

BANKING, BUSINESS & CONTRACT LAW

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INTRODUCTION

This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court (“Supreme Court”) and Indiana Court of Appeals (“Court of Appeals”) between September 1, 2024, and August 31, 2025 (the “Survey Period”).¹

1. This Article marks the twelfth consecutive year that the author has surveyed Indiana banking, business, and contract law for the *Indiana Law Review*, and he is grateful to the Editors-in-Chief, other editors, and staff of the ILR for their support and assistance. He is grateful as well to Judge Margret G. Robb who is the proximate cause of this effort. Prior Survey Articles are cited *passim* by year covered, e.g., “2022–2023 Survey Article.” All the Articles are denominated “Banking, Business, and Contract Law.” Here are the full citations for the prior eleven Articles: 48 IND. L. REV. 1195 (2015) (covering 2013–2014); 49 IND. L. REV. 981 (2016) (covering 2014–2015); 50 IND. L. REV. 1179 (2017) (covering 2015–2016); 51 IND. L. REV. 945 (2018) (covering 2016–2017); 52 IND. L. REV. 635 (2019) (covering 2017–2018); 53 IND. L. REV. 821 (2021)

This Article will not itemize every Indiana banking, business, and contract law development during the Survey Period. Instead, it will illustrate some of the big-picture issues in these fields, situate where applicable those developments in national trends, and provide several practice pointers for both transaction lawyers and litigators. This Article also gives a brief update on the Supreme Court's commercial courts initiative.²

I. COMMERCIAL COURTS UPDATE

The Supreme Court established "Commercial Courts" in six Indiana counties in 2019 and added courts in four additional counties two years later.³ Commercial courts seek to streamline a court's efficiency, educate judges and litigants, and create predictable business case law that encourages companies to incorporate or complete transactions within the state.⁴ In this regard, the Court has enhanced the functionality of Odyssey, its statewide online court case management system, to include substantive order searches of commercial court dockets.⁵

During the Survey Period, Judge Stephen R. Bowers of Elkhart County retired.⁶ Judge Bowers was truly one of the founders of commercial courts in Indiana and made significant contributions to their establishment and growth. The Supreme Court appointed Judge Andrew Hicks to succeed Judge Bowers.⁷ The Supreme Court also established a new Commercial Court in Tippecanoe County and appointed Judge Daniel J. Moore to preside over it.⁸

It is very clear that the commercial courts are attracting significant and complex commercial litigation that would likely have been filed as diversity actions in federal court. Examples of two such cases follow: one, a securities fraud class action arising out of a \$1.275 billion public offering; the second, a dispute over insurance coverage for a mass toxic tort action in Taiwan.

(covering 2018–2019); 54 IND. L. REV. 783 (2022) (covering 2019–2020); 55 IND. L. REV. 461 (2022) (covering 2020–2021); 56 IND. L. REV. 669 (2023) (covering 2021–2022); 57 IND. L. REV. 811 (2024) (covering 2022–2023); and 58 IND. L. REV. 741 (2025) (covering 2023–2024).

2. *Commercial Courts Committee*, IND. JUD. BRANCH, <https://www.in.gov/courts/iocs/committees/commercial-courts/> [https://perma.cc/V4QJ-CKL6] (last visited Sep. 23, 2025).

3. Sydney Byerly, *New state commercial courts are open in 10 Indiana counties*, THE STATEHOUSE FILE (Aug. 28, 2025), https://www.thestatehousefile.com/briefs/new-state-commercial-courts-are-open-in-10-indiana-counties/article_edb29962-3472-11ed-a95c-9743a225094a.html [https://perma.cc/P33M-T46G]; *Vigo County to open a commercial court*, TERRE HAUTE TRIBUNE-STAR (Dec. 2, 2020), https://www.tribstar.com/news/local_news/vigo-county-to-open-a-commercial-court/article_fa8db806-1a13-5ce5-95a3-587f853e0a2b.html [https://perma.cc/5V5D-34SS].

4. Tyler Moorhead, *Business Courts: Their Advantages, Implementation Strategies, and Indiana's Pursuit of Its Own*, 50 IND. L. REV. 397, 398 (2016).

5. TERRE HAUTE TRIBUNE-STAR, *supra* note 3.

6. IND. SUP. CT., ANNUAL REPORT 2024-2025, at 45 (2025), <https://www.in.gov/courts/supreme/files/2425report.pdf> [https://perma.cc/9SXG-K8FU].

7. *Id.*

8. *Id.*

The first case involves Elanco Animal Health Inc., an Indiana corporation, which is a global leader in animal health, manufacturing, and delivering products and services to prevent and treat disease in farm animals and pets. (Elanco was formerly a business unit of Eli Lilly and Company and became an independently incorporated company in 2018.) In January 2020, Elanco made a major public offering of its securities, selling approximately \$725 million of common stock and another \$550 million of a specialized security called “tangible equity units.”⁹

In October of that year, a shareholder class action lawsuit was filed in the Marion County Commercial Court of Indiana against Elanco, certain executives, and other individuals and entities, alleging that Elanco and certain of its executives made materially false or misleading statements and failed to disclose certain facts about Elanco’s relationships with third-party distributors and revenue attributable to those distributors in the January offering materials, causing investors in those offerings economic loss.¹⁰

The litigation was stayed during the pendency of parallel litigation in federal court. Following amendments to the complaint, the Commercial Court granted Elanco’s motion to dismiss on April 17, 2024, in an impressive forty-page order.¹¹ During the Survey Period, the Indiana Court of Appeals affirmed in all respects.¹²

The second case began nearly a decade ago, when a group representing over one thousand former workers sued a group of affiliated companies and alleged that they had been harmed by exposure to multiple toxic substances during their employment at numerous factories in Taiwan.¹³ The defendants are generally referred to in the litigation as “Technicolor” and include several affiliates, some of which are successors to companies that went by the names of “Thomson Consumer Electronics” and “RCA Corporation.”¹⁴

Technicolor subsequently filed suit in Marion Commercial Court against Allianz Global Risks US Insurance Company, a part of the largest insurance company in the world, seeking defense and indemnity for the claims in the Taiwan class action.¹⁵ The Commercial Court made a series of rulings in the litigation which were, for the most part, favorable to Technicolor. Some of these rulings were appealed but generally affirmed. The most recent developments included the Commercial Court entering an order on January 19, 2024, ordering

9. Order Granting Motion to Dismiss ¶ 39, *Safron Cap. Corp. v. Elanco Animal Health, Inc.*, No. 49D01-2010-CT-036760 (Marion Super. Ct. Apr. 17, 2024).

10. Class Action Complaint ¶¶ 40–79, *Safron*, No. 49D01-2010-CT-036760 (Marion Super. Ct. Oct. 16, 2020).

11. Order Granting Motion to Dismiss, *supra* note 9.

12. *Safron Cap. Corp. v. Elanco Animal Health Inc.*, 267 N.E.3d 463, 484 (Ind. Ct. App.), *reh’g denied*, Sep. 23, 2025.

13. Complaint for Damages and Declaratory Relief ¶ 9, *Technicolor USA Inc. v. Ins. Co. of N. Am.*, No. 49D01-1810-PL-040578 (Marion Super. Ct. Oct. 9, 2018).

14. *Id.* ¶¶ 1, 10.

15. *Id.* ¶ 6.

the payment of specified amounts of defense costs owed by Allianz to Technicolor.¹⁶ During the Survey Period, the Court of Appeals affirmed in all respects.¹⁷

As these two examples show, the Indiana Commercial Court project is achieving its purpose of allowing business and commercial disputes to be resolved with expertise, technology, and efficiency, ultimately enhancing economic development in Indiana by furthering the efficient, predictable resolution of business and commercial law disputes.

II. BANKING LAW

The mandate of this Article encompasses “banking,” and the author includes within that charge litigation, including debt collection actions, between financial institutions and their borrowers.¹⁸ Debt collection cases where the creditor is other than a financial institution are reviewed in Part IV of this Article.

A. A Priority Contest Between a Mortgage and a Mechanic’s Lien

EdgeRock Development, LLC v. C.H. Garmong & Son, Inc. involved the financial tribulations of a commercial construction project called the “Trails of Westfield.”¹⁹

EdgeRock contracted with Garmong, Fox Contractors Corp., and a third company to complete certain aspects of a retail and multi-family housing project spanning five different parcels of land, two of which were owned by EdgeRock, two by ZPS Westfield, LLC (“ZPS”), and one by a third party.²⁰ The two EdgeRock parcels were encumbered by a mortgage to secure the payment by EdgeRock of the purchase price of the two parcels.²¹ (This mortgage is referred to throughout the litigation as the “Acquisition Mortgage.”)²²

Work began on the project in 2017. ZPS contracted directly with EdgeRock for the work to be completed on its two parcels and paid its financial obligations outlined in its contract with EdgeRock in full.²³ In December 2018, following five months of nonpayment from EdgeRock, Garmong filed a notice of intention to hold a mechanic’s lien and recorded a mechanic’s lien in the amount of

16. Order on Defense Costs Owed by Allianz ¶ 49, *Technicolor*, No. 49D01-1810-PL-040578 (Marion Super. Ct. Jan. 19, 2024).

17. *Allianz Glob. Risks US Ins. Co. v. Technicolor USA, Inc.*, 266 N.E.3d 755 (Ind. Ct. App. 2025), *trans. denied*, 274 N.E.3d 934 (Ind. 2026).

18. See *infra* Part IV for a discussion of debt collection actions not involving financial institutions.

19. 261 N.E.3d 192, 198 (Ind.), *reh’g denied*, Aug. 20, 2025.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 200.

approximately \$2.1 million.²⁴

Shortly thereafter, First Bank agreed to loan \$4.9 million to EdgeRock, the proceeds of which were used to discharge the Garmong mechanic's lien (approximately \$2.1 million), which was released; pay off the Acquisition Mortgage on EdgeRock's two parcels (approximately \$2.0 million), which also was released; provide funds to EdgeRock (approximately \$400,000); and other purposes.²⁵ (First Bank refers to this loan as a "refinancing," and it did, indeed, take out the earlier Acquisition Mortgage on EdgeRock's two parcels.) First Bank was not aware that Garmong "had an outstanding claim for work performed of over \$1 million in addition to the Garmong mechanic's lien of \$2.1 million that was being paid off at the closing."²⁶

Garmong and Fox recorded and then sought to foreclose additional mechanics' liens.²⁷ Although there are other issues of interest in this case, only the validity of the Garmong and Fox mechanics' liens and the priority of the First Bank mortgage will be addressed.

In August and September 2019, Fox recorded mechanic's liens—each totaling approximately \$1.7 million—against ZPS's two parcels and EdgeRock's two parcels.²⁸ In September 2019, Garmong also recorded mechanics' liens—each in the approximate amount of \$1.0 million—against ZPS's two parcels and Edge Rock's two parcels.²⁹ This case was filed in December 2019, in which Garmong and Fox sought to foreclose on their mechanics' liens and damages for breach of contract and unjust enrichment.³⁰

Starting with the mechanic's lien issue, the trial court held Garmong was entitled to foreclose its mechanic's liens both on the EdgeRock parcels and on the ZPS parcels and that Fox was entitled to foreclose its mechanics' liens both on the EdgeRock parcels and on the ZPS parcels.³¹

The Court of Appeals vacated these two holdings, concluding that because the two contractors had filed mechanics' liens against the parcels of both EdgeRock and ZPS when they only had claims against one or the other, all of their liens were void.³²

The Supreme Court straightened this up, saying that "no reported case in Indiana has ever held [what the Court of Appeals did here], and this case should not be the first."³³ The court held that the liens filed against the properties with respect to which the two contractors did not have claims were, in fact, void, but

24. *Id.* at 214.

25. *Id.* at 201.

