for alleged design or manufacturing defects involving engine components that it manufactured before 1987 because the IPLA precludes causes of action that accrue "more than ten years after a product is sold."[201] Honeywell also argued that it could not be held liable for "alleged defects in the planetary gears that were used as replacement parts within the ten year" repose period "because it neither manufactured nor sold those replacement gears to the Army."[202] Plaintiffs countered that the IPLA does not bar their cause of action against the original manufacturer because the engine involved was rebuilt within ten years of the accident.[203] Plaintiffs also argued that "even if Honeywell was not the primary manufacturer of the replacement planetary gears, [it] was still responsible for providing, and then revising, the design specifications that were used in making them."[204]

The *Miller* court agreed with Honeywell's first argument, holding that the IPLA bars all of plaintiffs' claims "that are based solely on alleged pre-sale defects in the engine or carrier assembly."[205] The court disagreed with Honeywell's second argument, however, denying its motion for summary judgment regarding defects "in the replacement planetary gears or any alleged duty to warn regarding potential dangers to plaintiffs who use the replacement gears in the expected manner."[206]

The *Miller* decision is helpful to practitioners because it effectively delineates the difference between the repose and limitations periods. It also recognizes the two situations in which a manufacturer can be liable even beyond the ten years after delivery to the initial user or consumer: (1) when the

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195. *Id.* at *4.
196. *Id.* at *4-*5.
197. *Id.* at *5.
198. *Id.*
199. *Id.* at *6.
200. *Id.* at *6-*7.
201. *Id.* at *2.
202. *Id.* at *2-*3.
203. *Id.* at *3.
204. *Id.*
205. *Id.* at *3-*4.
206. *Id.* at *4.

manufacturer supplies replacement parts for the product and the replacement parts are the cause of the plaintiff's injury;[207] and (2) when the manufacturer rebuilds the product, to the point of significantly extending the life of the product and rendering it in like-new condition.[208]

In the case before the court, Honeywell sold the engine in question to the Army in 1971, which is when the statute of repose began to run. The facts did not establish that Honeywell rebuilt the engine and then reinjected it into the steam of commerce or that Honeywell exercised any significant control over the rebuilding process.[209] Indeed, the Army rebuilt the engine and continued to use it for its own purposes. As such, the court rejected plaintiffs' argument that the original manufacturer should be held liable for defects in the rebuilt product and therefore "the statute of repose clock should begin to run again from the time the rebuilt product is delivered to its initial consumer."[210] Even if the service performed on the carrier assembly in 1977 constituted a rebuild and that Honeywell's predecessor "exercised significant control over the rebuilding process," the statute of repose would have expired by 1987.[211] Thus, Honeywell could not be liable for pre-sale alleged defects in the engine or carrier assembly notwithstanding the 1990 and 1996 rebuilds.

The planetary gears, however, were a different story because they were replacement parts.[212] Because a replacement part is a manufactured product in its own right, Honeywell and its co-defendants could be held liable "to the extent that [they were] a manufacturer of the replacement planetary gears and the planetary gears themselves were defective."[213] Because issues of fact remained concerning supply, exercise of control, inspection, and design specifications of the planetary gears, Judge McKinney denied summary judgment to the defendants on the statute of repose issue with respect to the planetary gears.[214]

Judge McKinney was, nevertheless, "troubled by the possibility implicit in [its] discussion that a designer of a product could find itself faced with unending liability for its original design, contrary to the Indiana legislature's apparent intent."[215] Judge McKinney continued:

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207. In such a situation, the ten-year statute of repose begins to run from the time the manufacturer supplied the parts. *See* Richardson v. Gallo Equip. Co., 990 F.2d 330, 331 (7th Cir. 1993); Black v. Henry Pratt Co., 778 F.2d 1278, 1284 (7th Cir. 1985).

208. In this situation, the statute of repose begins to run from the time the rebuilt product is delivered into the stream of commerce. *Miller*, 2001 U.S. Dist. LEXIS 5574 at *19 (citing Whitaker v. T.J. Snow Co., 953 F. Supp. 1034 (N.D. Ind. 1997), *aff'd*, 151 F.3d 661 (7th Cir. 1998); Denu v. W. Gear Corp., 581 F. Supp. 7 (S.D. Ind. 1983)).

209. *See id.* at *21-*22.

210. *Id.* at *21-*23.

211. *Id.* at *24.

212. *See id.* at *27.

213. *Id.*

214. *Id.* at *31-*35.

215. *Id.* at *30.

> If, for example, a third party manufacturer bought the design rights, and then the original designer had nothing more to do with the manufacturing of the product from that day on, it would seem to defeat the whole point of the statute of repose for the original designer to continue to be held responsible indefinitely for actions by the third party over which it had no further control . . . .
>
> However, this case does not present the proper set of facts with which to test the issue under Indiana law. Although the precise contractual relations and obligations between the Army, Precision Gear, and [Honeywell] are unclear to the Court, it is evident from the record that all three parties continued to cooperate in manufacturing and testing the safety of the planetary gears that Precision was producing. It is simply not the case that [Honeywell] provided the Revision AK blueprints in 1986 and then had nothing more to do with manufacturing the planetary gears.[216]

One final point unrelated to the repose issues should be made. According to the court, Honeywell's motion "encompasses liability for defects in design and manufacture, as well as liability for the duties to warn or to instruct about the proper use of these products."[217] In discussing the elements of and requirements for a cause of action under the IPLA, the court recognized that a plaintiff maintains a "strict liability" action against a product manufacturer if the product contains a defective[218] condition unreasonably dangerous to the user or

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216. *Id.* at *30-*32. Judge McKinney added a few words about the interaction between the IPLA's statute of repose and the post-sale duty to warn. Although plaintiffs did not state it explicitly, according to Judge McKinney, plaintiffs seemed to be suggesting that the law should impose upon Honeywell a post-sale duty "to warn the Army of the problem" with the planetary gears and that "the statute of repose should begin to run from the moment" that Honeywell's predecessor "discovered what the problem was." *Id.* at *35. Judge McKinney wrote that the IPLA statute of repose "cannot be circumvented by asserting that the manufacturer continued to be negligent (indefinitely) for failing in its duty to warn of known dangers after the product was delivered to its initial user." *Id.* at *35-*36 (citing Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981)). He continued:

> Therefore, the statute of repose for those defects began to run from the time that the defective product was delivered to the initial user. It follows that an inquiry into when [Honeywell] discovered the defect can have no relevance with regard to whether [its] exposure to liability for failure to warn has expired. All that matters is: when was the product, to which the duty to warn attached, first placed into the stream of commerce?

Id. at *36.

217. *Id.* at *2.

218. A product is considered defective under the IPLA if it contains physical flaws but also if the seller "fails to . . . give reasonable warnings of danger about the product; or give reasonably complete instructions on [its] proper use . . . ." IND. CODE § 34-20-4-2 (1998); *accord Miller*, 2001 U.S. Dist. LEXIS 5574 at *15-*16.

consumer.[219] The court likewise recognized that before a manufacturer may be held "strictly liable," the user must have been "in the foreseeable class of persons who might be harmed, . . . the product must have reached the user without substantial alteration," and "the defective condition must have been present in the product at the time it was conveyed to the initial user or consumer."[220] Because the court's explanation is intended to address those situations in which a manufacturer may be "strictly liable" and because the case before it involved alleged defects in manufacturing, design, and by virtue of inadequate warnings, the court's summary of Indiana law needs to be augmented. As noted in previous sections, the IPLA provides that claimants may pursue a "strict liability" theory only in cases in which the theory of liability is a manufacturing defect.[221] Thus, the court's discussion nicely sets out the elements of proof in a product liability case, but practitioners should not interpret those elements as applying only in "strict liability" (i.e., manufacturing defect) cases.

In the other federal case, *Land v. Yamaha Motor Corp.*,[222] the estate of a man who was killed in an explosion while trying to start a WaveRunner sued the manufacturer. The WaveRunner involved "was first sold or delivered to a consumer on July 28, 1987, more than ten years before the explosion," which occurred on June 25, 1998.[223] After determining that Indiana law applied, the court held that the IPLA's ten-year statute of repose barred the claim.[224] In doing so, the court rejected plaintiffs' attempt to circumvent the statute of repose by arguing that defendants breached duties to warn users of dangerous defects in the WaveRunner long after the original sale.[225] Citing *McIntosh v. Melroe Co.*,[226] Judge Hamilton also rejected plaintiffs' argument that the statute of repose violates article I, section 23 of the Indiana Constitution.[227]

III. TOXIC EXPOSURE SUMMARY JUDGMENT STANDARD

Indiana appellate courts handed down five important decisions addressing the summary judgment standard in cases in which product liability defendants argued that they were entitled to summary judgment because of a lack of evidence of exposure to their product. As was true with statute of repose issues, cases involving exposure to asbestos products are in the vanguard.

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219. *Id.* at *14-*15.

220. *Id.* at *15.

221. *See* IND. CODE § 34-20-2-2 (1998).

222. No. IP 00-220-C H/G, 2001 U.S. Dist. LEXIS 2732, Prod. Liab. Rep. (CCH) ¶ 16,045 (S.D. Ind. Mar. 8, 2001), *aff'd*, 272 F.3d 514 (7th Cir. 2001).

223. *Id.* at *1.

224. *Id.* at *2.

225. *Id.* at *8-*10.

226. 729 N.E.2d 972 (Ind. 2000).

227. *Land*, 2001 U.S. Dist. LEXIS 2732 at *10-*11. The Seventh Circuit affirmed Judge Hamilton in *Land v. Yamaha Motor Corp.*, 272 F.3d 514 (7th Cir. 2001), which was decided beyond the survey period.

In the asbestos context, claimants must properly identify the products to which they claim exposure in order to satisfy both the legal and factual causation requirements necessary for sustenance of their cases. Most practitioners refer to that threshold evidentiary process as "product identification." In this regard, resolution of a product identification summary judgment motion requires the court to determine whether there is, as a matter of law, sufficient product identification evidence for the trier of fact to sustain a finding of causation against a given defendant.

On September 10, 2001, the Indiana Supreme Court addressed the product identification issue in *Owens Corning Fiberglass Corp. v. Cobb*.[228] Cobb, a former pipe fitter, sued more than thirty manufacturers or distributors of asbestos-containing products. As the case progressed toward trial, Cobb settled with some defendants and other defendants were otherwise dismissed.[229] Cobb and Owens Corning Fiberglass Corp. ("OCF") filed cross-motions for summary judgment. Cobb's motion for summary judgment argued that OCF had not presented sufficient evidence to support its affirmative defenses, including its non-party defense.[230] OCF's motion for summary judgment argued that "Cobb had failed 'to provide any evidence that he was exposed to asbestos-containing products manufactured or distributed' by [OCF]."[231] The trial court "denied without comment" OCF's motion for summary judgment.[232]

After suffering an adverse judgment at trial, OCF appealed the trial court's denial of summary judgment with respect to its product identification motion and the trial court's partial denial of its nonparty affirmative defense. The Indiana Court of Appeals reversed, remanding the case to the trial court with instructions to vacate the damage awards and to enter summary judgment in favor of OCF.[233] On transfer, the Indiana Supreme Court affirmed the trial court's denial of OCF's motion for summary judgment.[234]

OCF argued that Cobb did not provide any evidence to prove that he had been exposed to asbestos-containing products that OCF manufactured or distributed. According to OCF, the record showed that "'Cobb could not identify a single occasion at [sic] which he had been exposed to [OCF's] product.'"[235] Cobb testified in his deposition that he had been on several job sites where Kaylo (the brand name of a line of OCF's insulation products) was used while he

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228. 754 N.E.2d 905 (Ind. 2001).

229. *Id.* at 907, 914.

230. *See id.* at 907-08.

231. *Id.* at 908.

232. *Id.*

233. *See* Owens Corning Fiberglass Corp. v. Cobb, 714 N.E.2d 295, 303-04 (Ind. Ct. App. 1999), *trans. granted*, 735 N.E.2d 219 (Ind. 2000), *and vacated by* 754 N.E.2d 905 (Ind. 2001). The court of appeals' ruling rendered moot the nonparty defense issue.

234. 754 N.E.2d at 916. On the nonparty issue, the court reversed the trial court's grant of Cobb's motion for summary judgment with respect to co-defendant Sid Harvey, Inc., and it reversed the trial court's judgment in favor of Cobb. *Id.*

235. *Id.* at 909.

worked for Indianapolis Public Schools.[236] He recalled seeing the boxes of Kaylo at some of the sites, but he never personally installed the products and he could not recall at which job sites he saw the boxes or the Kaylo being installed.[237] Although Cobb did not install asbestos products, he testified that "he worked near others who did."[238] Cobb also testified that he occasionally removed and repaired pipe covering previously installed by other crews, but he did not know what company manufactured the pipe covering he removed and repaired.[239]

According to the *Cobb* court, such evidence was sufficient to establish a genuine issue of material fact with respect to whether OCF's asbestos caused Cobb's injuries:

> Cobb's testimony established that Cobb worked at multiple sites where asbestos products were used; Cobb worked near people installing pipe insulation containing asbestos; and boxes of Kaylo pipe insulation products were present on the work sites. We find it to be a reasonable inference, not conjecture or speculation, that the insulation from the Kaylo boxes was being installed at the worksites where it was present and not simply being stored there.[240]

Before the Indiana Supreme Court decided *Cobb* in September, the court of appeals already had issued two "product identification" opinions and handed down a third one just days after the release of the opinion in *Cobb*. Those cases

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236. *Id.* at 909-10.

237. *Id.*

238. *Id.* at 909.

239. *Id.* at 910 & n.3.

240. *Id.* at 910. Because the court determined that Cobb presented sufficient evidence to establish a genuine issue of material fact "as to exposure," the court did not address whether OCF demonstrated "the absence of any genuine issue of fact as to a determinative issue." *Id.* at 909. (citing Jarboe v. Landmark Cmty. Newspapers of Ind., Inc., 644 N.E.2d 118, 123 (Ind. 1994)). The *Jarboe* citation is a significant occurrence because it will be interesting to see whether the Indiana Supreme Court is willing to modify the *Jarboe* standard in a toxic exposure case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the case out of which the now-famous federal summary judgment standard arose, was an asbestos case. As many product liability practitioners well know, such cases nearly always hinge on a claimant's ability to properly identify or recall the allegedly-offending product or products that caused or contributed to his or her injuries. The *Celotex* standard is helpful in achieving some judicial control over that type of litigation. Indiana's disavowal of *Celotex* occurred in a more "traditional" setting. Indeed, *Jarboe* was a wrongful discharge case. Thus, in cases in which product identification is an essential, threshold issue, Indiana courts may need to examine the propriety and utility of continuing to adhere to a *Jarboe* summary judgment standard. Clearly, the *Cobb* court did not need to address the issue in light of its ultimate conclusion. Practitioners should, however, be attuned to the fact that the justices are cognizant that the threshold evidence necessary to shift the movant's initial burden is a question separate and apart from the sufficiency of the non-movant's evidence to prove legal and factual causation.

are *Black v. ACandS, Inc.*,[241] *Poirier v. A.P. Green Services, Inc.*,[242] and *Parks v. A.P. Green Industries, Inc.*[243] In all three instances, the courts did not have the benefit of the *Cobb* analysis. In all three instances, the court of appeals affirmed lower court decisions to grant summary judgment to defendants in cases presenting facts that are in some instances similar to *Cobb* and in some instances dissimilar.

The court in *Black* affirmed summary judgment with respect to four defendants that had filed product identification summary judgment motions.[244] In doing so, the court of appeals articulated the following standard: "To avoid summary judgment, a plaintiff must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product."[245] That standard is consistent with the Seventh Circuit's standard found in *Peerman v. Georgia-Pacific Corp.*[246] The panels in both *Poirier* and *Parks* used the same standard in determining, like *Black*, that the evidence against each defendant was speculative and insufficient to support the inference that the workers involved inhaled dust from any of the defendants' products.[247]

In the only case decided after *Cobb* during the survey period, *Fulk v. Allied Signal, Inc.*,[248] nothing appears to have changed. On the product identification issue, the *Fulk* court cited the *Peerman* summary judgment standard in exactly the same manner as did the other panels in *Black*, *Poirier*, and *Parks*: the *Fulk* court required the plaintiff to "produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product."[249] The

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241. 752 N.E.2d 148 (Ind. Ct. App. 2001).

242. 754 N.E.2d 1007 (Ind. Ct. App. 2001).

243. 754 N.E.2d 1052 (Ind. Ct. App. 2001).

244. *See* 752 N.E.2d at 155, 157. The four defendants were Rapid-American Corp., Universal Refractories, ACandS, Inc., and Brand Insulations, Inc. The trial court's summary judgment was affirmed with respect to Rapid-American because the plaintiffs failed to timely respond to its motion. *Id.* at 155 n.8. For a more detailed explanation of the product identification evidence before the *Black* court with respect to the other three defendants, see *id.* at 155-56.

245. *Id.* at 155.

246. 35 F.3d 284, 287 (7th Cir. 1994) (applying Indiana law).

247. *See Poirier*, 754 N.E.2d at 1010-11; *Parks*, 754 N.E.2d at 1056-57. Just as in *Black*, the trial courts in *Poirier* and *Parks* granted summary judgment in favor of four separate defendants in each case on product identification grounds. The four defendants in *Poirier* were North American Refractories, ACandS, Inc., Kaiser Aluminum & Chemical, and Plibrico Sales & Services. 754 N.E.2d at 1013. For a more detailed explanation of the product identification evidence before the *Poirier* court with respect to each defendant, see *id.* at 1010-12. The four defendants in *Parks* were B.M.W. Constructors, Inc., Chicago Firebrick Co., Hunter Corp., and Morrison Constr. Co. 754 N.E.2d at 1061. For a more detailed explanation of the product identification evidence before the *Parks* court with respect to each defendant, see *id.* at 1056-58.

248. 755 N.E.2d 1198 (Ind. Ct. App. 2001). The court of appeals decided *Fulk* on September 14, 2001, only four days after the Indiana Supreme Court rendered its decision in *Cobb*. It is clear from the *Fulk* opinion that the panel was unaware of the *Cobb* decision.

249. *Id.* at 1203.

Fulk court took it one step further, however, by further explaining the inference necessary to establish causation: "This inference can be made only if it is shown the product, as it was used during the plaintiff's tenure at the job site, could possibly have produced a significant amount of asbestos dust and that the plaintiff might have inhaled the dust."[250] The *Fulk* court ultimately affirmed the trial court's grant of summary judgment to all nine of the defendants against whom the issue was raised on appeal.[251] As was true in *Black*, *Poirier*, and *Parks*, plaintiff's product identification was "at best conjectural and insufficient to support the inference that the decedent inhaled dust from any of the defendants' products."[252]

The *Cobb* court seems conspicuously to have refused to articulate a specific summary judgment standard for asbestos toxic exposure cases. Whether the *Peerman* standard is close to what the *Cobb* court ultimately did probably is debatable. Regardless, the *Cobb* court appears to have missed an opportunity to provide a bit more stability for courts and practitioners who are handling toxic exposure cases. Although *Cobb* did not articulate a standard, the *Cobb* decision does not seem to dictate results different from those reached in the four cases decided by the court of appeals in *Black, Poirier, Parks*, and *Fulk*. Thus, practitioners and courts in the aftermath of *Cobb* simply will have to compare the facts of their individual cases to the facts in each of the five relevant cases, *Cobb, Black*, *Poirier*, *Parks*, and *Fulk*, and then either distinguish or favorably compare those facts to the ones at issue.

IV. EXPERT WITNESS EVIDENTIARY ISSUES

The significance of opinion witnesses in product liability cases is manifest. Opinion witnesses routinely testify about liability and medical causation issues in product liability litigation. As a result, product liability practitioners are quite interested in cases that address the evidentiary exclusion or admission of opinion witnesses. Arguably the leading Indiana case during the survey period that addressed opinion witness evidentiary issues is *Sears Roebuck & Co. v. Manuilov*.[253] Three other cases decided during the survey period that are

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250. *Id.*

251. *See id.* at 1206-07.

252. *Id.* at 1203. The nine defendants in *Fulk* were Allied Signal, Inc., Armstrong World Industries, A.O. Smith Corp., Bondex International, Combustion Engineering, Inc., Harbison-Walker Refractories, W.R. Grace & Co.-Conn., W.A. Pope & Co., and U.S. Gypsum. *Id.* at 1206-07. For a more detailed explanation of the product identification evidence before the *Fulk* court with respect to each defendant, see *id.* at 1203-06.

253. 742 N.E.2d 453 (Ind. 2001). In *Manuilov*, a jury awarded a high-wire performer $1.4 million after he was injured in a fall at a Sears store. The court held that admission of testimony from two medical professionals on post-concussion syndrome, brain damage, causation, and vocational impairment issues was not an abuse of the trial court's discretion. *Id.* at 455, 457-59, 461-62. Importantly, the Indiana Supreme Court did not fully endorse a *Daubert* analysis, preferring to require only that the trial judge be satisfied that the testimony will assist the jury and

instructive on opinion witness issues are *Lennon v. Norfolk & Western Railway*,[254] *Ollis v. Knecht*,[255] and *Court View Centre, LLC v. Witt*.[256] Because those cases do not involve substantive product liability issues, this survey does not address them in detail here. Nevertheless, practitioners in Indiana who have product liability cases that turn on opinion witness issues should be aware of *Manuilov*, *Lennon*, *Ollis*, and *Witt*.[257]

Product liability practitioners who wrestle with opinion witness issues should pay special attention to the court of appeals' opinion in *R.R. Donnelley & Sons Co. v. North Texas Steel Co*.[258] In addition to the "sale of a product" issue

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that the witness's general methodology is based on reliable scientific principles. *Id.* at 461. Beyond that, the accuracy, consistency, and credibility of an expert opinion is left for lawyers to argue and the jury to weigh. *Id.* With respect to the opinion witness issues, it is important to note that only two justices concurred in the plurality that ended up being the majority opinion. *Id.* at 463. Justice Sullivan concurred in result only. *Id.*

254. 123 F. Supp. 2d 1143 (N.D. Ind. 2000). In *Lennon*, the court excluded an opinion witness's testimony that trauma was not related to onset or exacerbation of multiple sclerosis (MS) because he did not conduct research or studies on MS, nor did he research the association between trauma and MS.

255. 751 N.E.2d 825 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 431 (Feb. 22, 2002). In *Ollis*, a jury awarded $2.8 million to a plaintiff in a wrongful death action in which the defendant admitted liability. *Id.* at 827. The trial court excluded an economist offered by the defendant who was set to offer an opinion about loss of income using the "mirror image" approach. *Id.* at 830. The defendant argued on appeal that the economist's testimony was improperly excluded because it met the requirements of Rule 702(b), case law established that the discount rates were appropriate, his methodology had been published, and it was generally accepted by economists. *Id.* at 828-29. Although the court agreed that Rule 702(b) could apply to social sciences that follow the scientific method, the court did not believe that the defendant presented sufficient evidence supporting the economist's approach. *See id.* at 828-31.

256. 753 N.E.2d 75 (Ind. Ct. App. 2001). *Witt* is important because, although it is not a product liability case, it limits the long-standing rule that an owner of property is competent to give an opinion about the value of the property owned. There, the owner of a building destroyed in a fire sued the building's insurer, contending that the building's actual cash value exceeded $1.5 million and that the insurer was liable for damages in excess of the $750,000 paid. *Id.* at 78. The court of appeals held that the owner can testify about the value of property, but "there must be a basis for that valuation." *Id.* at 82. The court of appeals also held that the trial court properly excluded an expert's testimony as to value because he admitted on cross-examination that he lacked specific data on which to form an opinion about the actual cash value of the building, and because he had never been inside the building, nor had he examined the building's foundation, framing, or excavation report. *See id.* at 85-86. He admitted that his value was an approximation based on photos of the building, the comments of others, and guesswork. *Id.*

257. Although it is not published and has very limited precedential value, Judge Young's decision in *Eve v. Sandoz Pharmaceutical Corp.*, No. IP 98-1429-C-Y/S, 2001 U.S. Dist. LEXIS 4531 (S.D. Ind. Mar. 7, 2001), contains a quality discussion about *Daubert* issues and medical causation that practitioners may find useful. *See id.* at *40-*76.

258. 752 N.E.2d 112 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 433 (Feb. 22,

discussed *supra*, Part I.C, the court addressed several other important questions, including three that involve opinion witnesses. Recall that the *R.R. Donnelley* case involved the collapse of large metal storage racks at the R.R. Donnelley & Sons Co. ("RRD") facility in Warsaw, Indiana.[259] RRD purchased the racks from Associated Material Handling Industries, Inc. ("Associated"), who had in turn purchased them from Frazier Industrial Co. ("Frazier"). Frazier designed the racks and contracted with North Texas Steel Co. ("NTS") "to manufacture the component parts."[260] Frazier provided NTS with

> written instructions on how to manufacture these parts. NTS received raw steel from the steel mill, and then cut, punched, welded, and painted the steel. Frazier instructed NTS to ship the component parts of the storage racks from its Texas plant to RRD's plant in Warsaw, Indiana, where the racks were to be erected. Associated supervised the installation of the racks . . . .[261]

RRD sued NTS, Associated, and Frazier, claiming more than $12 million in economic loss as a result of the collapsed racks and asserting product liability, breach of contract, and negligence claims.[262] Associated and Frazier settled before trial. The trial court granted summary judgment to NTS on the breach of contract and negligence claims, leaving the parties to try only the product liability claim against NTS.[263] At trial, RRD argued that NTS defectively welded the rack's component parts.[264] "NTS countered that the welds were sufficient to hold the load" and that the racks collapsed because "Frazier defectively designed the . . . system."[265]

The first opinion witness issue on appeal involved the testimony of an NTS witness named Raymond Tide.[266] "Tide testified that the welds were not a primary cause of the rack collapse."[267] Associated originally hired Tide as an expert but "did not designate him as a witness for trial" because it settled the case "before filing a witness list."[268] "Before Associated settled, it gave a copy of Tide's preliminary report to counsel for NTS, RRD, and Frazier."[269] Associated hired Tide as a consultant to review file materials and the collapse site, and to

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2002).

259. *Id.* at 120. RRD used the racks to store catalogs. Most of the racks collapsed on June 14, 1994, during a shift change. *Id.* Because the accident occurred before June 30, 1995, the 1995 amendments to the IPLA do not apply.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *See id.* at 130.

267. *Id.*

268. *See id.* at 130-31.

269. *Id.* at 131.

evaluate RRD's potential claims against it.[270] Tide's preliminary report "contained his analysis and conclusions regarding the cause of the rack collapse."[271] Associated distributed the report to further settlement negotiations.[272] After a hearing on the discoverability of Tide's opinion, the trial court "concluded that NTS had full discovery rights regarding Tide."[273] RRD filed a motion in limine and objected to NTS using Tide as a witness.[274] The trial court allowed Tide to testify.[275]

The court of appeals disagreed with the trial court's decision, determining that the trial court should have excluded Tide's testimony because it was based on a preliminary report he prepared for settlement negotiations and because its admission violated Rule 26(B)(4) of the Indiana Rules of Trial Procedure.[276] With respect to its first conclusion, the court cited favorably the Fifth Circuit Court of Appeals' opinion in *Ramada Development Co. v. Rauch*.[277] There, the court "upheld the district court's exclusion of a report that represented a collection of statements made in the course of compromise" negotiations.[278] Although the court does not specifically refer to Rule 408 of the Indiana Rules of Evidence[279] in the portion of the opinion discussing Tide's testimony, it is clear that the rule is one of the two bases for the court of appeals' conclusion that Tide's testimony was inadmissible.

The other basis for the court's decision is Indiana Trial Rule 26(B)(4). For "consulting experts" under Rule 26(B)(4)(b), the court wrote that "no discovery is permitted without 'a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.'"[280] RRD argued that the "policy" behind Rule 26(B)(4)(b) "encourages parties to consult experts, discard experts should they choose to, and place those discarded experts beyond the reach of an opposing party."[281] After a review of *Reeves v. Boyd & Sons, Inc.*[282] and Professor

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270. *Id.* Associated's counsel executed an affidavit explaining the purpose of Tide's engagement. *Id.* RRD submitted that affidavit in support of its motion in limine to exclude Tide's testimony. *Id.* Associated's counsel distributed Tide's preliminary report to counsel for RRD, Frazier, and NTS before RRD ever filed suit. *Id.*

271. *Id.*

272. *See id.* Associated's counsel stated in his affidavit that he took Tide to the mediation with him and distributed Tide's report to assist in the technical issues of the case and "in presenting arguments on behalf of Associated . . . during settlement negotiations." *Id.* (omission by court).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. 644 F.2d 1097 (5th Cir. 1981).

278. *R.R. Donnelley*, 752 N.E.2d at 131.

279. IND. EVIDENCE RULE 408.

280. *R.R. Donnelley*, 752 N.E.2d at 131.

281. *Id.* at 131-32.

282. 654 N.E.2d 864 (Ind. Ct. App. 1995), *trans. denied.*

Harvey's well-known treatise on Indiana practice,[283] the *R.R. Donnelley* court agreed that Indiana requires a showing of exceptional circumstances before judges may allow discovery aimed at an expert who is not expected to be called as a witness at trial.[284] In doing so, the court recognized that the purpose of Rule 26 was "largely developed around the doctrine of unfairness—designed to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation."[285] The court concluded that Tide was an advisory witness under Rule 26(B)(4)(b) because he "was retained by Associated in anticipation of litigation, but was never added to Associated's witness list because Associated settled" before filing one.[286] In order to use Tide at trial, the court held that NTS had to show "exceptional circumstances," which NTS did not do.[287]

The second of the three opinion witness issues on appeal involved the trial court's exclusion of rebuttal testimony the plaintiff sought to offer through a witness named Daniel Clapp. Plaintiff's offered Clapp to rebut NTS's theory offered by one of NTS's witnesses that "the collapse was the result of a design defect" (the lack of tower bracing) and not poor welds.[288] The trial court excluded Clapp's testimony because RRD failed to disclose timely that it would use Clapp, and rebuttal testimony "would violate the trial court's summary jury trial orders limiting the parties to theories presented at the summary jury trial."[289]

RRD first argued that it designated Clapp as an expert witness over a year before the parties engaged in a summary jury trial. NTS deposed Clapp before the summary jury trial. RRD claimed that it did not know about NTS's design expert until one week before the summary jury trial. Thereafter, RRD supplemented its expert interrogatory response, identifying Clapp as a rebuttal witness, after which NTS deposed Clapp a second time.[290] RRD also argued that it did not violate the trial court's summary jury trial order because using Clapp to rebut NTS's theory (which it advanced for the first time at the summary jury trial) did not constitute the presentation of a new theory.[291] Rather, RRD argued that it could not have formulated its rebuttal any earlier than the summary jury trial because that is when it first became aware of NTS's design theory.[292] Finally, RRD argued that exclusion of evidence was too harsh a sanction because it did not engage in "deliberate or other reprehensible conduct" that prevented NTS from receiving a fair trial.[293]

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283. *See* WILLIAM F. HARVEY, INDIANA PRACTICE § 26.14 (3d ed. 2000).
284. 752 N.E.2d at 132.
285. *Id.* (quoting *Reeves*, 654 N.E.3d at 875).
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at 132-33.
291. *Id.* at 133.
292. *Id.*
293. *Id.*

Because plaintiff proffered Clapp for rebuttal testimony, and not to espouse a new theory, the court of appeals disagreed with the trial court's characterization of RRD's disclosure of the content of Clapp's testimony as untimely, "especially in light of the fact that Indiana Trial Rule 26(E) only requires a duty to 'seasonably' supplement discovery responses, rather than requiring immediate supplementation."[294] The court pointed out that Clapp could not formulate his rebuttal testimony until after he was aware of NTS's design theory, of which he first became aware at the summary jury trial.[295] The court also noted that RRD identified Clapp as a rebuttal witness within three weeks of discovering the substance of NTS's expert's testimony and that NTS deposed Clapp thereafter.[296] Under those circumstances, the court of appeals believed that exclusion of Clapp's testimony was too harsh a sanction because RRD did not commit any "deliberate or other reprehensible conduct . . . that prevented NTS from receiving a fair trial."[297]

The third opinion witness issue addressed by the court in *R.R. Donnelley* involved the trial court's failure to exempt opinion witnesses from its separation order. The trial court granted NTS's motion for a separation of witnesses and "denied RRD's request to have experts in the courtroom in order to assist counsel."[298] The critical issue was whether the trial court erred in not finding RRD's opinion witnesses to be "essential to the presentation of [its] cause" under Indiana Rule of Evidence 615(3).[299] "Given the complexities of [the] case," the court of appeals wrote, "it appears that the use of experts was essential."[300] The court also concluded that it would be necessary for the plaintiff's opinion witnesses "to be present in the courtroom to witness the testimony or be provided with daily transcripts" in order to rebut any theory the defense proffered.[301] Because the trial court denied RRD that opportunity, the court of appeals held that "the trial court abused its discretion by failing to exempt experts from the Separation Order."[302]

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294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 134. Rule 615(3) of the Indiana Rules of Evidence provides that witnesses whose presence is shown to be "essential to the presentation of the party's cause" are exempt. *Id.* To be exempted from separation orders, the witness must possess "such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness." *Id.* (quoting Hernandez v. State, 716 N.E.2d 948 (Ind. 1999)).

300. *Id.*

301. *Id.* at 134-35.

302. *Id.* at 135. The *R.R. Donnelley* opinion also addresses the admissibility of settlement information, a demonstration used to clarify a scientific principle, and the appropriateness of instructing the jury on proximate cause. For additional analysis of the case by one of the lawyers who argued the case, see Nelson Nettles, *Important Expert and Mediations Issues Addressed in Recent Product Liability Case*, IND. LAW., Sept. 26, 2001, at 25.

V. PREEMPTION

Three published decisions from Indiana courts examined the federal preemption doctrine as it relates to various types of product liability claims.[303] On August 23, 2001, the Indiana Supreme Court issued an important unanimous preemption decision in *Dow Chemical Co. v. Ebling*.[304] The *Ebling* decision addresses preemption pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). In *Ebling*, plaintiffs alleged physical symptoms after application of an EPA-accepted pesticide known as "Dursban 2E"[305] in their apartment. The plaintiffs sued, inter alia, Dow Chemical Co.,[306] the pesticide manufacturer, Affordable Pest Control, Inc., the pesticide applicator, and Louisville Chemical Company, the distributor of another pesticide that was used in the apartment.[307] Among other claims, plaintiffs contended that the pesticide

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303. In addition to the three cases treated in this survey, practitioners should be aware of last year's court of appeals' opinion in *Rogers ex rel. Rogers v. Cosco, Inc.*, 737 N.E.2d 1158 (Ind. Ct. App. 2000) (addressing preemption issues involving the National Traffic Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standard 213), *trans. denied*, 761 N.E.2d 419 (Ind. 2001).

304. 753 N.E.2d 633 (Ind. 2001).

305. "Dursban" is a trademark of Dow AgroSciences LLC.

306. The proper defendant in this lawsuit was not the Dow Chemical Company, but rather Dow AgroSciences, LLC, which was formerly known as DowElanco, Inc. This survey Article will simply refer to the manufacturer as "Dow."

307. Justice Boehm's opinion refers to the court of appeals' opinion for a more detailed recitation of the facts. The court of appeals' opinion is *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881 (Ind. Ct. App. 2000), *aff'd in part and vacated in part by* 753 N.E.2d 633 (Ind. 2001). A review of the facts set forth in the court of appeals' opinion in *Ebling* reveals that Christina and Alex Ebling began experiencing seizures shortly after they and their parents moved into an apartment at the Prestwick Square Apartments. In April 1993, Prestwick Square "entered into a pest control service agreement" with Affordable Pest Control ("Affordable"), which obligated Affordable to "provide regular pest control for roaches, ants, silverfish, mice and rats." *Id.* at 889-909. Affordable applied Dursban "on a preventive basis." *Id.* at 890. The Eblings moved into their apartment in February 1994. "In April of 1994, Prestwick Square canceled its service agreement with Affordable and began using its own maintenance personnel to apply Creal-O, a ready-to-use pesticide" formulated by Louisville Chemical. *Id.*

DowElanco, now known as Dow AgroSciences, manufactured and distributed Dursban pesticide products pursuant to registrations with the United States Environmental Protection Agency (EPA). *See id.* at 889. As part of the registration process, the EPA provided Dow with stamped and accepted labels for its Dursban pesticide products, which the EPA authorized "for use in and around residential structures," including apartments and apartment complexes. *Id.* As part of the registration process for Creal-O, the EPA permitted Louisville Chemical to "adopt and incorporate the safety and toxicological data submitted by the manufacturers of Creal-O's active and inert ingredients. The EPA registered Creal-O and authorized its use in and around residential structures, including apartments and apartment complexes." *Id.*

Affordable did not provide the Eblings or Prestwick Square with any of Dursban's EPA-

applicator breached a duty to provide the plaintiffs with the pesticide's EPA-accepted warnings and labeling information.[308]

The court of appeals held in part that the manufacturer, applicator, and distributor all were entitled to summary judgment with respect to plaintiffs' failure to warn claims.[309] Plaintiffs sought transfer, challenging the court of appeals' decision only on the FIFRA preemption issue.[310] On transfer, the Indiana Supreme Court summarily affirmed the court of appeals' decision that FIFRA expressly preempts state common law tort claims against pesticide manufacturers such as Dow and Louisville Chemical.[311] The *Ebling* court disagreed, however, with the court of appeals concerning Affordable, the pesticide applicator, holding that FIFRA does not preempt state common law failure to warn claims against Affordable.[312] In doing so, the *Ebling* court rejected, in part, the court of appeals' 1996 decision in *Hottinger v. Truegreen Corp.*[313]

The plaintiffs argued that FIFRA did not preempt their state common law claim, "asserting that Affordable's duty of reasonable care included an obligation

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approved warnings and labeling information. *Id.* at 890. Although Louisville Chemical "provided Prestwick Square with the EPA-approved labeling for Creal-O," it did not provide the Eblings with the label until after their exposure to it. *Id.*

308. *Id.* at 898.

309. *See id.* at 910. The plaintiffs alleged various theories of recovery, including "failure to warn, strict liability, negligence, and willful/wanton misconduct." *Ebling*, 753 N.E.2d at 636. The trial court granted motions for summary judgment filed by Dow and Louisville Chemical. The trial court denied Affordable's motion. *Id.* All three defendants filed interlocutory appeals. *See Ebling*, 723 N.E.2d at 888. The court of appeals held that FIFRA expressly preempts all of the plaintiffs' claims against Dow and Louisville Chemical that relate to the product's labeling, *id.* at 910, which was everything except design defect claims. The court of appeals also held that FIFRA precluded plaintiffs' claim that it had an obligation to warn plaintiffs about the potential adverse effects of Dursban. *Id.* The court of appeals further held that "Affordable was entitled to summary judgment on the plaintiffs' claims for strict liability under both the IPLA and common law strict liability for ultra-hazardous activity" because the transaction was predominately for the sale of a service rather than a product. *Ebling*, 753 N.E.2d at 636. With respect to Affordable's negligence claim, however, the court of appeals held that summary judgment was properly denied because genuine issues of material fact existed regarding whether Affordable breached its duty of reasonable care by applying an excessive amount or concentration, by failing to properly ventilate the plaintiff's apartment, and by spraying Dursban in an area near the children's clothes and toys." *Id.* In addition, the court of appeals affirmed the denial of summary judgment concerning "the plaintiffs' request for punitive damages against Affordable." *Id.* On transfer, plaintiffs challenged only the FIFRA preemption issue. For further discussion about the court of appeals' decision, see Alberts & Henn, *supra* note 16, at 911-17.

310. *Ebling*, 753 N.E.2d at 636.

311. *See id.* at 635-36.

312. *Id.* at 636.

313. 665 N.E.2d 593 (Ind. Ct. App. 1996), *overruled by* Dow Chem. Co. v. Ebling, 753 N.E.2d 633 (Ind. 2001).

to provide them with the information contained in the EPA-accepted Dursban label."[314] Relying upon *Hottinger*, Affordable countered that the principles of preemption for failure to warn claims apply to pest control applicators "just as they do to manufacturers."[315] According to Justice Boehm's opinion, the court of appeals in *Hottinger* "summarily concluded" that FIFRA preempts state common law strict liability and negligence claims that are based upon alleged inadequacy of warnings on products that FIFRA regulates.[316] The *Ebling* court overruled that determination insofar as pesticide applicators are concerned.[317]

As part of an analysis dating to *McCulloch v. Maryland*,[318] the *Ebling* court recognized that there are three distinct types of federal preemption:

> A federal statute may now preempt state law [1] by express language in a congressional enactment[319] ["express preemption"] . . . [2] by implication from the depth and breadth of a congressional scheme that occupies the legislative field[320] ["field preemption"] . . . or [3] by implication because of a conflict with a congressional enactment[321] ["implied conflict preemption"].[322]

With respect to the third type, "implied conflict preemption," the *Ebling* court aptly noted that the "reach of federal preemption was increased" with the U.S. Supreme Court's decision in *Geier v. American Honda Motor Co.*[323]

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314. *Ebling*, 753 N.E.2d at 636.

315. *Id.*

316. Justice Boehm's opinion makes a point of stating that the supreme court never reviewed that conclusion when it denied Trugreen's petition to transfer in that case:

> Although finding FIFRA preemption applicable to some of Hottinger's claims, the court held that erroneous exclusion of expert opinion evidence required reversal of the summary judgment as to the remaining claims. Transfer to this Court was sought only by appellee Trugreen, whose petition to transfer was denied. To the extent that *Hottinger v. Trugreen Corp.* is inconsistent with our opinion herein, it is overruled.

Id. at 636 n.3.

317. *Id.*

318. 17 U.S. (4 Wheat.) 316, 427 (1819).

319. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

320. *See, e.g.*, Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

321. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Geier v. Am. Honda Motor Co., 529 U.S. 861, 869-74 (2000).

322. 753 N.E.2d at 637.

323. 529 U.S. 861 (2000). "Before *Geier*," the *Ebling* court wrote, "if a federal law had an express preemption clause, the reach of the preemption was limited to the domain expressly preempted." 753 N.E.2d at 637 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). After *Geier*, the *Ebling* court recognized that "even though a state law is not within the domain expressly preempted, the state law may yet be preempted if it frustrates the purpose of the federal law or makes compliance with both impossible." *Id.* The *Ebling* court's recognition of implied conflict preemption and its quality analysis of how it is different from the other two types of federal preemption are not insignificant because courts often confuse the principles and the underlying

After identifying the three types of federal preemption generally, the *Ebling* court turned its attention to FIFRA, discussing some of the structure and purpose of FIFRA as well as some of the pre-*Geier* U.S. Supreme Court decisions that addressed FIFRA preemption.[324] In an attempt to ensure uniformity, Congress included within FIFRA an express preemption provision that prevents a state from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]."[325] Indeed, the *Ebling* court noted "agreement among a majority of jurisdictions" that the phrase "any requirements" in FIFRA's express preemption provision "is sufficiently expansive to include both positive enactments of state law-making bodies and common law duties enforced in actions for damages."[326] Accordingly, the *Ebling* court pointed out that "[t]he law is fairly settled that when a pesticide *manufacturer* 'places EPA-approved warnings on the label and packaging of its products, its duty to warn is satisfied, and the adequate warning issue ends.'"[327] That conclusion compelled an affirmance of the court of appeals' decision with respect to Dow and Louisville Chemical because claims against those two entities were expressly preempted.

The remainder of the court's decision addresses why the law mandates a different result with respect to Affordable, the pesticide applicator. First, with respect to express preemption, the court pointed out that there is no "affirmative FIFRA labeling requirement for *applicators*."[328] As such, according to the *Ebling* court, "the alleged state tort law duty imposed upon applicators to convey the information in the EPA-approved warnings to persons placed at risk does not constitute a requirement additional to or different from those imposed by FIFRA."[329]

Second, with respect to field preemption, the *Ebling* court concluded that FIFRA does not preclude the state-law imposition of a duty to warn on

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bases therefor. In this area of law, practitioners should be aware of *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (Food, Drug & Cosmetic Act and Medical Device Amendments) (holding that state law fraud on the FDA claims were preempted); *see also* Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199 (9th Cir. 2002) (FIFRA) (holding that state law fraud on the EPA claims were preempted); Raymond M. Williams & Anita Jain, *Preemption of State "Fraud-on-the-FDA" Claims*, FOR DEF., June 2001, at 23.

324. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).

325. *Ebling*, 753 N.E.2d at 638 (quoting 7 U.S.C. § 136v(b) (2000)).

326. *Id.* A lengthy footnote contains an impressive string citation to the state and federal courts that have found "any requirements" to include common law actions. *See id.* at 638 n.4.

327. *Id.* at 639 (quoting Papas v. Upjohn Co., 985 F.2d 516, 519 (11th Cir. 1993)).

328. *Id.* (emphasis in original).

329. *Id.* Although the *Ebling* court acknowledged that the *Hottinger* court as well as courts in other jurisdictions have concluded that FIFRA expressly preempts duty to warn claims against applicators, their findings were not persuasive to the claims against Affordable because they failed to "consider the distinctions between pesticide manufacturers and applicators." *Id.* The opinion does not provide further explanation about the specifics of those distinctions.

applicators.[330] In doing so, the court relied on the U.S. Supreme Court's decision in *Wisconsin Public Intervenor v. Mortier*,[331] which "declined to extend FIFRA preemption to preclude local regulations requiring a pesticide applicator to give notice of pesticide use and of label information prescribing a safe reentry time and imposing fines in the event of violations."[332] From *Mortier*, the *Ebling* court discerned that, "like a state or local regulatory scheme that requires permits and notice to the non-user consumer/bystander and imposes penalties, the imposition of a duty to warn on applicators is not preempted by FIFRA."[333]

The court also used *Mortier* as the basis for its decision that implied conflict preemption does not preclude plaintiffs' claims. In the *Ebling* court's view, "Affordable's alleged failure to communicate label information to persons placed at risk" does not frustrate the purposes of FIFRA nor does it render "compliance with both state and federal law impossible."[334] According to the court,

> The plaintiffs' claim that Affordable should have communicated the label information is entirely consistent with the objectives of FIFRA. The use of state tort law to further the dissemination of label information to persons at risk clearly facilitates rather than frustrates the objectives of FIFRA and does not burden Affordable's compliance with FIFRA.[335]

A published federal trial court order by Judge Barker is also an important one for Indiana practitioners in the preemption area. The order stems from the Firestone/Ford Explorer "rollover" cases that are consolidated before Judge Barker in Indianapolis. The reported preemption order is styled *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*.[336] The specific issue that the preemption order covers involves that part of the plaintiffs' master complaint requesting the court to recall, buy back, and/or replace the allegedly defective tires. The defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiffs' request for a recall is preempted by the Motor Vehicle Safety Act ("MVSA").[337] Judge Barker agreed that the recall requests were preempted and dismissed

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330. *Id.* at 639-40.

331. 501 U.S. 597 (1991).

332. *Ebling*, 753 N.E.2d at 640.

333. *Id.*

334. *Id.*

335. *Id.*

336. 153 F. Supp. 2d 935 (S.D. Ind. 2001).

337. The MVSA is found at 49 U.S.C.A. §§ 30101-30170 (West 1997 & Supp. 2001). As Judge Barker noted in a later footnote, the discussion of preemption "presupposes that there is a state law providing for the claim at the heart of the lawsuit." 153 F. Supp. 2d at 940 n.6. On that point, Judge Barker wrote that it was not clear that the plaintiffs had met that prerequisite. *Id.* Only one case, *Howard v. Ford Motor Co.*, No. 7683785-2 (Cal. Super. Ct. Oct. 11, 2000), has ever granted a plaintiff's request for a recall of a motor vehicle safety defect, and "that case is not persuasive in establishing that California law authorizes a nationwide recall." *Id.*

them.[338] She then, sua sponte, certified the issue for interlocutory appeal.[339]

After first determining that a ruling on the issue was not premature,[340] Judge Barker's overview of preemption recognized, just as did the Indiana Supreme Court in *Ebling*, that there are at least three distinct types of federal preemption: express preemption,[341] implied field preemption,[342] and implied conflict preemption.[343] Because of what she determined to be a "significant history of activity" in the area of vehicle safety recalls, Judge Barker concluded that no presumption against preemption should be applied.[344] She also aptly recognized that neither express preemption nor field preemption was at issue.[345]

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338. Judge Barker's order disposed of the request for a recall of the tires in plaintiffs' preliminary injunction filing. *Id.* at 938. The ruling also rendered moot plaintiffs' request for preliminary injunctive relief against Ford to the extent that it sought "an immediate safety recall, replacement, or refund" of all model year 1991-2001 Ford Explorers. *Id.*

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> [B]ecause this decision turns on a difficult and controlling question of law as to which there is substantial ground for difference of opinion and because a final resolution of this question may materially advance the ultimate completion of this litigation, the Court sua sponte certifies its order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).