26. *EdgeRock Dev., LLC v. C.H. Garmong & Son, Inc.*, 227 N.E.3d 907, 916–17 (Ind. Ct. App. 2024), *aff'd in part and vacated in part*, *EdgeRock*, 261 N.E.3d 192.

27. *EdgeRock*, 261 N.E.3d at 201.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 201–02.

32. *Id.* at 202.

33. *Id.*

that this did not invalidate the liens against the properties with respect to which they had claims.³⁴ Based on the evidence at trial, the Supreme Court found that Garmong had a lien of \$520,000 against ZPS and that Fox had liens totaling approximately \$1.4 million against EdgeRock.³⁵

As to the priority of First Bank's mortgage, the trial court held that it had priority only for the approximately \$2.1 million of its loan that was paid to Garmong.³⁶ (This was not an issue in the Court of Appeals decision because it had vacated the competing mechanics' liens altogether.) The Supreme Court affirmed the trial court's judgment.³⁷

First, the bank claimed that the priority of a mechanic's lien dates from the date the lien was recorded, such that the bank's mortgage had priority here because it pre-dated the filing of the mechanics' liens.³⁸ The Supreme Court was extraordinarily firm rejecting this argument, saying that "more than 150 years' worth of cases from our Court and the Court of Appeals say otherwise," dropping a footnote citing ten Indiana cases to that effect and then saying that that case law "mirrors how courts around the country interpret these sorts of relation-back provisions in lien statutes."³⁹

Second, the bank argued that it enjoyed a statutory priority accorded to construction project financing by Indiana Code section 32-28-3-5(d).⁴⁰ This priority, the Supreme Court said, was available to the bank with respect to the approximately \$2.1 million that the bank loaned to EdgeRock to pay off the prior Garmong construction lien.⁴¹ But it was not available for the balance of the loan because those funds were not used for the project.⁴² Rather, those funds were used to pay off EdgeRock's investors' Acquisition Mortgage.⁴³ The court quoted with approval the finding of the trial court that "[t]he Bank knew that the lien it was paying off was for work already completed" and that "it was not funding a traditional construction loan where the bank provides acquisition funding that allows the project to proceed."⁴⁴

Third, the bank maintained that its mortgage was entitled to be equitably subrogated to the rights and obligations of the Acquisition Mortgage.⁴⁵ Equitable subrogation allows the refinancing lender to take the priority of the mortgage it pays off.⁴⁶ First Bank and Amicus Indiana Bankers Association pointed out that Indiana recognizes the doctrine of equitable subrogation in the refinancing

34. *Id.*

35. *Id.* at 209.

36. *Id.* at 217.

37. *Id.* at 219.

38. *Id.* at 215.

39. *Id.* at 215–16.

40. *Id.* at 214.

41. *Id.* at 217.

42. *Id.* at 218.

43. *Id.*

44. *Id.* at 218–19.

45. *Id.* at 214.

46. *Id.* at 219.

context generally, and they argued that there is no authority for not applying the doctrine when mechanics' liens are involved.⁴⁷ If anything, the contractors were better off, the bank said, because it was its loan that enabled EdgeRock to pay Garmong's outstanding invoices.⁴⁸

But the Supreme Court was quick to note that the doctrine of equitable subrogation sounds, in fact, in equity. Here, the "trial court found that the equities favored the contractors because the portion of the loan in dispute was not a traditional refinancing but a vehicle for the investors to retrieve their capital without paying the contractors that had improved the properties composing the project in which they had invested."⁴⁹ And that was enough for the Supreme Court: "While the trial court could have weighed the equities as the bank proposes, the court didn't have to. We cannot second-guess the court's judgment because the evidence supports its findings, and its findings support its conclusion."⁵⁰

The Supreme Court was undoubtedly correct on the issues of dating of the mechanics' liens and the statutory priority. As to the equitable subrogation issue, the question is one of equity and the trial court's reasoning is highly supportable. Furthermore, the timing of events in this drama was such that the bank, by not conditioning its making of the loan in the first place on obtaining the necessary protections from what happened, invited this result by its lack of diligence.

B. Renewing Unsatisfied Judgments

In a number of decisions over the years, Indiana Court of Appeals Judge Paul D. Mathias has explicated what he himself has called the "somewhat arcane legal history that is the background for collection of civil judgments under Indiana law."⁵¹ In a particularly helpful concurring opinion in *Lewis v. Rex Metal Craft, Inc.*, he points out two important statutory time periods affecting judgments: the ten-year judgment lien period and the twenty-year life of judgment period.⁵² As Judge Mathias stated:

During the eleventh through twentieth years after judgment, no lien exists as to the debtor's real estate. However, with the permission of the court, execution against real estate may still issue, albeit without the benefit of a judgment lien. Proceedings supplemental are also available to a judgment creditor during the second decade.⁵³

47. *Id.* at 219–20.

48. *Id.*

49. *Id.* at 220.

50. *Id.*

51. *Lewis v. Rex Metal Craft, Inc.*, 831 N.E.2d 812, 821 (Ind. Ct. App. 2005) (Mathias, J., concurring); *see also* *Converging Cap., LLC v. Steglich*, 234 N.E.3d 902, 904–06 (Ind. Ct. App. 2024).

52. *Lewis*, 831 N.E.2d at 822 (Mathias, J., concurring).

53. *Id.* at 823 (citations omitted).

However, Judge Mathias says, because of this confusing complexity of execution and proceedings supplemental, and the added uncertainty caused by the two attendant decade-long time periods, most sophisticated judgment creditors “renew” their judgments shortly before the expiration of the first (and each successive) decade after judgment.⁵⁴

In two extremely similar cases during the Survey Period, one from Marion County and the other from Lake County,⁵⁵ trial courts failed to understand the operation of such judgment renewals. In both cases, as the creditor’s unsatisfied judgment approached its tenth anniversary, the creditor filed a new complaint against the debtor to renew the original judgment and collect its amount plus interest.⁵⁶ This is the “judgment renewal” that Judge Mathias speaks of. The practical effect is to obtain a new ten-year judgment lien against the debtor’s property.

In both cases, the trial court dismissed the complaint.⁵⁷ In the Marion County case, the court said “the proper way to renew a judgment is to file a motion to renew in the original court . . . rather than in a new cause of action.”⁵⁸ In both cases, the Court of Appeals reversed, harkening back to a decision discussed in last year’s survey:

“To renew a judgment, before the end of the first ten-year . . . period[,] the judgment creditor *files a new case alleging that it owns the judgment at issue.*” Such a complaint enables the judgment creditor to obtain a new judgment against the debtor and, thus, a new judgment lien on the debtor’s property.⁵⁹

Accordingly, the creditors acted not only within their rights but prudently by filing their renewal complaint under a new cause number.⁶⁰

C. Some Shenanigans in a Bank/Lender – Borrower/Landlord – Tenant Relationship

The borrower in *Bob Evans Restaurants, LLC v. Bank OZK* used loan proceeds to purchase commercial real estate which was then leased to a tenant

54. *Id.*

55. *Autovest, L.L.C. v. Abner*, 245 N.E.3d 193 (Ind. Ct. App. 2024); *Autovest, LLC v. Bach*, 255 N.E.3d 1221 (Ind. Ct. App. 2025). As can be seen, both cases involve the same creditor. The second case was Judge Stephen E. Scheele’s first opinion for the Court of Appeals; in it, the court reversed his former court, the Lake Superior Court.

56. *Abner*, 245 N.E.3d at 194; *Bach*, 255 N.E.3d at 1222.

57. *Abner*, 245 N.E.3d at 194; *Bach*, 255 N.E.3d at 1222.

58. *Abner*, 245 N.E.3d at 194.

59. *Id.* at 195 (first alteration in original) (citations omitted) (quoting *Converging Cap., LLC v. Steglich*, 234 N.E.3d 902, 905 (Ind. Ct. App. 2024)).

60. *Id.*

for use as a restaurant.⁶¹ Included in the collateral for the loan was all of the borrower's interest as landlord under future and existing leases.⁶² Bank/lender, borrower/landlord, and tenant signed a standard subordination, non-disturbance and attornment agreement that subordinated the lease to the lien of the mortgage and authorized the bank to require that tenant pay rent directly to it.⁶³

Eventually tenant closed the restaurant, stopped paying rent, and defaulted on the lease.⁶⁴ Borrower then defaulted and the bank foreclosed on the property.⁶⁵ The bank also exercised its rights under the lease and subordination agreement to direct the tenant to pay rents directly to it.⁶⁶

Unbeknownst to the bank, the tenant and the borrower signed a settlement agreement where tenant agreed to pay the borrower \$225,000 in return for the borrower releasing the tenant from any obligations under the lease.⁶⁷

The bank obtained title to the property after the foreclosure sale and sued the tenant to enforce the lease.⁶⁸ The tenant responded that the lease had been terminated and so it was off the hook.⁶⁹

The Court of Appeals succinctly summarized the situation: "There is no dispute that Lender was not a party to the Lease Agreement and the Settlement Agreement between Tenant and Borrower. Lender, however, was a party to the Subordination Agreement executed by the three parties to protect each party's respective interest in the Property."⁷⁰ Judge Peter Foley does a nice job here of articulating how a mortgage, lease, and subordination agreement interact in such circumstances.

D. Rights of a Junior Lienholder Following Foreclosure

*Sanders v. US Bank Trust National Ass'n as Trustee for ABS Loan Trust VI*⁷¹ makes clear the rights of a junior lienholder in a mortgage foreclosure action. In this case, the sheriff's foreclosure sale yielded sufficient proceeds to pay the senior lienholder in full. The balance of the sale proceeds were held by the court's clerk, but when the junior lienholder (who, after all, had a valid judgment against the property) sought to be paid, the owner argued that the junior lienholder's "mortgage [lien] and claim based thereon was extinguished at the Sheriff's Sale" and did not attach to the sheriff sale proceeds.⁷² The Court

61. 245 N.E.3d 657, 2024 WL 4141625, at *1 (Ind. Ct. App. 2024) (unpublished table decision).

62. *Id.* at *1.

63. *Id.* at *2.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at *3.

68. *Id.* at *4.

69. *Id.*

70. *Id.* at *5.

71. 268 N.E.3d 803 (Ind. Ct. App. 2025).

72. *Id.* at 809.

of Appeals affirmed the trial court's judgment for the junior lienholder: "Indiana caselaw also provides that a lien of a junior mortgagee is transferred or attached to the surplus proceeds from the sale under a senior mortgage foreclosure."⁷³

E. A Mortgage Foreclosure Action Decided Against the Bank: Putative Mortgagee Failed to Designate Evidence Precluding Summary Judgment for the Owner

In *Servbank, SB v. RP2FISH LLC*, a bank claimed to be the successor-in-interest to the original mortgagee on some property in Indianapolis.⁷⁴ The owner took the position that the original mortgage had been released.⁷⁵ In the bank's foreclosure action, the owner sought summary judgment designating, among other things, the Mortgage, the Release, and an affidavit from the owner's manager indicating that the owner (1) paid \$285,000.00 for the property, (2) received a title commitment showing no unreleased mortgages, and (3) had no notice of any outstanding rights of others.⁷⁶ The court concluded that under the circumstances, that owner had made a prima facie showing of its entitlement to summary judgment, such that the burden shifted to bank to designate evidence establishing that a factual issue remained in the case.⁷⁷ The court then held that the bank had failed to designate evidence issue precluding summary judgment.⁷⁸ As such, the court affirmed the trial court's grant of summary judgment in favor of the owner.⁷⁹

F. Residential Property Foreclosure Cases

The author began writing these survey articles in the wake of the financial crisis of 2007–09. It was a time characterized by many residential foreclosures, a considerable number of which failed because of the inability of mortgagees to prove that they owned the debt. In the intervening decade, mortgagees have gotten their acts together, and it is rare to find a case in which the mortgagees cannot prove their entitlement to foreclosure. That was certainly the case during this Survey; cases in which foreclosure was achieved are set forth in the margin.⁸⁰

73. *Id.* at 814.

74. 266 N.E.3d 270, 2025 WL 1912094, at *1 (Ind. Ct. App. 2025) (unpublished table decision).

75. *Id.*

76. *Id.*

77. *Id.* at *3.

78. *Id.* at *4.

79. *Id.*

80. *Sims v. Bank of N.Y. Mellon as Tr. for Certificate Holders of CWABS, Inc., Asset-Backed Certificates, Series 2005-BC5*, 266 N.E.3d 267, 2025 WL 1903643 (Ind. Ct. App.) (unpublished table decision), *trans. denied sub nom.*, *Sims v. Bank of N.Y. Mellon*, 272 N.E.3d

One such case worthy of attention here is *Klunder v. Bank of New York Mellon as Trustee for CWHEQ Revolving Home Equity Loan Trust, Series 2007-A*.⁸¹ A promissory note evidencing a home equity loan was discharged in bankruptcy.⁸² Some years later, the note servicer sent information to the makers as to the amount outstanding on the note, including a caveat that if the note had been discharged in bankruptcy, the information did not constitute a demand for payment.⁸³ Ultimately, the property was foreclosed upon and the makers counterclaimed, arguing that the notices they had received violated the Indiana Deceptive Consumer Sales Act (DCSA).⁸⁴

The Court of Appeals does a good job walking through the law on how bankruptcy discharges the individual mortgagee's debt in a bankruptcy but that the lien on the property remains, citing what is probably the leading Indiana case on the subject: *McCullough v. CitiMortgage, Inc.*⁸⁵

As to the DCSA claim, the Court of Appeals says that "the DCSA does not apply to the alleged deceptive acts because the acts were permitted by law. Under federal law, for example, a creditor shall—to the extent applicable—furnish a consumer with a periodic statement disclosing several items, including some information particular to home-equity plans."⁸⁶

960 (Ind. 2025) (untimely petition to transfer has been filed) (land contract vendor defaulted on its mortgage on the property; mortgagee granted foreclosure; and contract vendee appealed but the Court of Appeals affirmed); *Deva v. Sec. Fed. Sav. Bank*, 267 N.E.3d 1075 (Ind. Ct. App.), *trans. denied*, 270 N.E.3d 958 (Ind. 2025) (trial court entered summary judgment in favor of Security Federal Savings Bank in this mortgage foreclosure action; the Court of Appeals affirmed); *Bonner v. Fifth Third Bank, Nat'l Ass'n*, 267 N.E.3d 1092, 2025 WL 2374892 (Ind. Ct. App. 2025) (unpublished table decision), *trans. denied sub nom.*, *Anderson v. Fifth Third Bank, Nat'l Ass'n*, 274 N.E.3d 936 (Ind. 2026) (Fifth Third sought to foreclose on the Bonner property because the Bonners had defaulted on their loan, which was secured by a mortgage on the property; Fifth Third designated the promissory note, the mortgage, and a sworn affidavit indicating the loan was in default; trial court held Fifth Third was entitled to foreclosure and the Court of Appeals affirmed); *Goodner v. M&T Bank*, 251 N.E.3d 558, 2024 WL 5116375 (Ind. Ct. App. 2024) (unpublished table decision), *trans. denied sub nom.*, *Ryan v. M&T Bank*, 257 N.E.3d 780 (Ind. 2025) (despite signing three sets of mortgage loan documents showing that she owed amounts exceeding \$90,000 for the home and despite making mortgage payments for over a decade, mortgagor claimed she had bought the property outright for \$10 cash and never owed anything to any lender; trial court rejected her arguments, and the Court of Appeals affirmed); *Bey v. Fifth Third Bank Nat'l Ass'n*, 253 N.E.3d 568, 2025 WL 289356 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 262 N.E.3d 819 (Ind. 2025) (Court of Appeals shows great patience here in considering the appeal from an order of foreclosure filed by an individual who described himself as the Grand Sheik of the Moorish Science Temple of America #27 Sol Temple; such respect for litigants is beyond admirable; Judge Elaine Brown wrote the decision, joined by Judges Altice and Tavitas).

81. 247 N.E.3d 789, 2024 WL 4602210 (Ind. Ct. App. 2024) (unpublished table decision).

82. *Id.* at *1.

83. *Id.*

84. *Id.*

85. 70 N.E.3d 820 (Ind. 2017). *McCullough*, in turn, cites *Long v. Bullard*, 117 U.S. 617 (1886), which established the principle.

86. *Klunder*, 2024 WL 4602210, at *3.

III. BUSINESS LAW

A. Andrew Nemeth Properties, LLC v. Panzica

After the close of the Survey Period, the Indiana Supreme Court decided *Andrew Nemeth Properties, LLC v. Panzica*,⁸⁷ a closely-watched case discussed at length in last year's Survey Article.⁸⁸

The reader is referred to that Article for the details of the dispute, including the conflicting outcomes in the trial court⁸⁹ and Court of Appeals.⁹⁰ In short, Andrew Nemeth and his company ("Nemeth") contended that he and three brothers named Panzica (the "Panzicas") orally formed a limited liability company (LLC) called "NP3, LLC" to pursue a business opportunity; that the Panzicas cut him out of the deal; and that he was entitled to share in the deal's profits, either as a member of NP3, LLC or under a theory of unjust enrichment.⁹¹ The Panzicas maintained that no LLC including Nemeth was ever formed (indeed, they argued that an Indiana LLC cannot even be formed orally) and that any claim Nemeth might have had for unjust enrichment was barred by the doctrine of "unclean hands" (a reference to an allegedly undisclosed real estate commission Nemeth received in connection with the deal).⁹² The trial court held that no LLC was ever formed, agreeing with the Panzicas that an Indiana LLC cannot be formed orally; conducted a bench trial on the unjust enrichment claim; and held it barred by the doctrine of unclean hands.⁹³ The Court of Appeals reversed, holding that an Indiana LLC can be formed by oral agreement; that issues of fact remained as to whether Nemeth and the Panzicas had formed such an agreement; that the issue of unjust enrichment is a question of law, not equity, such that it should have been tried to a jury; and that in such a jury trial, the Panzicas could not use the unclean hands defense as that is an equitable doctrine not available to defend against a legal claim.⁹⁴

Oral argument was held before the Supreme Court in the case on December 5, 2024, and the Court rendered its decision on November 6, 2025.⁹⁵ Amicus appeared in support of Panzica's position that an Indiana LLC can only be formed in writing and on both sides of the question of whether unjust enrichment

87. 271 N.E.3d 1100 (Ind. 2025).

88. 2023–2024 *Survey Article*, *supra* note 1, at 760–64.

89. *Andrew Nemeth Props., LLC v. Panzica*, No. 50C01-2202-PL-000002 (Marshall Cir. Ct. June 6, 2023).

90. *Andrew Nemeth Props., LLC v. Panzica*, 234 N.E.3d 183 (Ind. Ct. App. 2024), *vacated*, *Nemeth*, 271 N.E.3d 1100.

91. *Id.* at 185–86.

92. *Id.* at 187–88.

93. *Id.* at 188.

94. *Id.* at 191–93.

95. *Nemeth*, 271 N.E.3d 1100.

was a question of law or equity.⁹⁶

Justice Derek Molter's opinion for a unanimous Supreme Court resolved the major issues as follows. First, the Court agreed with Panzica that formation of an Indiana LLC requires a written operating agreement.⁹⁷ Second, although Nemeth could not therefore establish that he was a member of NP3, LLC, the court agreed with Nemeth that he could pursue a claim that the Panzicas breached an agreement that he had with them that he would become a member.⁹⁸ Third, the court agreed with Nemeth that his claim of unjust enrichment sounded in law, not equity, and that he was entitled to a jury trial on that issue.⁹⁹ Fourth, the court agreed with the Panzicas that their defense of unclean hands would be available to them in any such jury trial.¹⁰⁰

Assuming this Article's author is accurate in summarizing the court's decision in this way, it is apparent that each of the litigants won on two of the issues and lost on two of the issues. While the Supreme Court cut back on the decision of the Court of Appeals in Nemeth's favor, the court's decision was far more favorable to him than the result in the trial court.

Each of the four conclusions are extremely interesting and make a lot of new Indiana law. While this Article cannot exhaustively discuss the Court's analysis, a few points on each are warranted.

The issue of whether the formation of an Indiana LLC requires a written operating agreement is essentially a question of statutory interpretation. The battle is joined over the meaning of two sections of the act. First, a section defining the term "operating agreement" (the "Definition Section"):

"Operating agreement" means any written or oral agreement of the members as to the affairs of a limited liability company and the conduct of its business that is binding upon all the members.¹⁰¹

Second, a section describing the way in which a person becomes a member of an LLC (the "Member Section"):

(a) Subject to subsection (b), a person may become a member in a limited liability company: (1) in the case of a person acquiring an interest directly from the limited liability company, upon compliance with the operating agreement or if the operating agreement does not provide in writing, upon the written consent of all members; and (2) in

96. Brief of Amici Curiae Ind. Bus. L. Att'ys, *Nemeth*, 234 N.E.3d 183 (No. 23A-PL-1383), 2024 WL 3816418, at *12; Brief of Amicus Curiae Def. Trial Couns. of Ind., *Nemeth*, 234 N.E.3d 183 (No. 23A-PL-1383), 2024 WL 3816414, at *9-12; Brief of Amicus Curiae the Ind. Trial Laws. Ass'n, *Nemeth*, 234 N.E.3d 183 (No. 23A-PL-1383), 2024 WL 3816422, at *9-11.

97. *Nemeth*, 271 N.E.3d at 1108.

98. *Id.* at 1108.

99. *Id.* at 1114.

100. *Id.* at 1116-17.

101. IND. CODE § 23-18-1-16 (2025).

the case of an assignee of an interest, as provided in section 4 or 4.1 of this chapter. (b) The effective time of admission of a member to a limited liability company is the later of the following: (1) The date the limited liability company is organized. (2) The time provided in the operating agreement, or if no time is provided, when the person's admission is reflected in the records of the limited liability company.¹⁰²

Nemeth's argument is that the Definition Section makes unambiguously clear that LLC operating agreements may be oral; the word "oral" itself is used in the statute.¹⁰³ As to the language in the Membership Section that requires a writing, Nemeth says that that applies only to members joining an LLC after its formation, not original members.¹⁰⁴

But the court, acknowledging that Nemeth's interpretation is reasonable, nevertheless agrees with the Panzicas that LLC operating agreements must be in writing to bind the parties.¹⁰⁵ In support of its imposing a statute of frauds requirement on LLC operating agreements, the court gives three reasons. First, it says that requiring operating agreements to be in writing "better aligns with other provisions [of the LLC] Act."¹⁰⁶ Second, it finds that interpretation consistent with what it calls the "more clearly written statutes" of other states.¹⁰⁷ In a nod to originalism, the court looks to the "original public meaning" but finds evidence thereof to be "limited."¹⁰⁸

The court also sets forth several reasons in support of its conclusion that the Member Section (and its writing requirement) applies to both original and new members. First, the act's "member" definition does not distinguish between original and new members, and the Membership Section's timing provision covers original members.¹⁰⁹ Second, the court says, the "legislature has not amended the [a]ct to track other model acts that have more recently been amended to distinguish between original and later-added members."¹¹⁰

The court's reasoning is sound and certainly is grounded in all of the policy reasons that support the existence of statutes of frauds.¹¹¹ Of interest well beyond the particular issues in this case is the variety of statutory techniques that the court applied in analyzing them. The decision seems to make clear that, in future cases of statutory interpretation of any kind, the court is open to such considerations as how the statutory language in question aligns with other provisions of the statute; whether an asserted interpretation is consistent with

102. IND. CODE § 23-18-6-1 (2025).

103. *Nemeth*, 271 N.E.3d at 1109.

104. *Id.* at 1111–12.

105. *Id.* at 1111.

106. *Id.* at 1109.