153 F. Supp. 2d at 938.

340. The plaintiffs argued that a dismissal on the basis of preemption was premature because the court lacked "the benefits of full briefing and an evidentiary hearing on the preliminary injunction motion." *Id.* at 939. Judge Barker disagreed, writing that "a resolution of the preemption issue is entirely feasible and, indeed, appropriate at this stage. Whether federal law preempts state law-based judicial authority to order a tire or motor vehicle recall is a legal issue, not a factual one." *Id.* at 940 (citing Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 966 (7th Cir. 2000), *aff'd*, 2002 WL 1337696 (U.S. June 20, 2002)).

341. "Congress occasionally preempts the operation of state law in the express language of a statute. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 508 (1992) (noting that statutory language 'no statement relating to smoking and health shall be required in the advertising of . . . cigarettes' expressly prohibited states from mandating particular cautionary statements in cigarette advertisements)." 153 F. Supp. 2d at 940.

342. "When federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it," it is referred to as 'field preemption.'" 153 F. Supp. 2d at 940 (quoting *Cipollone*, 505 U.S. at 516).

343. "A third form of preemption, 'conflict preemption,' occurs when requirements of state law and federal law make it impossible for a party to comply with both laws or when state law 'prevent[s] or frustrate[s] the accomplishment of a federal objective.'" 153 F. Supp. 2d at 940 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 873-74 (2000)) (alterations by court).

344. 53 F. Supp. 2d at 942-43.

345. Express preemption was not an issue because no provision of the MVSA explicitly supersedes state-law-based injunctive relief and because the MVSA's express preemption did not apply. The MVSA's express preemption provision states that "'when a motor vehicle safety standard is in effect . . . , a State . . . may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this [Act].'" 153 F. Supp. 2d at 943 (quoting 49 U.S.C.

Turning her attention to conflict preemption, Judge Barker noted that it exists when "it is impossible for a private party to comply with both state and federal law and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[346] The defendants argued that a "parallel, competing system of court-ordered and supervised recalls would undermine and frustrate the [MVSA's] objectives of prospectively protecting the public interest through a scheme of administratively enforced remedies."[347] On that issue, Judge Barker found two U.S. Supreme Court cases instructive, *International Paper Co. v. Ouellette*[348] and *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*[349] In both of those cases, the Supreme Court considered a number of factors establishing the comprehensive nature of the federal administrative scheme at issue. In *International Paper*, an important consideration was the fact that the Clean Water Act mandated detailed procedures for obtaining a permit to emit possible pollution.[350] The MVSA likewise sets forth a "comprehensive scheme for prospective relief from dangerous features in vehicles," which incorporates a detailed notification procedure when the Secretary of Transportation determines that a vehicle model or its equipment "contains a defect or does not comply with other safety standards."[351] According to Judge Barker, "The detail contained in the [MVSA] suggests a clear congressional intent to limit encroachment on the agency's work."[352]

Citing *Kalo Brick*, Judge Barker recognized that another statutory feature indicating congressional intent to preempt state-law-based intrusions into an agency's work is the grating of discretion to the agency in its decision-making.[353] On that issue, Judge Barker wrote that the MVSA "affords the Secretary [of Transportation] much discretion to determine the need for notification or remedy

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§ 30103(b)(1) (1994 & Supp. V 1999)). "Though the Department of Transportation has promulgated a number of Federal Motor Vehicle Safety Standards (FMVSS), there is no standard that prescribes performance requirements for tires or sets a rollover standard for vehicles." *Id.*

On the field preemption issue, Judge Barker wrote that it was "clear" that "Congress in the [MVSA] plainly did not intend to occupy the field of motor vehicle safety." *Id.* (quoting Harris v. Great Dane Trailers, Inc., 234 F.3d 398, 400 (8th Cir. 2000)). It was less clear whether Congress ever intended to occupy the field in connection with the issues before the court. "Whether Congress intended to occupy the field with regard to recalls (as opposed to motor vehicle safety standards generally) remains an open question—one we need not address today because the parties focus their arguments on conflict preemption, which the Court finds dispositive." *Id.*

346. 153 F. Supp. 2d at 943-44 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000)).

347. *Id.* at 944 (citation omitted).

348. 479 U.S. 481 (1987).

349. 450 U.S. 311, 326 (1981).

350. 479 U.S. at 492.

351. 153 F. Supp. 2d at 944-45.

352. *Id.* at 945.

353. *Id.*

of a defect or failure to comply with safety regulations."[354] The National Highway Traffic Safety Administration's "broad discretion," coupled with "the specificity of the sections of the [MVSA] dealing with notification and remedies" caused Judge Barker to conclude that "Congress intended to establish comprehensive administrative regulation of recalls to promote motor vehicle safety."[355] As such, Judge Barker determined that "the comprehensiveness of the [MVSA] with regard to recalls demonstrates convincingly that any state law providing for a motor vehicle safety recall would frustrate the purposes of the [MVSA]."[356]

Finally, although it is not reported in the federal reporter system and of very limited precedential value, practitioners may find interesting and helpful the preemption analysis Judge Hamilton conducted in the case captioned *In re Inlow Accident Litigation*.[357] That case involved the accidental death of Lawrence Inlow, the former general counsel for Conseco, Inc. and related entities. Inlow was killed when he was hit in the head by a helicopter rotor blade after he disembarked from the company's helicopter.[358] As a result, representatives of Inlow's estate sued "three distinct sets of defendants."[359] One defendant was CIHC, Inc., a subsidiary of Conseco, Inc. alleged to have negligently operated the helicopter in question. Inlow's representatives also sued CIHC, Inc., "in its role as sublessor of the helicopter to Conseco, Inc.," for alleged negligence in failing to warn of a dangerously defective product.[360]

The preemption issue was just one of several Judge Hamilton addressed in his order. CIHC argued that the Federal Aviation Act shields it from liability in its role as the lessor of the helicopter because the "limitation of liability" section of the FAA provides that "an aircraft lessor can be liable for personal injuries caused by the aircraft only if the lessor is in actual possession or control of the

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354. *Id.* In more fully explaining the level of federal involvement, Judge Barker wrote:

> As an example, the Secretary has the authority to decide that notification by first class mail alone is insufficient and order that "public notices shall be given in the way required by the Secretary" after the Secretary has consulted with the manufacturer. The Secretary also has authority to disapprove the date set by the manufacturer as the earliest date that parts and facilities reasonably can be expected to be available to remedy the defect or noncompliance. As long as the Secretary permits public input through established procedures, the Secretary can even "decide [that] a defect or noncompliance is inconsequential to motor vehicle safety," and exempt the manufacturer from providing notification or a remedy.

Id. (citations omitted) (alteration by court).

355. *Id.*

356. *Id.*

357. No. IP 99-0830-C H/G, 2001 U.S. Dist. LEXIS 2747, Prod. Liab. Rep. (CCH) ¶ 16,044 (S.D. Ind. 2001).

358. *Id.* at *2-*3.

359. *Id.* at *3.

360. *Id.*

aircraft."[361] After a close analysis of the applicable law and facts, including a detailed review of the controlling lease agreement, Judge Hamilton determined that no genuine issue of material fact existed that could support a conclusion that CIHC "controlled" the helicopter at the time of the accident.[362]

CONCLUSION

Indiana courts and practitioners continue to define, re-define, develop, and refine Indiana product liability law. The survey period has once again proved that product liability practice in Indiana is as rich in its adversarial tradition as it is proud of its practitioners and adjudicators. As Mr. Shakespeare so well put it many years ago, our charge remains simple: "And do as adversaries do in law—Strive mightily, but eat and drink as friends."[363]

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361. *Id.* at *43. The relevant provision of the Federal Aviation Act is 49 U.S.C. § 44112 (1994).

362. *See id.* at *54-*48.

363. WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, act I, sc. 2.

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

I. *EX PARTE* COMMUNICATION WITH JUDICIAL OFFICERS

The practice of communicating with judges and other judicial officers in the absence of the opposing party or their representative has long been forbidden in the practice. The rationale should be obvious. Such communication abrogates any semblance of fairness in the adjudicative process. In Indiana, the practice is prohibited by Indiana Professional Conduct Rule 3.5(b).[1] The whole rule provides:

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person except as permitted by law; or
> (c) engage in conduct intended to disrupt a tribunal.[2]

When read in its entirety, this rule is intended to prevent lawyers from committing misconduct in the course of litigation. Viewed from another perspective, the rule's intent is to force lawyers to assist judges in maintaining an orderly administration of their courtrooms and the cases pending therein. The rule's associated comment gives slight guidance on the finer points of the law.

> Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
>
> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is not justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.[3]

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1. IND. PROFESSIONAL CONDUCT RULE 3.5(b).
2. *Id.*
3. *Id.*

A review of the comment highlights two key concepts within the rule. First, the rule concerns itself with the advocate's exertion of improper influence on a tribunal. Second (and more dominant) is the drafters' concern with lawyers' disruption of courtroom proceedings through the use of "belligerence or theatrics."[4] Looking at these concerns in reverse order as they appear in the rule, it should be readily apparent that intentionally disrupting a tribunal is, under most definitions, behavior that should be discouraged and prevented if possible. Take, for example, the Indiana case of *In re Ortiz*.[5] In *Ortiz*, the respondent lawyer had to be physically restrained by court personnel because of his antics.[6] The lawyer's behavior began as the result of what he perceived to be an incorrect evidentiary ruling by a trial judge in a criminal case.[7] In an attempt to derail the case, the lawyer also attempted to get the client to fire him and thereby prevent further proceedings in the case until a new lawyer could be appointed. Although the criminal defendant attempted to terminate the lawyer's services, the judge refused to allow the switch late in the proceedings.[8] The lawyer was jailed to assure his appearance for the remainder of the case.[9] *Ortiz* seems to be exactly the case contemplated by the drafters of Indiana Professional Conduct Rule 3.5(c). The situation is one where the lawyer's histrionics are calculated to override the judge's control over the proceedings in his or her own courtroom. Obviously, there are any number of reasons why lawyers (and litigants too, for that matter) should be prevented from wresting control of the courtroom from the presiding judge. One of the interesting analytical features of this rule is that it exists in addition to the trial court's inherent authority to punish those before it for contempt. As the rule points out, conduct intended to disrupt a tribunal can subject the offending lawyer to disciplinary action.[10] In other words, the lawyer can face serious career consequences *in addition to* the opprobrium from the trial court as punishment immediately imposed as its remedy for contempt.[11] This prohibition exists as sort of super-sanctioned conduct that must be avoided by the bar.[12]

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4. *Id.*
5. 604 N.E.2d 602 (Ind. 1992).
6. *Id.* at 603.
7. *Id.*
8. *Id.* at 604.
9. *Id.*
10. PROF. COND. R. 3.5(c).
11. This is not a terribly uncommon occurrence. In *In re Gemmer*, 679 N.E.2d 1313 (Ind. 1997), the respondent lawyer converted several thousand dollars from a fraternal organization in which he was treasurer. His law license was suspended for one year after his criminal conviction for conversion. Note also that the lawyer's misconduct was not the byproduct of an attorney-client relationship, but in his role as an officer of the fraternal organization.
12. Obviously, not every contempt citation results in disciplinary action against a lawyer. The conduct in *Ortiz* involved a physical altercation in the courtroom. Certainly serious misconduct on that order warrants more than the imposition of only a citation, which the lawyer can purge in

The first aspect of the rule proscribes conduct that undermines the fundamental fairness of the process generally.[13] Subsection (a) prohibits improper influence by communicating with jurors, prospective jurors, and judicial officers, presumably because they will be the finders of ultimate fact in adjudicating the underlying dispute. Subsection (b) prohibits the specific practice of communicating *ex parte* with the ultimate fact finder. This prohibition is based on the potential exertion of undue or improper influence in the absence of the opposing party or their representative. Although this practice has long been forbidden under Indiana law,[14] it remains a problem for insuring the fair adjudication of cases in Indiana courts. During the survey period, the Indiana Supreme Court and its Commission on Judicial Qualifications have had occasion to reflect on the problems created by lawyers when they give evidence to Indiana trial courts without the benefit of the opposing view by opposing counsel. Specifically, the reader would be well advised to examine the case of *In re Warrum*.[15] *Warrum* presents a recurring and troubling situation in Indiana courts. In this case, the respondent lawyer represented a client in a family law matter. Specifically, the client and her ex-husband were divorced in Utah.[16] The Utah court also retained jurisdiction over the issues of child support and visitation. Warrum's client sought to increase the child support awarded in the Utah order.[17] She had a petition to modify on file in Utah contesting the Utah order, but retained the respondent lawyer here in Indiana where she and the child were living and directed him to initiate proceedings to increase her child support payments even though the dissolution case had no connection to an Indiana court.[18] Needless to say, the respondent lawyer not only undertook the representation, but was able to obtain an order for the relief his client sought. This occurred even though she had initiated similar proceedings before the Utah court.[19] The lawyer's petition to the Indiana court was utterly inadequate to even remotely inform the court of the true circumstances of the requested relief and, in fact, the entire petition is set out in the supreme court's disciplinary action.[20] As a result of the lawyer's efforts, the client did obtain an order increasing the child support. The ex-husband's tax refunds were intercepted but the resultant controversy did not bode well for the judge, the system, the client or, in the end, the lawyer.[21] Before the dust settled, the governors' offices of both states were

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short order.

13. PROF. COND. R. 3.5.

14. Disciplinary Rule 7-110(B) of Indiana's former *Code of Professional Responsibility* (1971). In California, meanwhile, the prohibition on *ex parte* communication was formally made law in 1928 as former Rule 16 of California Rules of Professional Conduct.

15. 724 N.E.2d 1097 (Ind. 2000).

16. *Id.* at 1098.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1098 n.1.

21. *Id.* at 1099.

involved and a mediation session was held in Chicago in an attempt to resolve the dispute between the states.[22] In sum, the lawyer's efforts on behalf of one client resulted in a major disruption of an already existing system to provide for the orderly adjudication of such post-dissolution cases. Had the lawyer given the Indiana judge adequate facts in order to make an informed decision, it is certainly possible that the case could have been transferred to Indiana and the client could have received the relief she had been seeking.[23] In the alternative, the Utah court would have retained jurisdiction and the petition the ex-wife had filed in the court would have been adjudicated in due course. Instead, the lawyer's short cutting of the process resulted in professional disciplinary action against him.[24] Against this backdrop, it is easier to see why the practice of communicating *ex parte* with officials in the adjudicatory process is forbidden unless adequate notice and an opportunity to be heard is also provided to the opposing parties.[25]

The prohibition against *ex parte* communication is fairly broad in scope as well. In fact, it might fairly be said to have both a horizontal and vertical component. *Warrum*, it could be argued, represents the horizontal component of the analysis in that it makes clear that the prohibition against *ex parte* communication applies to all communications in the traditional litigation environment. Lawyers owe all the judges in Indiana courts a duty in addition to the duties that they owe their clients.[26] The duty encompasses good faith, fair dealing and honesty because the judges must rely on the trustworthiness of the representations of the lawyers appearing before them.[27]

The vertical component of this analysis is represented by the case of *In re LaCava*.[28] In *LaCava*, the respondent lawyer communicated with one of the members of the medical review panel evaluating his client's medical malpractice claim.[29] The communication caused the panel member to change its opinion in a manner favorable to his client.[30] For purposes of this work, however, it is significant to note that in imposing disciplinary action on the lawyer in *LaCava*, the supreme court recognized that the medical review panel, clearly not traditionally thought of as a tribunal, is certainly regarded as one for purposes of analyzing the lawyer's conduct under Indiana Professional Conduct Rule 3.5.[31] The "verticality" of the rule implies that the lawyer's obligation not to communicate *ex parte* with a judicial officer applies more generally to any

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22. *Id.*

23. *Id.* at 1100.

24. *Id.*

25. See, for example, Rule 65 of the Indiana Rules of Trial Procedure governing the notice requirements attendant to the issuance of temporary restraining orders without notice. IND. TRIAL RULE 65(B).

26. *See* Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999).

27. *Id.*

28. 615 N.E.2d 93 (Ind. 1993).

29. *Id.* at 94.

30. *Id.*

31. *Id.* at 95.

factfinder. Presumably, the rule also applies to adjudications pending before administrative agencies with equal force to that shown in *LaCava*. The rule would presumably apply with equal force to professional neutrals under the alternative dispute resolution rules.[32] In other words, lawyers must not address the facts of their causes with the factfinders in their cases without notice and an opportunity to be heard by the opposing party or their representative.

There are circumstances in which lawyers need to obtain emergency relief, without notice, in order to preserve their client's interests. For those circumstances, the provisions of Indiana Trial Rule 65 exist to govern *ex parte* proceedings. The Supreme Court's Commission on Judicial Qualifications, in an effort to advise and assist Indiana judges on the dangers of *ex parte* communication issued its opinion #1-01. A copy of the full text of the opinion follows this article as Appendix "A." The opinion primarily stresses to sitting judges the need to stick strictly with the provisions of Indiana Trial Rule 65 in dealing with requests for relief wherein one of the opposing parties is not before the tribunal to present their side of the dispute in the quest for relief. The advisory opinion points out that the Commission has reviewed a number of grievances in which one litigant has advanced their interests through the use of improper *ex parte* communication.[33] The problem had reached such a frequency that they felt compelled to directly express their concern to judges that such communications must stop, unless the judge carefully considers the process in light of the provisions of Indiana Trial Rule 65.

II. PRIVILEGE AND CONFIDENTIALITY

One of the key features of the attorney-client relationship is the level of trust attendant in the lawyer's ability to keep the client's secrets in confidence. Through the existence of such a "confidential" relationship, the client feels comfortable giving the lawyer sufficient information in order to best pursue the client's interests. Violating the client's trust by revealing their secrets is, at least on an emotional level, one of the most devastating blows to the confidence the client has in the lawyer. Such was the case of *In re Harshey*.[34] In that case, the respondent lawyer was hired on a contingency fee basis by the president of a closely held corporation to represent its corporate interests in a suit against another corporation.[35] During the course of the litigation, the president's wife filed for dissolution of the marriage, but the respondent did not represent the president in that matter.[36] The dissolution decree awarded the interest in the

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32. A list of "neutrals" is included in Rule 7 of Indiana's Rules for Alternative Dispute Resolution. IND. ALTERNATIVE DISPUTE RESOLUTION RULE 7.

33. In Appendix "A," the "Analysis" section notes that the Commission reviewed several such grievances and found that insufficient grounds were expressed in those grievances to warrant a change of custody on the facts provided by the lawyers.

34. 740 N.E.2d 851 (Ind. 2001).

35. *Id* at 852.

36. *Id.*

corporation to the president, but awarded the wife forty-five percent of the net proceeds of the still-pending corporate litigation.[37] Shortly thereafter, the defendant in the corporate litigation offered to settle by paying $125,000 and the respondent advised the corporation, through its president, to accept the offer. The president refused the offer of settlement.[38] Disagreeing with the prudence of the president's rejection of the offer, the respondent did not notify the defendant-wife that the settlement offer was rejected, but instead, just prior to the expiration of the offer, he contacted the divorce judge and informed him of the settlement offer in the corporate litigation.[39] The divorce judge set an emergency hearing and notified the attorney for the wife. At the hearing, wife's counsel subpoenaed the respondent to testify to the terms of the still-not-rejected offer.[40] The president directed the respondent to not appear and testify, but the respondent insisted that he was required to do so by the subpoena and asserted to the president that he now represented the court-appointed commissioners in the divorce case and that only they or the judge could fire him.[41] At a meeting in chambers with the divorce judge and wife's counsel that took place the day before the emergency hearing, the respondent asked the judge to authorize him to accept the still-pending offer subject to a formal entry being made at the emergency hearing the next day. The divorce judge gave the respondent that authority.[42] Meanwhile, the president attempted unsuccessfully to get the emergency hearing continued, and it was held as scheduled without the president's presence. At the emergency hearing, the respondent testified to the terms of the settlement offer and opined that it was a reasonable offer.[43] At that hearing, the judge ordered the divorce commissioners to accept the settlement offer. The president also objected in the corporate litigation to the settlement of the matter by the divorce commissioners, but the judge in the corporate litigation approved the settlement over the president's objection.[44]

These facts supported conclusions that the respondent violated two rules of professional conduct. First, the respondent violated Indiana Professional Conduct Rule 1.2(a) when he disregarded his own client's instructions concerning the objectives of the corporate litigation and caused the case to be settled over his client's objections.[45] The respondent also violated Indiana Professional Conduct Rule 1.6 and the confidentiality that cloaked the information he obtained during the course of his representation in the corporate litigation when he made disclosures in the divorce case, without his client's consent and over his client's objections, concerning the pending settlement

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37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 853.
43. *Id.*
44. *Id.*
45. *Id.*

offer.[46]

The supreme court's discussion (including a dissent over the appropriateness of the sanction) is quite interesting, in that it addresses the fundamental role and responsibility of the lawyer as fiduciary. By ignoring "his client's clear wishes" the respondent "ceased serving as an advocate for his client and instead became an adversary, one who disclosed confidential information about the representation in order to achieve his goal of obtaining a quick recovery and its attendant legal fee."[47] A majority of the court reluctantly accepted the proposed consent sanction of a public reprimand.[48] A two-justice dissent as to sanction provided:

> Mr. Harshey's stunning treatment of his client is remarkably simple to describe.
>
> After the client decided to turn down the defendant corporation's offer of settlement, Harshey decided not to act on the client's decision and set about finding some way to make the client accept it anyway.
>
> He started off with an *ex parte* communication to the judge who had presided in the client's divorce, a venue in which Harshey had no status at all. In the course of this communication, he violated his duty to preserve the confidences of his client by revealing the status of the settlement negotiations.
>
> When the client got wind of what Harshey was up to and asked him to stop, Harshey lied to the client, claiming he was now representing the lawyers who had litigated the divorce and could be fired only by them.
>
> Fearful that his client might find a way to stop him, Harshey decided to meet with the dissolution judge and the dissolution lawyers a day in advance of the scheduled court hearing—to ask for permission to inform the defendant corporation that its settlement would be accepted. In effect, he assured that even if the client showed up at the hearing to stand on his rights, it would be too late. It was too late.
>
> The client who wanted to go to trial—and whose trial was just a few weeks off—never got his day in court. He was thwarted by the active and willful effort of his lawyer, who refused the client's proper instructions, breached his confidences, lied to him, and *ex parte'd* the judge.
>
> Our disciplinary system should not treat such behavior as a matter for mere reprimand.[49]

Finally, this case subtly makes another point that is worth highlighting. The court noted as a mitigating factor that the president had himself revealed the terms of the proposed settlement in the corporate litigation to third parties before

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46. *Id.*
47. *Id.* at 853, 854.
48. *Id.* at 854.
49. *Id.* at 854-55.

the respondent revealed the terms to the divorce judge.[50] Note, however, that this was merely a mitigating factor and not a defense to the charge that the respondent violated Indiana Professional Conduct Rule 1.6(a) by revealing client confidences without client consent. This illustrated the fact that revelation of information by the client to a third party may defeat the privileged nature of that information, but it does not give free reign to the lawyer to breach his obligation to hold all relevant information related to the representation confidential, even when the client has chosen to reveal it to others.

III. RULE AMENDMENTS OF NOTE

The mechanics of actually running the bar of the Indiana Supreme Court are governed under Indiana's Rules for the Admission to the Bar and the Discipline of Attorneys. These rules govern, for example, admission of lawyers to the bar *pro hac vice*[51] and the procedures by which Indiana's bar examination is given.[52] Additions and amendments to the admission and discipline rules can often have the effect of making profound changes in the day-to-day practice of law in Indiana. During the survey period, the supreme court made a number of amendments to the rule governing the procedures by which disciplinary action is prosecuted against attorneys.[53] Most of these changes can be fairly described as cleaning up grammatical and other comparatively cosmetic problems in the rules which are, by now, more than thirty years old.[54]

One important change this year is that for the first time, the supreme court is now imposing a fee on lawyers who place their licenses on "inactive" status.[55] Since the practice of pilacing licenses on "inactive" status first started, lawyers have been able to take advantage of this provision of the rule without charge. This practice is attractive to lawyers who were, by way of example, engaged in corporate or government work not requiring them to actually practice law. It is also attractive to lawyers engaged in careers outside Indiana that do not require them to actually practice law and for those lawyers both inside and outside Indiana who were not in active practice. Going "inactive" requires the lawyer to represent to the supreme court that the lawyer will not engage in the practice of law during the time their license is on "inactive" status. Lawyers who wish to avail themselves of the privilege of going "inactive" must be in good standing at the time they make the election and pay one-half of the amount charged to lawyers who maintain their licenses in active status. "Inactive" lawyers need not obtain the requisite continuing legal education during the time their licenses are on "inactive" status. The holder of an "inactive" license must not, however, do

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50. *Id.* at 854.

51. IND. ADMISSION AND DISCIPLINE RULE 3.

52. ADMIS. DISC. R. 17.

53. ADMIS. DISC. R. 23.

54. *Id.* The rule was originally adopted in 1967 and has been amended in both substantive and ministerial aspects on an almost annual basis ever since.

55. ADMIS. DISC. R. 23, § 21(a)-(i).

any act that could be construed as being in the active practice of law. The supreme court takes this feature of the rule quite seriously and, in the past, lawyers have faced disciplinary action for continuing to deliver legal services to clients *after* declaring that their licenses were on inactive status.[56] Those lawyers who have placed their licenses on "inactive" status will receive fee notices from the Clerk of the Supreme Court for one-half of the amount paid by lawyers with current licenses.

Another important rule change is to the substantive law governing lawyers, the Indiana Professional Conduct Rules. The supreme court has added a provision to Indiana Professional Conduct Rule 8.4. The new subsection, subsection (g), prohibits a lawyer, while acting in his professional capacity from engaging in conduct disparaging any member of one of the enumerated groups in the rule. The full text of the rule provides:

> Rule 8.4 Misconduct
> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) engage in conduct that is prejudicial to the administration of justice;
> (e) state or imply an ability to influence improperly a government agency or official;
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
> (g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection.[57]

The new section of the rule is the first major addition to the form of this rule in many years. The preexisting subsections, (a) through (f), have remained essentially unchanged since they were originally included in the former Code of Professional Responsibility as Disciplinary Rule 1-102.[58] New provisions with this kind of regulatory language are showing up, in one form or another, in the rules governing lawyer conduct all across the nation. For example, the 2001 amendment to Iowa's Disciplinary Rule 1-102 from its Code of Professional Responsibility provides: "(A) A lawyer shall not: . . . (7) Engage in sexual

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56. *In re* Baars, 542 N.E.2d 558 (Ind. 1989). The lawyer continued to practice law despite having elected to place his license on "inactive" status.

57. IND. PROF. COND. R. 8.4.

58. The rule became effective in 1972.

harassment or other unlawful discrimination on the basis of sex, race, national origin, or ethnicity in the practice of law or knowingly permit staff and agents subject to the lawyer's direction and control to do so."[59] The law in New York was similarly amended in 2001 to include language of this type. Disciplinary Rule 1-102 of the New York Code of Professional Responsibility provides:

> A. A lawyer or law firm shall not:
>
> . . .
>
> (6) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.[60]

Similar such provisions were created in California, the District of Columbia, Missouri, and Vermont.[61] All the provisions prohibit discrimination based on race, sex, age and sexual orientation. Although they vary slightly in the prohibited conduct described and in procedural detail, all these provisions are quite similar. Despite the widespread adoption of these rules, none of the jurisdictions referred to herein has a reported case putting a gloss on the rule. The lack of reported decisions could be a byproduct of the relatively recent creation of these provisions.

Is this development in the law simply an application of the notion of political correctness? Perhaps there is an argument to be made in support of such a claim. Examining the trends in lawyer discipline, however, these rules can be viewed as the next logical step in the progression of a movement towards civility going back more than a decade.[62] Since the adoption of 1908 Canons of the American Bar Association, lawyers have sworn an oath to avoid engaging in offensive personality as members of the bar.[63] There are many cases using this provision in the oath of attorneys to impose disciplinary sanctions on lawyers for engaging

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59. IOWA BAR RULES OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 1-102.

60. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 1-102.

61. CAL. RULES OF PROFESSIONAL CONDUCT 2-400(B); D.C. RULES OF PROFESSIONAL CONDUCT 9.1; MO. RULES OF PROFESSIONAL CONDUCT 4-8.4(g); VT. RULES OF PROFESSIONAL CONDUCT 9.1.

62. Standards for Prof'l Conduct Within the Seventh Federal Judicial Circuit, http://www.ca7.uscourts.gov, contains the standards for professional conduct expected of members of the bars of the federal courts within the Seventh Federal Circuit.

63. ABA Canons on Professional Ethics, Oath of Admission (1908).

in misconduct.[64] Several cases in recent years have sanctioned lawyers for engaging in unwanted sexually explicit and suggestive language toward their clients.[65] In addition, lawyers have been exhorted to engage in more civil behavior in their day-to-day practices. Several years ago, the Seventh Circuit of Appeals developed a series of guidelines on civility for members of the bar and the judiciary in the Seventh Federal Judicial Circuit.[66] Notions of civility, however expressed, have tended to relate only to specified relationships within the litigation process. Lawyers are instructed to treat other lawyers with civility and respect.[67] Lawyers have long been admonished to treat judges and other judicial officers with respect and that lawyers can achieve their clients' ends through patient firmness as much or more effectively than through belligerence or theatrics.[68] Such attempts to regulate or impose civility, however, have tended to limit their application and exclude the lawyer's relationships with opposing parties and even witnesses.[69] In a way, the advent of Indiana Professional Conduct Rule 8.4(g) imposes a blanket minimum standard of conduct on lawyers in all their interactions with others while serving in their professional capacity.

Although defining notions of what constitutes the professional versus the personal capacities of lawyers may present some interesting cases in the future, the rule seems bent on mandating a particular standard of conduct for lawyers moving through the workday world. In the final analysis, then, the creation and adoption of Indiana Professional Conduct Rule 8.4(g) may someday become quite an important part of the regulation of lawyer conduct by the Indiana Supreme Court.

IV. THE JUDGES AND LAWYERS ASSISTANCE PROGRAM

Beginning in 1997, the Indiana Supreme Court established the Judges and Lawyers Assistance Program (JLAP) with the creation of the Judges and Lawyers Assistance Committee.[70] With a broad scope, JLAP has the mission of assisting members of the Indiana bar with a wide range of problems including the traditional ills of alcoholism and chemical dependency. Moreover, the program

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64. The oath of attorneys has been almost universally accepted among the states and has served as the basis for disciplinary action for more than fifty years. In one early Wisconsin case, the Wisconsin Supreme Court found that Judge Joseph R. McCarthy did not violate that state's oath when he refused to resign his judgeship while running for the U.S. Senate. *State v. McCarthy*, 38 N.W.2d 679 (Wis. 1949).

65. *See, e.g., In re* Coons, 751 N.E.2d 678 (Ind. 2001).

66. *See supra* note 62.

67. *See, e.g.*, ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 1 (1923) (admonishing lawyers to speak guardedly when speaking about judges in part because judges are peculiarly unable to defend themselves).

68. *See supra* note 3 and accompanying text.

69. There is no provision for treating parties and witnesses civilly contained in the Seventh Circuit standards. *See supra* note 62.

70. ADMIS. DISC. R. 31. Hereinafter the program will be referred to as JLAP.

is aimed at helping lawyers with problems associated with physical or mental disabilities, health problems, or age that impair their ability to practice the profession.[71] During this survey period, significant changes were made to JLAP's operating rules. For example, under section 9 of the prior rule, the confidentiality of information provided to JLAP officials was required by rule, "except as otherwise provided by these rules, or by order of (or as otherwise authorized by) the Supreme Court of Indiana."[72] In the recently amended rule, the autonomy of the JLAP program functions is restated in a somewhat more formal fashion and a "distancing" of the lawyer assistance function from the supreme court's disciplinary function is stated more clearly.[73] Pertinent portions of the augmented rule are attached to this article as Appendix "B."

CONCLUSION

Important developments in the law of professional responsibility occurred this year on a variety of fronts. Enhanced enforcement and attention to the dangers associated with *ex parte* communication were of significant concern to the supreme court and its disciplinary authorities. Lawyers would also be well advised to maintain inviolate their clients' confidences as the relevant case law is described herein. As always, rule amendments governing the operation of Indiana's bar are significant because they have both a powerful and subtle impact on the long range course taken by the courts and lawyers in this state.

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71. *Id.* § 2.
72. *Id.* § 9.
73. *Id.* (amended 2002).

APPENDIX "A"

ADVISORY OPINION

Code of Judicial Conduct #1-01
Canon 3
***Ex Parte* Custody Orders**

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The issue in this Advisory Opinion is the appropriate judicial response to an *ex parte* child custody request in which a party seeks a temporary custody order without prior notice or an opportunity for a hearing afforded any other party with a legal interest. It focuses on the application of Trial Rule 65(B), governing temporary restraining orders, and its pertinence in the contexts of legal separations, dissolutions, post-dissolutions, guardianships, or adoptions, when a party requests a custody order without notice or a hearing.[1] The Commission concludes that a judge must follow T.R. 65(B) when petitioned for an *ex parte* temporary custody order; otherwise, the judge violates Canon 3B(8) of the Code of Judicial Conduct prohibiting improper *ex parte* contacts, as well as Canons 1 and 2 of the Code, which require judges to uphold the integrity and independence of the judiciary, to respect and comply with the law, and to act at all times in a manner which promotes the public's confidence in the integrity of the court. Lawyers seeking this relief without adherence to the rules may violate Rule 3.5(b) of the Rules of Professional Conduct, which prohibits improper *ex parte* communications by lawyers. *See Matter of Anonymous*, 729 E.2d 566 (Ind. 2000).

ANALYSIS

This opinion does not represent a change or evolution in the Commission's views or in its interpretation of the relevant sections of the Code of Judicial Conduct.

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1. This opinion does not directly apply to proceedings which may involve custody issues but which properly are *ex parte*, such as protective order cases, or other matters which operate pursuant to their own statutory provisions, such as juvenile detention or CHINS placement proceedings. Generally, it does apply to any petition for a temporary restraining order under T.R. 65(B), whether or not custody issues are involved. *See* Matter of Jacobi, 715 N.E.2d 873 (Ind. 1999).

Rather, the opinion is generated by a substantial number of ethics complaints reviewed by the Commission in which judges have granted *ex parte* temporary child custody petitions which may state insufficient grounds for extraordinary relief or, in any case, where the judge does not adequately ensure the fairness of the proceedings, which is accomplished by careful adherence to T.R. 65(B).[2] *Id.*

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2. Black's Law Dictionary describes a temporary restraining order as "an emergency remedy of short duration which may issue only in exceptional circumstances and only until the trial court can hear arguments or evidence, as the circumstances require . . . A temporary restraining order may be granted without written or oral notice to the adverse party or attorney only if . . . it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition."

Trial Rule 65(B),(C), (D), and (E) provide as follows:

(B) Temporary restraining order – Notice – Hearing – Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

> (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
>
> (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(C) Security. No restraining order or preliminary injunction shall issue except upon the giving of

security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(D) Form and scope of injunction or restraining order. Every order granting temporary injunction and every restraining order shall include or be accompanied by findings as required by Rule 52; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(E) Temporary Restraining Orders – Domestic Relations Cases. Subject to the provision set forth in this paragraph, in an action for dissolution of marriage, separation, or child support, the court may issue a Temporary Restraining Order, without hearing or security, if ether party files a verified petition alleging an injury would result to the moving party if no immediate order were issued.

(1) *Joint Order.* If the court finds that an order shall be entered under this paragraph, the court may enjoin both parties from:

(a) transferring, encumbering, concealing, selling or otherwise disposing of any joint property of the parties or asset of the marriage except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court; and/or

(b) removing any child of the parties then residing in the State of Indiana from the State with the intent to deprive the court of jurisdiction over such child without the prior written consent of all parties or the permission of the court.

(2) *Separate Order Required.* In the event a party seeks to enjoin the non-moving party from abusing, harassing, disturbing the peace, or committing a battery on the petitioning party or any child or step-child of the parties, or exclude the non-moving party from the family dwelling, the dwelling of the non-moving party, or any other place, and the court determines that an order shall be issued, such order shall be addressed to one person. A joint or mutual restraining or protective order shall not be issued. If both parties allege injury, they shall do so by separate petitions. The trial court shall review each petition separately and grant or deny each petition on its individual merits. In the event the trial court finds cause to grant both petitions, it shall do so by separate orders.

(3) *Effect of Order.* An order entered under this paragraph is automatically effective

Trial Rule 65(B) protects against abuses by requiring the petitioner to state by affidavit specific facts showing that immediate and irreparable injury, loss, or damage will result before an adverse party may be heard in opposition, and by requiring the petitioner to certify in writing any efforts made to give notice and the reasons supporting the claim that notice should not be required. It calls for security in a sum deemed appropriate by the court for the payment of costs and damages which may be incurred by a party wrongfully enjoined or restrained. It requires the judge to define the injury in the order, and to state why it is irreparable and why the order was granted without notice. When a temporary restraining order is granted without notice, the court must set it for a hearing at the earliest possible time, giving precedence to it above all other matters.

The cases the Commission has scrutinized indicate a lack of mindfulness that *ex parte* requests and resultant orders affecting custodial rights are extraordinary, and that the relief depends upon the existence of exigent circumstances—irreparable injury, loss, or damage without immediate relief. A request for emergency relief should not supplant what in reality constitutes a standard invocation of the court's powers through the trial rules, which rules generally are premised on the notion that a fair proceeding involves the commencement of a proceeding, reasonable notice, and a chance to be heard on the merits by any party with a legal interest before judicial action occurs. Judges and lawyers should proceed with meticulous attention to T.R. 65(B) whenever emergency custody is requested, whether upon the commencement of an adoption proceeding, a guardianship of a child, a legal separation or divorce, or a post-dissolution modification. Inattention to the extraordinary nature of the relief, and to the procedural demands the rules impose, undermines judicial fairness and integrity, and the public's trust.

The circumstances leading to the ethics inquiries reviewed by the Commission sometimes involve a noncustodial parent who, instead of returning a child after a visitation period, determines he or she wants custody—a modification—and files for, and obtains, immediate custody. The custodial parent, perhaps out-of-state, discovers only after the fact that an Indiana court has suspended the parent's custodial rights to their children. The parent then is compelled to make arrangements to obtain counsel, travel to Indiana for an immediate hearing, if the

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upon service. Such orders are enforceable by all remedies provided by law including contempt. Once issued, such orders remain in effect until the entry of a decree or final order or until modified or dissolved by the court.

(F) Statutory Provision Unaffected by this Rule. Nothing in this rule shall affect provisions of statutes extending or limiting the power of a court to grant injunctions. By way of example and not by way of limitation, this rule shall not affect the provisions of 1967 Indiana Acts, ch. 357, § § 1-8, IC 34-4-17-1 to 34-4-17-8, relating to public lawsuits, and Indiana Acts, ch. 7, § § 1-15, IC 34-4-18-1 to 34-4-18-13 (repealed), providing for removal of injunctive and mandamus actions to the Court of Appeals of Indiana, and Indiana Acts, ch. 12 (1933), IC 22-6-1-1 to 22-6-1-12.

judge has expedited the case as required, and, if not, or if a continuance is needed for preparation, the custodial rights are suspended even longer. Of course, many are without the resources to defend the action at all.

Sometimes all the parties are local residents, and, perhaps, both have attorneys. The proceeding may be a new dissolution, or a guardianship or adoption. What is wrong is when an *ex parte* custody decision is made absent truly emergency circumstances and without regard to the details of T.R. 65(B). When this occurs, the perception is that custodial rights have been affected based only upon whether the petitioner has won a "race to the courthouse."

The Commission's intention is not to curtail the proper exercise of broad judicial discretion, nor do the members intend to substitute their judgments for that of a judge who finds on some rational basis that circumstances warrant emergency relief. The Commission members hope to improve and promote the integrity of our judiciary, and to help promote the public's confidence in the judiciary, by alerting judges, and lawyers, to the stringent and imposing ethical duties judicial officers undertake when considering whether to affect custodial rights *ex parte*. In considering a request for emergency custody of a child, or any other request under T.R. 65(B), a judge should be as cautious with the rights of the opposing party as with scrutinizing the merits of the petition.

A petitioner for a temporary restraining order under T.R. 65(B) must establish not only the potential for irreparable harm, but that the harm will occur before an adverse party may be heard; the petitioner must certify also what efforts at notice have been made and why notice is not required. A judge should carefully determine whether these elements are established. While the Commission hesitates to suggest a list of circumstances which the members would not favor, some examples may be helpful.

Many times, of course, these petitions present compelling reasons for an eventual custody order; yet, if the pleading really is a request for custodial rights, whether or not captioned as an emergency, it should not be treated as an emergency. An *ex parte* custody order is not properly a means to initiate a modification proceeding or to obtain an advantage in a subsequent petition on the merits of modification or other custody issue. Again, the custody request may be in the context of an adoption or guardianship, and not necessarily a dispute between two parents. Those proceedings, like modifications, presumably are not adjudicated without first providing any interested party the right to be heard, including on an interim custody issue. In those cases, too, petitioners for *ex parte* relief must set out a verified claim that irreparable injury will result without the emergency relief.

A claim that the custodial parent has violated an existing order, perhaps concerning visitation, should not alone justify emergency custodial relief. Those issues are addressed through the contempt process, or by injunction pursuant to I.C. 31-14-5-1. Similarly, a claim that the custodial parent has decided to move

out of state, or that the child has expressed a desire to reside with the petitioner, does not justify emergency relief. These are issues for a modification hearing and for the application of the appropriate standard supporting a modification order.

Also, for example, the desire to enroll a child in school, if it requires custodial rights, does not in the Commission's view, *in itself*, justify a temporary modification of custody before the parent who currently has the custodial rights to make those arrangements has been heard. The petitioner may allege that harm will result if he or she cannot enroll the child, but the requisite potential harm cannot be only a personal or strategic disadvantage or the fact that existing orders keep the party from his or her objectives. Again, the standard is *irreparable harm or injury*. Some real emergency must exist which changes the complexion of the case from one which simply involves a parent who desires a modification and custodial rights, to one possibly warranting emergency action in the petitioner's favor. Even then, T.R. 65(B) must guide the process, providing the safeguards of the affidavit, detailed findings, and an immediate hearing.

Concerning the absence of notice and a hearing in these proceedings, the rule similarly provides safeguards against abuse. The rule requires a showing that irreparable harm will occur before notice may be given or before an adverse party may be heard. It can mean only that, where those representations indicate that notice and a hearing could be accomplished without harm, they should occur. A judge should insist on notice and a hearing if it is feasible and would not result in the alleged irreparable harm. In other words, there may be no good reason, even under the petitioner's claim, why notice should not be given and a hearing held before a ruling. A simple telephone call to opposing counsel, or to the other parent, and an offer to schedule a hearing before ruling, only promotes the integrity of the process.

In assessing both the sworn statements of the alleged irreparable harm which could result without the order, and the written certifications about notice or reasons for not providing it, if the judge does not insist on an abundance of facts in the pleadings, the judge should be prepared to actively question the petitioner or the petitioner's attorney about these claims. The key inquiries pertain to why the petition is submitted *ex parte*. Where is the other party? What notice has been accomplished? Why should this matter be heard without the opposing party's participation? What exactly is the *irreparable harm* which would result if the case simply is set for a hearing after notice is made? No such potential harm was indicated in the instances investigated by the Commission.

Some judges insist that counsel bring in the petitioner to discuss these aspects of the petition. Other judges have expressed concern that these recommended discussions themselves constitute improper *ex parte* contacts. These concerns are misplaced. After all, the judge properly has entered into an *ex parte* proceeding if T.R. 65(B) is followed. To gather information which helps the judge determine whether the extraordinary relief is warranted only bolsters the

fairness of the *ex parte* process which is underway. Nonetheless, the judge should not entertain discussions which go beyond what he or she believes is necessary to adequately entertain the petition. Ideally, the conversation will be recorded.

Surely, many petitions for emergency custody raise issues which appear to require immediate action. Judges often are faced with real emergencies, and they may deem a situation an emergency where other reasonable people would differ. But even in those cases, consideration of the opposing party's rights is required. Again, T.R. 65(B) provides this underpinning of fairness. Of course, judges should be able to trust in the veracity of a sworn petition alleging that harm will result without an *ex parte* order. In reality, some are less than truthful, for which the judge is not accountable. However, T.R. 65(B) imposes important burdens on the petitioner, which likely will reduce the instances of false or unfounded petitions.

The Commission calls on the profession to eliminate the seemingly wide-spread practice in Indiana where lawyers seek, and judges provide, *ex parte* emergency custody where no irreparable harm or injury reasonably is foreseen without notice and a hearing – the fundamentals of our adversarial process. T.R. 65(B) provides the framework for fairness; judges and lawyers must make genuine assessments about whether the circumstances really invoke the rule at all. When this occurs, the Commission expects to review fewer citizen complaints about a lax and unfair procedure which adversely affects their most precious rights.[3]

CONCLUSION

Ex parte emergency custody orders in dissolution, post-dissolution, guardianship, and adoption proceedings must be considered the rare exceptions to the general premise that a fair proceeding includes reasonable notice and an opportunity to be heard. When the circumstances do warrant emergency *ex parte* relief, petitioners and judges must follow T.R. 65(B).

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3. The Commission, clearly, cannot contemplate all the potential circumstances which may arise. Judges may find themselves faced with truly unusual or unexpected sets of facts, and they must be able to proceed within their sound discretion. Nonetheless, these are not the circumstances which inspired this opinion.

APPENDIX "B"

PROGRAM GUIDELINES

Judges and Lawyers Assistance Program

Section 2. Purpose of JLAP

Pursuant to Admis.Disc.R. 31 §2, JLAP was established to assist impaired members in recovery; to educate the bench and bar; and to reduce the potential harm caused by impairment to the individual, the public, the profession, and the legal system.

These guidelines have been adopted with these purposes in mind. The work of JLAP is designed to be educational, confidential, and responsive to the special situations faced by impaired members of the legal profession.

The JLAP committee and the executive director may take any other action required to fulfill, yet remains consistent with, the stated purpose.

Section 3. Organization

JLAP was established pursuant to Admis.Disc.R. 31. The Committee consists of fifteen (15) members appointed by the Court; seven (7) practicing attorneys, five (5) judges, one (1) law student, and two (2) judge(s), lawyer(s), or law student(s). The director operates under the direction of the committee. The clinical director, staff and volunteers operate under the direction of the director.

Section 4. Policies

(a) JLAP designs and delivers programs to raise the awareness of the legal community about potential types of impairment and the identification, prevention and available resources for treatment and/or support.
(b) JLAP works toward increasing the likelihood of recovery by encouraging early identification, referral and treatment.
(c) Any person may report to the director, clinical director, or any member of the committee that a particular member of the bar needs the assistance of JLAP.
(d) JLAP encourages contact by any means; responses will be prioritized as follows: walk-in, telephone call, e-mail, and written communication.
(e) Neither JLAP, nor any representative, in their role as a volunteer, engages in the practice of law while fulfilling their JLAP responsibilities. Upon admission to inpatient or residential treatment, or with a physical disability case, JLAP may:
    1) work with the participant to find friends and/or colleagues to assist with the law practice,
    2) work with the relevant local and state bar association committees to

assist with the practice;

3) should no other arrangements be possible, attempt to facilitate movement of a participant's case files to the respective clients upon receipt of written permission from the participant.

Section 5. Referral Procedures

(a) General Procedures
The state will be divided into geographical areas and a committee member or other designated representative shall serve as the primary contact for each area.

(b) Self-Referrals and Other Referrals

1) When the participant is a self referral, the following procedures apply:
   i. JLAP may conduct an initial consultation to determine the nature of the participant's impairment;
   ii. where appropriate, JLAP may make a referral to a qualified medical and/or clinical resource for further evaluation, assessment, and/or treatment;
   iii. if appropriate, JLAP may assist in the development of a treatment plan, which may include participation in JLAP;
   iv. with the participant's permission, a volunteer will be appointed to provide ongoing support.

2) When the member is referred by a third party the following procedures apply.
   i. JLAP will obtain detailed information from the referral source regarding the nature of the impairment, the referral source's relationship to the member, and the circumstances giving rise to the referral. The identity of the referral source shall remain confidential unless the referral source instructs otherwise.
   ii. JLAP may conduct further investigations to verify the circumstances that led to the referral by contacting independent sources to determine whether the member may be impaired.
   iii. Any independent sources shall be approached in a manner to preserve, as far as possible, the privacy of the member.
   iv. If it is determined the member may be impaired, JLAP will determine how the member will be approached with special attention given to involving local volunteers and/or local members of the bar who may already be involved in the case.
   v. If the referred member is a judge, every effort shall be made to include at least one judge as a volunteer in the case.

3) If the impaired member agrees to treatment, or other levels of participation in JLAP, further assistance may include;
   i. consultation with the participant, in-house assessment/evaluation, or referral for appropriate assessment/evaluation;
   ii. assistance in locating treatment resources; and
   iii. assistance in development of continuing care including support and referral to JLAP.

4) The director may terminate JLAP's involvement in any case at any time should it be determined that the member does not comply or refuses to participate and will not likely benefit from JLAP services at that time.

(c) Official Referrals
  1) Upon receipt of an official referral for assessment/evaluation, JLAP will:
    i. Determine if all appropriate releases and/or authorizations have been signed and obtained.
    ii. Determine whether the requested assessment/evaluation will be done in house, referred out or a combination.
    iii. Contact the official referral source for background information and direction, if necessary.
    iv. Coordinate the assessment process with selected provider, participating as deemed appropriate on a case-by-case basis.
    v. Release information and/or the final assessment/evaluation as allowed by written release.
  2) Upon receipt of an official referral for a monitoring agreement JLAP will:
    i. Determine if all appropriate signed releases/authorizations have been obtained.
    ii. Review existing assessment(s) and/or determine whether initial or additional assessment(s) are necessary.
    iii. Develop a monitoring agreement.
    iv. Select and provide a monitor.
    v. Meet with the participant, his/her attorney if appropriate, and the monitor prior to execution of the agreement to explain JLAP's role and the agreement terms and conditions.
    vi. Report to the official referral source according to the terms of the referral and the monitoring agreement.

Section 6. Services

(a) Any member is eligible for assistance and participating in JLAP. JLAP services will be provided without charge for initial consultation, in house assessment, referral, peer support, and monitoring services.
(b) Referrals for medical and/or clinical evaluations, treatment, therapy and aftercare services will be provided; engagement of, and payment for, such services is solely the responsibility of the participant.

Section 7. Treatment—Medical Assistance

(a) JLAP endeavors to provide a network of therapeutic resources that includes a broad range of health care providers, therapists, and "self-help" support groups. JLAP will maintain a statewide list of available providers.
(b) With the written consent of the participant, JLAP may maintain contact with, and receive information from the treatment provider. JLAP may remain involved in support during treatment, and shall endeavor to provide peer support and aftercare assistance in early recovery.
(c) In cases where it is determined the participant is not in need of inpatient or residential treatment, JLAP may provide referrals to outpatient counseling resources and self-help groups such as 12-step programs.

Section 8. Confidentiality

(a) JLAP and its representatives will observe anonymity and confidentiality at all times. JLAP is an autonomous program, independent from the administrative offices of the Court or any other board or disciplinary organization, agency or authority.
(b) No disclosure of confidential information will be made by any representative except for permitted disclosures and those identified in Ind. Professional Conduct Rule 8.3.

FULFILLING THE DETERRENT AND RESTITUTIONARY GOALS OF THE SECURITY DEPOSITS STATUTE AND OTHER DEVELOPMENTS IN INDIANA PROPERTY LAW

LLOYD T. WILSON, JR.*

It has been said of human beings that "[w]e cannot escape the appeal of order."[1] In the physical sciences, even though we know that matter tends from order to entropy, we still look for "meaningful or nonrandom arrangement of parts within a structure."[2] The appeal of order likewise impacts the law. Roscoe Pound identified twelve functions accomplished by law, but common to each of them and to all theories of law is "a system of ordering human conduct and adjusting human relations."[3]

Legal order adjusts human relations in at least two respects. First, on a social scale, it resolves disputes in a way that expresses society's conclusions about fairness and justice. Second, on an individual scale, it informs people of the likely ramifications of their conduct, which in turn permits people to interact with others reasonably confident that legitimate expectations will be supported by the courts and improper conduct will be redressed.

Establishing legal order requires appellate courts to create order by establishing fair and just rules in the first instance. Appellate courts must also maintain order by implementing legal principles consistent with prior experience. Finally, appellate courts should not introduce disorder into the legal system by way of inconsistent applications of legal principles. If an inconsistency is introduced, a higher appellate court should be especially vigilant to correct it and to reinstate order.

The appellate court opinions discussed in this Article display the courts' efforts to create and sustain a meaningful arrangement of legal principles within the structure of property law. In the lead case,[4] the court's opinion contributed to a developing split between two irreconcilable analytical approaches to the Indiana Security Deposits statute. This divergence leaves an uncomfortable sense of disorder. In another case,[5] the court of appeals was confronted with a case of

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1. IAN MARSHALL & DANA ZOHAR, WHO'S AFRAID OF SCHRÖDINGER'S CAT? 13 (1997).
2. *Id.*
3. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF THE LAW 31 (1922).
4. Turley v. Hyten, 751 N.E.2d 249 (Ind. Ct. App. 2001). *See infra* Part I.
5. Howell v. Hawk, 750 N.E.2d 452 (Ind. Ct. App. 2001) (In deciding whether a restrictive

first impression for Indiana law and established principles that will order and adjust future relations. In other cases,[6] the court advanced the development of property law in an orderly fashion by bringing cases involving novel fact situations into the fold of existing legal principles.

The opinions examined in this Article also exhibit the institutional roles of the Indiana Court of Appeals and the Indiana Supreme Court in establishing and maintaining order. In one case,[7] the supreme court corrected a decision by the court of appeals that would have undone a century or more of precedent and would have introduced substantial disorder into the writing requirement in property law. In another case, involving a mortgagee's duties to other parties at a loan closing,[8] the supreme court denied a petition to transfer and thereby declined an opportunity to increase order. That denial leaves intact a court of appeals decision from 2000 in which two judges on the panel expressly sought a re-examination of current law by the higher court.

This Article consists of three sections, each with its own purpose. The first section analyzes the development of two mutually exclusive interpretations of the Security Deposits statute.[9] These competing interpretations, between which trial courts must choose to resolve disputes between landlords and tenants over retention of security deposits, lead to opposite results. This Article proposes that a landlord should be able to apply security deposit funds to legitimate and appropriately itemized damages even if the landlord's notice letter to the tenant fails to comply with the requirements of the statute with regard to other individualized items.

The second section describes six opinions issued by the Indiana Court of Appeals during the survey period. These opinions were selected because they either created new law, clarified existing legal principles, or demonstrated the application of a legal principle in a noteworthy fashion. This Article will attempt to identify the contributions of these opinions by placing them in a substantive or historical context.

The third section revisits two cases that were reviewed in the 2001 survey

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covenant prohibiting "mobile homes" in a subdivision precluded a resident from constructing a "modular home," the court stated, "We have not found . . . any Indiana case on point to guide our interpretation of these definitions and regulations . . . ."). *See infra* Part II.A.2.

6. *See infra* Part II.

7. Brown v. Branch, 758 N.E.2d 48 (Ind. 2001). *See infra* Part III.A.

8. Town & Country Homecenter of Crawfordsville, Ind., Inc. v. Woods, 725 N.E.2d 1006 (Ind. Ct. App.) *trans. denied*, 741 N.E.2d 1249 (Ind. 2000). *See infra* Part III.B.

9. IND. CODE §§ 32-7-5-1 to -19 (1998). In the 2002 session, the Indiana General Assembly recodified statutes affecting property law with the goals of reorganizing the statutes and of rephrasing them to improve clarity. Although the majority of the affected statutes are in Title 32, a large number of other titles are also affected. Effective July 1, 2002, many statutes are repealed and are recodified as new code sections. There are no substantive changes to the Security Deposits statute, but Indiana Code sections 32-7-5-1 to -19 will be recodified at Indiana Code sections 32-31-3-1 to -19. Because the former section numbers were in force in the survey period and were used in all of the cases analyzed, the former section numbers will be used throughout the Article.

issue on Indiana property law.[10] In *Brown v. Branch*,[11] the Indiana Supreme Court granted a petition to transfer and reversed the decision of the court of appeals. The supreme court's opinion is significant for its determination of the scope of the Statute of Frauds[12] with regard to transfers of interests in real estate. In *Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods*,[13] the supreme court denied a petition to transfer, leaving unresolved the problems identified by the concurring and dissenting opinions and discussed in last year's Article.[14]

I. LANDLORD—TENANT RELATIONS: CONFLICTING APPROACHES TO INDIANA'S SECURITY DEPOSITS STATUTE

In *Turley v. Hyten*[15] the Indiana Court of Appeals was confronted with an appeal from an entry of summary judgment in favor of a tenant that disallowed a landlord's claim for damages because the landlord failed to comply with the notice provisions of Indiana's Security Deposits statute.[16] The court of appeals' judgment to affirm the trial court's decision effected an unfair result that excessively penalized the landlord and unnecessarily enriched the tenant. The tenant who terminated his lease early and who caused extensive damage to the rental property escaped all liability for his actions while the landlord was compelled to return the full amount of the tenant's security deposit and to pay the tenant's attorney's fees.

The court of appeals reached this result by characterizing the provisions of the Security Deposits statute as "explicit and mandatory"[17] and by concluding that the notice requirements of the statute are "strict,"[18] meaning that nothing less than absolute and literal compliance will suffice. The analytical approach of the *Turley* court was so inflexible and so categorical in result that it begged closer examination. That examination disclosed a line of appellate court opinions issued prior to *Turley*. The analyses contained in those cases belie the existence of a single, mandated approach, as presented in *Turley*, and present instead two conflicting views of the correct interpretation of the Security Deposits statute. These views focus on whether the statute requires "strict compliance," producing only all-or-nothing results, or whether it permits "substantial compliance," allowing partial recognition and partial denial of a landlord's claims.

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10. *See generally* Lloyd T. Wilson, Jr., *New Bricks for the Wall: Developments in Property Law in Indiana*, 34 IND. L. REV. 955 (2001).

11. 758 N.E.2d 48 (Ind. 2001).

12. IND. CODE § 32-2-1-1 (1998). Effective July 1, 2002, the Statute of Frauds will be recodified at Indiana Code section 32-21-1-1.

13. 741 N.E.2d 1249 (Ind. 2000).

14. *See* Wilson, *supra* note 10, at 981-88.

15. 751 N.E.2d 249 (Ind. Ct. App. 2001).

16. *Id.* at 251.

17. *Id.* at 252 (citing Pinnacle Props. v. Saulka, 693 N.E.2d 101, 104 (Ind. Ct. App. 1998)).

18. *Id.* at 251.

It is the thesis of this Article that the *Turley* opinion misinterprets the intended application of the statute and that the substantial compliance approach better implements the deterrent and restitutionary goals and policies of the Security Deposits statute. Deficiencies in the landlord's notice letter were so extensive in the *Turley* case that the court may have reached the same result under either approach. The same may not be true, however, of other cases where the landlords' "failings" are not as extensive as in *Turley* but still do not reach the level of absolute compliance. In such cases, the choice of analytical method would lead to opposite results. The strict compliance approach of *Turley* merits examination and comparison to the substantial compliance approach so that their analytical differences can be illuminated and a single model can be adopted. The Security Deposits statute should be interpreted and applied in a way that promotes its goals while neither imposing undue burdens on, nor dispensing unmerited windfalls to, either landlord or tenant.

In *Turley*, the landlord and the tenant entered into a lease agreement for a house. The lease term was for one year, from May 1 to April 30, at a rent of $450 per month, payable in advance. The tenant paid to the landlord a security deposit equal to one month's rent. Near the end of January, the ninth month of the lease term, the tenant notified the landlord that the tenant intended to terminate the lease prematurely and would vacate the house at the end of the month. When the landlord went to the house on January 31, the tenant was still in possession.

When the landlord returned three days later, the tenant had vacated the house. In so doing, the tenant left the house unheated and a window open. As a result of cold February weather, the pipes in the house burst causing extensive water damage to the carpet and floors. According to the landlord, the house had to be "totally replumbed." The unrestricted flow of water also resulted in a large utility charge billed to the landlord. In addition, the landlord stated that the tenant left trash in the house and was responsible for multiple holes in the walls.

The landlord filed a complaint for damages against the tenant. The tenant answered and filed a counterclaim seeking return of his security deposit and payment of attorney's fees pursuant to the Security Deposits statute. The tenant filed a motion for summary judgment, which the trial court granted. The judgment denied relief to the landlord, ordered the landlord to return the tenant's security deposit, and ordered the landlord to pay the tenant's attorney's fees. The landlord appealed.

The court of appeals identified two issues on appeal. The first issue was whether the landlord provided sufficient notice of the damages and of his intent to apply the security deposit toward them. The second issue was whether a failure to meet statutory notice requirements under the Security Deposits statute barred the landlord from asserting a claim for other damages.

The Security Deposits statute[19] was enacted in 1989. Subsequent appellate discussion of the statute centers on three recurring disputes: 1) what action by a landlord is sufficient to satisfy the itemization of damages component of the

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19. IND. CODE § 32-7-5 (1998).

notice requirement, 2) what is the result if a landlord's notice letter is sufficiently itemized for some damage elements but not for others, and 3) what is the scope of the implied acknowledgment that no damages are due that arises from a landlord's failure to comply with the notice requirements. These recurring disputes arise from sections 12, 13, 14, and 15 of the statute.

Section 12 contains four important provisions. First, subsection (a) identifies the expenses and damages toward which a security deposit may be applied. It states that on termination of a rental agreement a landlord must return all of a tenant's security deposit, except for any amount that the landlord applies to "payment of accrued rent," "damages that the landlord has or will reasonably suffer by reason of the tenant's noncompliance with law or the rental agreement," and "unpaid utility or sewer charges that the tenant is obligated to pay under the rental agreement."[20] Second, subsection (a) also sets forth the landlord's itemization and notice requirements. It states that any application of a security deposit to an allowed expense or damage must be "itemized by the landlord in a written notice delivered to the tenant together with the amount due within forty-five (45) days after termination of the rental agreement and delivery of possession."[21]

Third, subsection (b) provides remedies to a tenant where the landlord fails to comply with subsection (a). "If the landlord fails to comply with subsection (a), the tenant may recover all of the security deposit due the tenant and reasonable attorney's fees." Fourth, subsection (c) provides that the statute does not "preclude the landlord or tenant from recovering other damages to which either is entitled."[22]

Section 13(1) supplements section 12(a), by elaborating on the purposes for which a security deposit may be used. For example, section 13 qualifies the "damages" component of section 12(a)(2) by adding the requirement that damages be "actual" and that they not be the result of "ordinary wear and tear expected in the normal course of habitation of a dwelling."[23] Similarly, section 13(2) elaborates on the "accrued rent" component of section 12(a)(1) by including both "rent in arrearage" and "rent due for premature termination of the rental agreement by the tenant."[24]

Section 14 specifies the itemization and notice requirement of section 12(a)(3) by providing:

> In case of damage to the rental unit or other obligation against the security deposit, the landlord shall mail to tenant, within forty-five (45) days after the termination of occupancy, an itemized list of damages claimed for which the security deposit may be used as provided in section 13 of this chapter, including the estimated cost of repair for each

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20. *Id.* § 32-7-5-12(a).
21. *Id.*
22. *Id.* § 32-7-5-12(c).
23. *Id.* § 32-7-5-13(1).
24. *Id.* § 32-7-5-13(2).

> damaged item and the amounts and lease on which the landlord intends to assess the tenant. The list must be accompanied by a check or money order for the difference between the damages claimed and the amount of the security deposit held by the landlord.

Section 15 creates an implied acknowledgment by the landlord that "no damages are due" if "the landlord [fails] to comply with the notice of damages requirement within the forty-five (45) days after the termination of occupancy," in which case "the landlord must remit to the tenant immediately the full security deposit."[25] The key terms that courts must interpret and reconcile are "itemization" from sections 12(a) and 14, "due the tenant" from section 12(b), "other damages" from section 12(c) and "no damages" from section 15.

In *Turley*, the landlord mailed a letter to the tenant on February 25, twenty-two days after the landlord discovered that the tenant had vacated the house. The landlord's letter contained a narrative description of the expenses and damages he had incurred as a result of the tenant's premature breach and damage to the house. The court of appeals acknowledged that the landlord's letter was timely mailed and that it "rather thoroughly identified various damaged items."[26] The court concluded, however, that the landlord's letter failed to comply with the itemization requirement of section 14. The landlord's letter to the tenant stated, "All though [sic] we don't have a complete estimate yet, the damage is already more than $1,400.00."[27] The landlord added, "After a complete assessment is made, we will give you a full itemized statement. It will also include lost rent due to our inability to lease the house again on a timely basis."[28]

The court of appeals determined that landlord's letter was "insufficiently detailed to comply with IC 32-7-5-14" because "it did not provide the estimated cost for each damaged item."[29] The court reasoned that "[w]ithout identification of the cost of each repair, tenant was unable to discern whether the individual charges that comprised the $1,400 were proper or reasonable."[30]

The notice letter from the landlord in *Turley* contained no itemization of any of the claimed damages, and the court's decision could have been decided simply by reference to existing precedents. It is the *Turley* court's emphatic pronouncement of a strict liability-like approach to compliance with the Security Deposits statute that raises concerns. For the benefit of cases to come, the *Turley* opinion must be recognized as an expression of the less desirable of two competing visions of the statute.

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25. *Id.* § 32-7-5-15.

26. Turley v. Hyten, 751 N.E.2d 249, 252 (Ind. Ct. App. 2001).

27. *Id.* at 251.

28. *Id.*

29. *Id.* at 252.

30. *Id.* The court rejected the landlord's argument that notice was unnecessary because the amount of unpaid rent exceeded the amount of the security deposit. The court stated, "[r]egardless of whether unpaid rent equals or exceeds the security deposit, Landlord must give statutory notice of intent to hold the security deposit." *Id.*

Interpretation of the Security Deposits statute begins with the court of appeals' 1992 decision in *Skiver v. Brighton Meadows.*[31] In *Skiver*, the landlord retained a tenant's security deposit of $350 and applied it to $4,230 of accrued rent that resulted from the tenant's early termination of his lease. The landlord did not send written notice to the tenant because the unpaid rent exceeded the security deposit and the landlord did not intend to pursue the tenant for any other damages done to the rental unit. The court held that notice under section 14 of the Security Deposits statute was required and that the landlord's failure to send "a letter itemizing the accrued rent due to [tenant's] premature termination of the rental agreement" operated as an agreement under section 15 that no damages were due.[32] As a result, the landlord could not collect accrued rent and was ordered to return the security deposit. *Skiver* established that a landlord must provide notice of intended uses for a security deposit even when the use is arguably within the actual notice of a tenant (as would be the case with accrued rent following premature termination) and where the damages "obviously" exceed the amount of the deposit.

Also decided in 1992 was *Duchon v. Ross.*[33] In that case, the court of appeals stated, "This is the first time the sufficiency of a notice submitted pursuant to [the Security Deposits] statutes . . . has been questioned in this state."[34] The court noted that "[t]hese statutes concern the duties of landlords to return security deposits to tenants."[35]

Duchon contains some facts reminiscent of *Turley.* Specifically, as in *Turley*, the tenant in *Duchon* vacated the rental premises in February, disconnected the heat, and left a window open. Additionally, the landlord's letter to the tenants, like the landlord's letter in *Turley*, contained a detailed description of damages but did not itemize the repair costs and instead promised a final accounting "[o]nce the costs associated with the [described] items are determined."[36]

Duchon, like *Skiver*, held that a notice of damages unaccompanied by estimated costs of repair is insufficient as a mater of law.[37] *Duchon* added that "[d]isputes over the costs of repair or the assessment of damages do not relieve the Landlords of the requirement to provide the estimated costs of repair."[38]

Duchon also includes the first discussion of the "other damages" component of section 12(c) and of the relationship of those damages to the implied agreement component of section 15. The court provided some insight into the otherwise undefined term, "other damages," by noting that such damages could include "claims for amounts in excess of the security deposit," and "other types

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31. 585 N.E.2d 1345 (Ind. Ct. App. 1992).
32. *Id.* at 1347.
33. 599 N.E.2d 621 (Ind. Ct. App. 1992).
34. *Id.* at 623.
35. *Id.*
36. *Id.* at 624.
37. *Id.* at 625.
38. *Id.* at 624-25.

of damages not specified in Section 12."[39] Although the court concluded that "the clear intent of Section 15 is that if a landlord fails to provide the requisite notice within the 45-day period[,] there are no 'other damages' to collect,"[40] this statement cannot be taken to support the complete release approach of *Pinnacle Properties*. First, the court provides no analysis to explain the propriety of its interpretation or to explore the implications of its statement. Second, to rely on this quote for that purpose ignores the fact that *Duchon*'s author is Judge Hoffman, who also wrote the dissent in *Pinnacle Properties* criticizing the majority's "all-or-nothing" approach. Unfortunately, the phrase that "there are no 'other damages' to collect" is often quoted without reference to context.

While the specificity of the notice was not challenged in *Miller v. Geels*,[41] the court of appeals did address the "other damages" issue. In *Miller*, the landlord gave a timely and itemized written notice of the damages toward which the tenants' security deposit would be applied, including accrued rent and carpet shampooing. The tenants did not dispute the deduction of all accrued rent from the deposit, but they did object to the deduction for carpet cleaning. The carpet was not stained or spoiled by pet odors, two common types of damage to carpet; it simply displayed "the accumulation of dirt." The tenants argued that the accumulation of dirt constituted "ordinary wear and tear expected in the normal course of habitation of a dwelling" and therefore was not a type of damage to which the security deposit could properly be applied.[42] The landlord argued that the carpet cleaning was a type of "other damage" that could be recovered pursuant to the "restoration provision" contained in the lease. By this provision the tenants agreed that when they vacated the rental premises the "carpet shall be shampooed" and that "[a]ny necessary cleaning to return the house to the same condition as when the Lessee moved in will be deducted from the security deposit."[43]

The court then concluded that dirt which a tenant permits to accumulate in carpet is not "ordinary wear and tear" and qualifies as "other damages."[44] Thus, the damage limitations of the Security Deposits statute did not apply to "other damages" a landlord might be entitled to recover apart from the deposit. "It was not the legislature's intent to limit the freedom of landlords and tenants to

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39. *Id.* at 625.

40. *Id.*

41. 643 N.E.2d 922 (Ind. Ct. App. 1994). In footnote six, the court identified two notable limitations on the Security Deposits statute. First, for items that are not specified in section 12, "the statute does not require any notice at all of the amount of 'other damages' the landlord may seek." *Id.* at 926 n.6. Second, estimated repair costs are all that are required as "[t]here is no requirement in the statute that the landlord provide actual receipts with the notice." *Id.*

42. *Id.* at 926-27.

43. *Id.* at 926.

44. Noting definitions of "ordinary wear and tear" in other jurisdictions, the court described it as "the gradual deterioration of the condition of an object which results from its appropriate use over time." *Id.* at 927 (citing Publishers Bldg. Co. v. Miller, 172 P.2d 489, 496 (Wash. 1946); Cyclops Corp. v. Home Ins. Co. (W.D. Pa. 1973)).

contractually define 'other damages' . . . . Thus, we decline to extend the reach of the statute beyond the security deposit."[45] The court stated that even though "[i]t was the intent of the legislature to provide special protection for security deposits, which often give rise to landlord-tenant disputes[,] [t]he statute clearly and unambiguously preserves the right of the landlord or tenant to recover other damages to which either is entitled."[46] The *Miller* case thus established that there are damages to which the Security Deposits statute applies and other damages that are outside the scope of the statute.

The court also circumscribed the reach of the statute by stating:

> The Security Deposits statute applies only to security deposits. It is a basic rule of construction that statutes in derogation of the common law are to be strictly construed. "We will assume that the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication."[47]

As discussed below, recognizing that claims not based on the Security Deposits statute remain unaffected by it has important ramifications for both the "other damages" provision of 12(c) and for the "no damages" presumption of section 15.[48]

The court of appeals further interpreted the provisions of the Security Deposits statute in *Rueth v. Quinn*.[49] In that case, the court of appeals addressed issues relating to both timeliness and content of the statute's notice provisions. In *Rueth* the tenants held over beyond the end of the lease term, even though they knew the landlord had sold the house to third parties and was obligated to close on a specific date. When the tenants finally vacated the house, the landlord sent written notice to them identifying the nature and amount of three types of damages that she intended to deduct from the tenants' $1,100 security deposit. These damages were for a per diem rent charge for occupancy during the hold-over period, a penalty imposed by the purchase agreement that the landlord was compelled to pay to the purchasers of the house because she could not convey

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45. *Id.*

46. *Id.*

47. *Id.* (citation omitted).

48. *See infra* notes 84-90 and accompanying text.

49. 659 N.E.2d 684 (Ind. Ct. App. 1996). This case contains a useful discussion of problems that can arise in determining the date on which the forty-five day notice period begins to run. The tenants claimed the landlord failed to send the damage notice to them within forty-five days after the lease terminated as required by sections 13 to 16 of the statute. The court determined that the lease agreement terminated on January 18, 1993, and not on June 10, 1992, which was the date the original lease expired, because January 18 was when the tenants surrendered the house and that was when the landlord accepted their surrender. *Id.* at 689. *See also* Figg v. Bryan Rental, Inc., 646 N.E.2d 69, 74 (Ind. Ct. App. 1995) (holding that a tenant's abandonment of leased premises did not trigger the forty-five day period for the landlord's notice letter). For the notice period to begin, the landlord must take "some decisive, unequivocal act . . . which manifests the lessor's acceptance or the surrender." *Id.* at 73.

possession on the scheduled closing date, and late fees the landlord had to pay to her title company for closing after the scheduled date.

Unfortunately for the landlord, she miscalculated the per diem rent in her notice to tenants by $366.64. Further, she actually paid $400 in hold-over penalties to the buyers when under the terms of the purchase agreement she was only obligated to pay $240. The landlord said she agreed to pay the higher figure to avoid being sued by the purchasers. The trial court decided that, as a result of the calculation error and the voluntary overpayment of fees to the buyers, the landlord's notice failed to comply with the Security Deposits statute. It ordered her to return the full amount of the tenants' deposit and to pay their attorney's fees.

The court of appeals affirmed in part and reversed in part. It reversed the trial court's conclusion that the landlord's overstatement of damages in her notice letter required her to return the entire deposit.[50] The court treated the components of the notice letter as distinct and severable. The landlord had to return the overstated amounts but was entitled to keep both the amounts that she had accurately stated and the correct amounts of the overstated damage items.

The court acknowledged that it was addressing a new question of law. "This court has not addressed the ramifications when the landlord's deductions from the [security] deposit are erroneous."[51] The court concluded that the inclusion of erroneous deductions rendered the notice insufficient to comply with the notice provisions of the statute.[52] Just as importantly, however, the court held that non-compliance, by itself, did not end the matter or require a landlord to return the entire deposit. Instead, the court had to determine what amount of the security deposit the tenants were entitled to recover.

Section 12(b) of the Security Deposits statute states, "If the landlord fails to comply with subsection (a), the tenant may recover all of the security deposit *due the tenant* and reasonable attorney's fees."[53] In *Rueth*, the tenants were "due" only the amount of the miscalculation of per diem rent and the excess hold-over amount paid to the buyers. The tenants were not "due" any further part of their deposit because the charges, at least as recalculated, were legitimate as either accrued rent under 12(a)(1) or as "damages that the landlord has . . . suffer[ed] by reason of the tenant's noncompliance with . . . the rental agreement" under 12(a)(2). Under the *Rueth* analysis, the itemization requirements of the landlord's written notice are correctable, subject to the "penalty" that

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50. *Id.* at 690.

51. *Id.* at 689.

52. *Id.* The court reasoned:

> Because a landlord is in a superior position to determine a tenant's damages, we find that when: 1) a landlord erroneously calculates the tenant's damages, 2) the tenant resorts to legal action to collect all or part of his deposit, and 3) the tenant was entitled to a return of all or part of the tenant's deposit, the landlord has not complied with the notice requirement of the statute.

Id.

53. IND. CODE § 32-7-5-12(b) (1998) (emphasis added).

noncompliance may require the landlord to pay the tenant's attorney's fees.[54]

The Security Deposits statute was next addressed in *Greasel v. Troy*.[55] *Greasel* provides guidance on both the itemization component of the notice letter and on the nature of "other damages." In that case, the tenant sued his landlord for return of his security deposit. The landlord filed a counterclaim for damages to carpet from pet odor. The tenant argued that he was entitled to return of his deposit because the landlord's notice letter failed to comply with section 14 of the statute. As a result of this non-compliance, the tenant argued that the landlord was barred from seeking "other damages."

The landlord's notice letter identified the damage to the carpet and the cost to repair it. The landlord's letter also listed other items of damage, but she included no costs of repair for them because she did not intend to assess those damages against the tenant. At trial, the tenant argued that failure to include repair costs for all items in the notice letter invalidated it in full. The court distinguished *Duchon*, which held that a landlord's notice letter failed to comply with the statute where the letter identified damages but provided no estimates of repair for any of them, on the ground that the landlord in *Greasel* did provide the cost of repair for the items she intended to assess against the tenant. The omission of repair costs for damaged items that may have been identified, but for which no recovery was sought, was inconsequential.[56] This holding stands in stark contrast to the decision in *Turley*.

Having determined that the landlord's notice complied with the statute and thereby preserved her right to seek "other damages," the court of appeals' opinion addressed that term. The court wrote, "[W]here the landlord provides notice in satisfaction of the statute, she may then seek to recover any 'other damages' *beyond the security deposit* to which she is entitled under the lease agreement."[57] The parties' lease provided that the tenant was required to repair at his expense "any damage caused by . . . pets of Tenant."[58] Accordingly, the landlord was entitled to seek recovery beyond the amount of the security deposit as "other damages" authorized by the lease agreement.

From *Skiver* and *Duchon* in 1992 through *Greasel* at the very end of 1997, several principles about the Security Deposits statute appear established. First, a landlord fails to comply with the statute when he fails to send any notice whatsoever to the tenant concerning use of the security deposit, even if the use

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54. *Rueth*, 659 N.E.2d at 689-90. Another problem for the interpretation of the Security Deposits statute relates to a court's discretion, or lack of it, in awarding attorney's fees to a tenant where the landlord's notice letter contains both adequately and inadequately stated damages. In *Pinnacle Properties*, the court of appeals said that an award of attorney's fees to the tenant is mandatory. Pinnacle Props. v. Saulka, 693 N.E.2d 101, 105 (Ind. Ct. App. 1998). In *Rueth*, the court said that an award of attorney's fees is discretionary. *Rueth*, 659 N.E.2d at 690.

55. 690 N.E.2d 298 (Ind. Ct. App. 1997).

56. *Id.* at 302.

57. *Id.* (emphasis added) (citing Miller v. Geels, 643 N.E.2d 922, 926 (Ind. Ct. App. 1994)).

58. *Id.*

is for unpaid accrued rent.[59] Second, a landlord fails to comply with the statute if he provides notice that identifies the nature of damages he intends to charge against the security deposit but fails to provide individual costs of repair for any of those items.[60] Third, where the notice letter is individually itemized as to both nature of damage and cost of repair, the damages limitations imposed by the statute do not limit a landlord's ability to seek recovery for "other damages" in excess of the deposit where permitted under the lease; only estimates of cost of repair are required, not actual receipts; and neither the nature nor cost of repair for "other damages" must be stated in the notice letter.[61] Fourth, where the notice letter is individually itemized as to both nature of damage and cost of repair, the inclusion of erroneously calculated or excessively stated damages does not invalidate the entire notice; the tenant is entitled to a return of only the amount of the deposit "due;" the landlord is entitled to retain the correctly calculated amounts of all legitimate charges.[62] Finally, where the notice letter is individually itemized as to both nature of damages and cost of repair for the damages the landlord seeks to charge against the security deposit, the inclusion of other items of damage without individual repair costs does not invalidate the notice or preclude the landlord from recovering "other damages" permitted under the lease; even with errors, the purposes of the notice provision, which are "to inform the tenant that the landlord is keeping the security deposit and for what reason" and to "provide[] the tenant an opportunity to challenge the costs for which the deposit is being used" are met.[63]

A difference in judicial approach clearly emerges with the court of appeals' decision in *Pinnacle Properties v. Saulka.*[64] This divergence is perpetuated by the court's decisions in *Schoknecht v. Hasemeier*[65] decided in 2000 and in *Turley* in 2001. The approaches used by these courts cannot be reconciled. One approach must be chosen, and that approach should be the one used in *Schoknecht* and expressly or impliedly endorsed in the pre-*Pinnacle Properties* opinions.

In *Pinnacle Properties*, the tenants sued their landlord to recover an earnest money deposit that the landlord had retained for damages to the rental property. The tenants asserted that the landlord's notice letter did not comply with the Security Deposits statute. The landlord filed a counterclaim seeking damages in excess of the amount of the security deposit.

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59. Skiver v. Brighton Meadows, 585 N.E.2d 1345 (Ind. Ct. App. 1992).

60. Duchon v. Ross, 599 N.E.2d 621 (Ind. Ct. App. 1992).

61. Miller v. Geels, 643 N.E.2d 922 (Ind. Ct. App. 1994).

62. Rueth v. Quinn, 659 N.E.2d 684 (Ind. Ct. App. 1996).

63. *Greasel*, 690 N.E.2d at 302 (citing Meyers v. Langley, 638 N.E.2d 875, 878-79 (Ind. Ct. App. 1994)). In *Meyers*, the court found that the purposes of the notice provision had been served where the landlord sent the tenant a letter that itemized as damages "material for two doors, material to fix the bathroom, material for a 'kit room,' labor costs, and court costs and set forth specific dollar amounts for each" and "$600.00 for two months rent." *Meyers*, 638 N.E.2d at 878-79.

64. 693 N.E.2d 101 (Ind. Ct. App. 1998).

65. 735 N.E.2d 299 (Ind. Ct. App. 2000). *See also* Wilson, *supra* note 10, at 976-78.

After the tenants vacated the property, the landlord sent a written "Vacate Report" identifying six types of damages and providing individual repair costs for each. The report contained commonplace items such as cleaning, carpet replacement, and painting; it also contained a $670 charge identified only as "other damages." The court found this damage entry insufficient to satisfy the itemization requirement of section 14 of the statute. That conclusion would have been unremarkable as the court had held since *Duchon* that costs of repair which are "lumped together" rather than individually itemized do not satisfy the statute. The analysis in the majority opinion, however, exhibits a marked difference from the approach used in prior opinions, especially *Rueth* and *Greasel*. The court identified the legitimate ends served by the notice requirement of the statute as follows:

> The notice provision does not impose a difficult burden on the landlord. The purpose of the provision is to inform the tenant that the landlord is keeping the security and for what reason, as well as to allow that tenant an opportunity to challenge the costs for which the deposit is being used.[66]

For the court in *Pinnacle Properties*, "if the landlord fails to provide the tenant with an itemized list of damages including the estimated cost of repair for *each damaged item*, the purpose for the notice provision has not been served."[67]

The court then took an unexpected and unnecessary step and used the inadequacy of *one* damages item to invalidate *all* damages items, even those that were appropriate in nature and accompanied by cost of repair. Announcing a strict construction approach, the court stated, "A strict reading of Indiana Code §§ 32-7-5-13 and –14 does not allow for substantial or partial compliance by the landlord with the itemization of damages notice requirement."[68] The court concluded that the failure to comply with the notice provision, which arose from the inadequacy of one entry in the Vacate Report, constituted agreement by the landlord that "no damages" of any kind were due by virtue of section 15.[69]

The *Pinnacle Properties* court does not explain why it was compelled to reach a decision contrary to the similar cases of *Rueth* and *Greasel*. The majority opinion did not refer to those cases, let alone distinguish them. The two cases the majority did cite, *Miller* and *Duchon*, do not require the decision the majority reached. In *Miller*, the tenant did not dispute either the timeliness or sufficiency of the detail in landlord's notice, and in *Duchon* the landlord's letter acknowledged that none of the repair costs had yet been determined. Further, other than reciting that the Security Deposits statute "is in derogation of the common law [and] must be strictly construed,"[70] the majority opinion did not explain why the policies of the statute could not be achieved by severing the

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66. *Pinnacle Props.*, 693 N.E.2d at 104.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* (citing Miller v. Geels, 643 N.E.2d 922, 927 (Ind. Ct. App. 1994)).

offending damage entry and enforcing the other legitimate and properly documented entries. For those appropriate entries the tenants would have been provided with notice and an opportunity to challenge. For the inappropriate entry, the landlord would have suffered the obligation to pay the tenants' attorney's fees as provided in *Rueth*.

The overreach of the majority's decision was noted by Judge Hoffman, who dissented "insofar as the majority finds that [landlord's] partially inadequate notice entitles the tenants to return of their entire security deposit."[71] Judge Hoffman supported his dissent on both statutory interpretation and policy grounds. Whereas the majority opinion concluded that the presumptive agreement of "no damages" in section 15 arises "unless the [landlord's] notice is in compliance *in toto*,"[72] Judge Hoffman argued that section 15 "is inapposite when only a portion of the notice fails"[73] and that the statute "contemplate[s] return of the full security deposit when the entire notice fails, e.g. untimely notice, no itemization, or no estimated costs."[74]

Judge Hoffman also provided a telling description of the effect of the majority's decision. "Certainly the statutes discourage overreaching and unscrupulous retention of security deposits. They do not, however, compel landlords to unrefutably itemize damages in a legal roll of the dice where they may lose all by a misstep."[75] Neither the terms of the Security Deposits statute nor existing precedent requires that the statutes be an "all or nothing proposition."[76]

The *Pinnacle Properties* opinion was cited once in the court of appeals' 2000 decision in *Schoknecht v. Hasemeier*,[77] but its all-or-nothing approach was not followed, or even directly acknowledged. In *Schoknecht*, the tenant defaulted on her lease by failing to make rental payments when due. The landlord obtained a judgment for possession, with a hearing on damages to follow. After obtaining possession, the landlord discovered damages to the property. The landlord timely sent written notice to the tenant, in which she itemized the damages and provided a cost of repair for each.

The tenant later filed suit for return of her security deposit, which suit was consolidated with landlord's suit for damages in excess of the amount of that deposit. The tenant argued that the landlord failed to comply with the Security

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71. *Id.* at 106 (Hoffman, J., dissenting).

72. *Id.*

73. *Id.*

74. *Id.* The majority opinion also fails to address the court's decision in *Figg*, where the landlord's erroneous inclusion of an extra month's unpaid rent in his notice letter did not render that notice insufficient. Figg v. Bryan Rental, Inc., 646 N.E.2d 69, 70 (Ind. Ct. App. 1995). But for two footnotes in which the court explained the damage component of the summary judgment entered in favor of the landlord, the error in the notice letter would have received no attention at all. *Id.* at 69 nn.1-2.

75. *Pinnacle Props.*, 693 N.E.2d at 107.

76. *Id.* at 106.

77. 735 N.E.2d 299 (Ind. Ct. App. 2000).

Deposits statute because the landlord's notice letter contained some damage items that she was not entitled to deduct from the security deposit and because she failed to substantiate the estimated cost of repair. The landlord responded that the letter included good faith estimates of repair costs, that she was not required to substantiate her itemized list of damages, and that her notice letter was valid even though she did not list damages chargeable to the security deposit separately from damage items that were not chargeable to it. Once again the itemization requirement of section 14 and the presumptive acknowledgment of "no damages" from section 15 had to be examined.

The court observed that section 14 of the statute contains "strict notice requirements" and that failure to comply with these requirements constitutes an agreement that no damages are due.[78] Quoting *Miller*, the court further observed, however, that "'the Security Deposit statute applies only to security deposits' and that the statute 'clearly and unambiguously preserves the right of the landlord . . . to recover other damages to which [he or she] is entitled.'"[79] Because the statute permits a landlord to pursue claims that are not deductible from the security deposit in addition to those claims that are deductible, it is not an "erroneous calculation" by the landlord to include both types of claims in one letter. "[W]hile the Security Deposits statute requires Landlord to itemize the damages for which the security deposit may be used, it does not prohibit her from also itemizing other damages claimed under the lease."[80] The court of appeals thus reversed the decision of the trial court and remanded with instructions to calculate the amount of damages landlord was entitled to receive and what amount should be reimbursed to the tenants.[81]

The *Schoknecht* opinion does not construe the inclusion of non-conforming damages or damages outside the scope of the statute as prohibited "partial compliance," as the majority opinion did in *Pinnacle Properties*. Although not expressly identified, Judge Hoffman's recognition of the possibility of partial compliance and the need to compute the amount of deposit "due" is consistent with the *Schoknecht* court's instructions on remand.

We now come full-circle to *Turley*. Because the landlord's notice letter in that case contained only a lump-sum damage repair cost and failed to provide itemized costs for any of the damages, that notice was insufficient under *Duchon* and all other cases that have interpreted the Security Deposits statute. The notice

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78. *Id.* at 302.

79. *Id.* at 303 (alteration in original and citations omitted).

80. *Id.* The court also held that pursuant to the notice requirements of the Security Deposits statute the landlord does not have to substantiate the damages in the letter but rather needs to supply only an "estimated cost for each damaged item." *Id.* The analysis of *Schoknecht* in last year's survey on Indiana property law concluded that to fulfill the statutory notice requirements "notice must be specific enough to set forth an itemized list of damages and an estimated cost of repair for each, but the substantive rights of the parties under the lease, the factual support . . . for claims asserted, and the substantiation of damage amounts are left for further proceedings." Wilson, *supra* note 10, at 978.

81. *Schoknecht*, 735 N.E.2d at 303.

contained no legitimate and itemized damage items capable of being severed and preserved.

However, there is reason to infer from the court's treatment of the landlord's claim for "other damages" that it would not have allowed itemized claims to survive even if the facts had been different. The landlord in *Turley* argued that even if he had failed to comply with the notice requirements of the statute and was obligated to return the full amount of the security deposit, he would still be entitled under section 12(c) to recover "other damages" pursuant to a waste claim. The court rejected landlord's argument, saying that if a landlord fails to comply with the notice requirements of the statute, "there are no 'other damages' to collect."[82] Stating that "[e]xisting caselaw concludes any debate on the issue," the court quoted *Miller* for the proposition that "[a] landlord can attempt to pursue a claim for 'other damages' only if it returns the tenant's security deposit within 45 days or provides statutory notice."[83]

There are two problems with this assertion: first, it is not supported by the case law; second, it converts section 15 from an implied acknowledgment that no damages are due and chargeable to the security deposit into a general release that precludes all claims of any type, as opposed to precluding only claims that arise under section 12. Such an interpretation unnecessarily and inappropriately expands the reach of subsection 15 far beyond the proper scope of the Security Deposits statute.

The court in *Miller* observed that the "Security Deposits statute applies only to security deposits."[84] The meaning of "other damages" thus depends on context. If damages are attributable to the lease and are sought to be charged against the security deposit, they must be itemized and must include individual costs of repair. Damage items in a notice letter that meet these requirements are "proper" damages under the statute. Items that are not individually identified violate the statute and are not recoverable from the security deposit. In this context of deduction from a security deposit that a landlord has retained, a presumptive agreement that "no damages" are due and deductible is appropriate.

The meaning of "no damages" should not, however, be extended to preclude recovery of damages that are not sought to be charged against a security deposit. Such damages are "other damages" because they are external to the regulation of security deposits. They may be external because deduction is not the remedy sought or because liability is based on a theory other than the lease. To hold otherwise extends the scope of the statute beyond the target of security deposit funds, and thus contradicts *Miller*, and turns the "no damages" clause of section 15 into a general release of all claims a landlord might have against the tenant independent of the regulation of deposits, which even according to *Turley* is the reason the statute was enacted.[85]

The court in *Turley* concluded that the landlord's failure to comply with the

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82. Turley v. Hyten, 751 N.E.2d 249, 253 (Ind. Ct. App. 2001).

83. *Id.*

84. Miller v. Geels, 643 N.E.2d 922, 927 (Ind. Ct. App. 1994).

85. *Turley*, 751 N.E.2d at 251.

Security Deposits statute precluded him from asserting a common law claim for waste.[86] Based on this reasoning, one would have to conclude that all other common law claims are similarly "released" by the "no damages" clause. There is no connection between the Security Deposits statute and damage claims that do not target the deposit, some of which may be based on causes of action apart from the lease, that would justify a comprehensive release. Such a release also violates the narrow construction given to statutes in derogation of the common law by barring claims without the "express terms or unmistakable implication" required by *Miller*.[87]

An interpretation of section 15 that converts it into a general release is also unsupported by the language of the statute itself. First, section 9 defines "security deposit" to mean "a deposit paid by a tenant to the landlord . . . to *secure performance* of any obligation of the tenant *under the rental agreement*."[88] There is no indication anywhere in the statute that its effect was to extend beyond the deposit and the tenant's obligations under the lease agreement. The illogic of reading section 15 as a general release can also be seen by comparing the security function of rental deposits to other areas of the law involving secured debts, such as real estate mortgages and security interests in personal property. In neither of these areas does a creditor's loss of secured status, as by failure to record a mortgage or file a financing statement, release the debtor from an obligation to pay.[89] Instead, loss of secured status simply requires the creditor to pursue an in personam action against the debtor instead of an in rem action against the security. The same result is appropriate for a landlord who fails to comply with the notice provisions of the Security Deposits statute. If the landlord's notice is inadequate, he forfeits the ability to pursue the collateral and must take his chances on an unsecured claim against the tenant, which claim may be uncollectable apart from the deposit or subject to a senior claim or judgment. Finally, conferring on section 15 the power to operate as a general release would render the ability to recover "other damages" moot and would make section 12 internally inconsistent.

"Other damages" that are founded on a legal basis apart from the lease agreement should not be barred because of a landlord's failure to comply with a statute that only regulates one lease provision. The landlord in *Turley* was willing to return the full amount of the tenant's security deposit for failing to provide proper notice, but he believed he should then have been able to pursue other claims unrelated to retention of the tenant's security deposit. He should

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86. *Id.* at 253.

87. *Miller*, 643 N.E.2d at 927.

88. IND. CODE § 32-7-5-9 (1998) (emphasis added).

89. In fact, the Colorado Supreme Court declared unconstitutional that part of the Colorado security deposits statute which prohibited a landlord from "bring[ing] suit against the tenant for damages to the premises" where that landlord had failed to provide a written statement listing the reasons for retaining the tenant's deposit. Turner v. Lyon, 539 P.2d 1241, 1242 (Colo. 1975). The court in that case held that the statute violated the Equal Protection Clause of the Fourteenth Amendment by treating a secured creditor different than an unsecured creditor. *Id.* at 1243.

have been allowed to do so.

Courts that are called upon in the future to consider claims arising under the Security Deposits statute should be aware of the conflicting interpretations of the notice provisions of section 14 and should reject the absolute compliance analysis of *Pinnacle Properties* in favor of the substantial compliance articulated by Judge Hoffman in his dissent in *Pinnacle Properties* and as utilized in *Rueth*, *Greasel*, and *Schoknecht*. Courts should also be aware of the limitations on the scope of the statute and should not interpret the "no damages" provision of section 15 as a general release. Instead, that section should be interpreted to act as a presumptive agreement by the landlord only that there are no damages chargeable to the security deposit other than for those items itemized in the notice letter and accompanied by correct or correctable repair costs.