107. *Id.* at 1110.

108. *Id.*

109. *Id.* at 1111–12.

110. *Id.* at 1112.

111. *See, e.g.,* *DF Activities Corp. v. Brown*, 851 F.2d 920, 923 (7th Cir. 1988) (Posner, J.).

“more clearly written statutes” of other states; the statutory language’s “original public meaning”; and whether the legislature has amended the statutory language to track developments with respect to any similar model acts.¹¹²

Having deprived Nemeth of his claim to have been a member of NP3, LLC, the court nonetheless held that genuine issues of material fact remained as to whether he and the Panzicas had an agreement that he would become a member of the LLC, an agreement which would have required no writing.¹¹³ While the Panzicas argued that the evidence was undisputed that there was never any agreement to this effect, the court sternly rejects their contention: “those are hotly disputed facts.”¹¹⁴ With a nod toward the Supreme Court’s summary judgment lodestar, *Hughley v. State*,¹¹⁵ the court agrees that Nemeth is entitled to present this claim to a jury.¹¹⁶

The court next takes up the question of the proper forum for litigating Nemeth’s unjust enrichment claim and quickly concludes it to be a legal claim that juries can decide. Citing other Indiana cases¹¹⁷ and several treatises,¹¹⁸ the court makes the crucial distinction that the relief Nemeth seeks here is a judgment for money, rather than equitable relief.¹¹⁹ Given that a claim for a money judgment is a legal claim, the court says, the Indiana Constitution’s Right to Jury Trial Clause¹²⁰ entitles Nemeth to a jury trial.¹²¹

The last issue dealt with by the court is the Panzicas’ “unclean hands” defense.¹²² Recall that the trial court and Court of Appeals had opposing views on this issue: the trial court stated that it precluded Nemeth from recovery; the Court of Appeals stated that it could not be utilized to defend against a legal claim tried to a jury.¹²³

The Supreme Court concluded that unclean hands is a defense available for unjust enrichment regardless of whether the plaintiff seeks legal or equitable relief and held that its existence is a jury question.¹²⁴ The court’s discussion is quite illuminating, starting with an overview of the doctrine itself and then candidly admitting that courts and commentators are deeply divided about

112. *Id.* at 1109–13.

113. *Id.* at 1113.

114. *Id.* at 1114.

115. *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014).

116. *Nemeth*, 271 N.E.3d at 1113–14.

117. *Id.* at 1115 (citing *McKinney v. Springer*, 6 Blackf. 511, 514–15 (Ind. 1843); *Nehi Beverage Co. of Indianapolis v. Petri*, 537 N.E.2d 78, 85 (Ind. Ct. App. 1989)).

118. *Id.* (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. d (A.L.I. 2011); 1 CORBIN ON CONTRACTS § 1.20 n.8 (rev. ed. 2024); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES 109 (3d ed. 2018); 1 AM. JUR. 2D *Actions* § 13).

119. *Id.* The Court gives examples of such equitable relief as a constructive trust, equitable lien, or subrogation. *Id.*

120. IND. CONST. art. I, §20.

121. *Nemeth*, 271 N.E.3d at 1115–16.

122. *Id.* at 1116–19.

123. *Id.* at 1106–07.

124. *Id.* at 1116.

whether the unclean hands defense is limited to equitable relief or whether it applies to legal relief as well.¹²⁵

After a review of the authorities on both sides of the question,¹²⁶ the court casts its lot in favor of the defense being available even when a plaintiff seeks a money judgment.¹²⁷ At bottom, the court says, consideration of whether Nemeth can prove the elements of unjust enrichment includes consideration of Nemeth's conduct, and that that consideration is the same as application of the unclean hands doctrine requires.¹²⁸

The last piece of the puzzle is whether the unclean hands question is also one to be decided by a jury.¹²⁹ The Panzicas had argued that not only were they entitled to present the unclean hands defense but that its availability barred Nemeth's unjust enrichment claim in the first place—and, indeed, the trial court had so held.¹³⁰ But finding the evidence on this issue to be conflicting, the court holds that the jury, rather than the judge, is required to consider the question.¹³¹

This is a most interesting and impressive opinion that will have influence far beyond business disputes like the one between Nemeth and the Panzicas.

B. Simon Property Group Leaves Delaware and Redomesticates in Indiana

Over a majority of both the Fortune 500 companies and the firms listed on the New York Stock Exchange (NYSE) are incorporated in one state, namely, Delaware. The state has long been considered the gold standard for corporate law in large part, at least in this Article's author's estimation, because of both its legislature and courts being deeply conscious of the interests of both corporations themselves and their investors. But things have gotten a little gnarly lately.

Proceedings were launched in a Delaware court to enforce by specific performance Elon Musk's agreement to purchase Twitter, prompting Musk to change his mind and consummate the deal.¹³² And the court also threw shade on Musk's Tesla pay packages.¹³³ Musk's control of Tesla was such that he caused it to be reincorporated in Texas, and other founder-managed companies either have or are considering doing the same.¹³⁴ In addition to Texas, Nevada has been

125. *Id.* at 1116–18.

126. *Id.* at 1118.

127. *Id.* at 1119.

128. *Id.* at 1120.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Crispo v. Musk, 304 A.3d 567, 570–71 (Del. Ch. 2023).

133. Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024), *rev'd sub nom.*, *In re* Tesla, Inc. Derivative Litig., No. 534, 2024, No. 10, 2025, No. 11, 2025, No. 12, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

134. *See* Ball v. Tesla, Inc., No. 2024-0622-KSJM, 2025 WL 696598, at *1 (Del. Ch. Mar. 3, 2025).

particularly aggressive in holding out the welcome mat.¹³⁵

Here in Indiana, the publicly traded Simon Property Group, Inc., relocated from Delaware during the Survey Period.¹³⁶ It is worth drilling down on this development.

First, under Delaware corporate law, a Delaware corporation can change its state of incorporation through a statutory process called “conversion.”¹³⁷ At the same time, under Indiana corporate law, a corporation in another state can change its state of incorporation to Indiana through a statutory process called “domestication.”¹³⁸ Both conversion from Delaware and domestication into Indiana require shareholder approval.¹³⁹ Because Simon is a publicly traded corporation, the details of the redomestication plan were required by applicable securities laws to be set forth in a proxy statement.

Simon did this in connection with its annual shareholders meeting held on May 14, 2025.¹⁴⁰ Its proxy statement for the meeting was sent to shareholders on April 1, and it set forth detailed reasons why its Board of Directors recommended redomestication.¹⁴¹ Among the reasons cited were that the cost-savings of not being a Delaware corporation include avoiding (i) ongoing, future franchise tax obligations in Delaware of \$250,000 each year, and (ii) litigation expense in Delaware based on historical activity and its case law, litigation driven regime.¹⁴² Second, most real estate investment trusts (REITS) are incorporated in Maryland, not in Delaware.¹⁴³ While Simon said that the Company could have joined many of its peers in Maryland, it values its deep, historical ties to the state of Indiana.¹⁴⁴ Third, the Company, and its predecessors, have been headquartered in Indiana for over 60 years, a state where it has significant operations, a large employee base, and familiarity with local government leaders.¹⁴⁵ The incorporation in Delaware was a result of a merger in 1998, after incorporation in Maryland in 1993 in connection with the Company’s IPO, and the Board and management have evaluated the costs and benefits of incorporation in Delaware for many years.¹⁴⁶ In connection with redomestication, the Board of Directors and its Governance and Nominating

135. See, e.g., *Gunderson v. Trade Desk, Inc.*, 326 A.3d 1264 (Del. Ch. 2024), *as corrected* (Nov. 8, 2024).

136. Simon Prop. Grp., Inc., Current Report (Form 8-K) (May 15, 2025).

137. DEL. CODE ANN. tit. 8, § 266(a) (West 2025).

138. IND. CODE § 23-0.6-5-2 (2025).

139. IND. CODE § 23-0.6-5-3 (2025); § 266(b).

140. Simon Prop. Grp., Inc., Proxy Statement (Schedule 14A), at 1 (Apr. 1, 2025).

141. *Id.* at 82–113.

142. *Id.* at 85, 90.

143. Eric Orlinsky, Hannah Lee & Itamar Kofman, *DEXIT? The Case for Maryland over Texas or Nevada*, A.B.A. (Mar. 16, 2026), https://www.americanbar.org/groups/business_law/resources/business-law-today/2026-march/dexit-case-for-maryland-over-texas-nevada/ (“Over 70 percent of publicly traded REITs are incorporated or formed in Maryland.”).

144. Simon Prop. Grp., *supra* note 140, at 83.

145. *Id.* at 82–83.

146. *Id.* at 82.

Committee undertook significant efforts to evaluate the issue, including multiple presentations from third-party advisors and substantial diligence.¹⁴⁷

During the run-up to the shareholder vote, an organization called Institutional Shareholder Services (ISS), a proxy advisory firm, recommended that shareholders vote against the redomestication proposal.¹⁴⁸ Simon called this recommendation misguided and disappointing; said that the motivations appeared to be unrelated to promoting long-term shareholder value; and reported that ISS had not responded to the company's request to correct certain materially misleading statements and assertions contained in the report.¹⁴⁹ Finally, Simon said, another proxy advisory firm, Glass Lewis, had recommended voting for the redomestication proposal.¹⁵⁰

The shareholder vote on May 14, 2025, in favor of redomestication was strong: 174,001,954 in favor; 94,879,715 against; 389,867 abstain; and 19,824,019 not voting.¹⁵¹ Redomestication in Indiana became effective on May 15, 2025.¹⁵²

C. Agency

1. Vicarious Liability of Gig Economy Employers.—Among the major exceptions to the doctrine of respondeat superior or vicarious liability is that an employer is not responsible for the torts of an agent who is an independent contractor. *Black v. Shaffer* addresses the hot topic of the applicability of this exception to gig workers.¹⁵³

Gina Black sued Kaytlin Shaffer and DoorDash, Inc. (“DoorDash”) after Black’s and Shaffer’s vehicles collided near an intersection in Munster, Indiana.¹⁵⁴ Black sought to hold DoorDash vicariously liable for Shaffer’s alleged negligence, claiming Shaffer was acting as an employee of DoorDash at the time of the accident.¹⁵⁵ After discovery, DoorDash moved for summary judgment, contending it could not be vicariously liable for Shaffer’s actions because Shaffer was an independent contractor and not a DoorDash employee.¹⁵⁶ Alternatively, DoorDash claimed it was entitled to summary judgment even if Shaffer was its employee because Shaffer was not delivering for DoorDash at the time of the accident.¹⁵⁷

147. *Id.* at 82–113.

148. Simon Prop. Grp., Inc., Proxy Statement Amendment (Schedule 14A), at 1 (May 5, 2025).

149. *Id.*

150. *Id.*

151. Simon Prop. Grp., *supra* note 136.

152. *Id.*

153. 253 N.E.3d 565, 2025 WL 262772, at *1 (Ind. Ct. App. 2025) (unpublished table decision).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

At the time, Shaffer was a full-time college student enrolled at Purdue University Northwest and had been delivering for DoorDash for about six weeks.¹⁵⁸ DoorDash is “a company that provides an online marketplace connection using web-based technology that connects contractors, restaurants and/or other businesses, and consumers.”¹⁵⁹

Before she was eligible to deliver for DoorDash, Shaffer had to sign an “Independent Contractor Agreement” (the “Agreement”).¹⁶⁰ Here are several of the features of the Agreement:

- Shaffer was free to select timeframes in which she wanted to receive delivery opportunities from DoorDash and could accept or reject opportunities as she saw fit.
- Upon accepting a delivery opportunity, Shaffer had “the sole right to control the manner in which deliveries [were] performed and the means by which those deliveries [were] completed,” including the manner of pickup, delivery, and route selection.
- The Agreement did not limit Shaffer’s ability to work for other companies—including DoorDash’s competitors—when she was not delivering for DoorDash.
- Nor did the Agreement require Shaffer to use a particular mode of transportation, wear certain clothing, display DoorDash signs or logos, have a specific personal appearance, or pass performance evaluations.
- Shaffer was, however, required to provide any equipment needed to facilitate deliveries, procure her own car insurance, and maintain a satisfactory consumer rating and completion rate.
- DoorDash agreed to pay Shaffer per accurate delivery, but did not withhold income taxes.
- The Agreement expressly classified Shaffer as an independent contractor.¹⁶¹

The Court of Appeals held that “because Shaffer was an independent contractor as a matter of law and no exception to the general rule that a principal is not vicariously liable for the negligence of an independent contractor applies,

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* (individual provisions of the Agreement have been separated for clarity).