Implementing the Security Deposits statute in this manner will serve the relevant policies of dissuading landlords from overstating or fabricating damages in a scheme to unfairly retain a tenant's deposit and of holding tenants responsible for damage they cause. Tenants will be protected because landlords must provide notice that specifically identifies the damages to be charged against the deposit and the amount of repair cost. Armed with this notice, tenants will be able to decide whether to challenge the landlord's intended use. Landlords will be dissuaded from improperly inflating damage claims or inventing them outright by the duty to pay the challenging tenant's attorney's fees if the notice does not comply with the statute. From the other perspective, landlords will not see their legitimate and documented damage claims defeated in full by reason of an error in one item, as well as losing the ability to pursue claims unrelated to retention of a security deposit. Finally, tenants will not be presented with a windfall by escaping liability for actual damages that are properly itemized in the notice letter, plus receiving a general release, a return of the entire amount of the security deposit, and payment of their attorney's fees simply because the notice letter also contains one or more unsupported or wrongly calculated items. The *Pinnacle Properties—Turley* approach to the Security Deposits statute cannot accomplish all of these goals.

II. New Holdings from the Indiana Court of Appeals: Some Clarification, Some Extension, Some Reminders

The second section of this Article will address six cases decided by the Indiana Court of Appeals in 2001 in the areas of restrictive covenants in neighborhood association documents, statutorily created exceptions to recording requirements, real covenants, and implied warranties of habitability for single-family residences. These opinions were chosen because they clarify some aspect of an existing legal principle or extend a principle into new areas.

A. Restrictive Covenants: Clarity Versus Ambiguity; Reciprocal Restrictions Versus Free Alienability of Land

One of the many methods available to restrict the future use of land is a restrictive covenant. Through restrictive covenants landowners can agree to impose reciprocal benefits and burdens on their parcels that will bind not only

themselves but will also run with the land and bind subsequent owners. In *Crawley v. Oak Bend Estates Homeowners Ass'n*[90] and *Howell v. Hawk*,[91] the court of appeals demonstrated the importance of language to the policy that will be deemed paramount. When covenants are clearly stated, the enforcement of private agreement accepted by the lot owners dominates. When covenants are ambiguous, preference for the free alienability of land will prevail.

1. Crawley v. Oak Bend Estates Homeowners Ass'n.—In *Crawley*, the Oak Bend Homeowners Association and two residents of the Oak Bend subdivision sued two other subdivision residents, the Crawleys, seeking preliminary and permanent injunctions to prevent the Crawleys from parking a recreational vehicle at their home in violation of the neighborhood restrictive covenants. Section 17 of the Oak Bend covenants provided:

> No trucks larger than pickup trucks, disabled vehicles, unused vehicles, campers, trailers, recreational vehicles, boats, motorcycles, or similar vehicles shall be parked on any road, street, private driveway, or lot in this subdivision unless it is screened in such a way that it is not visible to the occupants of the other lots in the subdivision.[92]

The Crawleys kept their thirty-seven-foot long and eleven-foot tall motor home parked in the driveway at their house. The Crawleys did not deny that they kept the motor home parked in their driveway or that it was not screened. Instead, they offered explanations for why their conduct was reasonable and why the restrictive covenant should not be enforced against them. The Crawleys stated that they kept the motor home stored off-site in the winter months and only parked it at their residence "temporarily" in the months of April to October. Such temporary parking was reasonable, the Crawleys asserted, because it made the motor home convenient for packing for use on weekends and vacations. They also considered the length of time that they stored the motor home at their residence to be reasonable because they would take it to an off-site storage facility if the motor home went unused for fifteen days. Neither the trial court nor the court of appeals was impressed with the Crawleys' "reasonable use" defense.

The court of appeals defined a restrictive covenant as "an agreement duly made to do, or not to do, a particular act" that is "created in conveyances or other instruments."[93] In addition, the court identified restrictive covenants as a form of express contract.[94] Because restrictive covenants were viewed as merely another species of contract, the *Crawley* court applied traditional contract interpretation tools to section 17. These tools included determining the parties' intent from the specific language used in the covenant and from the situation of the parties when the covenant was made, reading specific words and phrases in

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90. 753 N.E.2d 740 (Ind. Ct. App. 2001).
91. 750 N.E.2d 452 (Ind. Ct. App. 2001).
92. *Crawley*, 753 N.E.2d at 742.
93. *Id.* at 744.
94. *Id.*

conjunction with other provisions of the contract, determining the parties' intentions from the entirety of the contract, and construing the covenant provisions "so as to harmonize the agreement."[95]

Using these tools, the court of appeals saw no merit in the Crawleys' argument that the terms of the covenant were ambiguous or in their attempt to portray their conduct as reasonable and therefore not in violation of the covenants. The Crawleys were enjoined from parking their motor home on their property in the subdivision.[96]

The message of *Crawley* is clear. Restrictive covenants are valid, and unless ambiguous, they are strictly enforceable by another covenantee. That an expensive motor home would not normally be considered a nuisance or even an eyesore does not lessen the necessity of compliance. The same is true even though violation of the covenant is not continuous or is limited in duration.

The strict enforcement given to unambiguous restrictive covenants is noteworthy because it imposes a duty of inspection on buyers of real estate. Buyers cannot assume that once they become owners they will be permitted to engage in activities that contradict the terms of restrictive covenants on the ground that those activities are "reasonable." Because reciprocal benefits and burdens are designed to preserve the property values of all covenantees, the presence of even one objector will be sufficient to enjoin the prohibited activity. Further, although notice was not an issue in *Crawley*, buyers must be aware that they will not be able to assert lack of knowledge as a defense to an obligation imposed by a restrictive covenant. Provided that a declaration of the neighborhood covenants has been recorded in the office of the county recorder, the covenants will run with the land and will bind subsequent purchasers by virtue of constructive notice.

Standardized real estate purchase agreements provide a limited time for a buyer to inspect the covenants where membership in a homeowner's association is mandatory, as it usually is. The purchase agreement form for improved property prepared by the Indiana Association of Realtors states, "If the Buyer does not make a written response to the [homeowner's association] documents within _____ days after receipt, the documents shall be deemed acceptable."[97] Once deemed acceptable in the offer to purchase, the buyer has lost the ability to object to the covenants' provisions. The buyer's due diligence must therefore include a careful review of homeowner's association documents.

2. Howell v. Hawk.—Where *Crawley* promotes a policy favoring enforcement of clearly stated restrictive covenants, *Howell* demonstrates an approach to restrictive covenants that are ambiguous. The *Howell* court determined that if a term in a restrictive covenant is ambiguous the policy favoring free alienability of land compels use of the least restrictive meaning of

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95. *Id.* at 745.

96. *Id.* at 746.

97. Indiana Ass'n of Realtors, Inc., Purchase Agreement (Improved Property), Form # 02 (2001), para. 17.

the covenant.[98]

The *Howell* court, much like the *Crawley* court, began its analysis by identifying restrictive covenants as a form of contract. "We have held that restrictive covenants are, in essence, a form of express contract between a grantor and a grantee in which the latter agrees to refrain from using his property in a particular manner."[99] The court also noted that restrictive covenants are created "to maintain or enhance the value of land by controlling the nature and use of lands subject to a covenant's provisions."[100]

Also similar to the *Crawley* court, the court in *Howell* applied traditional tools of contract interpretation. "Because covenants are a form of express contract, we apply the same rules of construction. . . ."[101] Unlike the *Crawley* court, which was presented with unambiguous covenants, the *Howell* court considered the effect of ambiguity on the enforceability of restrictive covenant terms. "[W]here the intent of the parties cannot be determined within the four corners of the document, a factual determination is necessary to give effect to the parties' reasonable expectations."[102] The ambiguity in that case was whether the prohibition against "mobile homes" in Oak Bend precluded Hawk from constructing a "manufactured home" in the subdivision.

For the *Howell* court the presence of ambiguity called into play a proposition of law that was not mentioned in *Crawley* and that limits the enforceability of restrictive covenants. The court stated, "As a general proposition, restrictive covenants are disfavored in the law, strictly construed by the courts, and all doubts should be resolved in favor of the free use of property and against restrictions."[103] This statement foreshadows the result of the appeal.

For the trial court, the outcome of the case depended on "whether the term 'mobile home' as used in the plain language of the restriction [drafted in] 1972 is broad enough to encompass the house placed on Ms. Hawk's lot in 1999."[104] To answer this question, the trial judge engaged in an admirably broad examination of factors that would determine whether a manufactured home could be categorized as a mobile home. These factors included: 1) tax assessment procedures used by the county assessor, 2) understanding of realtors from custom and usage, 3) presence of steel chassis, 4) type of foundation, 5) applicable

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98. *Howell*, 750 N.E.2d at 456 (citing Campbell v. Spade, 617 N.E.2d 580, 584 (Ind. Ct. App. 1993)).

99. *Id.* (citing Columbia Club, Inc. v. Am. Fletcher Realty Corp., 720 N.E.2d 411, 418 (Ind. Ct. App. 1999)).

100. *Id.* (citing *Campbell*, 617 N.E.2d at 584).

101. *Id.*

102. *Id.* (citing *Campbell*, 617 N.E.2d at 584). In *Campbell*, the court found the trial court's grant of summary judgment in favor of a lot owner in a suit filed by the neighborhood association to be inappropriate. A factual dispute existed regarding the parties' intent of whether the construction and use of a gravel roadway on the lot without a residence violated the restrictive covenant that limited use of lots to "residential purposes only." *Campbell*, 617 N.E.2d at 583-84.

103. *Howell*, 750 N.E.2d at 456 (citing *Campbell*, 617 N.E.2d at 584).

104. *Id.* at 455.

building codes (state and local versus HUD requirements), 6) construction off-site and delivery in segments or as a whole, 7) nature of seller's business, 8) transportability on attached wheels, 9) number of square feet of living space, 10) similarity in appearance to other homes in the subdivision, and 11) Indiana Administrative Code definitions.[105] After analyzing these factors and applying the presumptions against restrictions and in favor of free use of land, the trial court concluded that Hawk's manufactured home did not violate the covenant against mobile homes. It therefore denied the residents' request for an injunction.

On appeal, Howell and the other residents argued that the trial court had erred in finding the term "mobile home" to be ambiguous and in finding that Hawk's manufactured home was not encompassed by that term. Addressing the residents' reliance on various statutory definitions of "mobile home," the court of appeals emphasized the paramount contract interpretation principle of "giv[ing] effect to the actual intent of the parties, as determined from the language used, the motives of the parties and the purposes they sought to accomplish."[106] The court added that the language of a covenant should be read in its ordinary or popular sense rather than a legal or technical sense and that the parties' construction of an ambiguous term is the best evidence of its meaning.[107] Finally, the court echoed the trial court's emphasis of free use of land over restrictions on use. "Covenants will be most strongly construed against the covenantor, at least where the terms used therein are equivocal."[108] The court of appeals affirmed the trial court's decision that Hawk's manufactured house was not barred by the covenant prohibiting mobile homes.[109]

To determine the parties' intent in their use of the word "mobile home" in the restrictive covenants, the court of appeals utilized a functional analysis that focused on the appearance and size of Hawk's house and on the purpose behind the covenant. The court identified the fundamental intent of the parties in prohibiting mobile homes in the subdivision as maintaining the covenantees' property values.[110] Guided by this goal, the court of appeals noted that Hawk's house exceeded the square footage requirements of the covenants and that it looked like the other houses in the neighborhood.[111] Because "a person could not tell [Hawk's house] from the others,"[112] it did not threaten the neighbors' property values and thus did not violate the intent of the covenant.[113] The court of appeals' use of a functional approach accommodated the covenantee's desire to preserve land values and preserved the free use of land against ambiguous

105. *Id.* at 453-55.
106. *Id.* at 457.
107. *Id.*
108. *Id.*
109. *Id.* at 460.
110. *Id.* at 456.
111. *Id.* at 459.
112. *Id.*
113. *Id.* at 459-60.

restrictions.

Perhaps the most important contribution of the *Howell* opinion is its focus on the parties' intent for a restrictive covenant as expressed at a particular time. The court stated that "[i]ntent should be determined *as of the time the covenant was made* . . . ."[114] This temporal component of the analysis fixes the parties' intent at a point in the past and does not permit the restrictive covenant to be interpreted to include conditions or products that arise subsequently, unless those conditions or products are unambiguously encompassed by the original covenant terms.

In 1972, when the restrictive covenants at issue in the *Howell* case were drafted, the court concluded that a mobile home was the only type of housing that was not "stick-built." Further, a mobile home was understood to be a "house trailer" that possessed identifiable features, including relatively small size (single-wide construction), ability to be towed on the highway using its own tongue and wheels, and absence of a permanent foundation.[115] Housing of this type was seen as a threat to property values for owners of stick-built homes.

However, between 1972 and 1999, when the College-Hill subdivision residents sought the injunction against Hawk, housing options had expanded to include double-wide mobile homes, manufactured homes, and modular homes in addition to stick-built homes. The distinction between home types was further blurred as components of stick-built homes may now be constructed off-site and delivered to the owner's lot for assembly. This evolution in housing options, the court of appeals said, has resulted in "now-overlapping concepts" in housing types.[116]

Issues can, and likely will, arise when products evolve but the intent of the convenantees' language cannot. For the court of appeals, the appropriate response to changed conditions is to change the language of the covenant. "Had the [residents] wished to clarify the covenant so as to restrict any structure other than a so-called 'stick-built' home, they had the means and the terminology at their disposal to do so."[117]

The court of appeals' emphasis on amending the language of restrictive covenants to keep pace with the times may not be the panacea it is portrayed to be. Such an amendment may be impossible if the restrictive covenants require a supermajority vote of homeowners to amend the covenants. A supermajority would not have been a problem in the *Howell* case as ninety-one residents of College-Hill joined in the complaint and in the appeal, but it is easy to conceive of situations where a sufficient number of lot owners will refuse to amend the covenants to exclude the newly-evolved product. The non-agreeing lot owners may be motivated by a desire to use their land in the way the other owners would like to prohibit or they may simply wish to maximize the marketability of their land by keeping it free of additional restrictions. The difficulty in amending

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114. *Id.* at 457 (emphasis added).

115. *Id.* at 458-59.

116. *Id.* at 459-60.

117. *Id.* at 460.

covenants would of course be amplified if unanimity is required.

The most effective approach for preserving the enforceability of restrictive covenants and for anticipating future developments is to utilize both negative restrictions and affirmative intent statements. To address existing conditions, the restrictive covenants should identify the prohibited structures, practices, and conditions as specifically as possible. To address future developments, the restrictive covenants should clearly identify the goal of the restriction. An affirmative goal statement of preserving property values by permitting the construction of residences using construction methods and building materials similar to existing homes in a subdivision states the residents' intent in a way that may lessen the risk of ambiguity due to the evolution of "overlapping concepts" of housing types.

B. Exclusion of Statutorily Created Interests in Real Estate from the Public Document Recording System: Mattingly v. Warrick County Drainage Board[118]

Prospective purchasers of real estate are naturally interested in confirming the state of title to the land they plan to purchase. Some certification of the state of title is contained in the words of grant contained in the deed and in the vendor's affidavit that generally accompanies a deed, but no reasonable, let alone careful, buyer would rely solely on the seller's affirmations. That buyer would seek further confirmation.

Further confirmation will often consist of a search of the documents placed in the public recording system. The most obvious place to conduct such a search is in the recorder's office in the county where the land is located. In that office, the prospective buyer will find deed record books, mortgage record books, and miscellaneous record books[119] that contain copies of documents affecting title to real estate.[120] These books are, however, not the only books in the recorder's office that must be examined. There will also be books that index federal and state tax liens.

Nor is the recorder's office the only office in the county courthouse that the prospective buyer must search. He must also check the county clerk's office to determine if any judgments have been entered against the seller as those judgments constitute a lien against all of the seller's real estate in that county.[121] Similarly, the prospective buyer must check the *lis pendens* record book to determine whether there are any pending complaints against the seller that would

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118. 743 N.E.2d 1245 (Ind. Ct. App. 2001).

119. These "books" may be in electronic form in many counties, but the intent and organization of the documents in them is the same whether the medium is print or electronic.

120. Although the possibility of having one's interest in land defeated, as by a bona fide purchaser, or subordinated, as by a recorded lien, is powerful incentive to record a document setting forth one's interest in land, recording is not required. As a result, the availability of public recording does not mean that every relevant document has been recorded.

121. IND. CODE § 34-55-9-2 (1998).

affect the real estate. Additionally, the county treasurer's records must be examined to determine if unpaid real estate taxes have resulted in a lien against the property.

Nor is the county the only governmental subdivision whose records must be examined. The federal court clerk's records must be searched for pending actions, and the federal bankruptcy clerk's records must be searched to determine whether the seller has filed a bankruptcy petition (or had one filed against him) that would include the real estate as part of a bankruptcy estate. Additionally, if the real estate is located in a town or city, the buyer must check the records of various municipal offices for a variety of charges that could constitute liens, such as utility assessments.

This list of offices whose records must be consulted is not exhaustive;[122] it includes only those records that are most commonly encountered in a real estate transfer. Because there is no centralized record system for real estate, a person interested in confirming the state of title for a parcel of land is made to work for his answer. Even though the public document recording system provides a generally workable framework for verifying the state of title of real estate, the system does contain "holes." These holes exist when an interest in real estate cannot be discovered, no matter how diligent the search of the public records. The relation-back provisions of mechanic's liens is an obvious example.[123] A future advances clause contained in a mortgage raises a similar problem.[124] Knowing that these holes exist, persons who wish to acquire an interest in real estate can take steps to protect themselves against the uncertainties about the state of title.[125]

Occasionally, a case comes along that highlights a further shortcoming in the public document recording system as a means of title verification. Such a case in 2001 was *Mattingly v. Warrick County Drainage Board.* The problem in that case arose from the fact that statutorily created interests in real estate are excluded from the recording system. Constructive notice arises merely from the enactment of the statute or regulation.

Mattingly purchased 3.10 acres of land in Warrick County, on which he planned to construct eight buildings containing 457 mini-storage units. After closing of the purchase and during the building permit process, Mattingly learned that a "regulated drain" abutted one border of his land and that his proposed construction encroached on the seventy-five foot right-of-way associated with the

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122. One text identifies seventy-six types of records located in sixteen different public offices that contain information relevant to the state of title to land. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 216 (5th ed. 1998) (citing QUINTIN JOHNSTONE & DAN HOPSON JR., LAWYERS AND THEIR WORK 274-75 (1967)).

123. IND. CODE §§ 32-8-3-1 to -3-15 (1998 & Supp. 1999). *See* Lloyd T. Wilson, Jr., *Reconstructing Property Law in Indiana: Altering Familiar Landscapes*, 33 IND. L. REV. 1405, 1406-10 (2000). Effective July 1, 2002, the mechanic's lien statutes will be recodified at Indiana Code sections 32-28-3-1 to -18.

124. *See* Wilson v. Ripley County Bank, 426 N.E.2d 263, 266, 269 (Ind. Ct. App. 1984).

125. *See* Wilson, *supra* note 123, at 1411-13.

drain. Mattingly asked the Warrick County Drainage Board to decrease the size of the right-of-way to twenty-five feet, but the board would only agree to a reduction to fifty feet. The effect of a fifty-foot right-of-way was to reduce the number of mini-storage units Mattingly could construct by thirty percent, from 457 to 318.

Mattingly sued the drainage board, alleging an unconstitutional taking of his property. The board and Mattingly filed cross-motions for summary judgment. In his motion, Mattingly argued that his land was not encumbered by the right-of-way for the drain because he did not have actual knowledge of its existence and could not be deemed to have constructive knowledge because there was no public record to put him on notice that a regulated drain existed on his land. The trial court denied Mattingly's motion and granted the motion for summary judgment filed by the board. The court of appeals affirmed the trial court's decision.[126]

Indiana Code section 36-9-27-2[127] defines a regulated drain as "an open drain, a tiled drain, or a combination of the two." Once a county declares a drain to be "regulated," the county becomes responsible for repairing and maintaining it.[128] The court of appeals identified a regulated drain as an interest in land in the nature of a license that includes both a right-of-entry and a right-of-way.[129]

Even if the drain was statutorily created, Mattingly argued that it could not adversely affect his title because the statutes that authorize and define regulated drains do not inform him that a drain exists on *his* land. Mattingly further argued that no publicly recorded documents existed by which he could have discovered the drain's existence. The court did not agree.

In addition to interests in land that can be created by private action or agreement or through judicial proceedings, the court of appeals noted that interests in land can also be created by statute. For those interests, the public document recording system is inapposite. Instead, the statute that creates the interest in land will designate a custodian of the records, and it is only in the records of the custodian that documents affecting real estate will be found. "[T]he easement associated with the regulated drain is a creature of statute and . . . was created by public action rather than by private agreement. Ind. Code § 36-9-27-29 designates the county surveyor as the 'technical authority' [for] . . . all regulated drains . . . in the county."[130] By virtue of his status as technical authority, the court of appeals determined that "the county surveyor is the custodian of the records pertaining to regulated drains . . . ."[131] Further, the county surveyor is required only to possess the records; "[t]he statute does not require the county surveyor to record regulated drains with the county

126. *Mattingly*, 743 N.E.2d at 1251.

127. IND. CODE § 36-9-27-2 (1998).

128. *Mattingly*, 743 N.E.2d at 1247 n.2 (citing Johnson v. Kosciusko County Drainage Bd., 594 N.E.2d 798, 800 (Ind. Ct. App. 1992)).

129. *Id.* at 1249 (citing *Johnson*, 594 N.E.2d at 804).

130. *Id.* at 1250.

131. *Id.*

recorder."[132]

The Warrick County Surveyor did maintain a list of the drains in the county and had maps showing their location. Such lists did not, however, show the location of regulated drains and they were not indexed by name of property owner. Instead the drains were locatable only by applying known geographic information to the maps. The court of appeals nonetheless concluded that the list and the maps were "public records" that "provide[d] constructive notice of the regulated drain" to Mattingly and the public in general.[133] Because constructive notice had been given, the board could enforce its right-of-way. Further the board's assertion of its pre-existing interest in land, as evidenced by its refusal to reduce the size of the right-of-way to Mattingly's liking, could not constitute a "taking" that required compensation.[134]

The court of appeal's decision in *Mattingly* serves as a sobering reminder of the limitations of the public recording system as a means of confirming the state of title to real estate. *Mattingly* is not unique, however, in this regard. In 1998 the court of appeals decided *WorldCom Network Services, Inc. v. Thompson*.[135] In that case, owners of land were deemed to have constructive knowledge of a county highway right-of-way even though there was no record of it in the county recorder's office. In upholding the enforceability of the right-of-way, the court of appeals determined that the owners had constructive notice of the existence of the right-of-way because of a 1913 entry in the county Board of Commissioner's order book.[136] The presence of that order book in the office of the county auditor was a "public record binding on the [owners]."[137]

As *Mattingly* and *WorldCom* demonstrate, the scope of inquiry necessary to "confirm" the state of title to real estate is broad. In addition to the multiple public offices where privately or judicially created interests in land are deposited, one must also take into account statutorily created interests that do not depend on the public document recording system to impart constructive notice.

C. The Scope and Duration of Real Covenants

Restrictive covenants used by neighborhood associations, as in *Crawley* and *Howell*, are a means by which a group of landowners can use contractual agreement to impose reciprocal benefits and burdens that affect and run with the land. When a grantor wishes to impose some restriction or affirmative duty on a grantee affecting a single parcel of land upon transfer, that restriction or duty is imposed by way of a real covenant contained in a deed. The court of appeals considered the scope and duration of such a real covenant in *Keene v. Elkhart*

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132. *Id.*
133. *Id.* at 1250-51.
134. *Id.* at 1251.
135. 698 N.E.2d. 1233 (Ind. Ct. App. 1998).
136. *Id.* at 1241.
137. *Id.* at 1238.

County Park & Recreation Board.[138]

The relevant facts of that case begin in 1924 when the owners, the Darrs, conveyed by deed a 100-foot strip of land on their farm to the Interstate Public Service Company (IPSCO). This strip of land ran the length of the Darrs' farm and bisected it. IPSCO intended to use the strip for a hydraulic canal in conjunction with a hydroelectric generating facility it operated on the Elkhart River. The canal would prevent the Darrs from accessing the rear part of their farm.

To address the bisection of the farm, IPSCO agreed, as part of the consideration for the sale of the strip, to "construct and forever maintain a proper bridge over the canal . . . , which bridge shall be one constructed and maintained as to provide safe and secure crossing over said canal for all farming operations upon [the] land. . . ."[139] IPSCO's obligation was memorialized as a real covenant in the deed from the Darrs to IPSCO. The deed further provided that "[t]he conditions herein set forth to be done and performed by said grantee shall be a burden upon and run with the title of the land hereby conveyed."[140]

IPSCO deeded the strip of land to Northern Indiana Public Service Company (NIPSCO) in 1932, and in 1970 NIPSCO deeded the land to the Elkhart County Park and Recreation Board (Board). Although the number of intermediary owners of the farm is not identified, the Keenes eventually acquired the Darrs parcels. The bridge was apparently maintained in a manner satisfactory to all parties until 1996. In that year the Keenes filed suit against the Board, alleging that it had failed to perform its obligations under the real covenant because it had failed to make necessary "repairs and alterations." As a result, the Keenes alleged that the bridge was "no longer suitable for [their] farming needs."[141]

The Keenes filed a motion for summary judgment, claiming that the real covenant in the deed obligated the Board to maintain the bridge "such that [it] could support reasonable modern farming operations."[142] The Board filed a cross-motion for summary judgment, arguing that its maintenance and repair duties were to be measured by the original 1924 specifications for the bridge. The trial court agreed with the Board.

The parties did not dispute that the Board, as successor in interest from IPSCO, was bound by the real covenant IPSCO had accepted, nor did they dispute that the Keenes were entitled to enforce the covenant as successors in interest to the Darrs. The parties did disagree, however, about the proper scope of the duty the covenant imposed. Were the maintenance and repair obligations assumed in 1924 to be viewed as static or evolving?

After reviewing basic principles applicable to real covenants, the court of appeals engaged in deed interpretation, "[t]he object [of which] is to identify and implement the intent of the parties to the transaction as expressed in the plain

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138. 740 N.E.2d 893 (Ind. Ct. App. 2000).

139. *Id.* at 895.

140. *Id.*

141. *Id.* at 895-96.

142. *Id.* at 896.

language of the deed."[143] Applying "ordinary and popular" meanings to the words in the covenant, as opposed to "technical or legal"[144] meanings, the court resolved the issue in three steps. First, it said that the obligation to construct and repair was tied to the characterization of the bridge as a "proper bridge." What made the bridge "proper" was suitability for some purpose, which the parties had identified in the real covenant as "[to] provide safe and secure crossing over [the] canal for all farming operations upon [the] land."[145]

Second, the court determined the duration of the obligation. It concluded that the use of the term "forever" in the deed "indicate[d] that this obligation would run in perpetuity."[146]

The final component of the court's analysis was to determine the scope of the necessary duties to maintain a bridge that would be "proper" because it provided "safe and secure crossing . . . for all farming operations upon [the] land." The court focussed on the word "all." From the inclusion of this word, the court concluded that the original parties to the real covenant did not intend to limit IPSCO's obligations (and thereby the obligations of IPSCO's successors) "to farming operations of a particular kind or extent."[147] When the court joined the unlimited extent of the repair and maintenance obligation with the unlimited time frame, it had the basis for rejecting the Board's contention that its obligations were fixed at 1924 standards. "[W]hen the phrase 'all farming operations' is read in conjunction with the perpetual nature of the obligations imposed by the covenant, it is clear that the parties did not intend that IPSCO's obligations would be fixed to the type or extent of farming operations in existence at any particular time."[148]

Instead, the court permitted the covenant obligation to be an evolving one. "We accordingly conclude that the Board's maintenance obligation under the covenant includes the perpetual duty to ensure that the bridge over the canal remains *sufficient to accommodate the farming operations performed on the Keenes's land.*"[149]

The court recognized that a perpetual maintenance obligation would exceed the useful life of the bridge and someday would require a new bridge to be built. The court also acknowledged that its ruling might seem inequitable as the Board did not receive any advantage from the 100 foot-wide strip of land, like IPSCO might have received, to offset the burden of repairing or replacing the bridge. Nevertheless, the court concluded that the Board was bound as successor in interest to the land burdened by a real covenant. The rule that "one who takes real property subject to covenants running with land set forth in a deed is bound

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143. *Id.* at 897 (citing Windell v. Miller, 687 N.E.2d 585, 589 (Ind. Ct. App. 1997)).
144. *Id.*
145. *Id.*
146. *Id.* at 898.
147. *Id.*
148. *Id.*
149. *Id.* (emphasis added).

by those covenants as if he were a party to the original transaction"[150] left no room for consideration of apparent burdens on successors in interest who may share little in common with the original grantee.

The *Keene* opinion does identify one open question that is likely to resurface: Even if it can be said that the parties intended to impose and to accept a changeable duty, how are the permissible extent and frequency of changes to be evaluated when the covenant is silent on those aspects. In other words, how far can the evolution of a duty progress? The Board argued that a perpetual and evolving maintenance burden rendered the covenant too uncertain to be enforceable. Specifically, the Board asserted that:

> [I]f [the Board] is required to maintain the bridge so that it will be suitable for use in connection with whatever farming operations are being conducted on the Keenes's property at any given time, [it] will be forced to improve or rebuild the bridge at the whim of the Keenes. . . .[151]

The court did not consider this objection sufficient to void the covenant. The court acknowledged that the covenant did not provide for "a fixed schedule of maintenance or decide in advance the exact specifications of future improvements,"[152] but, based on the parties' operation under the covenant from 1924 until the present dispute, the court said it was confident that the covenant was "sufficiently defined to guide their obligations in the future."[153]

The court's confidence in parties' ability to agree on undefined terms may be overly optimistic, both for the Keenes and the Board and for parties to other real covenants. In the absence of specifications, how is a court to determine whether an owner's demand for maintenance, repair, or reconstruction is excessive? If a court imposes a reasonableness standard, doesn't the court become involved in writing terms for the parties that they did not write for themselves? Further, wouldn't a reasonableness standard perhaps penalize the Keenes if they used larger equipment than their neighbors, and which permitted them to farm more efficiently, even if the result is greater and more frequent repairs to the bridge? Plus, shouldn't the covenant obligation pertain to the particular owner's use of this particular piece of land, as it was all farming operations on this land that was protected by the covenant? But on the other hand, aren't the Keenes being given the power to impose significant costs on the Board if they do indeed use unusually large and heavy equipment? If courts are going to be reluctant to invalidate restrictive covenants on vagueness grounds, covenantees may be dismayed at the ways courts fill gaps that the parties left behind.

Real covenants are a species of private law, where the parties have the ability to determine the content and scope of their rights and obligations. *Keene* emphasizes the care the original grantor and grantee must use when establishing

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150. *Id.* at 899 (citing Midland R. Co. v. Fisher, 24 N.E. 756, 756-58 (Ind. 1890)).

151. *Id.*

152. *Id.*

153. *Id.*

their private law rights and duties and the care subsequent guarantees must exercise before accepting title to real estate. Absent such care a subsequent grantee can incur unanticipated, and potentially undesirable, duties through real covenants.

D. The Elements and Scope of the Implied Warranty of Habitability in Sales of Residential Housing

Indiana law protects homebuyers from losses arising from latent defects in the property and improvements by implying a warranty of habitability. Through this warranty the vendor "warrants that the home will be free from defects that substantially impair the use and enjoyment of the home."[154] Two cases decided by the court of appeals address this warranty. *Smith v. Miller Builders, Inc.* provides an important clarification of the elements of proof a homeowner must establish to succeed on a claim for breach of implied warranty. *Carroll's Mobile Homes, Inc. v. Hedegard*[155] helps define the scope of the implied warranty by analyzing the classes of persons subject to the duties of the warranty. *Smith* and *Carroll's Mobile Homes* are thus important for defining the extent of protection provided to homebuyers who sustain losses arising from conditions unknown to them prior to closing.

1. Clarifying the Role of Reliance: Smith v. Miller Builders, Inc.—In *Smith*, homeowners, the Smiths, sued the developer of their subdivision, Miller, for negligent design and construction of drainage facilities and for breach of the implied warranty of habitability.[156] The primary issue considered on appeal was whether the trial court correctly concluded that the Smiths, who purchased the house from the original purchaser and not from the developer, could not recover from Miller because they did not rely on Miller's skill or expertise.[157] Is reliance a necessary element of an implied warranty of habitability claim asserted by a remote purchaser?

Miller was a real estate developer who developed a subdivision in St. Joseph County. In the subdivision approval process, Miller identified storm water drainage problems at the property, especially with regard to lots platted in the southwest corner of the subdivision. To address these problems, the County made approval of Miller's subdivision application subject to certain lot elevation requirements and to the construction of an urban drain engineered to accommodate a specified volume of water.

The St. Joseph County Area Plan Commission approved Miller's subdivision application, including its drainage system, in 1986. In 1988, Miller sold lot 71, which is located in the southwest corner of the subdivision, to Mrs. Crachy. Mrs. Crachy and her husband then built a house on the lot. Sometime thereafter, the basement of the Crachys' house flooded following a heavy rain. The drainage

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154. Smith v. Miller Builders, Inc., 741 N.E.2d 731, 740 (Ind. Ct. App. 2000).

155. 744 N.E.2d 1049 (Ind. Ct. App. 2001).

156. *Smith*, 741 N.E.2d at 734.

157. *Id.* at 740-41.

basin area at the rear of the lot also filled with water.

The Smiths purchased the Crachys' house in 1991. Prior to the sale, the Crachys told the Smiths about the earlier flooding. In 1993, the basement of the Smiths' house flooded after a heavy rain. An engineering study revealed that the retention basins in the subdivision were built to accommodate approximately twenty percent fewer cubic feet of water than called for in Miller's approved design, that none of the drywells planned for the drainage plain had been constructed, and that the Smiths' lot was located in a natural drainage course.

The Smiths' sued the developer, who planned and developed the subdivision, including the drainage plan, but who did not construct the house in which they lived. The court of appeals framed the issue stating, "The question addressed . . . was [w]hether a professional developer who improves land for the express purpose of residential homebuilding with knowledge but without disclosure of a latent defect in the real estate that renders the land unsuitable for the purpose of residential homebuilding breaches an implied warranty of habitability."[158]

The trial court based its analysis on a factually similar case the court of appeals had decided in 1989, *Jordan v. Talaga*.[159] In *Jordan*, homeowners sued subdivision developers, who improved the land but did not build the house, alleging breach of implied warranty of habitability when their home and lot were damaged from periodic flooding. The court of appeals in *Jordan* held that the theory of implied warranty of habitability is applicable to professional developers and that the developers in that case breached the duty.

Because there was no authority in Indiana on the issue raised in *Jordan* that court looked to a Colorado case, *Rusch v. Lincoln-Devore Testing Laboratory, Inc.*[160] The *Jordan* court quoted the *Rusch* opinion for the principle that:

> [I]f land is improved and sold for a particular purpose, if vendor has reason to know that the purchaser is relying upon the skill or expertise of the vendor in improving the parcel for that particular purpose, and the purchaser does in fact so rely, there is an implied warranty that the parcel is suitable for the intended purpose.[161]

The trial court in the Smiths' case characterized the *Jordan* court as "essentially adopt[ing]" the *Rusch* rule, including the element of reliance by the homeowner. Because a remote homebuyer could not have relied on a developer with whom that homebuyer had not dealt, the trial court entered judgment in favor of Miller.

In examining the Smiths' claims on appeal, the court of appeals re-examined the use that the *Jordan* court had actually made of the *Rusch* decision. The court of appeals concluded that the trial court had misconstrued the *Jordan* court's use of *Rusch*, stating that the court in *Jordan* "did not adopt" the holding of the

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158. *Id.* at 742 (alteration in original).

159. 532 N.E.2d 1174 (Ind. Ct. App. 1989).

160. 698 P.2d 832 (Colo. Ct. App. 1984).

161. *Jordan*, 532 N.E.2d at 1185.

Colorado court.[162] Instead, the court of appeals said that the *Jordan* court had found the *Rusch* decision "worthy of note" because it "illustrate[d] that other jurisdictions had reached the same conclusion under similar facts; namely that subdivision developers were liable to the homeowners for breach of the implied warranty of habitability."[163]

The question actually resolved by *Jordan*, according to the *Smith* court, was that for purposes of the implied warranty of habitability the term "vendor" could include a developer of real estate intended for residential use even if the developer did not build (and thus was not the "vendor" of) the residence that was damaged by a defect in the design or engineering of the land on which the residence sits. To explain the imposition of the warranty of habitability on the developer, the *Smith* court relied on the following factors and policy concerns established in *Jordan*: that developers are professionals in the real estate development business, that they may sell land without disclosing known defects, and that they do more than sell raw land as they construct infrastructure such as roads and sewers specifically for home construction.[164] Including developers within the definition of vendor was also guided by the policy concern that "homeowners would be left without a remedy for latent defects in real estate that unscrupulous developers failed to disclose."[165]

Having clarified what had been decided in *Jordan*, and what had not been decided, the *Smith* court turned to the issue it said had not been addressed in that case—whether under Indiana law reliance by a homeowner is a required element of a claim for breach of implied warranty. To answer this question the *Smith* court noted the trend inherent in the development of the implied warranty of habitability in residential construction.

The implied warranty of habitability in home purchases originated in Indiana in 1972 in *Theis v. Heuer*.[166] In that case, the Indiana Supreme Court held that the doctrine of *caveat emptor* would no longer be applied to claims of a homeowner involving the purchase of a new residence from the builder-vendor.[167]

The next significant development occurred in 1976 when the Indiana Supreme Court decided *Barnes v. Mac Brown & Co.*[168] The court there held that the warranty of habitability protects second and subsequent homeowners from latent defects that are not discoverable on the purchaser's reasonable pre-purchase inspections and which manifest themselves after the purchase.[169]

The court of appeals in *Smith* observed that nothing in *Barnes* required the second or subsequent homeowner to prove that he had relied on the builder's

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162. *Smith*, 741 N.E.2d at 742.
163. *Id.*
164. *Id.* (citing *Jordan*, 532 N.E.2d at 1185).
165. *Id.* (citing *Jordan*, 532 N.E.2d at 1186).
166. 280 N.E.2d 300 (Ind. 1972).
167. *Id.* at 306.
168. 342 N.E.2d 619 (Ind. 1976).
169. *Id.* at 620-21.

skill or expertise.[170] The court of appeals also stated that "such reliance would be unlikely and hard to prove given the lack of privity between the parties."[171] Thus, imposition of a reliance element would frustrate the policy objective noted in *Jordan* of providing a remedy for homeowners damaged by a developer's failure to disclose the existence of a known latent defect and would be counter to the consumer protection interests furthered by *Theis* and *Barnes*.

The court of appeals' decision in *Smith* continues the trend of expanding consumer protection in home purchases and of imposing liability on developers who fail to disclose their knowledge of latent defects. *Smith* does so by making clear that a "vendor" includes persons in addition to those who construct and sell houses; the term also includes those persons who construct infrastructure and sell lots to others, who in turn build houses. Thus, the court expanded the focus of the warranty of habitability from the residence building itself to all components of the development process that are necessary prerequisites for that residence. Imposition of reliance as an element of a claim for breach of implied warranty of habitability would have permitted some site developers who covered up latent engineering defects to escape liability. In the absence of a reliance element, such developers can be held responsible for the effects of their failure to disclose. By clarifying the meaning of its prior holding in *Jordan*, the court of appeals increased the sense of order in the law of implied warranties of habitability. The consumer protection goals inherent in the implied warranty are freed of an unnecessary barrier.

2. The "Builder" Component of "Vendor": Carroll's Mobile Homes, Inc. v. Hedegard.—The scope of consumer protection afforded by the implied warranty of habitability was also considered in *Carroll's Mobile Homes, Inc. v. Hedegard,* but in that case the defendant-vendor's lack of participation in creating the latent defect precluded liability. In *Carroll's Mobile Homes*, the buyer of a mobile home sued the vendor of that home alleging structural damages resulting from the vendor's failure to set up the home according to the manufacturer's specifications. The buyer also alleged that the vendor failed to properly construct the foundation on which the home's footers and piers rested.

The buyer purchased the mobile home in 1987 but did not file suit until twelve years later. Because the statute of limitations barred the buyer's negligence and breach of contract claims, the buyer based her complaint on a confusing mix of allegations sounding in fraud and in breach of implied warranty of habitability. The trial court ultimately ruled in favor of the buyer on the warranty claim, finding that the vendor "owed Plaintiff a warranty of habitability that the mobile home, as installed, would be free from defects which would substantially impair the use and enjoyment of such mobile home."[172] The court of appeals reversed.[173]

The court of appeals initially noted that "[t]he implied warranty of

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170. *Smith*, 741 N.E.2d at 743.

171. *Id.*

172. *Carroll's Mobile Homes*, 744 N.E.2d at 1051.

173. *Id.* at 1051-52.

habitability applies only to home builders-vendors" and that it "does not apply to a mere vendor."[174] The court cited *Choung v. Iemma*[175] for several established principles of warranty of habitability law, including principles that define the scope of the warranty's protection by identifying what classes of persons are presumed to have extended the warranty. "[A]n implied warranty of habitability in the sale of a new house [is] extended from a 'builder-vendor'. . . ."[176] Further, a "'builder-vendor' is a person in the business of building and selling homes for profit."[177] The court of appeals concluded that Carroll's Mobile Homes may have been a vendor but it was not a "builder-vendor" subject to duties pursuant to an implied warranty of habitability.[178]

The principle by which *Smith* and *Carroll's Mobile Homes* can be reconciled is that habitability for breach of the implied warranty requires a causal connection between the vendor and the defect. With the removal of contractual privity and actual reliance as elements of a homebuyer's warranty claim, remote vendors responsible for "building" the defect can be held liable, while immediate vendors who did not contribute to the defect will not be liable simply by virtue of their status as a vendor.

III. SECOND CHANCES AT ORDERING: TWO RULINGS ON PETITIONS TO TRANSFER

Cases discussed in one volume of this law review can resurface in a subsequent volume as a result of the supreme court's decision to grant or to deny a petition to transfer. A grant of transfer and subsequent opinion will usually merit analysis; a denial of transfer may merit discussion if that denial leaves standing an opinion that injects uncertainty or disorder into the law. In the survey period of this volume, the supreme court provided an example of each.

A. The Scope of the Statute of Frauds in Property Law: Brown v. Branch[179]

The 2001 survey issue Article on Indiana property law contains an analysis of the court of appeals' decision in the *Brown* case.[180] That analysis criticized both the result the court of appeals reached and the method it used to reach that result. Fortunately, the Indiana Supreme Court reversed the court of appeals' decision. In so doing, the court avoided injecting substantial uncertainty into an area of law that appeared to have been long-settled and reestablished order to the adjustment of allegedly competing claims to land.

The critical fact in *Brown* is an oral promise by Brown, the owner of a house, to Branch, his girlfriend in a stormy on-again, off-again relationship. Following

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174. *Id.* at 1051.

175. 708 N.E.2d 7 (Ind. Ct. App. 1999).

176. *Carroll's Mobile Homes*, 744 N.E.2d at 1051 (quoting *Choung*, 708 N.E.2d at 12).

177. *Id.*

178. *Id.* at 1051-52.

179. 758 N.E.2d 48 (Ind. 2001).

180. Wilson, *supra* note 10, at 994-99.

one of the couple's multiple breakups, Branch moved to Missouri. Shortly after that move, "Brown telephoned [Branch] and said that if she moved back to Indiana, Branch would 'always have the . . . house' and that she '[would not] be stuck on the street. [She] [would] have a roof over [her] head.'"[181] Branch returned; the couple fought and broke up again; Brown reneged on his oral promise; Branch sued. To support her claim, Branch argued that the Statute of Frauds[182] did not apply to the case because Brown's promise was to "give" her the house and thus did not involve the "sale" of real estate as provided in the statute. Alternatively, Branch argued that Brown's promise was taken out of the Statute of Frauds by promissory estoppel principles. The trial court awarded the house to Branch. The court of appeals affirmed, accepting both of Branch's arguments.

The principal criticism of *Brown* made in last year's survey issue focused on the court of appeals' use of an unduly restrictive definition of the word "sale" contained in the Statute of Frauds.[183] According to the court of appeals, the Statute of Frauds applies only to "[a] contract between two parties, called, respectively, the 'seller' . . . and the 'buyer,' . . . by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property."[184] The court of appeals' approach, it was observed, ignored a rich history of appellate decisions which applied the Statute of Frauds to transactions that did not involve consideration, did not involve transfers of title, or did not involve a change in possession.[185] Further, the court of appeals' opinion failed to analyze the evidentiary function of the Statute of Frauds, which requires a writing to substantiate the existence of a promise involving real property and failed to provide any guidance to prevent the promissory estoppel exception from swallowing the rule.[186]

The supreme court corrected both of these errors and restored order to Statute of Frauds analysis. First the court clarified the meaning of the word "sale" in the statute. Second, it also provided guidance for the analysis of those situations where promissory estoppel may appropriately be used to take an oral promise affecting real estate out of the Statute of Frauds.

The supreme court acknowledged that the Statute of Frauds does not define the word "sale" in the phrase "any contract for the sale of lands" contained in Indiana Code section 32-2-1-1.[187] The court pointed out, however, that "the law is settled that . . . 'any contract which *seeks to convey an interest in land* is

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181. *Brown*, 758 N.E.2d at 50.

182. IND. CODE § 32-2-1-1 (1998).

183. Wilson, *supra* note 10, at 994-99.

184. *Id.* at 995 (alteration in original) (quoting Brown v. Branch, 733 N.E.2d 17, 22 (Ind. Ct. App. 2000), *vacated by* 758 N.E.2d 48 (Ind. 2001)).

185. *Id.* at 996.

186. *Id.* at 997.

187. *Brown*, 758 N.E.2d at 50-51. *See also* IND. CODE § 32-2-1-1 (1998).

required to be in writing.'"[188] This principle, previously "not often articulat[ed] . . . as such"[189] was clearly articulated by the supreme court in *Brown*. The Statute of Frauds applies to promises to convey an interest in real estate, "[a]nd this is so whether there is actually a 'sale' as the term is commonly used."[190]

In addition to bringing the *Brown* decision in line with long-established precedent, the supreme court's decision spares the judiciary from the specter of resolving claims affecting a wide variety of interests in real estate based solely on "the word of one person . . . against the word of another."[191] This specter resulted from the court of appeals' decision as "[t]he definition [of "sale"] chosen by [that] court [would] certainly permit more actions to proceed on the basis of oral allegations alone than was previously thought possible, and the evidentiary and fraud prevention functions of the statute of frauds [would] be frustrated."[192]

The supreme court confirmed the importance of the evidentiary function of the Statute of Frauds, stating:

> Requiring a writing for transactions concerning the conveyance of real estate, regardless of whether a sale has occurred within the dictionary definition of the term, is consistent with the underlying purposes of the Statute of Frauds, namely: to preclude fraudulent claims that would likely arise when the word of one person is pitted against the word of another, and to remove the temptation of perjury by preventing the rights of litigants from resting wholly on the precarious foundation of memory.[193]

Thus in the first instance, the Statute of Frauds provides an "unambiguous" and "bright line rule"[194] concerning the necessity of a writing.[195] Nevertheless, oral promises to convey an interest in real estate can be enforceable if the facts of the case are appropriate for the application of the doctrine of promissory estoppel. Because the court of appeals held that Brown's promise was not subject to the Statute of Frauds, it did not address the propriety of using promissory estoppel.[196] However, because the supreme court held that the Statute of Frauds did apply, it was compelled to consider the effect of promissory estoppel.

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188. *Brown*, 758 N.E.2d at 51 (quoting Guckenberger v. Shank, 37 N.E.2d 708, 713 (Ind. App. 1941)).

189. *Id.*

190. *Id.* (citing Hensley v. Hilton, 131 N.E. 38, 40 (Ind. 1921); Fuelling v. Fuesse, 87 N.E. 700, 701 (Ind. App. 1909); McCoy v. McCoy, 69 N.E. 193, 195 (Ind. App. 1903)).

191. *Id.*

192. Wilson, *supra* note 10, at 997.

193. *Brown*, 758 N.E.2d at 51 (citing Summerlot v. Summerlot, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980); Ohio Valley Plastics, Inc. v. Nat. City Bank, 687 N.E.2d 260, 263 (Ind. Ct. App. 1997)).

194. *Id.*

195. *Id.*

196. *Brown*, 733 N.E.2d at 22, *vacated by* 758 N.E.2d 48 (Ind. 2001).

The supreme court's analysis emphasized that "while it is true that the doctrine of promissory estoppel may remove an oral agreement from the operation of the Statute of Frauds, it is also true that the party asserting the doctrine carries a heavy burden establishing its applicability."[197] Specifically in *Brown,* Branch had the burden of establishing that injustice could be avoided only by enforcing Brown's promise.[198]

To establish injustice, the party seeking to enforce promissory estoppel "must show [ ] that the other party's refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was intended to confer, but the infliction of an unjust and unconscionable injury and loss."[199] The supreme court utilized the "degree of consideration given in reliance on an oral promise"[200] as the measure of the unjustness and unconscionability. It identified the consideration for Brown's promise as quitting her "modest" job, dropping out of college at the end of a semester, and moving back to Indiana. These items of consideration were insufficient to establish unjust and unconscionable injury and loss because they were either seen as inconveniences or merely the denial of the benefits of the otherwise unenforceable oral promise.[201] The doctrine of promissory estoppel did not, therefore, remove Brown's oral promise from the writing requirement of the Statute of Frauds.

The doctrine of promissory estoppel is attractive because it provides a safety valve for those situations where the promisor "us[es] the statute of frauds as a shield to insulate himself from responsibility for unwritten promises."[202] However, if applied too liberally, the doctrine will be the exception that consumes the rule. The Statute of Frauds promotes order; the doctrine of promissory estoppel introduces a degree of uncertainty in the name of fairness and justice in extraordinary circumstances. The supreme court struck a balance between the rule and the exception and provided a tool for identifying the existence of "extraordinary circumstances" through its analysis of the "degree of consideration" given by the promisee in reliance on the oral promise.[203] By correcting the approach taken by the court of appeals, the supreme court institutionally restored order to the law of the Statute of Frauds.

B. The Scope of a Mortgagee's Duty to Protect the Interests of Third Parties: Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods[204]

A second case analyzed in last year's survey on Indiana property law, *Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods* is referenced

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197. *Brown*, 758 N.E.2d at 52.
198. *Id.* at 53.
199. *Id.* at 52 (alteration in original).
200. *Id.* at 53.
201. *Id.*
202. Wilson, *supra* note 10, at 998.
203. *Brown*, 758 N.E.2d at 53.
204. 725 N.E.2d 1006 (Ind. Ct. App. 2000), *trans. denied*, 741 N.E.2d 1249 (Ind. 2000).

here because of inaction taken by the supreme court. In *Brown* the court granted transfer, corrected an erroneous legal conclusion, and provided guidance for the application of the doctrine of promissory estoppel to oral promises within the Statute of Frauds.[205] In contrast, in *Town & Country Homecenter,* the supreme court denied a material vendor's petition for transfer, leaving intact the court of appeals' fragmented opinion, despite the express request of panel members for the supreme court to review unsatisfactory precedent.[206]

In one sense the refusal of the supreme court to consider the *Town & Country Homecenter* case could be seen as leaving an established order in place. The problem with such a view is that it does not take into account the extraordinary dissatisfaction with the existing rule separately expressed by two of the three members of the court of appeals panel that decided the case. As noted in last year's Article, the court of appeals' opinion in *Town & Country Homecenter* is interesting because:

> [I]t contains a majority opinion, a concurring opinion that decries the result the author feels compelled to follow by virtue of Indiana Supreme Court precedent, and a dissenting opinion that decries the result [reached in the majority opinion] and finds a way to interpret existing precedent to allow a decision contrary to the one reached by the majority.[207]

Judge Sullivan's plea that "the supreme court . . . reopen the matter" to "avert the inequities apparent in the present state of the law" went unheeded.[208]

By not providing clear guidance and explanation of the scope of a mortgagee's duty to protect the interests of third parties at loan closings conducted by that mortgagee, the supreme court permitted the dissatisfaction with the rule, and the multiple potential approaches to it, to remain. Order is not achieved; unnecessary disorder is injected into the law as trial courts will struggle to decide whether they must follow the majority opinion or whether they can craft a way around it to avoid unfair results.

The analysis conducted in the 2001 edition of this volume[209] will not be repeated here; it remains unchanged by the supreme court's denial of transfer. The two competing views of real estate closings include one that considers each party to be independent and free of duties, absent contractual or agency bases, to others, and one that sees duties arising between the parties based on tort principles. At present, the self-protection model of real estate closings, which holds each party responsible for protecting his own interests alone absent a fiduciary, agency, or contractual relationship, remains the rule. However, the sense of outrage expressed by two judges at the potential for unfairness that can result from this model should lead to the recognition of duties based on a model

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205. *See supra* Part III.A.

206. Town & Country Homecenter of Crawfordsville, Ind., Inc. v. Woods, 741 N.E.2d 1249 (Ind. 2000).

207. Wilson, *supra* note 10, at 981.

208. *Town & Country Homecenter*, 725 N.E.2d at 1013-14.

209. *See* Wilson, *supra* note 10, at 981-88.

that looks to the foreseeability of harm.

CONCLUSION

Property interests come in a wide variety of forms. They can be the "full bundle of sticks" represented by fee simple absolute ownership or they can be any of the individual sticks that represent the many lesser estates in land. Property interests involve people in a variety of relationships, such as lessor/lessee, vendor/vendee, creditor/debtor, and reciprocal covenantees, each of which confers benefits or duties based on status. Property interests are also supported by a variety of related systems, including the public document recording system. Given the pervasiveness of the types of property interests and the fundamental role of property, it should not be surprising that each year provides interesting developments in the law of property in Indiana.

Some of the developments in the period surveyed by this Article are likely to lead to further developments. Two conflicting views of the scope of the Security Deposits statute became crystallized, and continued attention should be focused on these views until a clear interpretation of the statute emerges that will appropriately balance the legitimate interests of both landlords and tenants. The extent of duties owed by a mortgagee to other parties to a loan closing should also attract further judicial attention as, at least for two notable voices, the existing rules do not adequately address the reality of relationships that can arise in practice.

In other areas of property law, the preceding year saw some useful clarifications, including clarification of the role of reliance in a claim for breach of implied warranty of habitability in home construction. Cases decided by the court of appeals also clarified legal principles by providing contrasting pairs of cases. One pair of cases provided an example of an enforceable restrictive covenant and one that was deemed unenforceable. Another pair of cases provided an example of a defendant who qualified as a vendor for the implied warranty of habitability, even though the vendor did not construct or sell the plaintiffs' home, and one who was not a vendor for purposes of that warranty even though it was the retail seller of the plaintiff's home. Perhaps the most notable clarification was the supreme court's express statement that the scope of the Statute of Frauds applies to transfers of interests in real estate and not just to sales.

The process of refining issues and balancing interests in real property is an on-going process. The cases analyzed and reviewed in this Article provide the foundation for future refinements.

DEVELOPMENTS IN INDIANA TAXATION

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The 112th Indiana General Assembly, the Indiana Supreme Court, and the Indiana Tax Court each contributed changes and clarifications to the Indiana tax laws in 2001.[1] This Article will highlight the more interesting developments for the period of October 1, 2000 through September 30, 2001.[2]

I. GENERAL ASSEMBLY LEGISLATION

Numerous legislative changes in 2001 affected Indiana taxation. While many of the changes were made in order to fine-tune existing laws, some policy changes occurred in each of the following Indiana tax areas: income tax, sales and use tax, tax credits, inheritance tax, financial institutions tax, gasoline tax, motor carrier fuel tax, commercial vehicle excise tax, cigarette tax, tax administration, and innkeeper's tax.

A. Indiana Income Taxes

The General Assembly enacted several laws affecting Indiana income taxes. For example, the General Assembly amended the general provision that all references to the Internal Revenue Code in Indiana tax statutes are to refer to the Internal Revenue Code "as amended and in effect on January 1, 2001."[3] This updating must be done each year if the State of Indiana wishes to continue, for example, for the Indiana adjusted gross income tax law to be based on the definition of the federal adjusted gross income tax, because the Indiana adjusted gross income tax is based on the federal income tax law's adjusted gross income. The Indiana Constitution prevents the State of Indiana from allowing Indiana laws to automatically change in response to changes that the federal government makes to the federal income tax laws.

1. Indiana Income Taxes: The Gross Income Tax.—The General Assembly enacted laws with respect to the gross income tax. For example, the General

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1. Hereinafter, at times, the following abbreviations are used in this Article: the Indiana General Assembly is referred to as General Assembly; the Governor of Indiana is referred to as Governor; the Indiana State Board of Tax Commissioners is referred to as ISBTC; the Indiana Department of Revenue is referred to as IDR; the Indiana Supreme Court is referred to as the supreme court; the Indiana Tax Court is referred to as the tax court; and, the terms petitioner, petitioners, taxpayer, and taxpayers are used interchangeably.

2. For comprehensive information concerning the tax court, the IDR, the ISBTC, and a variety of other tax items related to Indiana tax laws, visit the official State of Indiana web site, *available at* http://www.ai.org.

3. IND. CODE § 6-3-1-11(a) (1998 & Supp. 2001).

Assembly enacted a law that exempts from gross income the proceeds of a specific business transaction.[4] The new law provides that amounts received from the sale, lease, or other transfer of an electric generating facility and any auxiliary equipment are "exempt from gross income tax to the extent of any mortgage, security interest, or similar encumbrance that exists" with respect to the electric generating facility at the time of the sale, lease, or transfer.[5]

The General Assembly passed another exemption from gross income with respect to electric generating facilities. The new law provides that "[g]ross income received by a qualified lessee from a qualified investment is exempt from gross income tax."[6] The statute defines a qualified investment as an investment that is acquired by a qualified lessee for the purpose of paying rent under a qualified lease and exercising any purchase option in the qualified lease.[7] A qualified lease is defined as "the lease of an interest in an electric generating facility . . . where the property is subject . . . to (1) or more leases previously entered into under Section 168(f)(8) of the Internal Revenue Code of 1954."[8] A qualified lessee is any person or an affiliate of a person who is the lessee under a qualified lease.[9]

2. Indiana Income Taxes: The Adjusted Gross Income Tax.—In 2001, the General Assembly also amended and added new laws with respect to the adjusted gross income tax. Now an employee of a "nonprofit entity, the state, a political subdivision of the state, or the United States government" counts as a qualified employee with respect to the enterprise zone adjusted gross income deduction.[10] A qualified employee must reside in the enterprise zone in which the employee works; perform services for the employer, ninety percent of which are related to the employers' trade or business, or to the nonprofit or governmental entity's activities; and perform fifty percent of the employee's service for the employer during the taxable year in the enterprise zone.[11] The enterprise zone deduction permits the qualified employee to deduct the lesser of one-half of the employee's adjusted gross income for the taxable year or $7500.[12]

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4. *See id.* § 6-2.1-3-16(b).

5. *Id.*

6. *Id.* § 6-2.1-3-16.5(f).

7. *Id.* §§ 6-2.1-6-16.5(c)(1)(A)-(B). An investment is defined as a loan or deposit made by a qualified lessee or an investment contract or payment agreement purchased by a qualified lessee. *Id.* § 6-2.1-3-16.5(b).

8. *Id.* § 6-2.1-3-16.5(d). The federal income tax provision cited in the Indiana statute refers to a safe harbor provision that was given continuing effect for certain property by P.L. 99-514, Sec. 201(a).

9. *Id.* § 6-2.1-3-16.5(e). An affiliate is defined as a "corporation, partnership, limited liability company, or trust that controls, is controlled by, or is under common control with another corporation, partnership, limited liability company, or trust." *Id.* § 6-2.1-3-16.5(a). Control is further defined as ownership of eighty percent of voting stock. *Id.*

10. *Id.* § 6-3-2-8(a).

11. *Id.*

12. *Id.* § 6-3-2-8(b).

In another amendment, the General Assembly, by deleting part of a subsection, now permits individuals over the age of sixty-five to be eligible for the disability income tax deduction.[13] Another new law regarding the adjusted gross income tax treatment of distributions from individual accounts established under the Indiana family college savings account program provides that "[d]istributions from an individual account used to pay qualified higher education expenses are exempt from adjusted gross income . . . as income of an account beneficiary or an account owner."[14]

The General Assembly also amended the law regarding independent contractors' ability to elect exemption from worker's compensation.[15] The law now mandates that independent contractors must file a statement with the IDR declaring independent contractor status and obtain a certificate of exemption from Worker's Compensation.[16] This filing must be done yearly and be accompanied by a five-dollar filing fee.[17] Within seven days, the IDR must provide a certificate of exemption after verifying the accuracy of the statement.[18] Within thirty days after receiving the independent contractor's statement, the IDR "shall provide the independent contractor with an explanation of the department's tax treatment of independent contractors and the duty of the independent contractor to remit any taxes owed."[19]

3. Indiana Income Taxes: The County Adjusted Gross Income Tax.—The General Assembly enacted laws regarding the county adjusted gross income tax in 2001. For example, county solid waste management districts may not receive distributions from the county adjusted gross income tax unless a majority of the county fiscal bodies approve the distribution by passing a resolution.[20] This resolution may expire on a date specified in the resolution or may remain in effect until the fiscal body revokes or rescinds the resolution.[21]

Also, regarding county adjusted gross income tax revenues, the General Assembly increased the length of time a county with a certain population has to impose an additional adjusted gross income tax to eight years instead of four.[22] The purpose for this tax must be the operation and maintenance of a jail and

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13. *Id.* § 6-3-2-9(a).

14. *Id.* § 6-3-2-19(e).

15. *See id.* § 6-3-7-5.

16. *See id.* § 6-3-7-5(c).

17. *Id.* § 6-3-7-5(e)-(f).

18. *Id.* § 6-3-7-5(j). This certificate of exemption then must be filed with the Worker's Compensation Board of Indiana to be given effect. *Id.*

19. *Id.* § 6-3-7-5(k).

20. *Id.* § 6-3.5-1.1-1.3(b).

21. *Id.* § 6-3.5-1.1-1.3(c). The General Assembly passed a similar law regarding distributions to county solid waste management districts from the county option income tax. *See id.* § 6-3.5-6-1.3.

22. *Id.* § 6-3.5-1.1-2.5(c). The affected counties must have a population between 37,000 and 37,800, *id.* § 6-3.5-1.1-2.5(a) (2001), or between 12,600 and 13,000, *id.* § 6-3.5-1.1-3.5(a).

juvenile detention center.[23]

A county described as having a population between 68,000 and 73,000[24] is now permitted to raise its county adjusted gross income tax rates in order to "finance, construct, acquire, improve, renovate, or equip" its county jail or repay bonds issued for the same purpose.[25] The taxes raised may not exceed the amount necessary to accomplish the above-stated purpose.[26] The law further provides that any excess revenue from the increased tax imposed will go to the highway fund for the county.[27]

The General Assembly also passed a new law that prohibits it from amending or repealing the county adjusted gross income tax in a way that would hinder the collection of any taxes imposed for as long as obligations against which county adjusted gross income tax revenues are pledged remain unpaid.[28]

4. Indiana Income Taxes: The Municipal Option Income Tax.—The General Assembly created a new tax called the municipal option income tax.[29] The municipal option income tax is a tax on the adjusted gross income of municipal taxpayers.[30] The rate of tax is one percent on municipal taxpayers who are county residents and one-half of one percent on municipal taxpayers who are not county residents.[31] The revenue accumulated from this municipal option income tax will be used for the benefit of the county family and children's fund.[32]

5. Indiana Income Taxes: The Indiana Financial Intuitions Tax.—The General Assembly has enacted some minor amendments to the laws regarding the taxation of financial institutions. The definition of a unitary business has been amended in that the term "does not include an entity that does not transact business in Indiana."[33] Also, the General Assembly has changed the payment dates for the financial institutions tax to the twentieth day of the fourth, sixth, ninth, and twelfth months of the financial institution's fiscal year.[34]

B. Indiana Sales and Use Taxes

The General Assembly amended and added tax laws regarding Indiana sales and use taxes. For example, the General Assembly eliminated quarterly filing of

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23. *Id.* § 6-3.5-1.1-2.5(b).
24. *Id.* § 6-3.5-1.1-2.7(a).
25. *Id.* § 6-3.5-1.1-2.7(b).
26. *Id.* § 6-3.5-1.1-2.7(d).
27. *Id.* § 6-3.5-1.1-2.7(h).
28. *Id.* § 6-3.5-1.1-23.
29. *See id.* §§ 6-3.5-8-1 to -25.
30. *Id.* § 6-3.5-8-9(a). A municipal taxpayer is defined as resident of the affected county or a person who maintains his or her principal place of business in the affected county and does not live in a county were there is another municipal option income tax. *Id.* § 6-3.5-8-5.
31. *Id.* § 6-3.5-8-10.
32. *Id.* §§ 6-3.5-8-12(d)-(f).
33. *Id.* § 6-5.5-1-18(a).
34. *Id.* § 6-5.5-6-3(a).

sales tax returns.[35] The provision that allowed retail merchants to report and pay sales taxes on a quarterly basis if the merchant's tax liability in the previous calendar year was less than seventy-five dollars was removed.[36] Another deletion from the sales and use tax section eliminates the provision that allowed a taxpayer who remitted tax payments by electronic fund transfer to report quarterly instead of monthly.[37]

The General Assembly added a new chapter to the law of sales and use taxes entitled the "Simplified Sales and Use Tax Administration Act."[38] This Act permits the IDR to enter into agreements with other states to simplify state rates, establish uniform standards of sourcing and administration of tax returns, provide a central electronic registration for the collection and remittance of state taxes and reduce the burden of complying with local sales and use taxes.[39] The IDR has the power to act jointly with other agreeing states "to establish standards for certification of certified service providers and certified automated systems and to establish performance standards for multistate sellers."[40] Certified service providers are defined as agents of sellers who are liable for sales and use tax due to each agreeing state on all sales transactions that they process for the seller.[41]

C. Indiana Tax Credits

The General Assembly amended and added tax laws regarding tax credits. For example, the General Assembly provides that when a pass through entity entitled to the prison investment credit "does not have state tax liability against which the credit may be applied . . . , it is entitled" to the distributive share of the prison investment credit that is available.[42] A pass through entity is defined as any corporation that is exempt from adjusted gross income tax, a partnership, a trust, a limited liability company, or a limited liability partnership.[43]

Another amendment to Indiana tax credits provides that a high technology business operation is entitled to a five percent enterprise zone investment cost credit.[44] The General Assembly also decreased the maximum amount of credit allowed in a fiscal year for the individual development account tax credit from $500,000 to $200,000.[45] Further, the General Assembly extended the expiration

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35. *See id.* § 6-2.5-6-14.
36. *See id.*
37. *See id.*
38. *See id.* §§ 6-2.5-11-1 to -10.
39. *Id.* § 6-2.5-11-7.
40. *Id.* § 6-2.5-11-5.
41. *Id.* § 6-2.5-11-10(a).
42. *Id.* § 6-3.1-6-6.
43. *Id.* § 6-3.1-6-1.
44. *Id.* § 6-3.1-10-8(c)(4). *See* IND. CODE § 4-4-6.1-1.3 (Supp. 1998 & 2001) (defining a high technology business operation to include such operations as biotechnology and advanced computing).
45. *Id.* § 6-3.1-18-10(a).

date for the earned income tax credit to December 31, 2003.[46]

The General Assembly created new tax credits as well. For example, the General Assembly created the capital investment tax credit.[47] This tax credit is available only to taxpayers in a county that has a population between 40,000 and 41,000 people.[48] To be eligible for the credit in any year, the taxpayer must make a qualified investment in that year.[49] A qualified investment is an amount of not less than seventy-five million dollars that is used to purchase new manufacturing equipment or machinery or improve facilities.[50] The amount of the credit is equal to fourteen percent of the qualified investment.[51]

Another newly-enacted tax credit is the income tax credit for property taxes paid on homesteads.[52] A taxpayer is entitled to this credit if the taxpayer's earned income is less than $18,600 and the taxpayer pays property taxes on a homestead[53] that the taxpayer owns or is buying.[54] Further, the taxpayer must file with the IDR information about the amount of property taxes paid on a homestead.[55] The property upon which the taxpayer pays property tax must be located in a county with a population between 400,000 and 700,000 people.[56] Any taxpayer who meets the above-described characteristics "is entitled to a refundable credit against the individual's state income tax liability. . . ."[57] The amount of the credit for a taxpayer who has earned income of less than $18,000 is the lesser of $300 or the amount of property taxes actually paid.[58] For a taxpayer with earned income between $18,000 and $18,600, the amount of the credit is the lesser of the amount of property taxes paid or an amount determined by subtracting the taxpayer's earned income from $18,600 and multiplying the difference by 0.50.[59] The IDR must determine the amount of the credits allowed for a year by July 1 of the next year.[60] One-half of this amount will be deducted

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46. *Id.* § 6-3.1-21-10.

47. See *id.* §§ 6-3.1-13.5-1 to -13.

48. *Id.* § 6-3.1-13.5-3.

49. *Id.* § 6-3.1-13.5-6.

50. *Id.* § 6-3.1-13.5-3.

51. *Id.* § 6-3.1-13.5-6. This law is retroactive to January 1, 2001. *See* 2001 Ind. Acts 291.

52. *See* IND. CODE §§ 6-3.1-20-1 to -7.

53. A homestead is defined as a taxpayer's principle place of residence, including a dwelling and surrounding real estate of less than one acre. *Id.* § 6-1.1-20.9-1(2).

54. *Id.* § 6-3.1-20-4(a). Earned income is defined as employee compensation and net earnings from self-employment for the taxpayer and the taxpayer's spouse if the taxpayer files a joint tax return. *Id.* § 6-3.1-20-1.

55. *Id.* § 6-3.1-20-6.

56. *Id.* § 6-3.1-20-4(a)(2)(B).

57. *Id.* § 6-3.1-20-5(a). This section also states that "[i]f the amount of the credit . . . exceeds the individual's state tax liability for the taxable year, the excess shall be refunded [by] the [IDR]." *Id.* § 6-3.1-20-5(d).

58. *Id.* § 6-3.1-20-5(b).

59. *Id.* § 6-3.1-20-5(c).

60. *Id.* § 6-3.1-20-7(a).

from the riverboat admissions tax revenue due to the affected county and paid into the state general fund.[61]

The General Assembly also enacted the residential historic rehabilitation credit.[62] A taxpayer can receive a credit of twenty percent of qualified preservation and rehabilitation expenditures[63] on historic property[64] at least fifty years old[65] that the taxpayer intends to use as the taxpayer's residence.[66] To qualify for the credit, the expenditures on the property must exceed $10,000.[67] The adjusted basis for the property affected by this credit will be reduced by the amount of credit claimed by the taxpayer.[68] The amount of credit can be carried forward by the taxpayer for fifteen years;[69] however, the credit cannot be carried back or refunded to the taxpayer.[70]

The General Assembly has also enacted the rerefined lubrication oil facility credit.[71] A taxpayer is entitled to a credit that is equal to the percentage of property taxes paid by the taxpayer for real property containing a facility that processes rerefined lubrication oil and for personal property used in the processing of rerefined lubrication oil.[72] The percentage of property taxes on which the credit is determined decreases over five years from 100% in 2001 to twenty percent in 2005.[73] Rerefined lubrication oil is defined as used oil that is recycled in a manner that removes physical and chemical impurities so that it can be reused.[74] The taxpayer can carry forward any unused credit for two years.[75] To be eligible for the credit, the Department of Commerce must approve the taxpayer for the credit.[76]

The General Assembly enacted a tax credit entitled "the voluntary remediation tax credit."[77] This credit provides that a taxpayer is entitled to the

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61. *Id.* § 6-3.1-20-7(b)-(c). This credit will be applied retroactively to January 1, 2001. *See* 2001 Ind. Acts 151.

62. *See* IND. CODE §§ 6-3.1-22-1 to -16.

63. *Id.* § 6-3.1-22-8(b).

64. The property must be listed in the register of Indiana historic sites and structures. *Id.* § 6-3.1-22-9(2).

65. *Id.* § 6-3.1-22-9(1)(A).

66. *Id.* § 6-3.1-22-9(6).

67. *Id.* § 6-3.1-22-9(7).

68. *Id.* § 6-3.1-22-12.

69. *Id.* § 6-3.1-22-14(a).

70. *Id.* § 6-3.1-22-14(c).

71. *See id.* §§ 6-3.1-22.2-1 to -10.

72. *Id.* § 6-3.1-22.2-5. Personal property includes property used for transportation of rerefined lubrication oil. *Id.*

73. *Id.* § 6-3.1-22.2-6(b). This credit expires on January 1, 2006. *Id.* § 6-3.1-22.2-10.

74. *Id.* § 6-3.1-22.2-2.

75. *Id.* § 6-3.1-22.2-8.

76. *Id.* § 6-3.1-22.2-9.

77. *Id.* §§ 6-3.1-23-1 to -17.

lesser of $100,000 or ten percent of a qualified investment[78] incurred to conduct a voluntary remediation of a brownfield.[79] The taxpayer can carry any unused credit over for five years.[80] The credit expires on December 31, 2003.[81] A brownfield is defined as an industrial or commercial parcel of real estate that cannot be utilized because of the presence of a hazardous substance on or under the surface soil or in the groundwater that poses a risk to human health and the environment.[82]

A final credit enacted by the General Assembly in 2001 is the credit for property taxes paid on business personal property.[83] A taxpayer is entitled to a credit for the net property taxes paid on business personal property up to the lesser of $37,500 or the assessed value of the taxpayer's business personal property.[84] Business personal property is defined as tangible property held for sale in the ordinary course of business or held for the production of income.[85] The taxpayer can carry any unused credit over to the "following taxable years."[86] This credit is available to individuals and entities,[87] including pass through entities,[88] but the credit is not available to utility companies.[89]

D. Indiana Inheritance Taxes

The General Assembly has modified the Indiana inheritance taxes by moving the provision that provides that the IDR must prescribe the affidavit form that may be used to state that no inheritance tax is due to a different chapter.[90] Further, personal representatives, trustees, and transferees of property must file an inheritance tax return with the probate court within nine months, instead of the previously required twelve months, after the decedents' death.[91] Under the newly enacted laws, inheritance tax is to be paid within twelve months, instead of the

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78. *Id.* § 6-3.1-23-6.

79. *Id.* § 6-3.1-23-3.

80. *Id.* § 6-3.1-23-11.

81. *Id.* § 6-3.1-23-16. This expiration date does not affect a taxpayer's ability to carry any unused credit forward. *Id.*

82. *Id.* § 13-11-2-19.3.

83. *See id.* §§ 6-3.1-23.8-1 to -9.

84. *Id.* § 6-3.1-23.8-6. Net property taxes means the "amount of property taxes paid by a taxpayer for a particular calendar year after the application of all property tax deductions and property tax credits." *Id.* § 6-3.1-23.8-2.

85. *Id.* § 6-3.1-23.8-1.5.

86. *Id.* § 6-3.1-23.8-7.

87. *See id.* § 6-3.1-23.8-5.

88. *Id.* § 6-3.1-23.8-8.

89. *Id.* § 6-3.1-23.8-6(c).

90. The provision is now in Indiana Code section 6-4.1-4-0.5(b). This provision was formerly in Indiana Code section 6-4.1-3-12.5 which was repealed by 2001 Ind. Acts 252.

91. IND. CODE § 6-4.1-4-1(a) (1998 & Supp. 2001).

previously required eighteen months.[92] However, if the taxpayer pays the inheritance tax within nine months of the death of the decedent, then the taxpayer is entitled to a five-percent reduction in the inheritance tax due.[93]

The General Assembly has also shortened the time within which Indiana estate taxes are to be paid from eighteen months to twelve months after the death of the decedent.[94] Also, the generation-skipping transfer tax is due twelve months, rather than eighteen months, from the date of death of the "person whose death resulted in the generation-skipping transfer."[95]

E. Indiana Gasoline Tax

The Indiana General Assembly has amended one of the registration and licensure laws associated with the gasoline tax. The new law no longer requires a person who transports gasoline in a vehicle with a tank capacity of more than 850 gallons to display a transporter emblem.[96]

F. Indiana Motor Carrier Fuel Tax

The Indiana General Assembly amended the law regarding the motor carrier fuel tax to provide that a carrier may obtain an International Fuel Tax Agreement (IFTA) repair and maintenance permit from the IDR to travel into Indiana to repair any vehicles owned by the carrier and then return to some other state when they are finished.[97] The operator of a motor vehicle with such a permit, which costs forty dollars, does not need to pay the motor carrier fuel tax.[98] A carrier may also obtain an International Registration Plan repair and maintenance permit, which is similar in all tax respects to the IFTA permits.[99] Further, the commissioner of the IDR may become a member of the IFTA or other reciprocal agreements with other states or jurisdictions.[100] Also, entering into the IFTA provides for the exchange and sharing of information with other states and jurisdictions.[101]

The General Assembly further specified its own powers and the powers of the IFTA.[102] The IFTA is limited to determining the base state for users, specifying records requirements, specifying audit procedures, providing for the exchanging of information, defining persons eligible for tax licensing, defining qualified motor vehicles, determining whether bonding is required, and

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92. *Id.* § 6-4.1-9-1(a).
93. *Id.* § 6-4.1-9-2.
94. *Id.* § 6-4.1-11-3.
95. *Id.* § 6-4.1-11.5-9.
96. *Id.* § 6-6-1.1-606.5(g) (2000), *repealed by* 2001 Ind. Acts § 10.
97. *Id.* § 6-6-4.1-13(c).
98. *Id.*
99. *See id.* § 6-6-4.1-1.3(d).
100. *Id.* § 6-6-6-4.1-14(a).
101. *Id.* § 6-6-4.1-16.
102. *See id.* § 6-6-4.1-14.5.

specifying reporting requirements and periods.[103] Despite these enumerated powers, the General Assembly also retains the authority to determine whether to impose a tax, to prescribe the tax rates, to define tax exemptions and deductions, and to determine what constitutes a taxable event.[104] The General Assembly further replaced all references to the Base State Fuel Tax Agreement with references to the IFTA.[105]

G. Cigarette Tax

The General Assembly amended the law appropriating the money from the cigarette tax that is in the mental health centers fund, to the division of mental health and addiction.[106]

H. Tax Administration

The General Assembly amended existing laws and added new laws with respect to tax administration. For example, the General Assembly added the municipal option income tax to the list of taxes defined as listed taxes.[107] The General Assembly also changed the name of the Alcoholic Beverage Commission to the Alcohol and Tobacco Commission.[108]

The General Assembly amended the powers of the IDR by permitting the department to enter into the IFTA.[109] If the IDR does enter into the agreement, then any conflicts between the provisions of the agreement and any Indiana statute will be resolved in favor of the state statute.[110] Any conflicts between the provisions of the agreement and provisions in the Indiana Administrative Code will be resolved in favor of the agreement.[111]

The General Assembly amended the law of assessment of taxes by providing that if the IDR sends out a notice of a proposed tax assessment and the notice is returned because the taxpayer has moved, and the IDR cannot determine the taxpayer's new address, the IDR may immediately make an assessment for the taxes owing and demand immediate payment without issuing a ten-day demand notice.[112]

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103. *Id.* § 6-6-4.1-14.5(a).

104. *Id.* § 6-6-4.1-14.5(b).

105. *See id.* §§ 6-6-4.1-22 to -26.

106. *Id.* § 6-7-1-32.1. The division has changed its name from the Division of Mental Health. *See* 2001 Ind. Acts 215, § 11.

107. 2001 Ind. Acts 151, § (codified at IND. CODE §§ 6-3.5-8-1 to -25 (Supp. 2001) (describing and enacting the municipal option income tax)).

108. IND. CODE § 6-8.1-7-1(m) (1998 & Supp. 2001).

109. *Id.* § 6-8.1-3-14(a).

110. *Id.* § 6-8.1-3-14(c)(1).

111. *Id.* § 6-8.1-3-14(c)(2).

112. *Id.* § 6-8.1-5-3(b). This statute expressly provides that the IDR may ignore the provision that provides that the taxpayer has ten days to show the IDR why it has not paid the amount of tax required. *Id.*; *see also id.* § 6-8.1-8-2(a)(1).

The General Assembly amended several statutes dealing with the tax collection so that the word "lien" has been replaced with "judgment."[113]

A new law regarding tax collection mandates that "a judgment arising from a tax warrant is enforceable in the same manner as any judgment issued by a court of general jurisdiction."[114] Further, the IDR has the power to initiate proceedings supplementary to the execution of the warrant in any court of general jurisdiction in the county where the tax warrant is recorded.[115]

I. Innkeeper's Tax

The General Assembly amended and added several laws regarding the Vigo County Innkeeper's Tax. For example, the Vigo County Convention and Visitor Commission now has the power to issue bonds and enter into leases for the construction and equipping of a sports and recreational facility.[116] This is so because the General Assembly found that Vigo County "possesses a unique opportunity to promote and encourage conventions" and special events from which it could benefit if it had a sports and recreation facility within its borders.[117] The General Assembly covenanted that it would not amend or repeal this law while there are any outstanding bonds or payments due under any lease.[118] The commission also has the ability to exercise the power of eminent domain for the purpose of encouraging conventions and tourism.[119] The commission can now enter into agreements to pledge money deposited in the convention and visitor promotion fund[120] to pay for the construction and equipping of a sports and recreation facility.[121] Any sports and recreational facility constructed pursuant to these new laws must "serve[] a public purpose and [be] of benefit to the general welfare of the county by encouraging investment, job creation and retention, and economic growth and diversity."[122]

II. INDIANA TAX COURT OPINIONS AND DECISIONS

During the period of October 1, 2000 through September 30, 2001, the opinions and decisions of the Indiana Tax Court were dominated by cases dealing with Indiana real property cases. Specifically, the tax court published twenty-six opinions, sixteen of which concerned real property tax issues. The remaining cases are divided as follows: one case regarding the Indiana tangible personal

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113. *See* 2001 Ind. Acts 129, § 22 (codified at IND. CODE §§ 6-8.1-8-2 to -8 (Supp. 2001)).

114. IND. CODE § 6-8.1-8-8.5(a).

115. *Id.* § 6-8.1-8-8.5(b).

116. *Id.* § 6-9-11-3(a)(8)-(a)(9). *See id.* § 6-9-11-3.7 (establishing parameters and rules for bond issuance and lease terms).

117. *Id.* § 6-9-11-9.

118. *Id.* § 6-9-11-3.9.

119. *Id.* § 6-9-11-3(a)(10).

120. *See id.* § 6-9-11-7 (enabling the Vigo County treasurer to establish such a fund).

121. *Id.* § 6-9-11-3.5.

122. *Id.* § 6-9-11-4.5.

property tax; two cases regarding the Indiana gross income tax; three cases regarding Indiana sales and use taxes; one case regarding the Indiana controlled substance excise tax; one case regarding the Indiana financial institutions tax; and two cases regarding Indiana motor vehicle excise taxes.

A. Property Tax–Real Property

1. Bishop v. State Board of Tax Commissioners.[123]—The Bishops petitioned for review of the ISBTC's assessment of their Elkhart County condominium.[124] On review, the ISBTC did not adjust its determination of the condominium's assessed value of $25,400.[125] The Bishops appealed to the tax court asserting two issues: whether the ISBTC unconstitutionally applied its assessment regulations in assessing the Bishops' condominium[126] and whether the ISBTC erred in assigning a B grade to the Bishops' condominium.[127]

The tax court held that the Bishops did not sufficiently explain how the ISBTC method of assessment lacked equality and uniformity, and, therefore, the Bishops did not demonstrate that the method violated the property taxation clause of the Indiana Constitution.[128] The Bishops relied on a study performed by an appraiser, Landmark Appraisals, that analyzed the assessed value of newer homes as compared to older homes.[129] The study found that new homes are assessed at a higher rate than older homes.[130] The Bishops argued that these results demonstrated a lack of uniformity in the ISBTC's assessments.[131]

The court held that the Bishops did not explain how the study demonstrated "a lack of equality and uniformity of residential assessments under Indiana's true tax value system."[132] The figures used in the study were based on market information.[133] However, the ISBTC regulations for assessing improvements do not allow for the application of market information.[134] As a result of this disparity in standards, the Bishops failed to show how the study, which used market information, showed that the ISBTC's assessments, which did not use market information, were unconstitutional.[135] The ISBTC's refusal to adjust the Bishops' property assessment was not an error.[136]

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123. 743 N.E.2d 810 (Ind. T.C. 2001).
124. *Id.* at 812.
125. *Id.*
126. *Id.*
127. *Id.* at 815.
128. *Id.* at 814-15. *See* IND. CONST. art. X, § 1.
129. *Bishop*, 743 N.E.2d at 813.
130. *Id.*
131. *Id.*
132. *Id.* at 814.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 815.

With respect to the grading of the Bishops' condominium, the tax court held that since the Bishops failed to establish "a prima facie case as to grade,"[137] the ISBTC's assessment of a B grade was not an error.[138] To get a grade reduction, a taxpayer "must offer probative evidence sufficient to establish a prima facie case concerning the alleged assessment error."[139] The Bishops offered only a photograph of their condominium, photos of C grade homes, a sample property report card, and the ISBTC's grade specification table.[140] The court held that this evidence was not probative as to grade.[141] The court found this evidence to be merely conclusory statements by the Bishops that they deserved a grade reduction.[142] The court was not persuaded and affirmed the denial of their reduction of grade.[143]

2. Garcia v. State Board of Tax Commissioners.[144]—The Garcias challenged the ISBTC's grade assessment of their home to the tax court, as well as the ISBTC's failure to assess some enclosed property on the land to the tax court.[145] After considerable procedural history,[146] the ISBTC increased the grade of the Garcias' home from A+4 to A+6.[147] Further, the ISBTC did not assess an enclosure on the Garcias' property.[148]

The tax court held that the A+6 assessment was an error.[149] The court stated that the manner in which the ISBTC discerned the grade of the Garcias' home was wholly arbitrary and completely unsupportable by the ISBTC's own regulations.[150] The court further stated that the ISBTC's regulations did not support, under any circumstances, a grade above A.[151] Therefore, the court held

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137. *Id.* at 816.
138. *Id.* at 817.
139. *Id.* at 815.
140. *Id.* at 816.
141. *Id.*
142. *Id.*
143. *Id.* at 817.
144. 743 N.E.2d 817 (Ind. T.C. 2001).
145. *Id.* at 818.
146. *See id.*; *see also* Garcia v. State Bd. of Tax Comm'rs, 694 N.E.2d 794 (Ind. T.C. 1998).
147. *Garcia*, 743 N.E.2d at 818.
148. *Id.*
149. *Id.* at 821.
150. *Id.* at 820. The ISBTC's method of assessment started with determining the actual construction value of the home only. Then it discounted this price to 1985 costs in order to comply with its regulations in place at the time of the construction of the house in 1991. Then the ISBTC used its regulations to determine what the cost of the house would be if it were graded as a C house. Then the court divided that cost by the actual cost of the house. This quotient constituted a percentage that the ISBTC used to guess the grade above an A at which the Garcia home should be assessed. *See id.* at 819-20. The ISBTC's methods were so arbitrary, the court noted, that even members of the ISBTC admitted at trial that the calculations were unsupportable. *See id.* at 820.
151. *Id.* at 820-21.

that the A+6 assessment constituted an abuse of discretion by the ISBTC.[152] Further, the court directed the ISBTC to assess Garcia's property as grade A.[153]

The court held that the ISBTC's failure to assess the enclosure was also an error.[154] However, the court granted the ISBTC's request that the court remand the issue so that the ISBTC could "extrapolate the value of the enclosure from Schedule G.1 and then reassess it based on that extrapolation."[155]

3. Canal Realty-Indy Castor v. State Board of Tax Commissioners.[156]—Canal appealed to the tax court the assessment by the ISBTC of Canal's real property.[157] This appeal focused on certain paving surrounding buildings on Canal's property.[158] Canal posed three issues: whether the ISBTC erred in not allowing further obsolescence deductions; whether the ISBTC violated Canal's due process by assigning value to previously non-assessed property without giving Canal an opportunity to address the assessment; and whether the ISBTC incorrectly valued the paving on Canal's property.[159]

The court reversed and remanded the ISBTC's denial of an additional obsolescence deduction.[160] The ISBTC performed the assessment at issue in 1995.[161] In 1998, the tax court held that it would only hear obsolescence appeals from an ISBTC hearing in which the taxpayer identified the causes of the obsolescence and presented probative evidence to support an increase in obsolescence.[162] For any assessment performed prior to this decision, the ISBTC had to support its obsolescence assessment with substantial evidence.[163] On this issue, the tax court stated that Canal's offer of proof to support an increased obsolescence deduction was "woefully inadequate."[164] However, the court had to remand the case so that the ISBTC could support its denial of increasing the obsolescence deduction with substantial evidence because the assessment was performed before the 1998 decision.[165]

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152. *Id.* at 821.

153. *Id.*

154. *Id.*

155. *Id.* This procedure was mandated by the court in its earlier *Garcia* opinion. Garcia v. State Bd. of Tax Comm'rs, 694 N.E.2d 794, 799 (Ind. T.C. 1998). Instead of complying with this request, however, the ISBTC did nothing. *Garcia*, 743 N.E.2d at 821.

156. 744 N.E.2d 597 (Ind. T.C. 2001).

157. *Id.* at 599.

158. *Id.*

159. *Id.*

160. *Id.* at 603-04.

161. *Id* at 603.

162. *Id.* (referencing Clark v. State Bd. of Tax Comm'rs, 694 N.E.2d 1230, 1241 (Ind. T.C. 1998)).

163. *Id.*

164. *Id.*

165. *Id.* The court, however, did hint to the ISBTC that if Canal offered the same quantum of evidence as it did in this appeal, the ISBTC could "merely state in its final determination that Canal takes nothing by its petition." *Id.* at 604. Then the ISBTC's "quantification of obsolescence stands

The court held that the ISBTC did not violate Canal's due process.[166] The court stated that all that due process requires is "an opportunity to review and rebut the [ISBTC]'s evidence of the paving value."[167] The hearing officer at Canal's administrative hearing conducted an *ex parte* assessment of the paving on Canal's property because it had never been assessed.[168] The hearing officer then mailed a letter to Canal's representative asking Canal to "present evidence responding to the proposed assessment."[169] The representative did not answer directly to this request.[170] The hearing officer subsequently sent another letter asking Canal to respond to the proposed assessment.[171] Again, Canal's representative did not sufficiently respond to the request.[172] The court held that Canal, through its representative, had an opportunity to review and rebut the assessment of the paving, but it chose not to do so.[173] The fact that Canal had an opportunity was enough to satisfy due process.[174]

Regarding the issue of the value of the paving, the trial court affirmed the ISBTC's determination.[175] The court stated that since Canal had the opportunity to rebut the ISBTC's evidence at the administrative level, it bore the burden before the tax court of demonstrating that the ISBTC's assessment was invalid.[176] This burden required that Canal offer "probative evidence as to the paving's condition, for purposes of challenging the physical depreciation assigned to the paving."[177] The court stated that Canal offered no probative evidence.[178] Further, in support of the ISBTC's assessment, the court stated the its "photograph of the subject property, set to scale, shows the paving's size, and the ninety-cent per square foot base rate applied is taken directly from Schedule G of the regulations."[179] Therefore, the ISBTC's assessment of the value of the paving was affirmed.

4. Quality Farm & Fleet v. Board of Tax Commissioners.[180]—Quality Farm and Fleet ("Quality Farm") appealed to the tax court the ISBTC assessment of its property.[181] Quality Farm raised five issues: whether the ISBTC "exceeded its

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automatically" without the need of substantial evidence to support it. *Id.*

166. *Id.* at 605.
167. *Id.*
168. *Id.* at 599.
169. *Id.* at 605.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 606.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. 747 N.E.2d 88 (Ind. T.C. 2001).
181. *Id.* at 90.

legislative authority in conducting a hearing in this matter without having issued a letter of appointment or a prescription of duties to its hearing officer;"[182] whether the ISBTC erred in denying Quality Farm a negative influence factor; whether the ISBTC erred in not applying the General Commercial Kit (GCK) pricing schedule; whether the ISBTC erred in applying a D grade to Quality Farm's main building; and whether the ISBTC erred in not awarding an obsolescence adjustment.[183]

The court held that the administrative hearing was lawful even though the ISBTC did not issue a written order of appointment or a prescription of duties to the hearing officer.[184] The hearing was lawful because Quality Farm did not object to the hearing, and this failure constituted an acceptance of the hearing officer's authority, and a waiver of the issue.[185]

With respect to the negative influence factor, the court held that the ISBTC properly denied a negative influence factor to Quality Farm's parcel.[186] For a negative influence factor to apply in this case, Quality Farm would have had to show, via probative evidence, that its main building did not have the same use as its surrounding buildings and that this inconsistent use negatively impacted the value of the property.[187] Quality Farm proved the former; however, it did not demonstrate how the differing use of the buildings decreased the value of the property.[188] Therefore, the denial of a negative influence factor was proper.[189]

The court further held that the ISBTC did not err when it refused to use the GCK pricing schedule.[190] The GCK pricing schedule was used for determining the value of pre-engineered and pre-designed pole buildings used for commercial or industrial purposes.[191] Quality Farm alleged that it had two qualifying buildings: an addition and a small shop area.[192]

With respect to the addition, Quality Farm asserted that the ISBTC assessed it using the GCK price schedule in the past.[193] The court stated that this evidence alone was not sufficient to show an error here since "each assessment and each tax year stands alone."[194] Further, photographs shown by Quality Farm depicting the addition were not probative because they failed to explain how the addition qualifies for the GCK pricing schedule.[195]

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182. *Id.*
183. *Id.*
184. *Id.* at 91.
185. *Id.*
186. *Id.* at 92.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 93.
191. *Id.* at 92 (referencing IND. ADMIN. CODE tit. 50, r. 2.2-10-6.1(a)(1)(D) (2000)).
192. *Id.*
193. *Id.* at 93.
194. *Id.*
195. *Id.*

With respect to the small shop area, Quality Farm demonstrated that its characteristics are similar to other buildings that use the GCK pricing schedule.[196] The court stated that this evidence, while probative, was not sufficient to "establish a prima facie case that the Small Shop Area should be assessed using the GCK pricing schedule."[197]

The court further held that Quality Farm did not present sufficient evidence to establish a prima facie case to invalidate the grade assessment on its main building.[198] Quality Farm wanted a decrease in grade from a D to a D-1 on the main building because it lacked interior finish, exterior windows, and exterior attractiveness.[199] The court held that Quality Farm failed to explain why these deficiencies warranted a downward adjustment in the base value of the building.[200] Therefore, the ISBTC did not err in granting a grade assessment of D.[201]

The court finally held that Quality Farm was not entitled to an obsolescence adjustment.[202] Obsolescence was defined as a diminishing of a property's desirability and usefulness because of inadequacies inherent in the property, or economic factors external to the property.[203] Quality Farm claimed that the flat roof of its building and add-on construction create a loss in value of the property.[204] The court held, however, that Quality Farm did not sufficiently explain how these characteristics qualified as obsolescence.[205] Quality Farm relied on conclusory statements that such characteristics reduce the value of the property.[206] The court stated that these types of statements do not constitute probative evidence.[207] Therefore, the ISBTC did not err in denying an obsolescence adjustment.[208]

5. Fleet Supply, Inc. v. State Board of Tax Commissioners.[209]—Fleet appealed the assessment of its real property by the ISBTC to the tax court.[210] Fleet raised four issues: whether the depreciation schedule for its main building should be based on a thirty-year rather than a forty-year life expectancy; whether the ISBTC erred in declaring the conditions of improvements to be average; whether the D grade was improper; and whether the ISBTC erred in refusing to

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196. *Id.*
197. *Id.*
198. *Id.* at 94.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 95.
203. *Id.* (referencing IND. ADMIN. CODE tit. 50, r. 2.2-1-40 (1996)).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. 747 N.E.2d 645 (Ind. T.C. 2001).
210. *Id.* at 647.

apply a negative influence factor.[211]

With respect to the life expectancy issue, the court held that the forty-year expectancy table was properly used.[212] Life expectancy tables were used by the ISBTC to account for the physical depreciation of the property.[213] There are four different tables used for the depreciation of commercial and industrial buildings.[214] The thirty-year table is used for light pre-engineered buildings, while the forty-year table is used for buildings that are fire-resistant but not listed in other tables.[215] To show that the ISBTC should have used the thirty-year table, the court stated that Fleet "was required to submit to the ISBTC probative evidence sufficient to establish a prima facie case as to the invalidity of the application of the forty-year life expectancy table."[216]

This Fleet failed to do.[217] Fleet offered evidence through its appraiser, Landmark Appraisals, that the main building should have been depreciated by the thirty-year table, offered photographs of the main building, and offered testimony that the building was a light pre-engineered structure.[218] The court held that this evidence was conclusory and did not explain why the thirty-year table was more appropriate.[219] The photographs were without caption and were unexplained, so the court granted them no probative weight.[220] The testimony offered no argument or analysis but, rather, just stated conclusions, and the court refused to make any arguments for Fleet.[221] Therefore, the court held that the ISBTC did not err in using the forty-year depreciation table.