DoorDash was entitled to summary judgment.”¹⁶²

The Court of Appeals analysis, written by Judge Dana Kenworthy, is extremely thorough. It started by identifying ten factors to distinguish employees from independent contractors,¹⁶³ following *Moberly v. Day*.¹⁶⁴ It then analyzed each factor with respect to the Agreement and found the relationship to be that of an independent contractor.¹⁶⁵ The court then examined Indiana’s recognized exceptions to the general rule that a principal is not liable for the negligence of an independent contractor,¹⁶⁶ following *Bagley v. Insight Communications Co.*¹⁶⁷ Again it analyzed each of these exceptions as applied to this case and found none available to Black.¹⁶⁸

2. *Liability of a Corporation for Torts of an Employee in a Workplace Accident Where the Victim is an Employee of a Sibling Corporation.*—Theresa England, a driver for FedEx Express Corporation, a wholly owned subsidiary of FedEx Corporation, delivered a shipment to a business in Valparaiso.¹⁶⁹ She attempted to make her delivery at an office, but she was directed to the loading dock.¹⁷⁰ As she walked along the loading dock, another driver was backing a tractor-trailer into the loading dock.¹⁷¹ The tractor-trailer did not have an operating audible or visual warning system to alert others that the vehicle was being operated in reverse.¹⁷² The tractor-trailer was backed into England, pinning her between the vehicle and the loading dock; she suffered catastrophic injuries.¹⁷³

Indiana’s Workers’ Compensation Act provides the exclusive remedy for recovery of personal injuries “arising out of employment and in the course of employment.”¹⁷⁴ Although the law bars a court from hearing any common law claim brought against an employer for a workplace injury, it does permit an action for injury against a third-party tortfeasor provided the third party is neither the plaintiff’s employer nor a fellow employee.¹⁷⁵

Under this principle, one would have expected England to have a claim against the operator of the safety-featureless truck that crushed her.

162. *Id.* at *8.

163. *Id.* at *3.

164. 757 N.E.2d 1007, 1009–10 (Ind. 2001).

165. *Black*, 2025 WL 262772, at *5.

166. *Id.*

167. 658 N.E.2d 584, 586 (Ind. 1995).

168. *Black*, 2025 WL 262772, at *8.

169. *England v. Siebe*, 249 N.E.3d 619, 621–22 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 438 (Ind. 2025), *and cert. denied*, 146 S. Ct. 191 (2025). The author of this Article was consulted by England’s lawyers in this case.

170. *Id.* at 622.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 623 (quoting *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1285 (Ind. 1994)).

175. IND. CODE § 22-3-2-13 (2025).

Unfortunately for England, the tortfeasor was FedEx *Freight* Corporation, another wholly owned subsidiary of FedEx Corporation.¹⁷⁶ In *England v. Siebe*, the Court of Appeals held that FedEx Freight was a “joint employer” of England within the meaning of the Workers’ Compensation Act and, as such, was protected from suit by the exclusive remedy provision of the Act.¹⁷⁷

The backstory on this result starts thirty years ago when the Indiana Supreme Court decided *McQuade v. Draw Tite, Inc.*¹⁷⁸ In it, the victim of a workplace accident sued the parent company of the worker’s employer.¹⁷⁹ The court, viewing the parent and subsidiary as separate legal entities, held that the Act did not prevent an employee from suing the employer’s parent corporation for injuries sustained in the course of employment.¹⁸⁰ In doing so, the court carefully explained that

[s]uch actions must be based on the alleged breach of a duty of care separate and distinct from any vicarious liability attributable to a parent corporation for acts of its subsidiary under principles of agency law. What our decision is meant to prevent is a situation where an injured party would be deprived of his or her day in court by the purely fortuitous circumstance that the alleged tortfeasor is the corporate parent of the injured party’s employer.¹⁸¹

If *McQuade* was still good law, it clearly would be precedent for England’s claim to proceed. However, effective July 1, 2000, the General Assembly amended the definition of employer under the Act to provide that “[a] parent or a subsidiary of a corporation or a lessor of employees shall be considered to be the employer of the corporation’s, the lessee’s, or the lessor’s employees for purposes of [the exclusive remedy provision of the Act].”¹⁸² In 2001, the legislature further amended the definition of “employer” for purposes of the Act to provide “[a] parent corporation and its subsidiaries shall each be considered joint employers of the corporation’s, the parent’s, or the subsidiaries’ employees for purposes of [the exclusive remedy and a related provision of the Act].”¹⁸³

England held that these amendments to the Act’s definition of “employer” abrogated the holding in *McQuade* and applied to England’s situation as well, i.e., held that the new statutory language extended exclusive remedy not only to corporations that are parent and subsidiary, but also to sibling corporations

176. *England*, 249 N.E.3d at 624.

177. *Id.*

178. 659 N.E.2d 1016 (Ind. 1995). The author of this Article wrote *McQuade*.

179. *Id.* at 1017.

180. *Id.* at 1020.

181. *Id.* at 1020 n.7 (citation omitted).

182. Act of Mar. 15, 2000, Pub. L. No. 31-2000, § 7, 2000 Ind. Acts 322, 353 (codified at IND. CODE § 22-3-7-9(a) (2000)).

183. Act of May 10, 2001, Pub. L. 202-2001, § 8, 2001 Ind. Acts 1444, 1461 (codified at IND. CODE § 22-3-7-9(a) (2001)).

(corporations that are subsidiaries of a common parent).¹⁸⁴ Harkening back to the language of *McQuade*, poor England was “deprived of . . . her day in court by the purely fortuitous circumstance that the alleged tortfeasor is [a sibling corporation] of the injured party’s employer.”¹⁸⁵

3. *Personal Liability of an Agent for Torts Committed by the Agent in the Scope of the Agent’s Employment.*—*Dugan v. Stucker*¹⁸⁶ gives a different perspective on the agency issue than the foregoing. It focuses not on the liability of the employer but on the liability of the agent for torts committed by the agent in the scope of employment.¹⁸⁷

Reducing the facts to those relevant to this issue, the plaintiff here, Kelli J. Dugan, hired Thurston, Springer, Miller, Herd & Titak, Inc. (“Thurston Springer”) to provide her with financial and investment advice.¹⁸⁸ Thurston Springer employee J. Keith Stucker advised Dugan on her investments with Thurston Springer.¹⁸⁹

One of those investments turned out very badly, and Dugan sued Stucker for acts that were within the scope of his employment and sued Thurston Springer under the theory of respondeat superior.¹⁹⁰

After Dugan and Thurston Springer entered into a settlement agreement, they jointly moved to dismiss Thurston Springer with prejudice, which the trial court granted.¹⁹¹ “However, that dismissal was limited to only Thurston Springer. That left pending Dugan’s claims against Stucker, individually.”¹⁹² Additionally, the trial court entered summary judgment for Stucker.¹⁹³

Dugan argued that, while she released the employer, Thurston Springer, she did not release anyone else, and, thus, she may continue her action against the employee, Stucker, for acts that Stucker committed within the scope of his employment.¹⁹⁴ But, the Court of Appeals said, “By releasing Thurston Springer of respondeat superior liability, she conceded that her claims against Stucker could not have been within the scope of his employment; otherwise, under Indiana law, the ‘employer is liable.’”¹⁹⁵ “That is,” the court said, “there is no separate and independent employee liability to the plaintiff for acts within the

184. *England v. Siebe*, 249 N.E.3d 619 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 438 (Ind. 2025), and *cert. denied*, 146 S. Ct. 191 (2025). In this respect, England followed *Hall v. Dallman Contractors, LLC*, 51 N.E.3d 261 (Ind. Ct. App. 2016), an earlier decision of the Court of Appeals to the same effect.

185. *McQuade*, 659 N.E.2d at 1020 n.7.

186. 262 N.E.3d 851, 2025 WL 1292412 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 267 N.E.3d 979 (Ind. 2025).

187. *Id.*

188. *Id.* at *1.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at *2.

194. *Id.*

195. *Id.* at *6.

scope of the employee's employment; such liability 'will be imputed' to the employer."¹⁹⁶

The court agreed with Dugan that her release of Thurston Springer did not release claims against Stucker in his personal capacity, meaning he was not released for acts not within the scope of his employment.¹⁹⁷ However, the court determined that Dugan did release her claims for acts within the scope of Stucker's employment because those acts are imputed to his employer.¹⁹⁸ And, the court continued, "Dugan's claims against Stucker were wholly based on acts that were within the scope of his employment. Those claims were therefore not claims 'against Stucker' personally but against Thurston Springer, and she had no remaining claims against Stucker."¹⁹⁹

In reaching its conclusion, the Court of Appeals synthesized the holdings of three Indiana precedents²⁰⁰ as follows:

- A plaintiff may file suit against both an employee and an employer for acts arguably within the scope of the employee's employment, and the plaintiff's release of the employee from liability for those acts is not a release of the employer from respondeat superior liability.²⁰¹
- The ability to sue both the employee and the employer for employment-related acts and to hold the employer liable under respondeat superior for those acts is not a theory of joint liability but a theory of imputed liability.²⁰²
- Filing suit against both the employee and the employer is not based on a theory of joint and several liability but on a theory of alternative liability—if the employee's act is in fact within the scope of the employment, "liability will be imputed" to the employer, and if the act is in fact not within the scope of employment, any judgment for the plaintiff would be "against the employee."²⁰³

The bottom line is that if a plaintiff files suit against both an employee and an employer for acts arguably within the scope of the employee's employment, the plaintiff's release of the employer from liability for those acts is also a release of the employee from liability because, by releasing an employer of respondeat superior liability, the plaintiff concedes that the claims against the employee could not have been within the scope of employment; otherwise, under Indiana law, the "employer is liable." That is, there is no separate and independent employee liability to the plaintiff for acts within the scope of the

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. The three cases are *Pelo v. Franklin Coll. of Indiana*, 715 N.E.2d 365 (Ind. 1999); *United Farm Bureau Mut. Ins. Co. v. Blossom Chevrolet*, 668 N.E.2d 1289 (Ind. Ct. App. 1996), *disapproved of by* *Pelo v. Franklin Coll. of Indiana*, 715 N.E.2d 365 (Ind. 1999); *Henry B. Steeg & Associates, Inc. v. Rynearson*, 241 N.E.2d 888 (1968).

201. *Dugan*, 2025 WL 1292412, at *6.

202. *United Farm Bureau*, 668 N.E.2d at 1291–92.

203. *Dugan*, 2025 WL 1292412, at *6.

employee's employment; such liability is imputed to the employer.

D. Changes to the Indiana Business Corporation Law Address Fraudulent Use of Business Entities and Reinstatement Following Involuntary Dissolution

The 2025 General Assembly adopted several amendments to the Uniform Business Organizations Administrative Provisions Act²⁰⁴ to reduce fraud susceptibility in business entity filings.²⁰⁵ The Business Services Division of the Office of Indiana Secretary of State Diego Morales is responsible for maintaining records on the existence of Indiana for-profit and non-profit corporations, limited partnerships, and limited liability companies.²⁰⁶ These business entities are required to make filings at the time they go into business and to update those filings biennially.²⁰⁷

Approximately thirty percent of new businesses are formed by using a third party service provider such as an Attorney, CPA, or Commercial Registered Agent to make their filings. These providers vary in their practice of maintaining a business record once it has been filed. For example, some registered agent service providers do not resign on the business registry if a client's business stops paying their monthly fee. These variable business practices can result in a loss of connectivity between a business and the government, especially when those service companies replace a client's business address information with their own in filings. Those business owners in turn lose access to compliance notifications, notifications of changes made to their records, and other resources that may be promoted on the INBiz platform or by the Business Services Division.