As to the issue of the average condition rating, the court held that since Fleet failed to provide any explanation for its argument that the assignment of an average condition to the main building was in error, the court affirmed ISBTC's assessment of the main building's condition as average.[222] Fleet offered evidence that the proper condition was less than average because the main building received little maintenance and that the building had dents and stains.[223] The court again disregarded this evidence as conclusory and uninformative as to how these problems affected the usefulness of the buildings.[224]

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211. *Id.* at 647-48. Fleet also argued that the ISBTC's assessment violated the Indiana Constitution. However, the court replied that it would not invalidate an assessment because the regulations that led to the assessment were unconstitutional. *Id.* at 647-48 n.1.

212. *Id.* at 650.

213. *Id.* at 648.

214. *Id.* at 648-49.

215. *Id. See* IND. ADMIN. CODE tit. 50, r. 2.2-11-7 (1996).

216. *Fleet Supply*, 747 N.E.2d at 649.

217. *Id.*

218. *Id.*

219. *Id.* at 649-50.

220. *Id.*

221. *Id.*

222. *Id.* at 651.

223. *Id.* at 650.

224. *Id.* at 650-51.

As to the issue of grade, the court affirmed the D grade assessed by the ISBTC.[225] The court held that the evidence offered by Fleet did not create a prima facie showing to change the grade.[226] Fleet's evidence consisted of conclusory statements similar to those that the court had rejected in its analysis of Fleet's other complaints.[227]

The court finally held that Fleet was not entitled to a negative influence factor.[228] A negative influence factor is a percentage decrease in property's assessed value representing the effect of factors that influence the value.[229] Fleet argued that it was entitled to a negative influence factor because the structures surrounding the main building were used for purposes different from those of the main building, which was suited for retail purposes.[230] The court rejected this argument because Fleet failed to show that this disparate use of the property caused a decrease in the value of the property.[231] As a result, the court affirmed the denial of a negative influence factor.[232]

6. McDonald's Corp. v. Indiana State Board of Tax Commissioners.[233]—McDonald's appealed the assessment of its property by the ISBTC to the tax court.[234] McDonald's asserted that "its land should have been assessed on a front foot basis pursuant to the Commercial/Industrial Platted section of the Land Order rather than on the acreage basis."[235] The "land order" was the Kosciusko County Land Valuation Order.[236] McDonald's wanted its property assessed by the platted section rather than the acreage section of the land order.[237]

The court held that since McDonald's land was platted and "the subdivision where McDonald's land [was] located [was] specifically provided for in the Commercial/Industrial Platted land section of the Land Order,"[238] the land should have been assessed on a front foot basis pursuant to the commercial/industrial platted section.[239]

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225. *Id.* at 652.

226. *Id.*

227. *See id.* at 651.

228. *Id.* at 653.

229. *Id.* at 652.

230. *Id.* at 652-53. To be entitled to a negative influence factor, Fleet needed to show two things: that the main building did not have the same use as the surrounding buildings and that the "inconsistent usage negatively impacted the subject parcel's value." *Id.* at 653 (referencing IND. ADMIN CODE tit. 50, r.2.2-4-10-(a)(9)(E) (1996)).

231. *Id.* at 653.

232. *Id.*

233. 747 N.E.2d 654 (Ind. T.C. 2001).

234. *Id.* at 655.

235. *Id.* at 656.

236. *Id.*

237. *Id.*

238. *Id.* at 657.

239. *Id.*

7. Damon Corp. v. Indiana State Bd. of Tax Commissioners.[240]—Damon purchased certain property in Elkhart County from Mallard Coach Co. in 1992.[241] In 1993, Damon received a bill for property taxes due for 1989 through 1992.[242] Damon filed a petition for review of the assessment with the ISBTC arguing that it was a bona fide purchaser and, therefore, not subject to a lien for additional taxes assessed before Damon purchased the property.[243] The ISBTC did not hold a hearing or make any determination regarding Damon's petition.[244] Damon subsequently filed another petition with the ISBTC requesting an obsolescence deduction and kit building adjustment.[245] The ISBTC denied these requests, and Damon appealed to the tax court.[246]

The tax court initially ruled that it did not have jurisdiction over the bona fide purchaser issue.[247] However, under the jurisdictional laws in 1994, the date when Damon filed its initial petition, if the ISBTC did not conduct a hearing within a certain time after the filing of the petition, Damon could file an appeal with the tax court.[248] Since Damon filed its appeal after the requisite period, the tax court had jurisdiction over the case.[249]

With respect to the merits of the bona fide purchaser issue, the tax court held that the bona fide purchaser exception to liens for additional taxes assessed for assessment dates prior to Damon's purchase of property did not apply in this case.[250] The bona fide purchaser notion relied upon by Damon states: "With respect to real property which is owned by a bona fide purchaser without knowledge, no lien attaches for any property taxes which result from an assessment, or an increase in assessed value, made under this chapter for any period before his purchase of the property."[251] The court stated that the plain language of this section provides that bona fide purchasers were exempt from previous assessments made under chapter nine, which dealt with the assessments of undervalued or omitted tangible property.[252] Since the taxes were owed before Damon even possessed the property, there was no evidence showing why the previous owner of the property owed these taxes.[253] As a result, Damon failed to make a prima facie showing that it was not subject to the lien for additional

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240. 738 N.E.2d 1102 (Ind. T.C. 2000).

241. *Id.* at 1105.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *See id.* at 1105 n.3.

248. *Id. See* IND. CODE § 6-1.1-15-4(e) (1989). The requisite time period was one year in a nonreassessment year and two years in a reassessment year. *Id.*

249. *Damon*, 738 N.E.2d at 1105 n.3.

250. *Id.* at 1107.

251. *Id.* at 1106 (quoting IND. CODE § 6-1.1-9-4(b) (2000)) (emphasis deleted).

252. *Id.* at 1107.

253. *Id.*

taxes.[254]

With respect to obsolescence, Damon asserted that it was entitled to an obsolescence deduction because it paid less than the true tax value for the property, because the building was vacant before Damon took it over, and because the building was under construction.[255] The court held that the fact that Damon paid less than the true tax value of the property failed to make a prima facie case establishing an obsolescence deduction.[256] The court stated that "the difference between the true tax value of Damon's property and the price Damon paid for the property, two unrelated numbers, [did not] demonstrate that there has been a loss in value of the subject improvement."[257] The numbers were so unrelated, in fact, that a statute expressly states that "true tax value does not mean fair market value."[258]

The court further held that the vacancy of the building did not constitute a prima facie case establishing that the property suffered a loss and was entitled to obsolescence.[259] The court stated that Damon did not explain why the building was vacant or whether the building was even for sale during its vacant period.[260]

The court further found that no case for obsolescence had been shown by Damon's argument that its main building was under construction and unusable.[261] The court stated that "for an obsolescence adjustment to be made, there must be some loss in value."[262] Further, "obsolescence cannot be applied to a building that is under construction because its useful life has not yet begun."[263] Damon was not entitled to an obsolescence adjustment, because its building had not started becoming useful yet and therefore had not suffered a loss in value.[264]

With respect to the kit building adjustment, the court held that Damon had presented a prima facie case that its building was eligible for a kit building adjustment.[265] The ISBTC permits a fifty percent reduction in the base rate of kit buildings,[266] which are defined as buildings made of light weight and inexpensive materials put together in a particular way.[267] Damon presented evidence to the tax court tending to show that it was entitled to a kit building adjustment because its main building was constructed in such a manner as to be a kit building.[268] The

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254. *Id.*
255. *Id.* at 1108.
256. *Id.* at 1109.
257. *Id.*
258. *Id.* (quoting IND. CODE § 6-1.1-31-6(c) (2000)) (emphasis deleted).
259. *Id.*
260. *Id.*
261. *Id.* at 1110.
262. *Id.* (emphasis deleted).
263. *Id.*
264. *Id.*
265. *Id.* at 1111.
266. *Id.* (referencing IND. ADMIN. CODE tit. 50, r. 2.1-4-5 (1992)).
267. *Id.*
268. *Id.*

court stated: "Because Damon has presented evidence that its building had tapered columns and Cee channels (both key factors in identifying kit buildings) as well as cross bracing, this Court concludes that Damon has established a prima facie case that its building is eligible for a kit building adjustment."[269]

Since Damon had presented a prima facie case, the ISBTC had to rebut Damon's evidence and justify its decision to deny a kit building adjustment with substantial evidence.[270] The ISBTC argued that it denied the adjustment because Damon had put two additions to the main building.[271] The court rejected this reason as insufficient to rebut Damon's showing. The court stated that the ISBTC cited no authority supporting its position that additions to an otherwise qualifying structure disqualified that structure.[272] As a result, the court held that the ISBTC acted arbitrarily and capriciously in denying the kit building adjustment and remanded the case instructing the ISBTC to reassess Damon's property.[273] The court further instructed that if the assessment altered the grade of Damon's building, the ISBTC must grade it a C or must support with substantial evidence any grade other than a C.[274]

8. Componx, Inc. v. Indiana State Board of Tax Commissioners.[275]— Componx appealed to the tax court the final determination of the ISBTC assessing Componx's property.[276] Componx's property was subject to a kit building adjustment.[277] However, the ISBTC ruled that the interior components of the building should be subtracted from the base price of the building before applying the fifty percent reduction[278] for the kit building adjustment and then fully added back in after the adjustment has been made.[279] The issue was whether this procedure constituted an abuse of discretion by the ISBTC.[280]

The tax court ruled that this procedure was not an abuse of discretion or arbitrary and capricious action by the ISBTC.[281] The court reasoned that the kit building adjustment statute did not provide for the interior components to be reduced by fifty percent.[282] Further, the court stated that the ISBTC developed the subtraction method through its instructional bulletins.[283] The court stated that

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269. *Id.*
270. *Id.* at 1112.
271. *Id.*
272. *Id.*
273. *Id.* at 1113.
274. *Id.*
275. 741 N.E.2d 442 (Ind. T.C. 2000).
276. *Id.* at 443.
277. *Id.*
278. *Id.* at 445.
279. *Id.*
280. *Id.* at 444.
281. *Id.* at 446.
282. *Id. See* IND. ADMIN. CODE tit. 50, r. 2.1-4-5 (1992).
283. *Componx, Inc.*, 741 N.E.2d at 444-45. *See* IND. ADMIN. CODE tit. 50, r. 4.2-1-5 (1992) (permitting the ISBTC to issue instructional bulletins to provide instructions to assessors).

"Instructional Bulletins hold a lofty position in property tax law."[284] The court held that Instructional Bulletin 92-1, the one describing the subtraction method, prevails over other previous, less specific, and contradictory instructional bulletins.[285] Therefore, this method holds near-statutory status according to the tax court.

The court further supported its holding by stating that previous instructional bulletins, such as Instructional Bulletin 91-8,[286] indicate that the kit building adjustment was meant to apply only to the shell of the building and not its interior components.[287] To conclude, the court held:

> Because the [ISBTC]'s interpretation of IND. ADMIN. CODE tit. 50, r. 2.1-4-5 via [Instructional Bulletin] 92-1 is not inconsistent with the regulation itself, reflects the purpose of the kit building adjustment, and is the most recent, specific, and objective explanation by the [ISBTC], this Court holds that the method of calculating the kit building adjustment therein is not arbitrary or capricious and is not an abuse of the ISBTC's discretion.[288]

9. Clark v. State Board of Tax Commissioners.[289]—Clark appealed a final determination by the ISBTC adjusting the grade assigned to Clark's apartment complex to a C-1 and refusing to issue an obsolescence adjustment.[290]

The tax court held that the ISBTC erred in adjusting the grade on Clark's property from a C to a C-1.[291] In its final determination, the ISBTC offered no explanation as to why it adjusted Clark's grade.[292] At the trial before the tax court, however, the hearing officer of Clark's administrative hearing testified that she based the adjustment on deviations of Clark's apartment building from the "specifications of the GCR Apartment model."[293] The court held that the ISBTC could not support its final determination by "referring to reasons that were not previously ruled upon, but that [were] offered as post hoc rationalizations."[294] Since the hearing officer's trial testimony was the first explanation on the adjustment, the tax court reversed and remanded the ISBTC's grade

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284. *Componx, Inc.*, 741 N.E.2d at 446.

285. *Id.* at 447.

286. Instructional Bulletin 91-8 was previously used by the ISBTC in assessing the kit building adjustment. This instructional bulletin provided that the fifty percent reduction applied to the entire building, including the interior. *Id.* at 444.

287. *Id.*

288. *Id.* at 448. On practically the same facts, and on the very same day, the tax court made a ruling identical to *Componx* in *King Industrial Corp. v. State Board of Tax Commissioners*, 741 N.E.2d 815 (Ind. T.C. 2000).

289. 742 N.E.2d 46 (Ind. T.C. 2001).

290. *Id.* at 47.

291. *Id.* at 49.

292. *Id.* at 48.

293. *Id.* at 49. At no point in the opinion did the court define the GCR Apartment model.

294. *Id.* (quoting Word of His Grace Fellowship, Inc. v. State Bd. of Tax Comm'rs, 711 N.E.2d 875, 878 (Ind. T.C. 1999)).

determination.[295]

With respect to the issue of the obsolescence deduction, the court affirmed the ISBTC in denying the deduction.[296] Clark argued that he was entitled to a deduction because his apartment lessees tend to be Purdue University students. This characteristic, Clark argued, translated into higher maintenance costs and a higher turnover rate. Further, Clark argued that he was entitled to obsolescence because of the low land-to-building parking ratios.[297] The court held that while these reasons may in fact permit an entitlement, Clark failed to submit probative evidence tending to show that he actually suffered higher administrative costs or that the parking situation led to an actual problem.[298] Instead, Clark rested on conclusory statements which, the court commented, "do not qualify as probative evidence."[299] As a result, the court affirmed the ISBTC denial of an obsolescence deduction.[300]

10. Louis D. Realty Corporation v. Indiana State Board of Tax Commissioners.[301]—Louis Realty appealed to the tax court a final determination by the ISBTC.[302] Louis Realty raised two issues: whether the ISBTC's regulations regarding grade, condition, or obsolescence were unconstitutional because they were arbitrary and capricious and whether the ISBTC's determinations regarding grade, condition, or obsolescence in Louis Realty's case were arbitrary and capricious or unsupported by substantial evidence.[303]

The tax court held that the final determination of the ISBTC would not be reversed solely because Louis Realty's property was assessed under an unconstitutional system.[304] The court stated that property must still be assessed, even though the current system was unconstitutional, until new regulations are in place.[305] Therefore, "a taxpayer cannot come into court, point out the inadequacies of the present system and obtain a reversal of an assessment . . . . Instead, the taxpayer must come forward with probative evidence relating to" the specific issues of the taxpayer's individual case.[306] As a result, the court refused to reverse the final determination of the ISBTC solely on constitutional

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295. *Id.* The court hinted to the ISBTC that the preferred way of accounting for Clark's deviation from the GCR Apartment model is to "use separate schedules that show the costs of certain components and features present in the model." *Id.* (referencing Whitley Prods., Inc. v. State Bd. of Tax Comm'rs, 704 N.E.2d 1113, 1117 (Ind. T.C. 1998)). This method would be more objective than the grade adjustment method and therefore was preferred. *Id.*

296. *Id.* at 52.

297. *Id.* at 50-51.

298. *Id.* at 51-52. In fact, the evidence suggested that Clark was making money off his apartments. *Id.* at 51.

299. *Id.*

300. *Id.* at 52.

301. 743 N.E.2d 379 (Ind. T.C. 2001).

302. *Id.* at 381.

303. *Id.*

304. *Id.* at 383.

305. *Id.*

306. *Id.*

grounds.[307]

The court further held that the ISBTC did not err in its assessment of Louis Realty's property's grade.[308] The court held that for Louis Realty to show that the ISBTC acted arbitrarily and capriciously, it must offer probative evidence demonstrating such action.[309] Louis Realty failed to offer any evidence supporting its position that the ISBTC acted arbitrarily and capriciously, so the tax court affirmed the ISBTC's final determination with respect to grade.[310]

The tax court reversed, however, the ISBTC's final determination with respect to condition.[311] The condition of a structure on property was an important factor in the determination of that property's physical depreciation.[312] Physical depreciation was important because it affects the property's true tax value, which is the value on which the taxpayer paid property taxes.[313] To determine condition, the assessor must perform "an observation of the amount of physical deterioration relative to the age of that improvement and the degree of maintenance relative to the age of that improvement."[314] This observation required the assessor to "determine the average condition of similar structures, [and] then relate the structure being assessed to that established average."[315]

The assessor in this case failed to adhere to the assessment regulations.[316] The assessor compared Louis Realty's property to other similar property without ever determining the average condition of the similar buildings.[317] The court held that Louis Realty had presented a prima facie case of error in the ISBTC assessment of condition.[318] Further, the ISBTC failed to rebut this prima facie case.[319] Therefore, the ISBTC's final determination with respect to condition was reversed and remanded for a hearing in which Louis Realty must demonstrate, via substantial evidence, its entitled level of condition.[320]

With respect to obsolescence, the tax court held that Louis Realty failed to establish a prima facie case establishing that it was entitled to economic obsolescence, but it did establish a prima facie case establishing that it was entitled to functional obsolescence.[321] The rule regarding obsolescence in place

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307. *Id.*
308. *Id.* at 384.
309. *Id.*
310. *Id.*
311. *Id.* at 385.
312. *Id.* at 384.
313. *Id.*
314. *Id.*
315. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992)).
316. *Id.* at 385.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 386-87. Functional obsolescence was caused by factors internal to the property that reduced the value of the property, while economic obsolescence was caused by factors external to the property with the same effect. *Id.* at 386.

during the commencement of Louis Realty's case stated that in a case of alleged error in obsolescence assessments, Louis Realty must identify the causes of the obsolescence and demonstrate that the quantification of the obsolescence by the ISBTC was not supported by the evidence.[322]

The court held that the ISBTC erred in its assessment of Louis Realty's functional obsolescence.[323] At trial, the assessor testified that he found twenty percent functional obsolescence because that was what he always did for property like Louis Realty's.[324] The court stated that this finding was supported by no independent evidence.[325] Therefore, Louis Realty had met its burden to show that the quantification of the obsolescence by the ISBTC was not supported by the evidence.[326]

The court held that Louis Realty failed to show any probative evidence establishing an entitlement to economic obsolescence.[327] Louis Realty simply submitted to the assessor its financial statements and the vacancy rates for its property.[328] Louis Realty failed to meet its burden because its submissions did not show a cause of economic obsolescence.[329] Therefore, the ISBTC's denial of economic obsolescence was affirmed.[330]

11. Davidson Industries v. State Board of Tax Commissioners.[331]—Davidson appealed a final determination by the ISBTC assessing two parcels of land in Allen County.[332] Davidson asserted two issues to the tax court: whether the ISBTC's determination should be reversed because its regulations were unconstitutional and whether Davidson's property suffered from obsolescence.[333]

The court held that it would not reverse the final determination of the ISBTC solely because its regulations were unconstitutional.[334] Real property will still be assessed under the current system until a new set of regulations comes out.[335] To have a cognizable claim, Davidson needed to show why the ISBTC erred on a specific issue in its individual case.[336]

The court held that the ISBTC did not err in refusing an obsolescence

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322. *Id.* at 386. The current rule required the taxpayer to both identify the causes of the obsolescence and quantify the amount. *Id.* at 385-86 (citing Clark v. State Bd. of Tax Comm'rs, 694 N.E.2d 1230, 1241 (Ind. T.C. 1998)).

323. *Id.* at 386.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 387.

328. *Id.* at 386-87.

329. *Id.* at 387.

330. *Id.*

331. 744 N.E.2d 1067 (Ind. T.C. 2001).

332. *Id.* at 1068.

333. *Id.*

334. *Id.* at 1069.

335. *Id.*

336. *Id.*

deduction.[337] The rule in place at the time of the commencement of Davidson's case required that Davidson, to make a prima facie showing of an entitlement to obsolescence, demonstrate the cause of obsolescence.[338] All Davidson offered as evidence were conclusory statements without explanations of the cause for obsolescence.[339] The court stated: "Davidson did not even designate what kind of obsolescence was allegedly demonstrated by its evidence. It is not this Court's place to sift through Davidson's evidence and make its arguments for . . . it."[340] As a result, the tax court affirmed the denial of obsolescence.[341]

12. Champlin Realty v. State Board of Tax Commissioners.[342]—Champlin appealed to the tax court for the second time from a final determination of the ISBTC denying an obsolescence adjustment to Champlin's property.[343] Champlin owned two parcels of land in Elkhart County.[344] Champlin initially filed for review by the ISBTC the denial of an obsolescence adjustment by the local assessor.[345] At that time, the ISBTC agreed with Champlin and assessed an obsolescence adjustment.[346] However, Champlin appealed to the tax court.[347] At that appeal, the tax court reversed the obsolescence adjustment and remanded the case back to the ISBTC.[348] The court, on the first appeal, stated that the record was "bereft of any probative evidence which supports either the causes or quantification of functional obsolescence."[349] On remand, the ISBTC denied an obsolescence adjustment, and Champlin again appealed to the tax court.[350]

At the trial before the tax court, Champlin presented several exhibits, photographs, and reviews of its property describing how it was entitled to a functional obsolescence adjustment.[351] The court, however, was not persuaded by it.[352] To create a prima facie case of entitlement to an obsolescence adjustment, the court stated: "the taxpayer must explain how the purported causes of obsolescence cause the subject improvements to suffer losses in value."[353] It is not enough for the taxpayer to "merely identify possible causes

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337. *Id.* at 1071.

338. *Id.* at 1070. The current rule requires the taxpayer to both identify the causes of the obsolescence and quantify the amount. *Id.* (citing Clark v. State Bd. of Tax Comm'rs, 694 N.E.2d 1230, 1241 (Ind. T.C. 1998)).

339. *Id.* at 1071.

340. *Id.*

341. *Id.*

342. 745 N.E.2d 928 (Ind. T.C. 2001).

343. *Id.* at 929.

344. *Id.* at 930.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 930-31.

349. *Id.* at 930.

350. *Id.* at 931.

351. *Id.* at 932-34.

352. *Id.* at 934.

353. *Id.* at 936.

of obsolescence."[354]

Champlin next contended that, since it and the ISBTC agreed in the first determination that the obsolescence adjustments were appropriate, the only issue before the court was the quantification of the obsolescence.[355] The court rejected this argument.[356] The court remarked that any agreement between the parties was negated by the issuance of a remand order.[357] "The Court's Remand Order wiped the slate clean with respect to functional obsolescence, due to the lack of any probative evidence tending to show that the subject improvements suffered from causes of functional obsolescence."[358] As a result, there was no agreement for the court to recognize.[359] Therefore, the second final determination denying a functional obsolescence adjustment was affirmed.[360]

13. North Group, Inc. v. State Board of Tax Commissioners.[361]—North Group appealed a final determination by the ISBTC that assessed North Group's property as separate lots rather than on an acreage basis.[362] The property at issue was previously owned by Tipton.[363] Prior to Tipton's sale to North Group, the land was assessed on an acreage basis.[364] After an agreement to sell, but before title changed hands, Tipton platted the property into lots.[365] After North Group received title to the property, the county assessor reassessed the subject property on a lot basis, rather than on an acreage basis.[366] North Group objected, but the ISBTC decided that the property was properly assessed on a lot basis.[367]

The tax court affirmed.[368] The controlling statute over this dispute stated that "if land assessed on an acreage basis is subdivided into lots, the lots may not be reassessed until the next assessment date following a transaction which results in a change in legal or equitable title to that lot."[369] The court held that this statute was not ambiguous.[370] "The facts of this case fit squarely within the statute," and there was no error in reassessing the land on a lot basis.[371]

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354. *Id.*

355. *Id.* The court noted that on remand the "local assessing officials . . . opined that the obsolescence adjustments granted by the [ISBTC] in its original Final Determinations were adequate." *Id.*

356. *Id.* at 937-38.

357. *Id.* at 937.

358. *Id.*

359. *Id.* at 938.

360. *Id.*

361. 745 N.E.2d 938 (Ind. T.C. 2001).

362. *Id.* at 939.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.* at 940-41.

368. *Id.* at 941.

369. *Id.* at 940 (quoting IND. CODE § 6-1.1-4-12 (2000)) (emphasis deleted).

370. *Id.* at 941.

371. *Id.*

14. Miller Structures, Inc. v. State Board of Tax Commissioners.[372]—Miller Structures, Inc. ("Miller") owned two parcels of land in Elkhart County, designated parcel one and parcel two.[373] Miller filed a Form 133 Petition for Correction of Error for parcel one, asserting that the assessment of parcel one was in error because of the failure to consider the metal construction of a building on parcel one.[374] Miller also filed a Form 131 Petition for Review of Assessment for both parcel one and parcel two asserting that the buildings on these parcels required kit building adjustment, a grade adjustment, and a obsolescence adjustment.[375] Regarding the 133 petition, the ISBTC concluded that parcel one was not entitled to a kit building adjustment. Regarding the 131 petitions, the ISBTC concluded that neither parcel one nor parcel two was entitled to a kit building adjustment, the grade should be C-2, and there should be no obsolescence adjustment.[376] Miller appealed to the tax court all of these issues and in addition whether the ISBTC exceeded statutory authority in conducting hearings on these petitions without having the hearing officers receive written prescriptions of their duties.[377]

With respect to the issue of the hearing officers, the court held that Miller had waived the issue.[378] The ISBTC was required to set a hearing on these petitions[379] and had to appoint a hearing officer who had received prescriptions about the duties of a hearing officer.[380] Whether the hearing officers of Miller's petitions actually received prescriptions of duties or not, the court stated that "there is no evidence presented by Miller and this Court has found no evidence that Miller objected to the authority of" the hearing officers.[381] This failure constituted a waiver.[382] Therefore, the ISBTC had not exceeded its statutory authority in this case.[383]

With respect to the 133 petition, the court held that the building on parcel one was not entitled to a kit building adjustment.[384] The court stated that Miller needed "to present a prima facie case that its building was entitled to" the kit adjustment.[385] All Miller did was simply state that its building was made of metal and, therefore, the kit adjustment should have been applied.[386] The court

372. 748 N.E.2d 943 (Ind. T.C. 2001).

373. *Id.* at 946-47.

374. *Id.* at 947.

375. *Id.*

376. *Id.*

377. *Id.* at 947-48.

378. *Id.*

379. *See* IND. CODE § 6-1.1-15-4(a) (1998 & Supp. 2001).

380. *Miller Structures*, 748 N.E.2d at 948 (referencing IND. CODE § 6-1.1-30-11(a)-(b) (1998 & Supp. 2001)).

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 949.

385. *Id.*

386. *Id.*

held that this statement was a bare allegation, which did not constitute a prima facie case.[387] Since Miller failed to make a prima facie case, the ISBTC's burden to rebut this case had not been triggered.[388]

With respect to the 131 petitions, the court dealt with the kit adjustment issue, the grade issue, and the obsolescence issue separately. The court held that Miller had stated a prima facie case that the light manufacturing structure on parcel two and all structures on parcel one were entitled to a kit building adjustment.[389] Miller met its burden by providing ample evidence that these buildings contained the elements of kit buildings, such as rigid framing with Cee channels and tapered columns, and that twenty-six gauge steel was used on the buildings.[390] Because Miller had met its burden, the burden shifted to the ISBTC to rebut that the buildings were entitled to a kit building adjustment.[391] The ISBTC pointed to other characteristics of the buildings that were inconsistent with kit buildings, such as high tolerance loads for the concrete floors, beams, and roof.[392] The court found this rebuttal evidence to be sufficient to support the ISBTC's "final determination that the buildings in question were not entitled to a kit building adjustment."[393] Since Miller did not present further evidence to rebut the ISBTC's rebuttal evidence, the court affirmed the ruling of the ISBTC.[394]

Miller asked the tax court for a grade adjustment if it denied the kit building adjustment.[395] The trial court stated that the evidence Miller presented for a grade adjustment was the same as the evidence Miller presented for the kit building adjustment.[396] The court held that this evidence did not constitute a prima facie case for a grade adjustment because Miller never explained why these characteristics better resembled D grade buildings instead of C-2 grade buildings.[397] As a result, the tax court affirmed the ISBTC's C-2 grade assessment.[398]

Miller finally argued that its buildings were entitled to an obsolescence adjustment.[399] The court stated that the rule regarding obsolescence in place during the commencement of Miller's case was that Miller simply needed to identify the causes of the obsolescence.[400] Miller claimed that its buildings

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387. *Id.*

388. *Id.*

389. *Id.* at 950.

390. *Id.*

391. *Id.*

392. *Id.* at 951.

393. *Id.*

394. *Id.* at 951-52.

395. *Id.* at 952.

396. *Id.* at 952-53.

397. *Id.* at 953.

398. *Id.*

399. *Id.*

400. *Id.* at 954. The current rule requires the taxpayer to both identify the causes of the obsolescence and quantify the amount. *Id.* at 953-54 (citing Clark v. State Bd. of Tax Comm'rs,

suffered from obsolescence because they had add-on construction.[401] Miller argued that the buildings would be more efficient if there were just one building with everything under one roof rather than having the add-on construction.[402] The court held that these statements were conclusory and did not establish how the property lost value because of these characteristics.[403] As a result, the court affirmed the ISBTC's denial of an obsolescence adjustment because Miller failed to meet its burden.[404]

15. Zakutansky v. State Board of Tax Commissioners.[405]—The Zakutanskys owned real residential property in Porter County.[406] The Zakutanskys appealed to the tax court from a final determination by the ISBTC, which concluded that the assessment of $350 per front foot was proper and that the correct depth factor for the Zakutanskys' home was the 150 feet depth table.[407]

With respect to the front foot value issue, the tax court held that the ISBTC's use of the $350 per front foot was proper.[408] The Zakutanskys' property was in the third line of houses from Lake Michigan.[409] The Zakutanskys argued that other homes located in the third row from Lake Michigan were assessed a lower rate than $350 per front foot.[410] The tax court concluded that this showing constituted a prima facie case that the property was not assessed in an equal and uniform manner.[411] However, the ISBTC rebutted the Zakutanskys' evidence by demonstrating that the houses with which Zakutansky compared its own were in fact different from the Zakutanskys' home.[412] The other houses did not enjoy the hill-top positioning of the Zakutanskys' home and did not share the Zakutanskys' lake view.[413] Further, the ISBTC provided evidence that other properties that were very similar to the Zakutanskys' property were valued at the same or higher rates.[414] As a result, the tax court held that ISBTC rebutted the Zakutanskys' prima facie case and affirmed the $350 per front foot valuation.[415]

With respect to the depth-factor issue, the court remanded the issue back to the administrative level to determine the predominant lot depth in the area under consideration.[416] A depth factor was the factor used to adjust the front foot base

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694 N.E.2d 1230, 1241 (Ind. T.C. 1999)).

401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*
405. 758 N.E.2d 103 (Ind. T.C. 2001).
406. *Id.* at 105.
407. *Id.* at 104.
408. *Id.* at 107.
409. *Id.* at 106.
410. *Id.*
411. *Id.*
412. *Id.* at 106-07.
413. *Id.*
414. *Id.* at 107.
415. *Id.*
416. *Id.* at 109.

rate to account for depth variations from the standard.[417] Indiana law stated that "depth charts should be selected by determining the predominant lot depth of the area under consideration."[418] The ISBTC used the entire town of Ogden Dunes to determine the predominant lot depth.[419] The Zakutanskys asserted that this was error and argued that using only one block would be best.[420] The court, however, held that the predominant lot depth should be the one that occurs more often than the others.[421] As a result of this definition, the court remanded the case back to the administrative level so that the parties could determine the predominant lot depth for the area under consideration.[422]

B. Property Tax–Tangible Personal Property

1. Mariah Foods LP v. Indiana State Board of Tax Commissioners.[423]— Mariah Foods ("Mariah") purchased certain new equipment.[424] Mariah petitioned the ISBTC for a deduction in both 1997 and 1998 from the assessed value of this equipment because Mariah operates in an Economic Revitalization Area.[425] After both petitions, the ISBTC sent correspondence to Mariah stating that Mariah had not provided a detailed description of the equipment, the equipment's cost, and its installation date.[426] After these correspondences, Mariah did nothing.[427] The ISBTC then sent notice to Mariah that the ISBTC was not going to allow a deduction and gave Mariah three weeks to object or present additional information.[428] Mariah again did nothing, so the ISBTC denied the request for a deduction.[429] Mariah appealed to the tax court.[430]

The tax court held that Mariah was not entitled to the deduction.[431] The tax court will only reverse a decision of the ISBTC if it was unsupported by substantial evidence, arbitrary or capricious, an abuse of discretion, or exceeded statutory authority.[432]

The Indiana legislature permitted a deduction from the assessed value of this new manufacturing equipment installed by Mariah.[433] However, to qualify for

417. *Id.* at 108 (referencing IND. ADMIN. CODE tit. 50, r. 2.2-4-8 (1996)).
418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.* at 109.
423. 749 N.E.2d 646 (Ind. T.C. 2001).
424. *Id.* at 647.
425. *Id.*
426. *Id.*
427. *Id.*
428. *Id.* at 648.
429. *Id.*
430. *Id.*
431. *Id.* at 650-51.
432. *Id.* at 648.
433. *Id. See also* IND. CODE § 6-1.1-12.1-4.5 (1998 & Supp. 2001).

this deduction, Mariah needed to file an application with the ISBTC that, among other things, adequately described the equipment installed.[434] Mariah described the equipment only as "new pork processing equipment."[435] The court held that the ISBTC could have reasonably concluded that this description "lacked sufficient detail to properly identify the new equipment."[436] The court was moved by the numerous opportunities the ISBTC gave Mariah to correct the non-specific definition of which Mariah failed to take advantage.[437] As a result, the ISBTC's refusal to grant a deduction was affirmed.[438]

C. Gross Income

1. Allison Engine Co., Inc. v. Indiana Department of State Revenue.[439]— Allison Engine Co., Inc. ("Allison") filed two claims for a refund of gross income tax paid with the IDR.[440] The IDR denied the first claim.[441] Allison subsequently filed the second claim, which the IDR refused to address because the IDR thought the second claim was the same as the first claim.[442] Allison filed an appeal with the tax court, and the IDR argued that the tax court lacked jurisdiction to hear the appeal.[443]

The tax court held that it did have jurisdiction over the second claim.[444] The court commented that the issue of whether more than one claim for a refund can be filed for the same tax was one of first impression in Indiana.[445] However, relying on federal precedent, the court adopted an analysis to consider when determining whether two claims were identical.[446] The court considered the "facts, grounds, and theories in each claim."[447] Allison's first claim was for a refund of gross income because Allison should have been taxed at a lower rate as it qualified as a contractor in certain transactions.[448] In the second claim, Allison claimed to be entitled to a lower tax rate because Allison was acting as a retail seller in certain transactions with the government.[449]

The court held that while there was some overlap between the claims, "claim

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434. *Mariah Foods*, 749 N.E.2d at 648.

435. *Id.* at 649.

436. *Id.*

437. *See id.* at 649-50.

438. *Id.* at 651.

439. 744 N.E.2d 606 (Ind. T.C. 2001).

440. *Id.* at 607-08.

441. *Id.* at 607.

442. *Id.* at 608.

443. *Id.*

444. *Id.* at 611.

445. *Id.*

446. *Id.* at 610. *See also* Huettl v. United States, 675 F.2d 239 (9th Cir. 1982); Charlson Realty Co. v. United States, 384 F.2d 434 (Ct. Cl. 1967).

447. *Allison Engine*, 744 N.E.2d at 610.

448. *Id.* at 611.

449. *Id.*

one is based upon the theory and facts which support Allison's contention that it is a contractor while claim two is based upon the theory and facts which support its assertion that it is selling at retail because of the title passage clauses in its government contracts."[450] Therefore, the court held that it had jurisdiction over the appeal of the denial of Allison's second claim "because it was filed less than three years but more than 180 days after Allison filed [c]laim [t]wo" with the ISDR, and the ISDR had not made a decision on claim two.[451]

2. May Department Stores Co. v. Indiana Department of State Revenue.[452]—May Department Stores, Inc. ("May") had merged with Associated Dry Goods Corp. ("Associated").[453] Both companies' principle business is department store retailing.[454] Prior to and as a result of the planned merger, the City of Pittsburgh, Pennsylvania sued May and Associated for antitrust violations.[455] The parties resolved this dispute by a stipulation that required May to divest all of the assets of one of the divisions of Associated.[456] After the sale, May filed an Indiana adjusted gross income tax and supplemental income tax return.[457] May characterized the gains realized from the sale of Associated's assets as non-business income.[458] The IDR, after an audit, recharacterized these gains as business income.[459] May paid the taxes owed and then filed for a refund.[460] The IDR denied the refund claim, and May appealed to the tax court.[461]

The issue was whether the gains realized by the sale of Associated's assets were business or non-business income.[462] The distinction was important because business income is apportioned between Indiana and other states, while non-business income is allocated either to Indiana or another state.[463] Indiana law defines business income as "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."[464] To determine whether income is business income, the tax court

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450. *Id.*

451. *Id.*

452. 749 N.E.2d 651 (Ind. T.C. 2001).

453. *Id.* at 653.

454. *Id.* at 654.

455. *Id.*

456. *Id.*

457. *Id.* at 655.

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.* at 653.

463. *Id.* at 656. In other words, if the gains were non-business income then May would only have to pay taxes on those gains in one state, which would likely not be Indiana. If the gains were business income, then May would have to pay taxes on those gains to many states, pursuant to some formula irrelevant to the disposition of this case.

464. *Id.* at 655 (quoting IND. CODE § 6-3-1-20 (1998 & Supp. 2001)).

has adopted two tests: the transactional test and the functional test.[465] To be business income under the transactional test, the gains must have been realized from a transaction that occurred in the regular course of May's business.[466] To be business income under the functional test, the gains must have been realized from acquisition, management, or disposition of property by the taxpayer, and the process must be integral to the taxpayer's regular trade or business operations.[467]

The court concluded that the gains realized by May were non-business income under both tests.[468] The gains were realized pursuant to the sale of an entire division of Associated.[469] Associated was not in the business of selling entire divisions, but rather department store retail.[470] Further, the disposition of these assets "was neither a necessary nor an essential part of Associated's department store retailing business operations."[471] Therefore, the income should have been characterized as non-business income, and it was error for the IDR to consider it otherwise.[472]

D. Sales and Use Tax

1. Meyer Waste System, Inc. v. Indiana Department of State Revenue.[473]— Meyer Waste System, Inc. ("Meyer Waste") was a garbage collector.[474] Indiana law imposes a use tax "on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making the transaction."[475] Certain transactions are exempt from this use tax. One such exemption applies to transactions involving tangible personal property acquired in providing public transportation to the property.[476] Meyer Waste claimed that it was exempt from the use tax because the transportation of trash constituted public transportation.[477] The IDR disagreed and assessed the use tax on Meyer Waste.[478] Meyer Waste appealed to the tax court.[479]

The tax court held that Meyer Waste was liable for the use tax because it was not exempt under the public transportation exemption.[480] The court stated that

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465. *Id.* at 662-63.
466. *Id.* at 663.
467. *Id.* at 664.
468. *Id.* at 665.
469. *Id.* at 663.
470. *Id.*
471. *Id.* at 665.
472. *Id.* at 666.
473. 741 N.E.2d 1 (Ind. T.C. 2000).
474. *Id.* at 3.
475. *Id.* at 4 (quoting IND. CODE § 6-2.5-3-2(a) (1998 & Supp. 2001)).
476. *Id.* (citing IND. CODE § 6-2.5-3-4(a)(2) (1998 & Supp. 2001)).
477. *Id.* at 3.
478. *Id.*
479. *Id.*
480. *Id.* at 15-16.

to constitute public transportation, the carrier must be predominantly engaged in the transportation of the property of another.[481] In this case, Meyer Waste owned the trash it transported because the generator of the trash abandoned it when it put the trash at the curb.[482]

Meyer Waste further challenged the public transportation exemption on equal protection grounds.[483] The court, using rational basis review, held that any disparities caused by the exemption are fairly and substantially related to a legitimate governmental interest.[484] The interest involved was to reduce the cost to the carrier that provided transportation services to the public so that the carrier could pass those savings along to the public.[485]

2. Panhandle Eastern Pipeline Co. v. Indiana Department of State Revenue.[486]—Panhandle Eastern Pipeline Co. ("Panhandle") was a company in the business of transporting natural gas.[487] Most of the gas Panhandle transported belonged to other people; however, some of the transported gas belonged to Panhandle.[488] Indiana law imposes a use tax on persons who acquire property through a transaction from a retail merchant.[489] A taxpayer is exempt from this tax if it used or consumed the acquired property while providing public transportation for the property.[490] Panhandle asserted that it was entitled to a 100% exemption because it transported tangible property in public transportation.[491]

The court held that this exemption was "an all-or-nothing exemption."[492] It further held that when "a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, it is entitled to the exemption."[493] Panhandle predominantly transported gas for third parties.[494] As a result, Panhandle was entitled to a 100% exemption from the use tax.[495]

3. Williams v. Indiana Department of State Revenue.[496]—Williams purchased and paid the gross retail tax on a car in Indiana.[497] Williams then lost

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481. *Id.* at 5-6.
482. *Id.* at 5-9.
483. *Id.* at 11.
484. *Id.* at 15.
485. *Id.* at 13.
486. 741 N.E.2d 816 (Ind. T.C. 2001).
487. *Id.* at 817.
488. *Id.*
489. *Id.* at 818 (referencing IND. CODE § 6-2.5-2-1(a) (1998 & Supp. 2001)).
490. *Id.* (referencing IND. CODE § 6-2.5-5-27 (1998 & Supp. 2001)).
491. *Id.*
492. *Id.* at 819.
493. *Id.*
494. *Id.*
495. *Id.* at 819-20.
496. 742 N.E.2d 562 (Ind. T.C. 2001).
497. *Id.* 562-63

the original title and requested a duplicate title from the dealer.[498] Thereafter, Williams moved to Michigan.[499] While in Michigan, Williams received the duplicate title and then registered the car.[500] As a result of this registration, Williams paid the Michigan use tax on the car.[501] Williams never registered the car in Indiana.[502] Williams filed a petition with the IDR requesting a refund of the Indiana retail tax paid.[503] The IDR denied the refund, and Williams appealed to the tax court.[504]

Williams contended that she was entitled to a credit since she paid a tax equal to or greater than the Indiana tax in another state.[505] The tax court held that the credit listed taxes for which the credit applied, and the retail tax was not listed.[506] Further, the credit was not applicable for vehicles that were required to be registered in Indiana.[507] Since the car Williams purchased was supposed to be registered in Indiana, regardless of whether it ever was, Williams was not entitled to the credit.[508]

E. Controlled Substance Excise Tax

1. Clifft v. Indiana Department of Revenue.[509]—This case concerned a woman who was arrested for possession of marijuana.[510] The IDR issued an assessment of the Controlled Substance Excise Tax (CSET).[511] The issue was whether Clifft possessed the marijuana and, as a result, is liable for the CSET.

The court held that Clifft indeed possessed marijuana and that the CSET assessment was proper.[512] The court stated that Clifft pled guilty to possession of marijuana in her criminal case, and thereby admitted that she did indeed possess marijuana.[513] Also, the court found that Clifft had the intent and capability to exercise dominion and control of the marijuana that the police found

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498. *Id.* at 563.
499. *Id.*
500. *Id.*
501. *Id.*
502. *Id.*
503. *Id.*
504. *Id.*
505. *Id.* at 564. *See* IND. CODE § 6-2.5-3-5 (1998 & Supp. 2001).
506. *Williams*, 742 N.E.2d at 564.
507. *Id.*
508. *Id.* at 564-65.
509. 748 N.E.2d 449 (Ind. T.C. 2001).
510. *Id.* at 451.
511. *Id.* at 450. *See* IND. CODE §§ 6-7-3-1 to -20 (2001).
512. *Clifft*, 748 N.E.2d at 454.
513. *Id.* at 453. Although the state submitted Clifft to a criminal trial, the CSET did not violate double jeopardy because the jeopardy in CSET cases attaches at the moment of the assessment, which occurred before the criminal case here. *Id.* at 451. *See* Clifft v. Ind. Dep't of State Revenue, 660 N.E.2d 310 (Ind. 1995). In other words, a double jeopardy issue would only apply against the subsequent criminal jeopardy and not the initial tax jeopardy.

in Clifft's house.[514] This evidence was sufficient for the court to affirm the CSET assessment.[515]

F. Financial Institutions Tax

1. Salin Bancshares, Inc. v. Indiana Department of Revenue.[516]—Salin Bancshares, Inc. ("Salin") is an Indiana corporation that is subject to the Financial Institutions Tax (FIT).[517] The FIT is an "excise tax on the exercise of the corporate privilege of operation as a financial institution in Indiana."[518] The financial institution subject to this tax must, among other things, submit to the IDR the amount of federal adjusted gross income tax paid for a particular year, and then the IDR will calculate the FIT liability for that year.[519] In 1995, Salin entered into a closing agreement with the IRS settling a dispute regarding certain deductions Salin had been taking over the period of time dating back to 1984.[520] This agreement had the affect of changing Salin's federal income tax liability for the year 1991.[521] Salin did not file an amended tax return for the year 1991,[522] nor did it notify the IDR of its agreement or its increased tax liability for 1991.[523] The IDR audited Salin in 1996 and discovered a deficiency in Salin's FIT for 1991.[524] Salin overpaid its FIT in 1993, so the IDR applied the subsequent overpayment.[525] Salin requested a refund of its payment of the 1991 deficiency arguing that the statute of limitations for issuing an assessment for 1991 had expired.[526] The IDR denied a refund.[527] Salin appealed this denial to the tax court.

The issues before the tax court were "[w]hether Salin was obligated to notify the [IDR] of its 1995 closing agreement with the IRS"[528] and "whether the [IDR]'s assessment of Salin for deficient FIT payments more than three years after the due date for the tax was untimely. . . ."[529] Regarding the first issue, the court held that "Salin was obligated to and failed to notify the [IDR] of its 1995

514. *Clifft*, 748 N.E.2d at 454.

515. *Id.*

516. 744 N.E.2d 588 (Ind. T.C. 2000).

517. *Id.* at 590. *See* IND. CODE § 6-5.5-1-1 to -9-5 (1998 & Supp. 2001).

518. *Salin*, 744 N.E.2d at 591 (quoting Ind. Dep't of State Revenue v. Fort Wayne Nat'l Corp., 649 N.E.2d 109, 112 (Ind. 1995)).

519. *Id.*

520. *Id.* at 590.