According to Business Services Division Director Anthony Willis, this lack of connectivity made the filing system susceptible to fraud where parties with no connection to a business entity at all take actions in the name of the entity. In testimony before the Senate Judiciary Committee in support of the new legislation, Willis said that in the previous year there had been 178 complaints of fraudulent filings and that he believed that literally thousands of others had been blocked under current policy review procedures.

Not only did this loss of connectivity provide opportunities for bad actors seeking to commit fraud, it also disconnected businesses from the helpful

204. IND. CODE § 23-0.5 (2025). Article 0.5 to Title 23 was passed by the General Assembly and signed into law by Governor Holcomb, consolidating in a single place in the Indiana Code and harmonizing certain administrative provisions that had previously been contained in five different business entity statutes. This consolidation and harmonization has the effect that, when administrative issues involving Indiana businesses arise, they need only be addressed in one place in the Indiana Code, rather than five. *See 2016–2017 Survey Article, supra* note 1, at 945.

205. Act of Apr. 16, 2025, Pub. L. No. 96-2025, 2025 Ind. Acts 1156.

206. *See Business Forms*, IND. SEC'Y OF STATE DIEGO MORALES, <https://www.in.gov/sos/business/division-forms/business-forms/> [<https://perma.cc/EG2Y-WPKC>] (last visited Mar. 11, 2026).

207. IND. CODE §§ 23-0.5-2-1, -13 (2025).

resources and staff of the Indiana Economic Development Corporation, the Indiana Small Business Development Center, and the SBA (SCORE mentors).

The new legislation addresses this loss of vital connectivity by ensuring third party filers know who they are filing for and mandating the collection of address information that is more conducive to making contact directly with the business entity, regardless of that business relationship with any third-party service. Specifically, the new legislation enhances the ability of the Business Services Division to prevent fraud in several ways.

First, the legislation expands and clarifies the statutory definition of “principal office address.” The new definition specifies that the principal office address is the usual place of business, headquarters, or other address at which executive functions occur.²⁰⁸ In addition, that definition is expanded to take into account the fact that online and certain other businesses do not have a traditional commercial address or storefront. In those situations, the residential address of an entity’s governing person is the principal office address. However, such addresses are protected from public disclosure.²⁰⁹

Second, the legislation requires third-party filers of biennial reports to verify the identity of the entity on behalf of which the third-party filer is submitting the biennial report.²¹⁰ It is anticipated that this will close a potential gap which can be exploited by malicious or fraudulent filers.

Third, the legislation creates requirements and procedures for businesses that offer “commercial mail receiving agency” addresses that are listed as the mailing address for a business entity in filings made with the Business Services Division.²¹¹ Those third parties that wish to offer those addresses in filings must file an “intent to file” form and commit to providing connectivity information to a governing person connected to that business. It is anticipated that these requirements and procedures will also help safeguard against malicious or fraudulent filers.

Connectivity is key to providing notices to businesses when filings are due, or changes to their records occur, and to build awareness of resources that may benefit them in their pursuit of growth in Indiana.

One of the provisions of business entity consolidation and harmonization legislation enacted in 2017 that has been the subject of debate is the five-year limitation for reinstatement of administratively dissolved business entities.²¹² On the one hand, the ability to reinstate a long-dormant business entity provided an opportunity for fraudulent misappropriation of the dissolved entity’s existence. On the other hand, for ongoing entities that were unaware of their dissolved status, not being able to achieve reinstatement often had serious

208. Act of Apr. 16, 2025, §§ 1–2, 2025 Ind. Acts at 1156 (codified at IND. CODE §§ 23-0.5-1.5-4.2, -29 (2025)).

209. *Id.* § 7, 2025 Ind. Acts at 1162 (codified at IND. CODE § 26-0.5-8-4 (2025)).

210. *Id.* §§ 3, 4, 2025 Ind. Acts at 1157–59 (codified at IND. CODE §§ 26-0.5-2-1(e), (f); 26-0.5-2-13(g), (h) (2025)).

211. *Id.* § 5, 2025 Ind. Acts at 1159–60 (codified at IND. CODE § 23-0.5-2.5 (2025)).

212. *See 2016–2017 Survey Article, supra* note 1, at 953.

consequences. Most commonly these are non-profit entities that may have rotating managing members and compliance contact gets overlooked.

The new legislation addresses these concerns by permitting reinstatement even after five years following dissolution but only by demonstrating clear connectivity between the dissolved entity and the party's seeking reinstatement.²¹³ The new legislation took effect January 1, 2026.²¹⁴ State Representative Matthew Carbaugh, Secretary of State Morales, and Business Services Division Director Willis deserve credit and thanks for these valuable changes.

E. Transfer of Restricted Shares

Meuth v. Ubelhor Trustee of Daniel J. Ubelhor Revocable Trust illustrates a number of the procedural issues that can arise with respect to the transfer of restricted shares of a corporation, which may then implicate the fiduciary duties of shareholders and directors in such situations.²¹⁵

The share transfer procedural issues are relatively straightforward. At the outset of this drama, Joseph and Roberta, the parents of five children, owned all of the 1,000 shares of a corporation.²¹⁶ (The children and their respective descendants are referred to as individual "family units.") Following the parents' death, each child owned 200 shares and each became a member of a five-member Board of Directors.²¹⁷ Two sisters, Mary and Sharon, were also the officers of the corporation.²¹⁸ Upon the death of one of the other of these five siblings, his four sons inherited fifty shares each and one of those sons replaced his father on the Board.²¹⁹

The share transfer issue arose when the four grandsons decided that they wanted out.²²⁰ The bylaws of the corporation contained several provisions directly relevant to the transfer of shares. First, that "[i]f any Shareholder desires to sell his or her shares of stock, the same shall be first offered for purchase to the Corporation."²²¹ Second, that if the Board elects to purchase the shares, the purchase price is to be its "book value . . . as determined by the accountant of the Corporation" with a carve-out from book value for "funds on deposit in the Endowment Fund shall not be considered in determining book value and may

213. Act of Apr. 16, 2025, § 6, 2025 Ind. Acts at 1160–62 (codified at IND. CODE § 23-0.5-6-3 (2025)).

214. *Id.* §§ 1–10, Ind. Acts at 1156–62.

215. 258 N.E.3d 270, 2025 WL 880405 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 265 N.E.3d 991 (Ind. 2025).

216. *Id.* at *1.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Amended Brief of Appellees, *Meuth*, 258 N.E.3d 270 (No. 23A-PL-01870), 2024 WL 5695663, at *8 (alteration in original).

not be used to effect such purchase.”²²² Third, that the transfer of shares is restricted to only to “the lineal descendants” (natural children or their descendants) of Joseph and Roberta, the parents who founded the corporation.²²³

The four grandsons offered to sell the shares to the corporation, and the Board of Directors convened to consider the offer.²²⁴ At the Board’s request, the corporation’s accountant determined the corporation’s book value to be \$151.62 per share.²²⁵ However, the Board decided that a certain rental property should be excluded from the book value by operation of the “Endowment Fund” carve-out.²²⁶ With this deduction, the per share valuation was reduced to \$76.42.²²⁷ The grandsons did not tender their shares to the corporation but instead gifted them to a first cousin once removed.²²⁸ The corporation refused to register the transfer on the books of the corporation and instead continued to treat the four grandsons as shareholders of record.²²⁹

This stalemate continued from February 26, 2013, until February 21, 2019, when the two sisters, in their capacity as officers of the corporation, filed a declaratory judgment action naming the grandsons and the cousin as defendants.²³⁰ The corporation sought a declaration from the court that the grandsons were obligated to sell their shares back to the corporation at book value.²³¹ Regarding the book value, the complaint referred only to the \$76.42 amount, without explanation of how that value was determined.²³²

The trial court ruled in favor of the grandsons and cousin, holding that the cousin was the owner of the shares.²³³

First, the court held that the Board meeting at which the purchase price was set had not been duly called in accordance with the bylaws because the notice of the meeting had been sent by fax rather than “delivered or mailed” as required by the bylaws.²³⁴ Does a fax transmission constitute delivery for these purposes? This Article’s author would think so.

Second, the court held that the Board improperly excluded the rental property from the book value calculation as not qualifying for the “Endowment Fund” carve-out.²³⁵

Third, the court held the Board improperly made the determination of the purchase price when bylaws required the purchase price to be determined by the

222. *Id.* at *9.

223. *Meuth*, 2025 WL 880405, at *2.

224. *Id.* at *1.

225. *See id.*

226. *Id.*

227. *See id.*

228. *Id.* at *2.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at *3.

234. *Id.* *See also* Amended Brief, *supra* note 221, at *9.

235. *Meuth*, 2025 WL 880405, at *3.

corporation's accountant.²³⁶

The trial court was probably right on these two points, but the author does not think they were slam dunks. As to the endowment carve-out, the corporation's bylaws provided that the duties of the Board of Directors included "[c]reation and maintaining of an endowment fund to provide sufficient investment income to pay expenses of the Corporation."²³⁷ Because the income from the rental property was to be used to pay the expenses of the corporation, it does not seem that treating the rental property in this way was too far from the mark. And because the bylaws did allow for the Endowment Fund carve-out, it was arguably consistent with the bylaws for the purchase price to be the book value calculated by the accountants as adjusted by the Board for the Endowment Fund carved-out. Given these interpretations and the general deference given to Board decisions under the business judgment rule, it would have been plausible for the court to have ruled the other way.

Lastly, the trial court tied a bow around its conclusion by holding that the transfer of the shares to the cousin did not violate the bylaw provision limiting transfers to family members since the cousin fell within the bylaws definition of family members.²³⁸ Furthermore, the transfer from the grandsons to the cousin did not run afoul of another bylaw provision limiting membership on the Board to one member from each family unit since each of the family unit of the transferring grandsons and the family unit of the transferee cousin still only had one member each on the Board after the transfer.²³⁹

In any event, the corporation did not appeal the trial court's decision that the cousin duly owned the shares transferred from the grandsons.

Now onto stage II.

When the corporation filed a declaratory judgment action, the grandsons and cousin responded with a furious counterclaim against the two sisters—Mary and Sharon—who were officers of the corporation that directed that the declaratory action be filed.²⁴⁰ The counterclaim first alleged that the complaint in the declaratory judgment action was full of material misrepresentations and omissions, to wit: the defective meeting notice, the Endowment Fund and book value calculation methodology, and various disclosure omissions, including allegations of misuse of corporate funds.²⁴¹ The counterclaim then built upon these alleged material misrepresentations and omissions by contending that they constituted breaches of the sisters' fiduciary and statutory duties.²⁴² And the counterclaim further contended that the misuse of corporate funds constituted theft and conversion, entitling the counterclaim plaintiffs to damages under the

236. *Id.*

237. Amended Brief, *supra* note 221, at *8.

238. *Meuth*, 2025 WL 880405, at *3.

239. *Id.*

240. *Id.*

241. *Id.* at *3–4.

242. *Id.* at *4.

Crime Victim's Relief Act (CVRA).²⁴³

Now there are some pretty heavy-duty allegations here that should make corporate counsel sit up and take notice before recommending to a corporate client that it seek a declaratory judgment as to the legal effect of corporate action. Ordinarily, one would think that the business judgment rule would shield individual directors from a retaliatory counterclaim like this. And, as the sisters argued, the very fact that a declaratory judgment was sought would seem to indicate good faith on the part of the corporation; it could have just stonewalled the grandsons and cousin, requiring them to file suit.