521. *Id.*

522. *Id.* at 592.

523. *Id.* at 590

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.*

closing agreement with the IRS."[530] The FIT statute provides that each taxpayer must, within 120 days, notify the IDR of "any alteration or modification of a federal income tax return . . . including any modification or alteration in the amount of tax, regardless of whether the modification or assessment results from an assessment."[531] The court held that this broad language required Salin to notify the IDR of the changed liability "regardless of whether alterations or modifications are made on a tax return itself or in a manner that effectively alters or modifies the tax return."[532]

Regarding the issue of the statute of limitations, the court held that while the IDR did not issue a timely proposed assessment, Salin was equitably estopped from asserting this as a defense.[533] The FIT statute provides a three-year statute of limitations after the filing of a return for issuing an assessment;[534] however, there is no statute of limitations if the taxpayer fails to file a return.[535] The court, however, concluded that the FIT statute did not actually require the taxpayer to file an amended return if the federal liability was altered or modified.[536] The express language and intent of the statute allowed, but did not require, an amended return to be filed to constitute notice for the purpose of the statute of limitations.[537] Therefore, the IDR only had three years to conduct this assessment, which it failed to do.[538]

The court, however, held that Salin was equitably estopped from asserting the statute of limitations as a defense.[539] The elements of equitable estoppel are:

> (1) a representation or concealment of a material fact; (2) made by a person with knowledge of the fact and with the intention that the other party act upon it; (3) to a party ignorant of the fact; (4) which induces the other party to rely or act upon it to his detriment.[540]

The court concluded that Salin failed in its statutory duty to notify the IDR of its closing agreement with the IRS.[541] The court stated: "the [IDR] had every right to presume that Salin would notify it of changes in Salin's federal tax liability. The Court will not allow Salin to disclaim its obligation to notify the [IDR] of the closing agreement's terms. Salin's conduct amounted to constructive fraud on its part."[542] As a result, the court granted summary judgment for the IDR, thereby

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530. *Id.* at 593.
531. IND. CODE § 6-5.5-6-6(a) (1998 & Supp. 2001).
532. *Salin*, 744 N.E.2d at 593.
533. *Id.* at 595.
534. *Id. See* IND. CODE § 6-8.1-5-2(a)(1) (1998 & Supp. 2001).
535. *Salin*, 744 N.E.2d at 595. *See* IND. CODE § 6-8.1-5-2(e) (1998 & Supp. 2001).
536. *Salin*, 744 N.E.2d at 595.
537. *Id.*
538. *Id.*
539. *Id.*
540. *Id.* (citing Wabash Grain, Inc. v. Smith, 700 N.E.2d 234, 237 (Ind. Ct. App. 1998)).
541. *Id.* at 596.
542. *Id.*

affirming the IDR's denial of a refund to Salin.[543]

G. Motor Carrier Fuel Tax

1. Jack Gray Transport, Inc. v. Department of State Revenue.[544]—The taxpayer[545] was a motor carrier in the business of commercial trucking.[546] The General Assembly passed a law that exempted from the motor carrier tax those vehicles that used power take-off equipment.[547] The taxpayer applied for this exemption, but the IDR denied its application.[548] The taxpayer appealed to the tax court asking that the court certify its class and grant it the exemptions.[549]

The tax court did not certify the class.[550] The court held that the taxpayer did not meet the numerosity requirement because the taxpayer expressly indicated that it could join all potential claimants in one lawsuit.[551] Furthermore, the IDR stated that it was willing to try all 1536 cases if necessary.[552]

The tax court did hold, however, that as to the taxpayers directly involved in this action,[553] the IDR erred in refusing to give the taxpayers their exemption.[554] The court held that the statute that provided the exemption was not completely invalidated by a previous tax court case that declared part of the statute unconstitutional.[555] Since the court had previously only struck the unconstitutional language in the motor carrier fuel statute, the statute still existed and the taxpayer was entitled to the exemption.[556]

2. Hi-Way Dispatch, Inc. v. Indiana Department of State Revenue.[557]—Hi-Way Dispatch, Inc. ("Hi-Way") is a commercial motor vehicle operator with

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543. *Id.*

544. 744 N.E.2d 1071 (Ind. T.C. 2001).

545. The taxpayer includes Jack Gray Transport as well as thirty-eight other parties. *Id.* at 1072. The taxpayer sought to certify a class action consisting of 1536 similarly-situated motor carriers. *Id.* at 1073.

546. *Id.*

547. *Id. See* IND. CODE § 6-6-4.1-4(d) (1998 & Supp. 2001).

548. *Jack Gray Transport*, 744 N.E.2d at 1072-73.

549. *Id.* at 1073.

550. *Id.* at 1075.

551. *Id. See* IND. TRIAL RULE 23(A).

552. *Jack Gray Transport*, 744 N.E.2d at 1075.

553. *Id.* at 1077 n.11.

554. *Id.* at 1077.

555. *Id. See* Bulkmatic Transp. Co. v. Dep't of State Revenue, 715 N.E.2d 26, 36 (Ind. T.C. 1999); Bulkmatic Transp. Co. v. Dep't of State Revenue, 691 N.E.2d 1371, 1379 (Ind. T.C. 1998). The previous version of the motor carrier fuel tax was unconstitutional because in contained language that "discriminated against interstate commerce and foreclosed tax neutral decisions, a result which is not allowed under the Commerce Clause." *Jack Gray Transport*, 744 N.E.2d at 1076.

556. *Jack Gray Transport*, 744 N.E.2d at 1077.

557. 756 N.E.2d 587 (Ind. T.C. 2001).

a principle place of business in Marion, Indiana.[558] Between 1992 and 1994, Hi-Way did not pay its motor carrier fuel taxes for the gas lost during idle time.[559] Idle time was when a motor vehicle's engine was on, but the vehicle was not moving.[560] The IDR issued an assessment against Hi-Way for the amount of taxes not paid plus interest, and Hi-Way appealed to the tax court.[561]

The issues before the tax court were whether the IDR properly included idle time gas consumption in the calculation of fuel tax owed, whether Hi-Way had any affirmative defenses with respect to the IDR's assessment, and whether Hi-Way was entitled to full credit for the fuel purchased in Indiana but consumed elsewhere.[562]

The tax court held that the IDR properly concluded that Hi-Way could not reduce its total fuel consumed figure by fuel lost in idle time.[563] Indiana was a member of the International Fuel Tax Agreement (IFTA).[564] The IFTA is an agreement between member jurisdictions that permits a motor carrier to pay fuel tax in one jurisdiction, and then that jurisdiction distributes the tax to other jurisdictions in which the carrier operates.[565] The IFTA permitted a tax on the consumption of motor fuels used in the propulsion of certain vehicles.[566] Hi-Way argued that idle time gas loss was not used in the propulsion of their vehicles, so it was exempt from the tax.[567] Indiana statutes provide, however, a road tax on the consumption of fuel during operations on the state's highways.[568] Another Indiana statute states that if an Indiana law and an IFTA regulation conflict, the IFTA regulation prevails.[569]

The court held that the Indiana road tax law and the IFTA tax only on the fuel that was used to propel the carrier were not inconsistent.[570] The court stated that the IFTA regulation "explains the general use for which fuel must be consumed under IFTA, not the fuel's specific use at any given time."[571] Since there was no conflict, the IDR properly did not reduce Hi-Way's tax liability by the amount of gas used in idle time.[572]

The court held that Hi-Way had a valid affirmative defense of laches against

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558. *Id.* at 591.

559. *Id.*

560. *Id.* at 596.

561. *Id.* at 591.

562. *Id.* at 590.

563. *Id.* at 597.

564. *Id.* at 595. *See* IND. CODE § 6-8.1-3-14 (1998 & Supp. 2001).

565. *Hi-Way Dispatch*, 756 N.E.2d at 594.

566. *Id.* at 595.

567. *Id.* at 596.

568. *Id. See* IND. CODE § 6-6-4.1-4 (1998 & Supp. 2001).

569. *Hi-Way Dispatch*, 756 N.E.2d at 595. *See* IND. CODE § 6-8.1-3-14(d) (1998 & Supp. 2001).

570. *Hi-Way Dispatch*, 756 N.E.2d at 597.

571. *Id.*

572. *Id.*

the IDR.[573] The elements of the defense of laches were: "(1) inexcusable delay in asserting a right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) circumstances resulting in prejudice to the adverse party."[574] The court found a genuine issue of material fact as to laches because Hi-Way offered evidence that tended to show that its president received the blessing of the administrator of the IDR's Special Tax Division to exclude idle time.[575] Despite this apparent acquiescence, the IDR, after seven years, decided to enforce its right to collect idle time taxes anyway.[576] As a result, the tax court permitted a trial to go forward on the issue of laches.[577]

With respect to the issue of Hi-Way's entitlement to a tax credit, the court held that the IDR properly denied the credit to Hi-Way.[578] The court held that the Indiana statute that provided a full tax credit for gasoline purchased in Indiana but consumed in a non-IFTA state only when a similar fuel tax was remitted to that state was not in conflict with the IFTA and did not violate the Commerce Clause.[579] As a result, Hi-Way's motion for summary judgment on the issue of the credit entitlement was denied.[580]

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573. *Id.* at 600. The court concluded that Hi-Way did not have a valid equitable estoppel defense against the IDR. *Id.* at 599. The court stated: "Hi-Way must identify an important public policy reason for disregarding the general rule that government entities cannot be estopped." *Id.* The reason for this rule is that "[i]f the government could be estopped, then dishonest, incompetent or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees' unauthorized representations, then government itself could be precluded from functioning." *Id.* at 598 (quoting Samplawski v. City of Portage, 512 N.E.2d 456, 459 (Ind. Ct. App. 1987)).

574. *Id.* at 599-600.

575. *Id.* at 600.

576. *Id.*

577. *Id.* at 605.

578. *Id.*

579. *Id.* at 602-03.

580. *Id.* at 605.

RECENT DEVELOPMENTS IN INDIANA TORT LAW

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INTRODUCTION

This Article surveys the most significant developments in Indiana tort law from October 1, 2000 through September 30, 2001. The Article is confined solely to the review of court decisions, as the General Assembly did not enact any legislation that significantly affected tort law during the survey period.

I. TORT CLAIMS ACT

In *Porter v. Fort Wayne Community Schools*,[1] the court of appeals addressed the notice requirements under the Indiana Tort Claims Act ("ITCA"). Porter was injured in a motor vehicle collision involving a Fort Wayne Community Schools bus. Porter subsequently hired an attorney who wrote a letter regarding the claim to Fort Wayne Community Schools' insurance carrier.[2]

While the attorney's letter contained specifics about the collision and his client's injuries, he did not mention the ITCA nor the amount of damages sought.[3] Thereafter, Fort Wayne Community Schools moved for summary judgment, which the trial court granted, based on Porter's failure to comply with the notice requirements of the ITCA.[4]

On appeal, the court of appeals initially noted that "[t]he purpose of the ITCA's notice requirements is to provide the political subdivision the opportunity to investigate the facts surrounding an accident so that it may determine its liability and prepare a defense."[5] Further, the court noted that "[s]ubstantial compliance with the notice requirement may be sufficient provided the purpose of the requirement is satisfied."[6] Finally, the court noted that "[w]hen deciding whether there has been substantial compliance, [the appellate court] reviews whether the notice given was, in fact, sufficiently definite as to time, place, and nature of the injury."[7]

In its analysis of the facts, the court of appeals determined that although the attorney's letter did not expressly state that Porter intended to file a claim against

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1. 743 N.E.2d 341 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 17 (Ind. 2001).
2. *Id.* at 342-43.
3. *See id.* at 343.
4. *Id.*
5. *Id.* at 344 (citing Hasty v. Floyd Mem'l Hosp., 612 N.E.2d 119, 123 (Ind. Ct. App. 1992)).
6. *Id.*
7. *Id.*

Fort Wayne Community Schools, he did state "his representation of Porter's 'interests' and that additional information would be forwarded 'to support his claim.'"[8] Therefore, the court determined that the attorney's letter "adequately informed Fort Wayne [Community Schools] of Porter's intent to make a claim and provided sufficient information about the collision to facilitate Fort Wayne's investigation."[9]

Further, the court noted that "Fort Wayne considered Porter's letter to be notice of a tort claim."[10] Specifically, the court found that "Fort Wayne's insurance company assigned a 'claim number' to Porter's claim and maintained a file 'reflective of [Porter's] condition.'"[11] Therefore, the court found that "Fort Wayne's conduct was inconsistent with its position" that the attorney's letter on behalf of Porter "did not satisfy . . . the purpose of the ITCA notice requirements."[12] Therefore, the court of appeals concluded that the attorney's letter on behalf of Porter "was sufficiently definite as to time, place, and nature of Porter's injuries and, thus, substantially complied with the notice requirements of the ITCA."[13]

In *Metal Working Lubricants Co. v. Indianapolis Water Co.*,[14] the court of appeals addressed whether the Indianapolis Water Company ("IWC") qualified as a "governmental entity" for purposes of immunity. After Metal Working Lubricants' plant was ravaged by fire in 1996, it sued the IWC, maintaining that the fire hydrants in the area provided an inadequate water supply for fire-fighting purposes. The IWC, "a privately-owned water company providing the City of Indianapolis with water for domestic purposes pursuant to a franchise contract between IWC and the City," affirmatively pled immunity pursuant to the ITCA as an affirmative defense.[15] Ultimately, the IWC moved for and was granted summary judgment based upon its immunity defense.[16]

On appeal, the court of appeals addressed the issue of whether the IWC qualified as a "governmental entity." In that regard, the court recognized that IWC is not a "governmental entity" as defined in the ITCA.[17] However, the court noted that the Indiana Supreme Court "has held that when private groups are 'endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and are subject to the laws and

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8. *Id.* (alteration by court).

9. *Id.*

10. *Id.* at 345.

11. *Id.* (alteration by court).

12. *Id.* at 345 (citing Delaware County v. Powell, 393 N.E.2d 190, 192 (Ind. 1979) ("finding substantial compliance with tort notice requirements despite lack of any writing within 180 days where defendant's conduct established that purposes of notice statute were satisfied")).

13. *Id.* at 345.

14. 746 N.E.2d 352 (Ind. Ct. App. 2001).

15. *Id.* at 354.

16. *Id.*

17. *Id.* at 355.

statutes affecting governmental agencies and corporations.'"[18]

The court of appeals held that, "[a]s a matter of law," IWC was "an instrumentality of the government."[19] Specifically, the court determined that IWC had "not only been 'endowed . . . with powers or functions governmental in nature,' but it is, in essence, acting in the government's stead."[20] Further, the court noted that "IWC may technically be a 'private' company, but it enjoys very few attributes of a truly private company."[21] Specifically, the court found that IWC "operates by the authority and at the will of the City and [that] it is subject to extensive oversight by the state through the [Indiana Utility Regulatory Commission]."[22] Therefore, the court held that IWC could "be considered a governmental entity."[23] Finally, the court held that failure to provide adequate fire protection is similar to failure to provide police protection and, as such, it held that the IWC was entitled to immunity pursuant to the common law.[24]

In *PNC Bank, Indiana v. State*,[25] the court of appeals addressed the "discretionary function" immunity of the ITCA. PNC Bank, Indiana ("PNC"), as guardian of Marcus Speedy, "filed a negligence action against the State . . . , alleging that the State negligently caused Speedy's injuries by failing to provide a left-turn arrow at the intersection" where Speedy was involved in an automobile collision.[26] The State filed a motion for summary judgment alleging that it was immune from liability pursuant to the "discretionary function" immunity contained in the ITCA.[27] The trial court granted summary judgment and PNC appealed.[28]

On appeal, the State claimed that it was "immune from liability to PNC for Speedy's injuries because its alleged act of negligence (failure to install a left-turn signal) was a discretionary function."[29] Initially, the court of appeals noted that the ITCA "provides that a governmental entity is not liable for loss resulting from 'the performance of a discretionary function.'"[30] The court further noted that the Indiana Supreme Court had "adopted the 'planning-operational test' for assessing whether a governmental entity is immune under the ITCA for the performance of a discretionary function."[31] This test essentially provides that "a

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18. *Id.* at 356 (citing Ayres v. Indian Heights Volunteer Fire Dep't, 493 N.E.2d 1229, 1235 (Ind. 1986)).

19. *Id.* at 357.

20. *Id.* (quoting *Ayres*, 493 N.E.2d at 1235) (citation omitted).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 359.

25. 750 N.E.2d 444 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 421 (Ind. 2001).

26. *Id.* at 445.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 446.

31. *Id.* (citing Peavler v. Bd. of Comm'rs of Monroe County, 528 N.E.2d 40 (Ind. 1988)).

governmental entity will not be liable for negligence arising from decisions that are made at a planning level, as opposed to an operational level."[32] Specifically, the court noted that the State had undertaken a lengthy analysis of the intersection in question prior to the collision and that it had exercised its official judgment and discretion, and had weighed alternatives and public policy choices.[33] The court held that "the State's allegedly negligent failure to install a left-turn signal prior to Speedy's accident [was] entitled to immunity because it involved the performance of discretionary function."[34]

In *City of Anderson v. Davis*,[35] the court of appeals addressed the "law enforcement" immunity provision of the ITCA. In May 1995, a Madison County sheriff "observed a teenage male walking along the road."[36] The pedestrian "matched the description of a teenager who had reportedly walked away from the Madison County Juvenile Center, where he was being detained upon charges of auto theft."[37] When the teenager "realized he had been spotted, he retreated into a nearby wooded area."[38] The sheriff "called his office for assistance," and, among the officers who responded to the call was Timothy Davis, the department's chief deputy.[39]

"Davis parked his police vehicle near the edge of the wooded area . . . , and began to search on foot."[40] While Davis was searching the area on foot, Officer Stoops from the Anderson Police Department arrived with his police dog, Chester, and they began searching the same area. At one point, Officer Stoops, believing that Chester was alerted to the scent of the suspect, "deploy[ed] Chester in an off-leash search."[41] Chester bolted, and "when officer Stoops caught up with his dog, he saw [Chester] attacking Davis," causing serious injuries to Davis.[42]

Davis filed a complaint against, inter alia, the City of Anderson and Officer Stoops, alleging that they were negligent in the off-leash deployment of Chester.[43] The defendants "asserted the affirmative defense of governmental immunity under the ITCA."[44] After a bench trial, judgment was entered in favor of Davis and the appeal ensued.[45]

On appeal, the City claimed "that it was immune from liability for Officer

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32. *Id.* at 446 (citing Lee v. State, 682 N.E.2d 576, 578 (Ind. Ct. App. 1997)).
33. *Id.* at 446-47.
34. *Id.* at 447.
35. 743 N.E.2d 359 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 412 (Ind. 2001).
36. *Id.* at 361.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 362.
44. *Id.*
45. *Id.*

Stoops' alleged negligence pursuant to the 'law enforcement' immunity provision of the ITCA."[46] Davis contended that the City was not immune because the use of the dog "under the circumstances did not constitute the 'enforcement of law' within the meaning of the Act."[47]

The court of appeals decision was based on the recent Indiana Supreme Court case of *Benton v. City of Oakland City, Indiana*.[48] Pursuant to the *Benton* opinion, the court of appeals determined that it simply needed to decide whether Stoops was acting within the scope of his employment and whether he was engaged in the "enforcement of law" at the time of the incident involving the plaintiff.[49]

There was no allegation or evidence indicating that Stoops was not acting within the course of his employment with the City of Anderson at the time of the incident.[50] Therefore, the court's analysis dwelt on whether he was engaged in the "enforcement of a law" at the time the incident occurred.[51]

Davis contended that the "use of Chester did not constitute law enforcement" because Chester was used despite the knowledge that the dog "had inappropriately attacked people in the past."[52] However, the court found no authority "suggesting that when a police officer performs his duties in a negligent matter, the officer is no longer 'enforcing a law.'"[53] Instead, the court determined that Chester had been deployed "to assist in locating and apprehending an individual who had escaped from a juvenile detention facility . . . and who was evading recapture by the police."[54] Further, the court determined that the "use of Chester under the circumstances plainly constituted an 'activity in which a government entity or its employees compel or attempt to compel the obedience of another to laws, rules or regulations, or sanction or attempt to sanction a violation thereof'. . . ."[55] Therefore, the deployment of Chester "amounted to the 'enforcement of the law' within the meaning of the ITCA."[56]

II. MEDICAL MALPRACTICE

In *Narducci v. Tedrow*,[57] the court of appeals addressed the necessity of expert testimony regarding the requisite standard of medical care in the context

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46. *Id.*
47. *Id.*
48. 721 N.E.2d 224 (Ind. 1999).
49. *Davis*, 743 N.E.2d at 364.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 364-65.
54. *Id.* at 365.
55. *Id.*
56. *Id.*
57. 736 N.E.2d 1288 (Ind. Ct. App. 2000).

of the doctrine of res ipsa loquitur. Narducci performed colon surgery on Tedrow and allegedly lacerated his spleen during the procedure.[58] After Tedrow filed a lawsuit against Narducci, Narducci moved for summary judgment and submitted an affidavit of an expert witness who testified that a spleen laceration can occur without negligence on the part of the surgeon.[59] Tedrow did not present any expert opinion in opposition to Narducci's motion for summary judgment.[60] "[T]he trial court found that the doctrines of 'res ipsa loquitur' and 'common knowledge' applied to Tedrow's claims against Dr. Narducci and, thus, Tedrow was not required to present expert testimony regarding the requisite standard of [medical] care in order to establish negligence on the part of Dr. Narducci."[61]

On appeal, Narducci contended that the application of res ipsa loquitur was "improper because the uncontradicted expert testimony stated that a patient's spleen can accidentally be injured during colon surgery absent any negligence on the part of the surgeon."[62] Further, Narducci also claimed that "the 'common knowledge' exception should not apply because the determination of whether Dr. Narducci complied with the requisite standard of [medical] care during the colon surgery require[d] the education, training, and experience of a surgeon and is beyond the common knowledge of a layperson."[63]

The court of appeals noted that "[g]enerally, the mere fact that an injury occurred will not give rise to a presumption of negligence."[64] Further, in order to "establish the applicable standard of [medical] care and to show a breach of that standard, a plaintiff must generally present expert testimony."[65] However, the court recognized that "the doctrine of res ipsa loquitur is a qualified exception to the general rule that the mere fact of an injury will not create an inference of negligence."[66]

The court noted that

> [u]nder the doctrine of res ipsa loquitur, negligence may be inferred where 1) the injuring instrumentality is shown to be under the management or exclusive control of the defendant, . . . and 2) the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care.[67]

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58. *Id.*

59. *Id.* at 1291.

60. *Id.*

61. *Id.*

62. *Id.* at 1292.

63. *Id.*

64. *Id.* (citing Baker v. Coca-Cola Bottling Works of Gary, 177 N.E.2d 759, 761 (Ind. App. 1961)).

65. *Id.* (citing Slease v. Hughbanks, 684 N.E.2d 496, 499 (Ind. Ct. App. 1997)).

66. *Id.* (citing *Baker*, 177 N.E.2d at 762).

67. *Id.* at 1292-93 (quoting Vogler v. Dominguez, 624 N.E.2d 56, 61 (Ind. Ct. App. 1993)).

Further, the court noted that "[a] plaintiff relying on res ipsa loquitur may establish the second prong, and show that the event or occurrence was more probably the result of negligence, by relying upon common knowledge or expert testimony."[68] Moreover, "[e]xpert testimony is required only when the issue of care is beyond the realm of the lay person."[69] Finally, the court noted that the "common knowledge" exception "will apply where 'the complained-of conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach' of the applicable standard of care."[70]

In its analysis of the facts of this case, the court determined that "there [was] no dispute that the first prong of the res ipsa loquitur doctrine [was] satisfied, as Tedrow's spleen was perforated in a setting under the exclusive control of Dr. Narducci . . . ."[71] Relative to the second prong of the doctrine, the court noted that the "undisputed expert testimony" was that Dr. Narducci met the requisite standard of care in her treatment of Tedrow.[72] Despite this testimony, Tedrow asserted that the "common knowledge" exception applied "to satisfy the second prong of the doctrine because it is within the cognitive abilities of a layperson to conclude that removal of one's spleen is not the natural or usual outcome of colon surgery."[73] However, the court concluded that "it [was] not apparent that a fact-finder possesses the knowledge and expertise necessary to render an informed decision on the issue of negligence."[74] Specifically, the court held that "the determination of whether Dr. Narducci . . . met the relevant standard of care in [her] treatment of Tedrow [required] some understanding of the procedures involved in colon surgery, the location in the body of the various organs at issue, and the nature of the spleen."[75] The court found this type information was not within the "common knowledge" of lay people and, thus, expert testimony on this issue was required.[76] As such, the court reversed the trial court's judgment and remanded with instructions to enter summary judgment for Narducci.[77]

In *Patel v. Barker*,[78] the court of appeals addressed the issue of whether each of two breaches of care of the standard occurring during a single surgery constitutes separate "occurrences" for purposes of the Indiana Medical Malpractice Act.

> Baker was diagnosed with a malignancy in her colon and referred to [Dr.] Patel for surgery. Patel performed the surgery, which involved

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68. *Id.* at 1293.
69. *Id* (citing Stumph v. Foster, 524 N.E.2d 812, 815 (Ind. Ct. App. 1988)).
70. *Id.* (quoting Malooley v. McIntyre, 597 N.E.2d 314, 319 (Ind. Ct. App. 1992)).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1293-94.
76. *See id.*
77. *Id.* at 1294.
78. 742 N.E.2d 28 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 416 (2001).

> resectioning the colon. During the surgery, Patel used hemoclips to control bleeding. At some point following the surgery, it was discovered that Barker's colon was leaking into her abdominal cavity at the point of reattachment.[79]

Further, it was discovered that "a hemoclip had been left on Barker's ureter."[80] Barker filed a medical malpractice suit against Patel and "claimed that Patel breached the standard of [medical] care in two ways: by suturing the colon in such a way that it leaked and by leaving a hemoclip on her ureter."[81] A jury awarded Barker $1.8 million in damages.[82] However, the trial court reduced the award to $1.5 million, in accordance "with the Indiana Medical Malpractice Act limitation of $750,000 . . . per act of malpractice."[83]

On appeal, Patel contended that the acts which Barker complained about "constituted [o]ne 'occurrence' . . . under the Indiana Medical Malpractice Act," entitling Barker to only one recovery of $750,000.[84] Barker argued that "Patel committed two breaches of the standard of [medical] care, and therefore two 'occurrences' by failing to close her colon correctly and by leaving a hemoclip in place."[85]

The court of appeals noted that the Medical Malpractice Act broadly defines malpractice "as a tort or breach of contract based on health care services that were provided or that should have been provided to a patient."[86] Further, the court noted that the Act provided in relevant part:

> (a) The total amount recoverable for an injury or death of a patient may not exceed the following:
> (1) Five hundred thousand dollars ($500,000) for an act of malpractice that occurs before January 1, 1990.
> (2) Seven hundred fifty thousand dollars ($750,000) for an act of malpractice that occurs:
> (A) after December 31, 1989; and
> (B) before July 1, 1999.
> (3) One million two hundred fifty thousand dollars ($1,250,000) for an act of malpractice that occurs after June 30, 1999.
> (b) A health care provider qualified under this article (or IC 27-12 before its repeal) is not liable for an amount in excess of two hundred fifty thousand dollars ($250,000) for an occurrence of

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79. *Id.* at 30 (footnote omitted).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 31. The limitation of $750,000 in damages per act of malpractice was increased to $1.25 million effective July 1, 1999. *See* IND. CODE § 34-18-14-3 (1998).

84. *Patel*, 742 N.E.2d at 30-31.

85. *Id.*

86. *Id.*

malpractice.[87]

Even though "Barker and Patel debated the meaning of the term 'occurrence,' the court noted that this term occurs only in subsection (b), which discusses" the effect of a claim on the health care provider.[88] By contrast, the court noted that "subsection (a) is concerned with the effect of the limitation on recovery to the patient. This provision addresses the subject in terms of 'injury' and the critical concept is 'an act' of malpractice."[89]

The court noted that Indiana appellate cases have interpreted the Act as allowing only one recovery when multiple breaches lead to a single injury and multiple recoveries when multiple breaches during more than one procedure lead to multiple injuries.[90] However, the court recognized that this was a "unique case [because] multiple breaches during a single procedure lead to multiple injuries."[91] The court found no reason "why this distinction should require a different analysis" than that contained in prior case law.[92] Specifically, the court recognized that "the limitation on recovery applies to 'an injury or death,' not 'an act of malpractice.'"[93] Further, the court found that it was "undisputed that Barker had two distinct injuries from two distinct acts of malpractice to two separate body systems, her digestive and urinary systems."[94] Thus, the court held that "the Indiana Medical Malpractice Act allows for one recovery for each distinct act of malpractice that results in a distinct injury, even if the multiple acts of malpractice occur in the same procedure."[95]

In *Winona Memorial Hospital, Ltd. Partnership v. Kuester*,[96] the court of appeals addressed an issue of first impression in Indiana: "[w]hether a claim against a qualified health care provider for the negligent credentialing of a physician is an action for 'malpractice' subject to the provisions of the Medical Malpractice Act."[97] On interlocutory appeal, Winona contended that "'negligent credentialing' is a tort covered under the Medical Malpractice Act . . . and, as such, an opinion must be obtained from a medical review panel before a complaint may be filed with the trial court."[98] Winona argued that "Kuester's complaint should have been dismissed because she failed to obtain first an opinion from a medical review panel."[99] However, Kuester asserted that

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87. *Id.* (quoting IND. CODE § 34-18-14-3 (1998)).
88. *Id.* at 32.
89. *Id.*
90. *Id.*
91. *Id.* at 33.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. 737 N.E.2d 824 (Ind. Ct. App. 2000).
97. *Id.* at 825.
98. *Id.*
99. *Id.*

"'negligent credentialing' is administrative in nature and is, therefore, not subject to the requirements of the Act."[100]

The court noted that "[u]nder the Act, 'malpractice' is defined as a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider to a patient."[101] Although the term "'professional services' was not defined in the Act," Winona contended that "the act of credentialing is such a 'professional service,' and therefore, the tortious act of 'negligent credentialing' falls within the meaning of 'malpractice.'"[102] Conversely, Kuester maintained that "in order for conduct to fall within the Act, it must occur in the course of a patient's medical care, treatment, or confinement, and that the Act does not extend to conduct outside this relatively circumscribed timeframe."[103]

In order "[t]o determine whether credentialing of a physician is subject to the Act," the court was "guided by other relevant Indiana statutes" concerning "credentialing of hospital medical staff . . . performed by each hospital's governing board," as well as the medical staff's statutory responsibility.[104] After reviewing the "statutory responsibilities of the . . . governing board and the hospital medical staff," the court concluded that "the credentialing process" involves a blend of both medical and nonmedical personnel and expertise.[105] Therefore, because credentialing was "neither clearly within the Act nor outside of it," the court held that the Act was "ambiguous with regard to whether the physician credentialing process [was] included within its ambit," and, thus, the court was compelled to "construe the Act . . . to give effect to the intention of the General Assembly."[106]

In construing the Act, the court first noted that Indiana appellate courts "have historically determined the applicability of the Act by examining whether the cause of action alleged sounds in medical malpractice or in ordinary negligence."[107] Further, the court of appeals has "consistently held" that "the substance of the claim as pleaded . . . determine[s] the applicability of the Act."[108] After reviewing Kuester's complaint, the court noted that she alleged that two negligent acts proximately caused the injury.[109] Further, for Kuester to prove the tort of negligent credentialing, she must first establish that a negligent act by the treating physician "proximately caused her injury before she could proceed against Winona."[110] As a result, the court found it "inappropriate to look

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100. *Id.*
101. *Id.* at 826 (citing IND. CODE § 34-18-2-18 (1998)).
102. *Id.*
103. *Id.*
104. *Id.* at 826-27 (citing IND. CODE §§ 16-21-2-5, -7 (1998 & Supp. 2001)).
105. *Id.* at 827.
106. *Id.*
107. *Id.*
108. *Id.*
109. *See id.* at 827-28.
110. *Id.* at 828.

only to the credentialing conduct alleged in the complaint to determine whether it sound[ed] in malpractice or in a[] . . . common law cause of action."[111] Moreover, the court stated that "[t]he credentialing process alleged must have resulted in a definable act of medical malpractice that proximately caused injury to . . . Kuester or [she] is without a basis to bring the suit for negligent credentialing."[112]

The court determined that when "both alleged negligent acts required to recover (i.e., both the credentialing and the malpractice)" are considered, it was clear that the "*General Assembly intended that all actions the underlying basis for which is alleged medical malpractice are subject to the [A]ct.*"[113] Specifically, because "credentialing and appointing licensed physicians to its medical staff is a service rendered by the hospital in its role as a health care provider," the court determined that "inclusion of negligent credentialing under the Act is consistent with use of the medical review panel to establish the standard of care owed by Winona in credentialing."[114]

The court stated that "[t]he composition and function of medical review panels supports the inclusion of negligent credentialing within the purview of the Act."[115] Further, the court held that "the Act applies to conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only conduct which is unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment."[116] Therefore, the court held that "credentialing was directly related to the provision of health care" and thus was not excluded from the Medical Malpractice Act.[117]

In *Sherrow v. GYN, Ltd.*,[118] the court addressed the permissibility of including legal argument in an evidentiary submission to a medical review panel. "Sherrow filed a proposed complaint with the Indiana Department of Insurance for personal injuries and wrongful death" against, inter alia, GYN, Ltd. ("GYN").[119] "A medical review panel was convened . . . and the parties [gave] their evidentiary submissions to the panel" pursuant to the Medical Malpractice Act.[120] The submission given on behalf of GYN, contained a legal argument, which included the following phrase: "Nor is a physician liable for errors in

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111. *Id.*

112. *Id.*

113. *Id.* (quoting Lee v. Lafayette Home Hosp., Inc., 410 N.E.2d 1319, 1324 (Ind. Ct. App. 1980) (emphasis by court)).

114. *Id.* (citing Methodist Hosp. of Ind., Inc. v. Ray, 551 N.E.2d 463, 468 (Ind. Ct. App. 1990), *adopted on trans.*, 558 N.E.2d 829 (Ind. 1990) (per curiam).

115. *Id.*

116. *Id.* (quoting *Ray*, 551 N.E.2d at 466).

117. *Id.*

118. 745 N.E.2d 880 (Ind. Ct. App. 2001).

119. *Id.* at 881.

120. *Id.*

judgment or honest mistakes in the treatment of a patient."[121] Taking exception to the inclusion of legal discussion in the evidentiary submission, Sherrow requested that all legal citations and argument be redacted.[122] The panel chairperson rejected Sherrow's request, leading Sherrow to file "a motion for preliminary determination of law in the trial court."[123] While the trial court did order a slight modification of the submission, it did not require "complete redaction of all legal discussion."[124]

On appeal, the court began by noting that "[p]arties are permitted to submit evidence to the [medical review] panel" and that such evidence "may consist of 'medical charts, x-rays, lab tests, excerpts of treatises, . . . depositions of witnesses including parties, and any other form of evidence allowable by the medical review panel.'"[125] The court noted that GYN's submission contained discussion of the applicable legal standards.[126] Pursuant to statute, the court concluded that "legal argument is inappropriate in evidentiary submissions because [it] is not 'evidence.'"[127] Specifically, the court found that neither of the applicable statutes authorized parties "to submit their interpretations of guiding legal precedent to the [medical review] panel."[128] Moreover, the court recognized that the medical review panel chairperson, an attorney, "bears the responsibility for advising the three medical professionals on the panel" relative to any legal question involved in the review proceeding.[129] Finally, according to the court, "if parties want the panel to be advised" on any legal issues that may arise, "they should submit a request to the . . . chairperson" and not attempt to include legal arguments in their evidentiary submissions.[130] As a result, the court of appeals determined that "the trial court erred by not redacting all legal argument" from GYN's evidentiary submission.[131]

In *Blevins v. Clark*,[132] the court of appeals addressed whether an attending nurse during a patient's labor and delivery is covered by the physician-patient privilege. After prolonged labor, Blevins was forced to undergo an emergency Caesarian section performed by Dr. Clark.[133] During that procedure, Dr. Clark discovered that her uterus had ruptured, and the baby had entered her abdomen.[134]

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121. *Id.*
122. *Id.*
123. *Id.* at 881-82.
124. *Id.* at 882.
125. *Id.* at 884 (quoting IND. CODE § 34-18-10-17 (1998)).
126. *Id.* at 885.
127. *Id.*
128. *Id.*; *see also* IND. CODE §§ 34-18-10-17, -21 (1998).
129. *Sherrow*, 745 N.E.2d at 885.
130. *Id.*
131. *Id.*
132. 740 N.E.2d 1235 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).
133. *Id.* at 1237.
134. *Id.*

Unfortunately, the baby died only a few days later.[135] Blevins filed a complaint against Dr. Clark alleging that Dr. Clark failed to meet the standard of care.[136] "During the pre-trial phase, Dr. Clark submitted a witness list, identifying three nurses who had treated [Blevins] during her labor and delivery."[137] When counsel for Blevins attempted to interview these nurses, they were informed that "Dr. Clark's counsel . . . had instructed them not to discuss Blevins' treatment with anyone other than Dr. Clark's counsel."[138] As a result, Blevins' counsel "[filed a] motion requesting sanctions against Dr. Clark's counsel and exclusion of the nurses' testimony."[139] After the trial court denied the motion, Blevins appealed.[140]

At trial and on appeal, Blevins contended that "Dr. Clark's counsel interviewed nurses covered by a physician-patient privilege."[141] Based on *Cua v. Morrison*,[142] Blevins contended that "Dr. Clark's attorney improperly conducted *ex parte* interviews with nurses who attended [Blevins] during her delivery.[143] The court noted that to decide whether *Cua* applied, it must first be determined "whether the nurses who assisted [Blevins] during her pregnancy were covered by the privilege."[144]

The court recognized that the Indiana Supreme Court has extended the physician-patient privilege "to third persons who aid physicians or transmit information to physicians on behalf of patients."[145] Further, the court stated that in order to "determine whether a nonphysician health care provider is covered by extension of the privilege," the court "must examine 'the nature and degree of control exercised' by the physician over the health care provider under the circumstances . . . ."[146] The court determined that Blevins failed to show that "Dr. Clark's degree of control or supervision over the nurses require[d] application of the privilege."[147] Specifically, the court found that "[t]he nurses exercised a certain degree of independence in assessing and monitoring [Blevins'] condition, given Dr. Clark's periodic absences throughout the day of delivery."[148] Therefore, the court was unwilling to find that "the trial court abused its discretion in denying [Blevins'] motion to exclude the nurses'

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135. *Id.*
136. *See id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1237-38.
140. *Id.* at 1238.
141. *Id.* at 1239.
142. 636 N.E.2d 1248 (Ind. 1994).
143. *Blevins*, 740 N.E.2d at 1239.
144. *Id.*
145. *Id.* (citing Springer v. Byram, 36 N.E. 361, 363 (1894)).
146. *Id.* at 1240 (quoting *In re* C.P., 563 N.E.2d 1275, 1278 (Ind. 1990)).
147. *Id.*
148. *Id.*

testimony."[149]

In *Harlett v. St. Vincent Hospitals & Health Services*,[150] the court of appeals addressed the appropriateness of a nurse serving as a member on a medical review panel. "The Harletts filed their proposed complaint with the Indiana Department of Insurance, alleging that St. Vincent nurses were negligent in failing to protect Harlett from developing a bedsore . . . and for failing to treat the bedsore once it became apparent."[151] Thereafter, the panel chairman provided two striking panels, one composed of nurses and one composed of physicians. The parties struck from the striking panels, resulting in the selection of one nurse and one physician as panel members.[152] These panelists "twice selected a physician as the third panelist, but the Harletts objected."[153] Then, "the chairman listed a striking panel of nurses, and the parties alternatively struck, leaving one panelist. The chairman then certified the panel to the Indiana Department of Insurance as consisting of two nurses and one physician.[154]

St. Vincent asked the chairman "to excuse the two nurses and replace them with physicians."[155] The chairman denied this request, and St. Vincent filed a "motion for a preliminary determination of law, requesting that the trial court order that the medical review panel be comprised of at least two physicians and that any nurse panelist be limited in the opinions that she might render."[156] After the trial court "ordered the chairman to excuse one of the registered nurse panelists" and submit "a striking panel consisting of three [physicians]," the Harletts appealed.[157]

The Harletts contended that the trial court erred in removing the nurse from the panel because the trial court misinterpreted *Long v. Methodist Hospital of Indiana, Inc.*,[158] "which formed the basis for the trial court's decision."[159] The court of appeals noted that under *Long*, "nurses are not qualified to offer expert testimony as to the medical cause of injuries or as to increased risk of harm."[160] The court also noted that no opinion was expressed in *Long* whether a nurse is qualified "to serve on a medical review panel."[161]

In its analysis of the case, the court noted that the Medical Malpractice Act provides that "all health care providers in Indiana . . . who hold a license to practice in their profession shall be available for selection as members of the

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149. *Id.*
150. 748 N.E.2d 921 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 422 (Ind. 2001).
151. *Id.* at 923.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. 699 N.E.2d 1164 (Ind. Ct. App. 1998).
159. *Harlett*, 748 N.E.2d at 924.
160. *Id.* at 925 (citing *Long*, 699 N.E.2d at 1169-70).
161. *Id.*

medical review panel."[162] Further, the court recognized that "the Act includes 'registered or licensed practical nurses' in its definition of the term 'health care provider.'"[163] Therefore, the court considered that the Medical Malpractice Act allows nurses, "as health care providers, . . . to serve on a medical review panel" and thus held that "the trial court erred in expanding the specific holding of *Long* to exclude the nurse from the medical review panel."[164]

III. PREMISES LIABILITY

In *Merchants National Bank v. Simrell's Sports Bar & Grill, Inc.*,[165] the court of appeals addressed a tavern owner's duty to protect a patron from the criminal acts of a third person. Christopher Merchant entered Simrell's Sports Bar and "remained inside the bar until closing time at approximately 3:30 a.m. . . . Another group of patrons, including Theodore Brewer, had left the bar several minutes earlier."[166] After Merchant left Simrell's, "an altercation erupted involving Merchant and Brewer on the sidewalk outside the bar where Brewer shot and killed Merchant."[167] The administrator of Merchant's estate filed a wrongful death suit against Simrell's Sports Bar.[168] Simrell's moved for, and was granted, summary judgment on the grounds that "it owed no duty to Merchant as a matter of law."[169]

On appeal, the court of appeals first noted that Indiana has "long recognized the duty of a tavern owner, engaged in the sale of intoxicating beverages, to exercise 'reasonable care to protect guests and patrons from injury at the hands of irresponsible persons whom they knowingly permit to be in and about the premises.'"[170] However, the court also noted that the duty to "anticipate and to take steps against a criminal act of a third-party arises only when the facts of the particular case make it reasonably foreseeable that a criminal act is likely to occur."[171] Moreover, the court noted that "[p]articular facts, which make it reasonably foreseeable, include the prior actions of the assailant either on the day of the act or on a previous occasion."[172]

The court also noted that the Indiana Supreme Court recently held that Indiana courts, when "confronted with the issue of whether a landowner owes a

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162. *Id.* (quoting IND. CODE § 34-18-10-5 (1998) (omission by court)).

163. *Id.* (citing IND. CODE § 34-18-2-14 (1998)).

164. *Id.*

165. 741 N.E. 2d 383 (Ind. Ct. App. 2000).

166. *Id.* at 386.

167. *Id.*

168. *Id.* at 385.

169. *Id.*

170. *Id.* at 386 (quoting Ember v. B.F.D., Inc., 490 N.E.2d 764, 769 (Ind. Ct. App. 1986), *modified on denial of reh'g*, 521 N.E.2d 981 (Ind. Ct. App. 1988)).

171. *Id.* at 386-87 (citing Welch v. R.R. Crossing, Inc., 488 N.E.2d 383, 388 (Ind. Ct. App. 1986)).

172. *Id.* at 387.

duty to take reasonable care to protect an invitee from the criminal acts of a third party, should apply the 'totality of the circumstances' test" in determining whether the crime was foreseeable.[173] The Indiana Supreme Court in *Delta Tau Delta* provided that when considering whether the totality of the circumstances supports the imposition of a duty, courts should look to "all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable."[174] Further, the *Delta Tau Delta* opinion provided that "[a] substantial factor in the determination of duty is the number, nature, and location of prior similar incidents, but the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable."[175]

In its analysis of the facts of this case, the court found that there was "no evidence of any prior or similar shooting incidents outside of the tavern that would have alerted Simrell's to the likelihood that Brewer would shoot Merchant."[176] Further, the only evidence of prior incidents was "testimony by a tavern employee that fights occurred outside the tavern."[177] The court found this evidence "insufficient to demonstrate that Merchant's shooting death was foreseeable."[178] Moreover, the court found that in the record nothing indicated that "Simrell's had any knowledge that Brewer had the propensity to commit a criminal act," and also, nothing revealed that "Merchant and Brewer had any contact while inside the tavern on the night in question to indicate any hostility" between them.[179] Under the totality of the circumstances presented, the court concluded that "Simrell's did not have a duty to protect Merchant" from Brewer's unforeseeable criminal act.[180]

IV. WRONGFUL DEATH DAMAGES

In *Durham v. U-Haul International*,[181] the Indiana Supreme Court addressed whether punitive damages are recoverable in a wrongful death action and whether there is an independent claim for consortium damages in a wrongful death action. Kathy Wade died as a result of injuries sustained in a vehicle collision with a U-Haul truck.[182] Durham, the father of Kathy's children, and Bill

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173. *Id.* (quoting Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999)).

174. *Delta Tau Delta*, 712 N.E.2d at 972.

175. *Id.* at 973.

176. *Merchants Nat'l Bank*, 741 N.E.2d at 387.

177. *Id.*

178. *Id.* at 387-88.

179. *Id.* at 388.

180. *Id.*

181. 745 N.E.2d 755 (Ind. 2001).

182. *Id.* at 757.

Wade, her husband, sued as co-executors of Kathy's estate.[183] Wade asserted a separate claim for loss of consortium.[184] The defendants "moved for partial summary judgment on the issues of punitive damages and Wade's loss of consortium claim."[185] The defendants argued that

> no punitive damages are recoverable under the wrongful death statute and that Wade was limited to a wrongful death claim and [could] not pursue a separate loss of consortium claim for Kathy's death. The trial court held that . . . Wade's loss of consortium claim could proceed, including a claim for punitive damages . . . .[186]

The trial court further held that "punitive damages were not recoverable under the wrongful death statute. The court of appeals affirmed the holding that a consortium claim could be asserted but reversed the grant of summary judgment on the issue of punitive damages," holding that "statutory construction, case law, and policy support[ed] recovery of punitive damages in a wrongful death claim."[187]

On transfer, a narrow 3-2 majority of the Indiana Supreme Court held that punitive damages may not be recovered in wrongful death actions in Indiana.[188] Further, the supreme court also held that while there is no independent claim for consortium damages in death claims, such damages are a proper element of wrongful death damages.[189] Finally, the supreme court held that because the consortium damages are merely an element of wrongful death damages and not a separate cause of action, punitive damages are not recoverable on consortium claims.[190]

V. STATUTE OF LIMITATIONS

In *DeGussa Corp. v. Mullens*,[191] the Indiana Supreme Court addressed the application of statute of limitations when the plaintiff had been exposed to chemicals in the workplace for a prolonged period of time. The plaintiff, Mullens, began working for Grow Mix on September 4, 1990.[192] Mullens' "primary responsibilities included the physical mixing of liquid and dry ingredients to make animal feeds," a process that "generated a great deal of dust."[193] Several months into her job, Mullens began experiencing a persistent

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183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 757-58.
187. *Id.*
188. *Id.* at 766.
189. *See id.*
190. *See id.*
191. 744 N.E.2d 407 (Ind. 2001).
192. *Id.* at 409.
193. *Id.*

cough and was eventually evaluated by her personal physician, Dr. Watkins, on March 17, 1992.[194] Although she was diagnosed with bronchitis, Dr. Watkins informed Mullens that her respiratory problems were possibly work-related.[195] Moreover, Dr. Watkins opined that if Mullens' problems were work-related, he "was unsure whether her symptoms were caused, or merely aggravated by, the conditions at work."[196]

On March 26, 1992, Mullens was examined by one of her two pulmonary specialists and was treated through March 1994, at which point she "received the first unequivocal statement . . . that her lung disease was caused by exposure to chemicals consistent with those at Grow Mix."[197] Mullens filed suit on March 25, 1994, "alleging negligence in the sale of, and her exposure to, products that caused lung damage."[198] Defendants moved for summary judgment, claiming that Mullens had not asserted her claims within the two-year statute of limitations applicable to product liability actions.[199] The trial court denied this motion and defendants appealed.[200] "The Court of Appeals concluded that Mullens failed to file her claims within the statute of limitations period and reversed the trial court . . . ."[201]

On transfer, the supreme court examined the applicable statute of limitations, which provides in relevant part that "any product liability action in which the theory of liability is negligence or strict liability in tort . . . must be commenced within two (2) years after the cause of action accrues."[202]

The court noted that "[t]he statute is silent as to the meaning of 'accrues.'"[203] The court observed that a discovery rule had been adopted "through case law for the accrual of claims arising out of injuries allegedly caused by exposure to a foreign substance."[204] Pursuant to the discovery rule, the "two-year statute of limitations begins 'to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another.'"[205] DeGussa argued that "the statute of limitations had started to run when Dr. Watkins examined Mullens on March 17, 1992," and opined that "her exposure to chemicals at work was one of a number of possible

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 409-10.

198. *Id.* at 410.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (quoting IND. CODE § 33-1-1.5-5 (1993)). The court noted that Indiana Code section 33-1-1.5 "has been recodified, without substantive change," at Indiana Code section 34-20-3-1.

203. *Mullens*, 744 N.E.2d at 410.

204. *Id.*

205. *Id.* (quoting Barnes v. A.H. Robins Co., 476 N.E.2d 84, 87-88 (Ind. 1985)); *see also* Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 842-843 (Ind. 1992) (extending *Barnes*' discovery analysis to all tort cases).

causes" of her symptoms.[206] Therefore, given that Mullens' claim was eight days late when filed on March 25, 1994, Mullens responded by asserting that the statute of limitations had not begun to run "until sometime after March 25, 1992, if not as late as March 1994 when she received the first [unequivocal] diagnosis from a physician that her lung disease was caused by exposure to chemicals at work."[207]

In evaluating when Mullens "knew or should have discovered that she suffered an injury" relative to her products liability claim, the court turned to case law regarding medical malpractice claims, as such cases are "instructive because medical and diagnostic issues are common between the two actions, the statute of limitations for both claims is two years, and discovery is sometimes at issue in determining whether the respective statutes of limitation have been triggered."[208] The court stated that it "is often a question of fact" when the plaintiff in a medical malpractice action "discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury."[209] However, the court went on to address when a physician's diagnosis is sufficient to constitute discovery; specifically, "[o]nce a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."[210]

While the *Van Dusen* opinion provided the court with a background relative to the discovery of an injury, the court declined to extend its holding to the facts of the case at hand. Instead, the court held that "[a]lthough 'events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that another's' product caused his or her injuries, a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute."[211] The court reasoned that, because Mullens had not received a definitive diagnosis relative to the cause of her symptoms until March 1994, any previous assertions by her physicians that her work environment may have been a cause of her illness only provided her with mere speculation as to the actual cause of her injuries.[212] Moreover, the court averred that the ongoing medical consultation and diagnostic testing further evinced Mullens' confusion as to the actual cause of her injuries.[213] Consequently, the court affirmed the trial court's order denying the defendants' motions for summary judgment on the

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206. *Mullens*, 744 N.E.2d at 410.

207. *Id.*

208. *Id.*

209. *Id.* at 410-11 (quoting Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999)).

210. *Id.* at 411 (quoting Van Dusen, 712 N.E.2d at 499).

211. *Id.* (quoting Evenson v. Osmose Wood Preserving Co. of Am., 899 F.2d 701, 705 (7th Cir. 1990) (applying Indiana law)).

212. *Id.*

213. *See id.*

statute of limitations issue.[214]

VI. RELEASE

In *Estate of Spry v. Greg & Ken, Inc.*,[215] the court of appeals addressed whether a release agreement signed by the plaintiff and one of the defendants effectively released any claims against another potential tortfeasor. Kelly Spry was killed in an automobile accident.[216] Thereafter, Kelly's father, James, who had been appointed administrator of the estate, settled with the negligent driver's insurance carrier, GRE Insurance Group ("GRE").[217] Upon executing that settlement agreement, a release was signed which provided in relevant part that "any other person, firm or corporation" charged with "responsibility or liability" for Kelly's death was thereafter released and forever discharged relative to any responsibility or liability.[218]

Following the execution of that release agreement, Kelly's widow "was substituted as Special Administratrix of the estate" and a new attorney was hired.[219] A dramshop suit was then filed on behalf of the estate against Greg & Ken, Inc., owners of the tavern at which the negligent driver had become intoxicated prior to causing the collision.[220] The tavern moved for summary judgment, claiming that the general release form signed in the settlement with GRE and the negligent driver "had released the Tavern from any possible claims of liability."[221] After the motion was granted, the estate appealed.[222]

The only issue on appeal was whether the release agreement executed between the estate and GRE effectively barred claims against the tavern. The estate argued that "the intentions of the Estate and GRE were to release only [the driver] and GRE from future claims and liability arising from the accident that killed Kelly," while the tavern argued that the release barred the estate's claim against it.[223]

In evaluating the parties' arguments, the court noted that "[n]early a decade ago, our supreme court abrogated the common law rule that "the release of one joint tortfeasor released all of the other joint tortfeasors."[224] Consequently, the court held that "the release of [the driver] and GRE did not release the Tavern as a matter of law"; therefore, the court had to look at the language of the release

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214. *Id.* at 414.

215. 749 N.E.2d 1269 (Ind. Ct. App. 2001).

216. *Id.* at 1271.

217. *Id.*

218. *Id.* at 1271-72.

219. *Id.* at 1272.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1272-73.

224. *Id.* at 1273 (citing Huffman v. Monroe County Cmty. Sch. Corp., 588 N.E.2d 1264 (Ind. 1992)).

itself to determine whether or not the tavern was immune from liability.[225]

The court relied on the Indiana Supreme Court's opinion in *Huffman v. Monroe County School Corp.*[226] for the standard employed in reviewing releases. Specifically, the *Huffman* opinion held that

> a release executed in exchange for proper consideration works to release only those parties to the agreement unless it is clear from the document that others are to be released as well. A release, as with any contract, should be interpreted according to the standard rules of contract law. Therefore, from this point forward, release documents shall be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document governing.[227]

The court further noted that "[o]ne standard rule of contract interpretation is that if the language of the instrument is unambiguous, the intent of the parties is to be determined by reviewing the language contained between the four corners of that instrument."[228] The court concluded that the release executed between the plaintiff and GRE was subject to "four corner" analysis.[229] Moreover, the court noted that language releasing "all" people "is clear unless other terms in the instrument are contradictory"; thus, the court reasoned that because there was no other language in the release contradicting "the notion that all possible defendants [were] to be released, the tavern was not subject to any claims of liability asserted by the Estate."[230] Nevertheless, the estate maintained that the court was obligated to reverse the grant of summary judgment "by applying the contemporaneous writing rule, by following public policy, or by reforming the contract."[231]

The court was not swayed by any of the estate's arguments. First, relative to the contemporaneous writing rule, the court held that the rule did not apply as neither of the two documents the estate cited to were contemporaneous pursuant to the requirements of the rule.[232] Specifically, the court found that the three documents "were not executed on the same day," and the petition and order were not a part of the original transaction between GRE and Taylor but were, instead, a separate transaction between the estate and the trial court.[233]

Next, in disposing of the estate's public policy argument and holding that the plain language of the document should prevail, the court stated that "[i]f judges

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225. *Id.*

226. 588 N.E.2d 1264 (Ind. 1992).

227. *Estate of Spry*, 749 N.E.2d at 1273 (citing *Huffman*, 588 N.E.2d at 1267).

228. *Id.* (citing Dobson v. Citizens Gas & Coke Util., 634 N.E.2d 1343, 1345 (Ind. Ct. App. 1994)).

229. *See id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1273-75.

233. *Id.* at 1274-75.

could interpret a release to mean something that is contrary to the plain language because one party intended for it to mean something else, then parties would be discouraged from signing releases because they could not have confidence that a court would enforce the release's plain language."[234]

Finally, the court declined to reform the release because the language of the release was plain and "the Estate's mistake was regarding the effect of the release, not its terms."[235] Consequently, the court held that it "may not reform the release to correct the Estate's mistake of law."[236]

VII. INDEMNITY

In *Hagerman Construction Corp. v. Long Electric Co.*,[237] the court of appeals addressed whether a general contractor is liable for injury to a subcontractor's employee when a contract for indemnification exists between the two. The court held that under the parties' agreement, while the subcontractor was liable for the employee's injuries to the general contractor to the extent of the subcontractor's negligence, it was not liable to the extent of the general contractor's negligence.[238]

Scott was an employee of a subcontractor, Long Electric Company ("Long"), on a construction project on the campus of Indiana University-Purdue University Fort Wayne, when he sustained injury by being "struck on the head by a falling light pole."[239] Thereafter, Scott filed suit against the general contractor, Hagerman Construction Corp. ("Hagerman"). "Hagerman subsequently filed a third party action against Long based upon an indemnity clause contained in the form contract between [them]."[240] Hagerman moved for summary judgment, arguing that under the parties' contract, "Long was required to indemnify Hagerman for any losses Hagerman suffered in the Scott litigation."[241] The trial court, finding that "Hagerman was not entitled to indemnification" for its own negligence, denied Hagerman's motion.[242]

In relying on *Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols*[243] the court noted that "[a]bsent prohibitive legislation, no public policy prevents parties from contracting as they desire."[244] Moreover, the court, in relying on the *Moore Heating* holding, asserted that a party is free to "contract to indemnify another for the other's negligence"; however, this indemnification "may only be

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234. *Id.* at 1275.
235. *Id.* at 1276.
236. *Id.*
237. 741 N.E.2d 390 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 422 (Ind. 2001).
238. *Id.* at 393-94.
239. *Id.* at 391.
240. *Id.*
241. *Id.*
242. *Id.*
243. 583 N.E.2d 142 (Ind. Ct. App. 1991).
244. *Hagerman Constr.*, 741 N.E.2d at 392 (citing *Moore Heating*, 583 N.E.2d at 145).

done if the party knowingly and willingly agrees" to it.[245] Further, such indemnification provisions are to be strictly construed "and will not be held to provide indemnification unless it is so stated in clear and unequivocal terms."[246] Finally, the court found that such clauses are disfavored "because we are mindful that to obligate one party to pay for the negligence of another is a harsh burden that a party would not lightly accept."[247]

The court noted that a two-step analysis is necessary in determining "whether a party has knowingly and willingly accepted" such a burden.[248] The first step is that the "indemnification clause must expressly state in clear and unequivocal terms that negligence is an area of application where the indemnitor (. . . Long) has agreed to indemnify the indemnitee (. . . Hagerman)."[249] Then, "[t]he second step determines to whom the clause applies"; specifically, the indemnification clause must state in clear and unequivocal terms that "it applies to indemnification of the indemnitee (. . . Hagerman) by the indemnitor (. . . Long) for the indemnitee's own negligence."[250] The indemnification clause utilized by the parties provided:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this paragraph 4.6.[251]

In addressing the first step of its analysis, the court found that the language of the clause clearly defined negligence "as an area of application in clear and unequivocal terms"; specifically, the court cited the use of terms such as "claims,

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245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 392-93.

damages, losses and expenses attributable to bodily injury."[252] Finally, the court stated that "[t]hese words, taken in this context, are the language of negligence, and, as such, clearly and unequivocally demonstrate that the indemnification clause applies to negligence."[253]

Concluding that the first step of analysis had been met, the court determined that the clause did not state, in clear and unequivocal terms, that it applied "to indemnify Hagerman for its own negligence."[254] In making this determination, the court looked to a previous case, *Hagerman Construction, Inc. v. Copeland*,[255] where the court was asked to interpret an indemnification clause identical to the one in question. In *Copeland*, the court stated in dicta that the indemnification provision "appears to provide for indemnification for Hagerman's own negligence."[256] However, the *Copeland* court concluded that "because the jury found that Crown-Corr was zero percent at fault for the accident, and therefore Crown-Corr need not indemnify Hagerman" interpretation of the indemnification clause was unnecessary.[257] Consequently, the court held that Hagerman's reliance on the dicta in *Copeland* was misguided.[258]

Long argued that the phrase "but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor" limited the scope of Long's liability to only those losses that were "caused by the negligence of the sub-contractor or its agents."[259] The court agreed.[260] In explaining its reasoning, the court noted that the inclusion of the phrase "to the fullest extent permitted by law" was "not necessarily inconsistent" with the inclusion of the phrase "but only to the extent."[261] The court held that the phrase "to the fullest extent permitted by law" was a preservation clause preserving Hagerman's rights under the law "to the extent that Long and/or its sub-contractors, etc. are negligent."[262] Therefore, so held the court, Hagerman was entitled to "pursue its rights to the fullest extent of the law as long as, and to the measure of, Long's negligence."[263] The court further reasoned that the phrase "regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder" contradicted the other language of the indemnification clause limiting Long's liability to Hagerman.[264] The court interpreted that phrase to be limited to Long's inability to "disregard its duty to indemnify Hagerman for Long's

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252. *Id.* at 393.
253. *Id.*
254. *Id.*
255. 697 N.E.2d 948 (Ind. Ct. App. 1998).
256. *Hagerman*, 741 N.E.2d at 393 (quoting *Copeland*, 697 N.E.2d at 962).
257. *Id.*
258. *Id.*
259. *Id.*
260. *See id.* at 394.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*

negligence merely because Hagerman may [have] also [been] negligent under the circumstances."[265] Therefore, the court concluded that "the indemnification clause does not expressly state, in clear and unequivocal terms, that it applies to indemnify Hagerman for its own negligence."[266] The clause clearly indemnifies Hagerman for the acts of Long and its sub-contractors, employees and "anyone for whom it may be liable, but it does not explicitly state that Long must indemnify Hagerman for its own negligent acts."[267]

VIII. INTENTIONAL TORTS

In *Branham v. Celadon Trucking Services, Inc.*,[268] the court of appeals considered whether or not a plaintiffs' claims for invasion of privacy, libel, intentional infliction of emotional distress, negligent supervision, and loss of consortium were viable when the incident giving rise to the suit occurred when the plaintiff was asleep. The court held that all of the claims failed primarily because the plaintiff was asleep.[269]

The plaintiff, Lawrence Branham, was an employee of the defendant, Celadon, and was on a break on Celadon's property when he fell asleep. One of the defendants, Bruce Edwards, and another employee, Adam Deaton, found Branham sleeping. The two men then procured a camera.[270] Deaton lowered his pants, remained in his underwear, stood beside the plaintiff and posed with his hand held suggestively in front of his genital area. Edwards took a picture of the scene, which he placed on the table in the break room, where it was seen by several employees of Celadon. Branham was subsequently teased, which ultimately caused him to secure employment elsewhere.[271]

The plaintiffs, Branham and his wife, filed suit against the defendants, alleging "invasion of privacy, libel, intentional infliction of emotional distress, negligent supervision, and loss of consortium. Celadon filed a motion to dismiss" the complaint, contending that the trial court did not have jurisdiction "because the claim was governed by the Indiana Worker's Compensation Act."[272] The motion was denied.[273] Celadon and Edwards subsequently moved for summary judgment on all of the plaintiffs' claims. The trial court granted summary judgment relative to the negligent supervision claim against Edwards; however, the trial court denied the motion as to the rest of the Branhams' claims.[274]

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265. *Id.*
266. *Id.* at 393.
267. *Id.*
268. 744 N.E.2d 514 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).
269. *See id.*
270. *Id.* at 518-19.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 519.

On appeal, the court briefly discussed Celadon's mistaken reliance on the Worker's Compensation Act. Specifically, the court held that since the heart of Branham's injury was emotional, not physical or disabling in quality, the Act did not apply.[275]

Next, the court first evaluated the libel claim.[276] The court averred that libel "is a species of defamation under Indiana law."[277] Moreover, to maintain a defamation action, a plaintiff must prove that the communication at issue met the following four elements: (1) "defamatory imputation"; (2) "maliciousness"; (3) "publication"; and (4) "damages."[278] Alternatively, a communication is defamatory per se "if it imputes: (1) "criminal conduct"; (2) "a loathsome disease"; (3) "misconduct in a person's trade, profession, office, or occupation"; or (4) "sexual misconduct."[279] Branham asserted that "the picture was defamatory per se because it showed him engaged in criminal sexual conduct."[280] The court rejected that argument because the picture merely depicted him sleeping with Deaton standing nearby.[281] The court concluded that because Branham was in fact asleep, the picture was "not defamatory as a matter of law," as it evinced a truthful representation of Branham's state at the time of the incident.[282]

Next, the court discussed the merits of Branham's intentional infliction of emotional distress claim.[283] To sustain an action for the intentional infliction of emotional distress, a plaintiff must show that the defendant engaged in extreme and outrageous conduct that intentionally or recklessly caused severe emotional distress.[284] Furthermore, the issue of whether the conduct in question rises to the level of an intentional tort, in some cases, is a matter of law.[285]

The court decided that, as a matter of law, the defendants' conduct did not constitute intentional infliction of emotional distress.[286] In reaching that

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275. *Id.* at 519-20 (quoting IND. CODE § 22-3-6-1 (Supp. 2001)). "'Injury' and 'personal injury' mean only injury by accident arising out of and in the course of the employment and do not include a disease in any form except as it results from the injury." *Id.*

276. *See id.* at 522.

277. *Id.* (citing Ind. Ins. Co. v. N. Vermillion Cmty. Sch. Corp., 665 N.E.2d 630, 635 (Ind. Ct. App. 1996)).

278. *Id.* (citing Davidson v. Perron, 716 N.E.2d 29, 37 (Ind. Ct. App. 1999); N. Ind. Pub. Serv. Co. v. Dabagia, 721 N.E.2d 294, 301 (Ind. Ct. App. 1999); Samm v. Great Dane Trailers, 715 N.E.2d 420, 427 (Ind. Ct. App. 1999)).

279. *Id.* (citing Daugherty v. Allen, 729 N.E.2d 228, 237 n.8 (Ind. Ct. App. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 570 (1977)); Levee v. Beeching, 729 N.E.2d 215, 220 (Ind. Ct. App. 2000); Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992)).

280. *Id.*

281. *Id.*

282. *Id.*

283. *See id.* at 522-24.

284. *Id.* at 523 (citing Bradley v. Hall, 720 N.E.2d 747, 752 (Ind. Ct. App. 1999)).

285. *Id.* (citing Conwell v. Beatty, 667 N.E.2d 768, 775-77 (Ind. Ct. App. 1996)).

286. *See id.* at 524.

conclusion, the court relied on the testimony of Edwards and Deaton that there was no intent to harm Branham.[287] Both testified that the incident was meant only as a joke and that everyone viewing the photograph interpreted the incident as a joke as well.[288] Further, Branham himself testified that Deaton had joked with him in the past and that Edwards had sincerely apologized for the incident and stated it was meant to be a joke.[289] Due to that testimony, the court concluded that there was absolutely no evidence presented that the defendants intended to harm Branham.[290] Therefore, the court granted summary judgment on that claim.[291]

Next, the court addressed Branham's invasion of privacy claim.[292] Generally, the tort has four variations: "(1) unreasonable intrusion upon the seclusion of another; (2) publicity that unreasonably places another in a false light before the public; (3) unreasonable publicity given to another's private life; and (4) appropriation of another's name or likeness."[293] Branham claimed that the invasion of privacy was an intrusion into seclusion and false light publicity. To establish that claim, Branham would have had to show that there was an intrusion upon his "physical solitude or seclusion, as by invading his home or other quarters."[294] For such an incident to give rise to a valid claim, "the intrusion must be something which would be offensive or objectionable to a reasonable person."[295]

Branham's physical intrusion claim failed because, as the court noted, he had fallen asleep in a break room utilized by all employees.[296] Thus, his physical space, as a matter of law, was not invaded.[297] The court held that Branham's emotional privacy intrusion claim failed as well because he was asleep at the time of the incident; therefore, "he could not have suffered emotional disturbance from it."[298] Moreover, any joking alleged to have occurred by other co-workers could not "be imputed to Deaton and Edwards."[299] Thus, "the defendants were entitled to summary judgment."[300]

Finally, the court held that Branham's claim for false light publicity failed

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287. *See id.* at 523.

288. *Id.*

289. *Id.* at 523-24.

290. *See id.*

291. *Id.* at 524.

292. *See id.* at 524-25.

293. *Id.* at 524 (citing Doe v. Methodist Hosp., 690 N.E.2d 681, 684 (Ind. 1997)).

294. *Id.* (quoting Ledbetter v. Ross, 725 N.E.2d 120, 123 (Ind. Ct. App. 2000) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 854 (5th ed. 1984))).

295. *Id.* (quoting *Ledbetter*, 725 N.E.2d at 123).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

as well.[301] Noting that the tort is similar to that of defamation, but differs as to the nature of the protected interest, the court explained that "[d]efamation reaches injury to reputation; privacy actions involve injuries to emotions and mental suffering."[302] As such, the court concluded that as was the case with the defamation claim, "there was no false light because the picture [was] not false."[303] Branham was asleep and a partially clad co-worker was standing beside him. "The picture was accurate, not false, and the defendants are entitled to summary judgment on Branham's false light publicity claim."[304]

IX. LEGAL MALPRACTICE

In *Douglas v. Monroe*,[305] the court of appeals addressed a plaintiff's claim against an attorney for malpractice based on advice obtained from the defendant via a third party. The court concluded that no attorney-client relationship had ever existed between the plaintiff and the defendant.[306]

Carol Douglas brought suit on behalf of herself and as the administratrix of her son's estate.[307] Douglas' son drowned at the Indiana University-Purdue University Indianapolis Natatorium. Several months later, Douglas considered filing a wrongful death suit.[308] Due to her ongoing grief, Douglas' brother, Lionel, "looked into the possibility of bringing suit."[309] While working at his job as a bank security guard, Lionel happened upon a woman he knew to be an attorney, Monroe, although she had never represented him.[310] He approached Monroe and explained the nature of his nephew's death and indicated that the family was considering filing a lawsuit.[311] Lionel specifically inquired into whether or not a time limit existed regarding filing suit. While Monroe informed Lionel that suit needed to be filed within two years, she did not mention the 180-day limit barring the filing of tort claims notices nor did she indicate that Lionel should rely on this advice.[312]

The two had a second conversation, again in the bank lobby, at some point after Monroe told him of the two-year statute of limitations.[313] Based on these two conversations, Lionel did not believe that Monroe represented either him or

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301. *Id.* at 825.

302. *Id.* at 824 (citing Near E. Side Comm. Org. v. Hair, 555 N.E.2d 1324, 1335 (Ind. Ct. App. 1990)).

303. *Id.* at 525.

304. *Id.*

305. 743 N.E.2d 1181 (Ind. Ct. App. 2001).

306. *See id.*

307. *See id.*

308. *Id.* at 1183.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

Douglas. Lionel conveyed the two-year statute of limitations information to Douglas.[314] Later that year, after the 180-day time limit expired, Douglas engaged the services of another attorney who informed Douglas that her claim expired. Douglas then filed a suit, inter alia, against Monroe, alleging that her "failure to inform Lionel of the 180-day tort claims notice requirement" caused her wrongful death suit to be barred.[315] Monroe denied the allegations and successfully moved for summary judgment on the grounds that no attorney-client relationship existed between the parties.[316]

On appeal, Douglas argued that there was a question of fact about the existence of an attorney-client relationship. Further, Douglas asserted theories of detrimental reliance and agency. The court noted that, to prevail on a legal malpractice claim, a plaintiff must show: (1) "employment of an attorney"; (2) "failure by the attorney to exercise ordinary skill and knowledge"; (3) "proximate cause"; and (4) "loss to the plaintiff."[317] In discussing the creation of the attorney-client relationship, the court averred that an important factor is the client's subjective understanding;[318] "[h]owever, 'the relationship is consensual, existing only after both attorney and client have consented to its formation.'"[319]

The court concluded that the requisite attorney-client relationship had never existed because Douglas had never spoken to Monroe; Douglas never made any attempt to contact or schedule an appointment with Monroe; and Douglas never "consented to the formation of an attorney-client relationship" with Monroe.[320] Moreover, Douglas never "entered into a contract for legal services with Monroe," never "paid for advice from her," and "never thought Monroe was representing her in the matter of [her son's] death."[321] When she was contacted by her current counsel, she said she was not already represented by counsel.[322] Finally, there was "no evidence indicating that Monroe believed she was in any way representing [Douglas] or that [she] consented to the formation of an attorney-client relationship."[323] To the contrary, "Monroe's brief statement regarding the statute of limitations appears to have been fostered by sympathy, not by any desire to provide professional services to a woman she did not know."[324]

In addressing Douglas' detrimental reliance claim,[325] the court noted that

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314. *Id.*

315. *Id.* at 1183-84.

316. *Id.* at 1184.

317. *Id.* (quoting Bernstein v. Glavin, 725 N.E.2d 455, 462 (Ind. Ct. App. 2000) (quoting Fricke v. Gray, 705 N.E.2d 1027, 1033 (Ind. Ct. App. 1999))).

318. *Id.* (citing *In re* Anonymous, 655 N.E.2d 67, 70 (Ind. 1995)).

319. *Id.* (citing *In re* Kinney, 670 N.E.2d 1294, 1297 (Ind. 1996)).

320. *Id.* at 1186.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* (footnote omitted).

325. *See id.*

only a few cases have held a defendant-attorney liable, and "liability has been found only when the attorney undertook, gratuitously or otherwise, to complete an affirmative act for the party who later brought suit."[326] Further, the plaintiff-client must offer proof that he had a prior, continuous relationship with the defendant or that the defendant agreed to represent the plaintiff-client relative to the transaction.[327] The court averred that the evidence in this case did not meet the requirements of detrimental reliance because Lionel, not Douglas, had a brief conversation at his place of business with a woman he knew to be an attorney.[328] Thus, "[u]nder the circumstances, Monroe did not know Carol would rely on [that] isolated statement, and any reliance Carol placed on the statement was not reasonable. Thus, we find Carol's detrimental reliance theory unavailing."[329]

Finally, the court addressed Douglas' agency argument.[330] The court easily disposed of the argument, given that no evidence was adduced tending to prove that Douglas instructed her brother to seek an attorney's advice, much less Monroe's.[331] Moreover, no evidence was advanced demonstrating that Douglas told her brother "when or where to speak with Monroe, gave him questions to ask her, outlined potential terms of employment, or gave him the power to bind her to an agreement."[332] Specifically, Douglas' own deposition testimony revealed that she never believed Monroe "was representing her in the matter of [her son's] death."[333] Thus, her agency theory failed, and summary judgment in favor of Monroe was affirmed.[334]

X. MISTRIAL

In *Stone v. Stakes*,[335] the court of appeals addressed whether or not a reference made by the plaintiff as to the defendant's connection to the liability

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> In certain cases, an attorney-client relationship may also be created by a client's detrimental reliance on the attorney's statements or conduct. An attorney has in effect consented to the establishment of an attorney-client relationship if there is "proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."

Id. (quoting Hacker v. Holland, 570 N.E.2d 951, 956 (Ind. Ct. App. 1991) (quoting Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977))).

326. *Id.* (citing *Hacker*, 570 N.E.2d at 956).

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *See id.* at 1187.

332. *Id.*

333. *Id.*

334. *Id.*

335. 749 N.E.2d 1277 (Ind. Ct. App.), *aff'd on reh'g*, 755 N.E.2d 220 (Ind. Ct. App.), *trans. denied*, 2002 Ind. LEXIS 182 (2001).

insurance carrier during voir dire warranted a mistrial. The court held that it did not.[336]

Stone and Stakes were involved in an automobile collision. Stakes subsequently filed a complaint, which Stone failed to answer. A default judgment was entered relative to liability, and a trial on the issue of damages was scheduled.[337] Mr. Foos entered his appearance for Stone and filed a motion in limine for the exclusion of any references to insurance coverage. The motion was granted, with the exception that references to insurance may be made during voir dire.[338]

At the commencement of voir dire, Mr. Lloyd also entered an appearance for Stone that contained his address, which referenced the insurance company for which his firm was a captive law firm. During voir dire, Stakes' attorney questioned the prospective jurors as to their familiarity with defense counsels' firm, thereby indicating that Stone carried liability insurance.[339] Stone moved for a mistrial, which was denied. An appeal ensued.[340]

The sole issue on appeal was whether reference to the jury pool of defense counsel's affiliation with an insurance company was sufficient to reverse the refusal of the trial court to grant a mistrial. The court declined to hold as such.[341]

In addressing Stone's contention, the court noted that it has long been held that evidence of a defendant's insurance coverage is "not allowed in a personal injury action and that its admission is prejudicial."[342] Rule 411 of the Indiana Rules of Evidence generally excludes references to a defendant's liability insurance coverage; however, this "does not require the exclusion of evidence . . . when offered for another purpose, such as . . . ownership, or control, or bias or prejudice of a witness."[343] Therefore, the court concluded that a question about a juror's relationship to a specific insurance company as it relates to bias or prejudice, if asked in good faith, is within the exception provided by Rule 411.[344] Moreover, the motion in limine granted to Stone on the matter of insurance specifically excluded voir dire.[345]

Finally, Stone argued that the reference to insurance made by Stakes' attorney "was a deliberate attempt to interject the notion of insurance into the

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336. *Id.* at 1282.

337. *Id.* at 1278.

338. *Id.* at 1278-79.

339. *See id.* at 1279.

340. *Id.*

341. *See id.* at 1278.

342. *Id.* at 1279 (citing Rausch v. Reinhold, 716 N.E.2d 993, 1002 (Ind. Ct. App. 1999)); *see also* Pickett v. Kolb, 237 N.E.2d 105, 107 (Ind. 1968); Martin v. Lilly, 121 N.E. 443, 445 (Ind. 1919).

343. *See id.* at 1281 (omission by court) (quoting IND. EVIDENCE RULE 411 (stating that "evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully")).

344. *Id.* (citing Rust v. Watson, 215 N.E.2d 42, 52-53 (Ind. Ct. App. 1966)).

345. *Id.* at 1280.

jurors' minds."[346] The court rejected that argument, stating:

> [W]e do not believe that Stakes' counsel, reading from an appearance form handed to him that morning which, for the first time, identified Stone's counsel as a member of a captive law firm of Warrior Insurance, was deliberately attempting to inform the jury that Stone was covered by liability insurance and prejudice the venire in favor of a verdict for his client.[347]

Thus, the verdict for Stakes was affirmed.[348]

XI. JURY QUESTIONS AND INSTRUCTIONS

In *Rogers v. R.J. Reynolds Tobacco Co.*,[349] the Indiana Supreme Court accepted transfer of the case for determination as to whether the trial judge committed reversible error by communicating ex parte with the jury.[350] Rogers, the widow of a now-deceased smoker, along with her husband, brought a product liability action against cigarette manufacturers and distributors.[351] After the first trial ended in a mistrial, a second trial resulted in a verdict for several tobacco companies.[352] "The Court of Appeals reversed and remanded the case for a new trial because the trial" court had responded to a jury inquiry "without first informing counsel."[353] The supreme court granted transfer to decide whether the trial court committed reversible error when it responded to a question from the deliberating jury without first informing counsel.[354] Rogers argued that a new trial was necessary because the jury was improperly influenced by ex parte communication.[355]

On transfer, the supreme court initially noted that "[c]ontrol and management of the jury is an area generally committed to the trial court's discretion."[356] Moreover, regarding judicial communications to a deliberating jury, the court stated that "[t]he proper procedure is for the judge to notify the parties so that they may be present in court and informed of the court's proposed response to the jury before the judge ever communicates with the jury."[357] However, the court

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346. *Id.* at 1281.

347. *Id.* at 1282.

348. *Id.* at 1283.

349. 745 N.E.2d 793 (Ind. 2001).

350. *Id.* at 795.

351. *Id.* at 795 & n.1.

352. *Id.* at 795.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* (citing Norton v. State, 408 N.E.2d 514, 531 (Ind. 1980); Morris v. State, 364 N.E.2d 132, 139 (Ind. 1977)).

357. *Id.* (citing Grey v. State, 553 N.E.2d 1196, 1197 (Ind. 1990); Morgan v. State, 544 N.E.2d 143, 149 (Ind. 1989); Moffatt v. State, 542 N.E.2d 971, 975 (Ind. 1989); Martin v. State,

further noted that the rule is tempered, in that while an ex parte communication may "create[] a presumption of error," it "does not constitute per se grounds for reversal."[358] In making a determination as to whether the presumption of harm has been rebutted, the court noted that the reviewing court must "evaluate the nature of the communication to the jury and the effect it might have had upon a fair determination" of the case.[359]

The question posed by the jury in this case was whether the judge would allow the jury to hold a press conference after the completion of the trial.[360] The bailiff relayed the jury's question to the judge, who did not share the question with counsel. Rather, the judge responded affirmatively to the jury via the bailiff. No further information was provided to the jury by the judge or bailiff.[361]

The supreme court looked to the decision in *Smith v. Convenience Store Distributing Co.*[362] for guidance on the impact the communication might have had on the jury.[363] In *Smith*, the Indiana Supreme Court held that "[t]he effect of the communication may be gauged by the reaction of the jury. A short time interval between the judge's comments and the verdict tends to support the presumption of error."[364] In *Smith*, the jury had declared itself deadlocked after six hours of deliberation. However, the jury returned a verdict within ten minutes of the ex parte communication.[365] Therefore, the court reasoned that judge's comments might have influenced the verdict.[366]

In this case, the jury was in its second day of deliberations when it posed its question to the judge. Following the judge's response, the jury deliberated for seven more hours before returning a verdict, which the court noted was "hardly a sudden turn of events."[367] Therefore, the court concluded that, while "it would have been better practice" for the judge to have conferred with counsel before responding to the jury's question, the presumption of error had been rebutted under these circumstances.[368] In addition, the jury's inquiry had related to a "matter of trial administration," not to any "substantive issues pending for its determination."[369] Consequently, "the ensuing length of deliberations provides a strong indication that the response did not substantially influence the verdict, if at all. We find no reversible error on this issue."[370]

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535 N.E.2d 493, 497 (Ind. 1989)).

358. *Id.* (citing Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998); *Grey*, 553 N.E.2d at 1198)).

359. *Id.* (citing Smith v. Convenience Store Distrib. Co., 583 N.E.2d 735, 738 (Ind. 1992)).

360. *Id.*

361. *Id.*

362. 583 N.E.2d 735 (Ind. 1992).

363. *See Rogers*, 745 N.E.2d at 795.

364. *Id.* (citing *Smith*, 583 N.E.2d at 738).

365. *Id.*

366. *Id.* at 795-96 (citing *Smith*, 583 N.E.2d at 738).

367. *Id.* at 796 (citing Nesvig v. Town of Porter, 668 N.E.2d 1276, 1288 (Ind. Ct. App. 1996)).

368. *Id.*

369. *Id.*

370. *Id.*

In *Executive Builders, Inc. v. Trisler*,[371] the court of appeals reviewed the trial court's decision not to provide the jury with copies of its final instructions and held that the decision did not constitute reversible error.[372]

The suit arose when Executive Builders, Inc. ("Executive"), filed suit against Trisler, alleging intentional interference with business. Trisler filed a counterclaim and a complaint against Executive, alleging "defamation, invasion of privacy, abuse of process and frivolous litigation."[373] The trial court entered summary judgment for Trisler with respect to Executive's suit; however, that decision was vacated. The court of appeals reversed and remanded with instruction that the trial court's summary judgment be reinstated. The trial court eventually entered full judgment for Trisler on its claims. Executive appealed.[374]

Executive appealed on several grounds; specifically, it asserted "that the trial court erred in refusing its request to amend the pleadings to conform to the evidence."[375] According to Executive, "the issue of 'probable cause' regarding the malicious prosecution claim should not have been submitted to the jury."[376] Furthermore, Executive alleged that "it was denied a fair trial when the judge refused to provide the jury with a copy of the final twenty-two instructions;"[377] and it also complained about erroneous jury instructions relative to the interference action,[378] that the evidence was insufficient to support the verdict,[379] that "the award of punitive damages was erroneous,"[380] and that a new trial was warranted "because of the existence of poor acoustics and the amount of 'diffused sunlight' that was shining in counsel's face throughout the trial."[381] The court was not swayed by any of Executive's arguments.[382] However, this Article will be limited to reviewing the court's opinion as to the jury instruction issue.

Executive argued that it was "denied a fair trial" when the trial judge declined to provide the jury with a copy of its final instructions, which were read to the jury.[383] Additionally, Executive claimed that it was entitled "to reversal because the trial judge erred in not clarifying certain portions of the instructions during deliberations."[384] Specifically, when the jury propounded questions to the

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371. 741 N.E.2d 351 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 412 (Ind. 2001), and *cert. denied*, 122 S. Ct. 814 (2002).

372. *See id.* at 357-58.

373. *Id.* at 354-55.

374. *Id.* at 355.

375. *Id.*

376. *Id.* at 356.

377. *Id.* at 357.

378. *Id.* at 358.

379. *Id.* at 358-59.

380. *Id.* at 359.

381. *Id.* at 358.

382. *See id.* at 361.

383. *See id.* at 357.

384. *Id.*

judge, he responded to them with a note indicating that all he could do was re-read the final instructions.[385]

In evaluating Executive's assertions, the court noted that a trial court's failure to answer questions propounded by the jury during deliberation is not error per se.[386] Rather, "the trial court must exercise discretion in determining whether certain inquiries of the jury should be answered."[387] Furthermore, "[i]n criminal cases, our supreme court has determined that the generally accepted procedure in answering a jury's question on a matter of law is for the trial court to re-read all the instructions and not to qualify, modify, or explain its instructions in any way."[388] The court further noted that several "favorable results had been reached" when a trial court provides the deliberating jury with written or taped instructions.[389] However, in *Taylor v. Monroe County*,[390] the court of appeals held that "the practice of providing copies of the jury instructions to the jury [was] not recommended."[391]

Nonetheless, noting that, the "preferred method" would have been sending copies of the final instructions to the jury following their questions, the court declined to "condemn his response to the questions made in accordance with [the court's] decision in *Taylor*."[392] Therefore, the court concluded that "in light of our decision today, we find it acceptable for a trial judge to either re-read the instructions as suggested in *Taylor*, or to send unmarked copies of them to the jury room."[393]

XII. ATTORNEY FEES

In *Davidson v. Boone County*,[394] the court of appeals addressed whether a trial court is authorized to award sua sponte attorney fees without being requested to do so by the prevailing party.[395] The court held that an award of attorney fees is within the discretion of the trial judge.[396]

The Davidsons had filed suit against the county, alleging that local building

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385. *Id.* at 358.

386. *Id.* at 357.

387. *Id.* (citing Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc., 437 N.E.2d 1360, 1364 (Ind. Ct. App. 1982)).

388. *Id.* (citing Riley v. State, 711 N.E.2d 489, 492 (Ind. 1999)).

389. *Id.* (citing AMER. BAR. ASS'N, COMM'N ON JURY STANDARDS, *Standards Relating to Juror Use and Management* 148 (rev. ed. 1993) (commenting on Standard 16(c)(ii) that "[s]uch a practice aids juror comprehension, and the ABA standards specifically call for such a procedure of making the instructions available to the jury during deliberations").

390. 423 N.E.2d 699 (Ind. Ct. App. 1981).

391. *Executive Builders*, 741 N.E.2d at 357 (citing *Taylor*, 423 N.E.2d at 701).

392. *Id.* at 358.

393. *Id.*

394. 745 N.E.2d 895 (Ind. Ct. App. 2001).

395. *See id.* at 900.

396. *Id.* at 898.

codes were being applied against them "in an arbitrary and discriminatory manner."[397] Specifically, the Davidsons and the county had been engaged in a dispute because the Davidsons had consistently failed to obtain a building permit or comply with sewage and electrical codes relative to construction on their rental property.[398]

Following a bench trial, the trial court entered judgment in favor of the county on all counts.[399] The trial court "further found that the Davidsons had filed an unreasonable, groundless, and frivolous action"; therefore, the trial court ordered that they pay the county's "attorney fees, costs, and expenses incurred in defending the action."[400] The Davidsons appealed the judgment; however, that appeal was dismissed on procedural grounds because the trial court had not yet entered "final judgment on the amount of attorney fees."[401] After a hearing, the trial court awarded the county "$79,085.02 in attorney fees, costs and expenses."[402]

On appeal, the Davidsons argued that "the trial court abused its discretion" when it awarded attorney fees sua sponte to the county; specifically, they asserted that the county never alleged that the suit was groundless, unreasonable, or frivolous, nor had the county requested such an award of fees.[403]

The court explained that litigants are generally required to "pay their own attorney fees."[404] However, in Indiana, an award of attorney fees is allowed pursuant to statute if the litigation is found to be "in bad faith," "frivolous, unreasonable, or groundless."[405] Specifically, Indiana Code section 23-52-1-1 provides in relevant part:

> (b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.[406]

Moreover, pursuant to the statute, an award of attorney fees is justified "upon a finding of any one of these elements."[407]

The Davidsons contended that the trial court did "not have the power to

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397. *See id.* at 896-98.
398. *Id.* at 898.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* at 898-99.
404. *Id.* at 899 (citing Kintzele v. Przybylinski, 670 N.E.2d 101 (Ind. Ct. App. 1996)).
405. *Id.*
406. IND. CODE § 34-52-1-1 (1998).
407. *Davidson*, 745 N.E.2d at 899.

award attorney fees *sua sponte*."[408] However, the court held that because the Davidsons had failed to support that contention "with any argument or citation to authority," it was "waived for failure to present cogent argument."[409]

Despite the Davidsons' failure to present the court with argument relative to the trial judge's power to award attorney fees sua sponte, the court went on to address the issue by interpreting the language of the governing statute, Indiana Code section 34-52-1-1, which "provides that the court 'may' award attorney fees if the court finds that either party has litigated in bad faith or pursued a frivolous, unreasonable or groundless claim."[410] Moreover, the court noted that "the statute does not specifically require that the injured party move for an award of attorney fees under the statute before the trial court can exercise its discretion in this regard."[411] Therefore, the court held that a trial court has the power to award attorney fees even in the absence of a prior request from the prevailing party.[412]

Finally, the court addressed the Davidsons' argument that the county had waived any claim to attorney fees by not having requested them.[413] The court found that argument "unavailing," given that the county was under no obligation "to file a claim for attorney fees pursuant to [Indiana Code section] 34-52-1-1 prior to final adjudication."[414] Additionally, the court averred that since the trial court had awarded the attorney fees "in its final adjudication," any claim the county may have filed thereafter for attorney fees was rendered moot; therefore the county could not have waived such a claim that "had already been awarded by the trial court."[415]

XIII. EMPLOYER-EMPLOYEE RELATIONSHIP

In *GKN Co. v. Magness*,[416] the Indiana Supreme Court accepted transfer and addressed the exclusivity of the Worker's Compensation Act ("Act") when the plaintiff had alleged employment by a non-party.

GKN Company ("GKN"), was the general contractor on a highway construction project that entered into a written contract with Starnes Trucking, Inc. ("Starnes"), to "haul various materials to and from a GKN job site."[417] Starnes hired Magness to drive one of the cement trucks from the GKN site "to various highway construction sites."[418] Magness was injured by a retaining wall, constructed and maintained by GKN, that collapsed while he was standing on the

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408. *Id.* at 900.
409. *Id.* (citing Choung v. Iemma, 708 N.E.2d 7 (Ind. Ct. App. 1999)).
410. *Id.*
411. *Id.*
412. *Id.*
413. *See id.*
414. *Id.*
415. *Id.*
416. 744 N.E.2d 397 (Ind. 2001).
417. *Id.* at 399-400.
418. *Id.* at 400.

wall to fuel his truck.[419] Thereafter, Magness received worker's compensation benefits from Starnes and filed a complaint against GKN, alleging negligence in maintenance and construction of the wall.[420] GKN filed a motion to dismiss for lack of subject matter jurisdiction, maintaining that Magness was an employee of GKN; thus, the exclusive remedy was the Act.[421] "The trial court denied the motion without reciting its reasons . . . ."[422] However, on interlocutory appeal, "the Court of Appeals reversed the judgment of the trial court."[423] Magness filed a petition to transfer, and the supreme court accepted review.[424]

On transfer, the court explained that the Act "provides the exclusive remedy for recovery of personal injuries arising out of . . . employment"; however, Indiana Code section 22-3-2-13 provides that a person may bring suit "against a third-party tortfeasor" as long as the "third-party is neither the plaintiff's employer nor a fellow employee."[425] In this case, Magness never contended that GKN was his employer; rather, he alleged that Starnes was his employer, thereby enabling him to bring a negligence action against GKN. GKN, on the other hand, contended that Magness was a "dual employee" of both GKN and Starnes.[426] Moreover, the Act contemplates that a worker may have two employers simultaneously.[427]

The court held that the Indiana Supreme Court's holding in *Hale v. Kemp*[428] was controlling as to the factors considered in the determination of whether an employment relationship exists.[429] Specifically, those factors are: "(1) right to discharge; (2) mode of payment; (3) supplying of tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and, (7) establishment of the work boundaries."[430]

The court went on to hold that the *Hale* factors should be "weighed against each other as a part of a balancing test" instead of a "formula where the majority wins."[431] Moreover, the court held that in the application of the balancing test, a trial court is to "give the greatest weight to the right of the employer to exercise control over the employee."[432] The court's reasoning was that control suggests a certainty relative to "economic interdependency and implicates the employer's

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419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. *See id.*
425. *Id.* at 401-02 (citing IND. CODE § 22-3-2-13 (Supp. 2001)).
426. *Id.* at 402.
427. *Id.* (citing IND. CODE § 22-3-3-31 (1998)).
428. 579 N.E.2d 63 (Ind. 1991).
429. *See GKN*, 744 N.E.2d at 402 (citing *Hale*, 579 N.E.2d at 67).
430. *Id.* (citing *Hale*, 579 N.E.2d at 67).
431. *Id.*
432. *Id.*

right to establish work boundaries, set working hours, assign duties, and create job security."[433]

Next, the court addressed who bears the burden of proof in such a case.[434] Generally, the party challenging subject matter jurisdiction bears "the burden of establishing that jurisdiction does not exist."[435] However, given the "public policy favoring coverage of employees under the Act," the court noted multiple decisions holding that "once an employer raises the issue of exclusivity of the Act, the burden [then] automatically shifts to the employee."[436] However, the court disagreed with that proposition, maintaining that "public policy is not advanced" if third-party tortfeasors and their liability insurance carriers are immunized.[437] Moreover, the court noted that the Indiana Supreme Court had "never endorsed the proposition that an employee automatically bears the burden of proof" relative to a question of jurisdiction raised in a worker's compensation claim.[438]

In conclusion, the court held that an employer who challenges the trial court's jurisdiction will bear "the burden of proving that the employee's claim falls within the scope of the Act unless the employee's complaint demonstrates the existence of an employment relationship."[439] However, if the employee's complaint does demonstrate the existence of an employment relationship, the burden will shift to the employee to show some ground for taking the case outside of the Act.[440] Hence, the court found that Magness' complaint failed to demonstrate an employment relationship; therefore, the burden remained with GKN.[441] Finally, after balancing all of the *Hale* factors and "giving considerable weight" to the control element, the court reasoned that "there was sufficient evidence before the trial court to show that Magness was not an employee of GKN" and affirmed the trial court's judgment.[442]

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433. *Id.* at 403.

434. *Id.*

435. *Id.* at 404 (citing Methodist Hosp. of Ind., Inc. v. Ray, 551 N.E.2d 463, 467 (Ind. Ct. App. 1990), *opinion adopted by* 558 N.E.2d 829 (Ind. 1990) (per curiam)).

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 407.