The trial court nevertheless bought into the counterclaim plaintiffs' theory and awarded damages, including treble damages under the CVRA and attorney fees.²⁴⁴ But the Court of Appeals, found that the conduct complained of all related back to the decisions made at the time the grandsons tendered their shares, which had occurred more than six years before the filing of the counterclaim. As such, the counterclaim was time barred.²⁴⁵

F. A Common Law Gloss and a Procedural Gloss on the Indiana Corporate Dissolution Statute

1. *The Common Law Gloss.*—*Partenheimer v. Robling*²⁴⁶ reminds this Article's author of a common law gloss on the Indiana corporate dissolution statute about which he had forgotten.

Partenheimer and Robling were partners in three businesses that had a contract with the state to remediate or reclaim an abandoned coal mine, cleaning it so it could become useful land, in exchange for being allowed to sell remaining coal from the mine.²⁴⁷ Part of the contract required the businesses to post a bond as security for their reclamation efforts.²⁴⁸

This lawsuit was filed by Robling, contending that Partenheimer breached his fiduciary duties as a co-owner of the businesses in various ways, including a degree of self-dealing.²⁴⁹ Partenheimer failed to participate meaningfully in the litigation, and the trial court entered a default judgment in favor of Robling on the fiduciary duty issue.²⁵⁰ Because the trial court's ruling on fiduciary duty was more in the nature of a sanction for Partenheimer's failing to participate, rather than on the merits, the law of fiduciary duty is not really implicated here.

In subsequent proceedings, the trial court awarded damages to Robling which Partenheimer did contest.²⁵¹ The first damage award is what the Court of

243. *Id.*

244. *Id.* at *5.

245. *Id.* at *8.

246. 258 N.E.3d 279, 2025 WL 942973 (Ind. Ct. App. 2025) (unpublished table decision).

247. *Id.* at *1.

248. *Id.*

249. *Id.* at *2.

250. *Id.* at *3.

251. *Id.* at *4.

Appeals refers to as a “judicial buyout of Robling’s interests” in the businesses.²⁵² That’s probably a good way of describing it. The trial court valued the security bond and the businesses’ equipment and then awarded Robling 50% of that value.²⁵³ Partenheimer did not object to the buyout but did argue that the bond was not an asset of the businesses at all and that the equipment had been incorrectly valued.²⁵⁴ The Court of Appeals affirmed in all respects,²⁵⁵ and the author perceives no error here; the bond clearly was an asset of the businesses and the valuation was for the trial court to decide.

Partenheimer did argue that there should be some offset for the businesses’ remediation liability, but the Court of Appeals dismissed that argument, saying that whatever evidence there was on the amount of the liability, it was offset by evidence of the value of the coal left to be sold.²⁵⁶

The second damage award was for what the Court of Appeals refers to as “restitution,” an amount equal to the funds that Partenheimer misappropriated from the businesses.²⁵⁷ Partenheimer argues that Robling is entitled to no more than his pro rata share of that amount, but the Court of Appeals says that these are damages for self-dealing, not part of the judicial buyout of the businesses.²⁵⁸

All of this seems to be a good piece of work by both the trial court (Judge Celia M. Pauli) and the Court of Appeals (Judge Paul Felix).

What caught the author’s attention about this case, however, was an introductory sentence in the Court of Appeals discussion of the “judicial buyout.” Here the court says that the Indiana Supreme Court “has held that a forced sale of parties’ corporate interests may be an appropriate remedy under the circumstances.”²⁵⁹ In doing so, the trial court has “has full discretion to fashion equitable remedies that are complete and fair to all parties involved.”²⁶⁰ The citation here is to *G & N Aircraft, Inc. v. Boehm*,²⁶¹ to the author’s mind the single most important Indiana Supreme Court business law decision. And if not the most important, certainly the most comprehensive.

As in this case, the control person in *G & N Aircraft* was found guilty of breach of fiduciary duty.²⁶² The trial court had directed a forced sale of the company as the appropriate remedy.²⁶³ The business in *G & N Aircraft* was a corporation and so this remedy ran up against our corporate code, which does not provide judicial dissolution as a remedy for oppressive conduct.²⁶⁴ Indeed,

252. *Id.* at *8.

253. *Id.*

254. *Id.*

255. *Id.* at *9.

256. *Id.*

257. *Id.* at *10.

258. *Id.*

259. *Id.* at *8.

260. *Id.*

261. 743 N.E.2d 227, 243 (Ind. 2001).

262. *Id.* at 242–43.

263. *Id.* at 243.

264. IND. CODE § 23-1-47-1 (2025).

the official comment to the dissolution statute explains that the legislature intended to exclude it.²⁶⁵ But *G & N Aircraft* is quick to point out that that exclusion was made because of the “concern that it might be abused in a hostile takeover.”²⁶⁶ “[T]he reasons for omitting an express remedy of judicial dissolution for oppressive conduct are not relevant in the context of a close corporation,” the Court held.²⁶⁷ Rather, “traditional powers of equity courts are available to fashion a remedy for breach of a fiduciary duty in a close corporation.”²⁶⁸ There is a “need for more flexible remedies in the case of close corporations. Unlike shareholders in a publicly traded corporation, the oppressed minority in a close corporation does not have the option of voting with its feet by selling its shares in a public market for a presumptively fair price.”²⁶⁹

The Court, in other words, put a common law gloss on the language of the corporate dissolution statute.

Now the businesses in the case we have been talking about were not corporations, but two LLCs and a partnership. Both the LLC statute²⁷⁰ and the Indiana Uniform Partnership Act²⁷¹ explicitly give the court authority to dissolve the entity, as to LLCs when “it is not reasonably practicable to carry on the business,” and as to partnerships when “circumstances render dissolution equitable.”

2. *The Procedural Gloss*.—Ordinarily the author does not address issues in cases arising under the trial procedure, appellate procedure, or evidence rules but *421 Storage, LLC v. Bazinga Farms, LLC*²⁷² is an exception.

The authority of an Indiana court to dissolve a business entity is limited compared to that of courts in other states. A court “may decree dissolution of the limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.”²⁷³

421 Storage LLC was ordered dissolved apparently because of a deadlock between its two 50% owners—Bazinga Farms, LLC, and an individual named Dean Trennepohl.²⁷⁴ Under the dissolution statute, the managers are to wind up the affairs of the business unless, if a manager has engaged in wrongful conduct, the court of the county in which the business is located may do so.²⁷⁵ The court found Trennepohl had engaged in “unauthorized, unilateral conduct” related to

265. See IND. CODE § 23-1-47-1, cmt. 1 (West 2025).

266. *G&N Aircraft*, 743 N.E.2d at 243.

267. *Id.*

268. *Id.* at 244.

269. *Id.*

270. IND. CODE § 23-18-9-2 (2025).

271. IND. CODE § 23-4-1-32 (2025).

272. 251 N.E.3d 543, 2024 WL 4948813 (Ind. Ct. App. 2024) (unpublished table decision).

273. § 23-18-9-2.

274. *Bazinga Farms*, 2024 WL 4948813, at *1.

275. IND. CODE § 23-18-9-4 (2025).

the business and assumed authority to wind up 421 Storage's business affairs.²⁷⁶ The Court appointed Hanlin, who owned Bazinga.²⁷⁷ Trennepohl objected to this, asking that a "receiver" be appointed under the receivership statute.²⁷⁸ The trial court went ahead and entered an "Order Appointing Receiver" and appointed Hanlin.²⁷⁹ Trennepohl asked to have the order certified for interlocutory appeal, but the trial court refused.²⁸⁰

Now the interlocutory appeal rule permits an appeal of right from the appointment of a receiver,²⁸¹ and that's what Trennepohl is trying to do here. But Hanlin argues that even though the trial court's order denominates him as a "receiver," he was not a receiver at all but a person appointed to wind up the affairs of an LLC under the LLC statute.²⁸² The Court of Appeals says that "[t]he parties and the trial court used the term 'receiver' as a type of shorthand rather than in its strict legal sense. But Appellants did not request, and the trial court did not appoint, a receiver under Chapter 32-30-5."²⁸³ The Court says that "[a] more accurate descriptive term for a person acting under Indiana Code Chapter 23-18-9 might be 'agent' or 'liquidator.'"²⁸⁴

Because Hanlin was not a receiver, this was not an interlocutory appeal of right, and the Court of Appeals dismissed the appeal for lack of jurisdiction.²⁸⁵

G. "Piercing the Corporate Veil"

*Miller v. Lulinski*²⁸⁶ is a case which nicely and precisely illustrates the operation of what the author of this Article refers to as the "bedrock principle of limited liability." Under Indiana law, a corporation is a legal entity separate from its shareholders,²⁸⁷ and corporate shareholders are liable for corporate acts to the extent of their investment but are not personally liable for acts attributable to the corporation.²⁸⁸

Lulinski was standing on a scaffold in the course of his employment with Forest River, Inc., an RV manufacturer, when a guard rail failed.²⁸⁹ As a result, Lulinski fell from a height of approximately eight feet and sustained serious

276. *Bazinga Farms*, 2024 WL 4948813, at *1.

277. *Id.*

278. *Id.* The receivership statute is IND. CODE § 32-30-5-2 (2025).

279. *Bazinga Farms*, 2024 WL 4948813, at *2.

280. *Id.*

281. IND. R. APP. P. 14(A)(6).

282. *Bazinga Farms*, 2024 WL 4948813, at *2.

283. *Id.* at *3.

284. *Id.* at *3 n.3.

285. *Id.* at *4.

286. *Miller v. Lulinski*, 258 N.E.3d 249, 2025 WL 711181 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 265 N.E.3d 982 (Ind. 2025).

287. *See Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1231–32 (Ind. 1994) (citing *Benner-Coryell Lumber Co. v. Ind. Unemployment Comp. Bd.*, 29 N.E.2d 776, 778 (Ind. 1940)).

288. *See Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994).

289. *Miller*, 2025 WL 711181, at *1.

injuries, including multiple fractures to both feet.²⁹⁰ Precision Fabricating LLC had designed and manufactured the scaffold before selling it to Forest River.²⁹¹ At all times relevant to this appeal, Joseph J. Miller and his wife were the principal owners and operators of Precision, a limited liability company.²⁹² A jury entered judgment against both Precision and Miller and awarded Lulinski \$1.25 million.²⁹³ The jury found that Precision was 90% at fault and Miller was 10% at fault.²⁹⁴

Miller contended that the evidence shows that he acted only through the LLC and not personally.²⁹⁵ Citing *Five Star Concrete, L.L.C. v. Klink, Inc.*,²⁹⁶ *Brant v. Krilich*,²⁹⁷ and *Troutwine Estates Development Co., LLC v. Comsub Design & Engineering, Inc.*,²⁹⁸ the Court of Appeals correctly recited that a limited liability company provides individuals the same protection enjoyed by shareholders of a corporation through creation of a distinct legal entity.²⁹⁹ Thus, the Court said, individuals associated with a limited liability company are not personally liable merely because of their ownership in the entity, while at the same time, association with a limited liability company does not preclude liability for one's own actions or omissions.³⁰⁰

As such, it was Lulinski's burden to prove that Miller was personally liable for Lulinski's injuries. But Lulinski, the Court said, made no attempt to argue either a lack of "proper adherence to corporate formalities" or any of the factors that case law identified as grounds for "piercing the corporate veil."³⁰¹

In sum, the Court held, Lulinski did not prove that Miller was personally liable for his injuries and reversed the judgment against Miller.³⁰² And listen to this: the Court of Appeals said that because the jury found Precision 90% at fault and because Miller's actions and omissions were within the scope of his work as a member of the LLC, the 10% fault assigned to Miller should be reassigned to Precision.³⁰³ It therefore remanded with instructions to amend the judgment to find Precision 100% at fault.³⁰⁴

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at *2.

294. *Id.*

295. *Id.*

296. 693 N.E.2d 583 (Ind. Ct. App. 1998).

297. 835 N.E.2d 582 (Ind. Ct. App. 2005).

298. 854 N.E.2d 890 (Ind. Ct. App. 2006).

299. *Miller*, 2025 WL 711181, at *2.

300. *Id.*

301. *Id.* at *3.

302. *Id.* at *4.

303. *Id.*

304. *Id.*

IV. CONTRACT LAW

A. *Contracts for the Sale of Goods*

1. *An International Contract for the Sale of Goods Under the CISG.*—The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty to which approximately ninety nations are a party, including the United States and Canada.³⁰⁵ It operates as an analog to UCC Article 2 with respect to contracts for the sale of goods between commercial parties whose places of business are in different countries that are parties to the CISG. It is worth noting that because the CISG is a treaty, it operates as federal law under the Supremacy Clause and so preempts state law, including the UCC.³⁰⁶

Just prior to the Survey Period, the United States District Court for the Southern District of Indiana decided a straightforward contract interpretation case under the CISG.³⁰⁷ During the Survey Period, the Seventh Circuit reversed.³⁰⁸

The background facts are as follows. Overhead Door Company of Indianapolis contracted with Blue Giant Equipment Corporation, a Canadian company, for the purchase of multiple dock levelers, a device that bridges the gap between a trailer and the dock during the loading and unloading process.³⁰⁹ When issues with the levelers arose after installation, Overhead sued Blue Giant in the Southern District Court under diversity jurisdiction for breach of contract and warranty.³¹⁰ Blue Giant moved to dismiss, pointing to a provision in the standard terms listed on its website that requires parties to arbitrate disputes in Ontario, Canada.³¹¹

This Article's author has seen CISG disputes in which the parties have argued over whether the CISG applies³¹² and disputes involving the CISG's analog to UCC Article 2 "battle of the forms" provisions.³¹³ In this dispute, both parties agreed that they had a contract under the CISG.³¹⁴ Where they disagreed,

305. *CISG: Table of Contracting States*, INST. OF INT'L COM. L. (Dec. 9, 2024), <https://iicl.law.pace.edu/node/30143> [<https://perma.cc/8QLA-26ZQ>].

306. *See Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001).

307. *Garage Door Sys., LLC v. Blue Giant Equip. Corp.*, No. 1:23-cv-02223-JMS-KMB, 2024 WL 3088833 (S.D. Ind. June 20, 2024), *rev'd and remanded*, 134 F.4th 953 (7th Cir. 2025).

308. *Garage Door Sys., LLC v. Blue Giant Equip. Corp.*, 134 F.4th 953 (7th Cir. 2025).

309. *Garage Door Sys.*, 2024 WL 3088833, at *2.

310. *Garage Door Sys.*, 134 F.4th at 956.

311. *Garage Door Sys.*, 2024 WL 3088833, at *1.

312. *See, e.g., Microgem Corp., Inc. v. Homecast Co. Ltd.*, No. 10 Civ. 3330(RJS), 2012 WL 1608709 (S.D.N.Y. Apr. 27, 2012); *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61 (D.R.I. 2006).

313. *See, e.g., Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11cv302 ERIE, 2013 WL 4852314 (W.D. Pa. Sep. 10, 2013); *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247 (7th Cir. 2016).

314. *Garage Door Sys.*, 2024 WL 3088833, at *5.

as alluded to above, was whether a provision in Blue Giant's standard terms listed on its website that required the parties to arbitrate disputes in Canada had been incorporated by reference into the contract.³¹⁵

The District Court performed a very careful analysis, both of the facts and of relevant authority. The court's primary conclusion was based on the language of the contract. While there were several references to website "Terms and Conditions" in the correspondence of the parties that made up the contract, at no point did the language specify that the Terms and Conditions were part of the parties' agreement.³¹⁶ Acknowledgments of the orders "must have referred to 'the inclusion of standard terms' or have contained an incorporation clause referring to the website such that inclusion was clear to a reasonable person in order for the Terms and Conditions to be part of the parties' agreement," the court said, quoting an Advisory Opinion of the CISG Advisory Council.³¹⁷ There was no such language in the contract. The court buttressed its conclusion with citations to several cases including a decision from the Western District of Pennsylvania, *Roser Techs., Inc. v. Carl Schreiber GmbH*.³¹⁸ Based on this reasoning, the court concluded that the arbitration language was not part of the contract.³¹⁹

As noted, the Seventh Circuit reversed.³²⁰ To that court, the inclusion of incorporation by reference language was "unnecessary" because "standard terms [were] provided alongside the offer and [were] sufficiently conspicuous or noticeable to a reasonable person. . . . [P]arties need not expressly state their intent to incorporate separate standard terms when this intent is otherwise obvious."³²¹ The court said that the "reference [to the Terms and Conditions] was printed legibly in a text box at the very center of the Order Acknowledgment form, a place 'where a reasonable contractual party would have noticed [it].'"³²² The court said that "[u]nder these circumstances, Overhead was not entitled to simply ignore the terms nor Blue Giant's conspicuous reference to them."³²³

The decisions of both courts are defensible. A textualist will favor the District Court's opinion. But to a judge willing to look at the intent of the parties—which is somewhere between the text and purely extrinsic evidence—the Seventh Circuit's opinion is more appealing.

What is clear is that, in the global economy, American courts adjudicate disputes under the CISG without favor based on the nationality of the parties—

315. *Id.* at *1.

316. *Id.* at *9.

317. *Id.* at *7 (quoting CISG ADVISORY COUNCIL, CISG ADVISORY OPINION NO. 13 (2013), https://ciscg-online.org/files/ac_op/CISG_Advisory_Council_Opinion_No_13.pdf [<https://perma.cc/R3MU-MGFP>]).

318. *Roser Techs.*, 2013 WL 4852314, at *9.

319. *Garage Door Sys.*, 2024 WL 3088833, at *9.

320. *Garage Door Sys., LLC v. Blue Giant Equip. Corp.*, 134 F.4th 953, 960–61 (7th Cir. 2025).

321. *Id.*

322. *Id.* at 961.

323. *Id.*

a tribute to our cherished rule of law.

2. *A UCC Article 2 Contract.*—*Seawin Global, LLC v. CPM Construction Planning & Management, Inc.*,³²⁴ involves a contract for the sale of goods, raising several issues under Article 2 of the UCC.

As part of a hotel construction project, general contractor CPM Construction Planning and Management, Inc. (CPM) entered into an agreement with supplier Seawin Global, LLC, Seawin Hospitality, LLC, and/or Seawin Shower LTD (collectively Seawin) for Seawin to provide glass panels and materials for 102 shower doors.³²⁵ Following delivery, CPM filed a complaint against Seawin asserting that the glass panels were nonconforming and unusable.³²⁶

The original CPM purchase order that initiated the transaction did not specify dimensions for the glass panels but stated, in paragraph two, that “[a]ll materials must be submitted with product information, color samples & shop drawings for review and approval prior to fabrication/ordering/delivery.”³²⁷ There were several email exchanges that seem to indicate that the parties agreed that the glass panels would be 85-7/8 inches.³²⁸ However, when the panels arrived, they were only 85.0 inches which CPM deemed to be “useless.”³²⁹ After Seawin refused to replace the glass panels, CPM purchased 102 glass panels with a height measurement of 85 7/8 inches from another supplier for \$18,150.³³⁰

Litigation eventually ensued. Following a bench trial, the court entered judgment in favor of CPM, awarding \$18,150 in compensatory damages and \$14,530 in incidental and consequential damages.³³¹ The court also awarded \$102,605.73 in attorney’s fees, pursuant to Indiana Code section 26-1-2-721 (Section 721), Indiana’s Uniform Commercial Code (UCC) “Remedies for fraud” provision.³³² Later, the court granted CPM’s request to allow supplemental attorney’s fees in the amount of \$39,975, resulting in a total award of attorney’s fees in the amount of \$142,580.73.³³³

The first issue that the trial court had to resolve was whether Seawin had breached the contract by delivering nonconforming glass panels. Based upon the string of emails between it and CPM concerning the exact height measurement for the glass panel, the Court of Appeals concluded that the trial court’s determination that the contract had been breached was not erroneous.³³⁴

324. 253 N.E.3d 566, 2025 WL 274660 (Ind. Ct. App. 2025) (unpublished table decision).

325. *Id.* at *1.

326. *Id.*

327. *Id.*

328. *Id.* at *2.

329. *Id.*

330. *Id.*

331. *Id.* at *1.

332. *Id.*

333. *Id.* at *6.

334. *Id.*

Next up was the issue of damages. Article 2 provides that a buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages, but less expenses saved in consequence of the seller's breach.³³⁵

"Cover" is a "reasonable purchase of or contract to purchase goods in substitution for those due from the seller" that is made "in good faith and without unreasonable delay."³³⁶ Seawin argued that there was evidence that around half of the panels were in fact usable.³³⁷

The Court of Appeals found that the trial court was presented with evidence from which it reasonably could find that CPM incurred \$18,150 in damages to cover 102 nonconforming glass panels.³³⁸

Seawin also challenged the award of \$14,530 for incidental and consequential damages as unsupported by admissible evidence.³³⁹ Incidental damages include "expenses reasonably incurred in inspection, receipt . . . and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach."³⁴⁰ Consequential damages include "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[.]"³⁴¹

The trial court's award was based on the CPM president's estimate of the hours that he and three other CPM employees spent, prior to litigation, addressing the problem with the glass panels delivered by Seawin.³⁴² Seawin claimed that the exhibit did not quantify the damages with reasonable certainty.³⁴³ But the Court of Appeals was satisfied that the trial court's award of \$14,530 in incidental and consequential damages was not erroneous.³⁴⁴

Lastly, Seawin appealed the trial court's decision to award attorney's fees to CPM.³⁴⁵ The general rule in Indiana is that each party bears its own fees unless a statute, agreement, or stipulation authorizes a fee award. Here, CPM had sought and recovered attorney's fees pursuant to a provision in Article 2 entitled "Remedies for Fraud," which provides, in part:

Remedies for material misrepresentation or fraud include all remedies available under this chapter for non-fraudulent breach. In all suits based

335. IND. CODE § 26-1-2-712(2) (2025).

336. § 26-1-2-712(1).

337. *Seawin*, 2025 WL 274660, at *7.

338. *Id.*

339. *Id.*

340. IND. CODE § 26-1-2-715(1) (2025).

341. § 26-1-2-715(2)(a).

342. *Seawin*, 2025 WL 274660, at *8.

343. *Id.*

344. *Id.*

345. *Id.*

on fraud or material misrepresentation, if the plaintiff recovers judgment in any amount, the plaintiff shall also be entitled to recover reasonable attorney fees[.]³⁴⁶

CPM argued to the trial court that its claims against Seawin included a component of fraud or misrepresentation.³⁴⁷ The trial court agreed, determining that Seawin had engaged in material misrepresentation or fraud in one or more ways.³⁴⁸

Seawin contended that the trial court's determination that CPM was entitled to an award of fees under the "Remedies for Fraud" section was clearly erroneous and the Court of Appeals agreed for several reasons:

- The Indiana Trial Rules require that fraud be pled with specificity.³⁴⁹ CPM's complaint did not include a fraud claim or assert allegations of such. Nor did it identify or even mention any misrepresentation, intentional or otherwise.³⁵⁰
- The record did not support the trial court's determination that fraud or misrepresentation was tried by express or implied consent of the parties.³⁵¹
- Even if fraud had been expressly pled or tried by implied consent, CPM failed to prove it as a matter of law. The trial court did not enter findings on those elements, nor did any witness testify to them—or to any misrepresentation generally.³⁵²

"In sum," the Court of Appeals said, "we agree with Seawin that this is a 'quintessential contract case,' not a fraud case, and [the "'Remedies for Fraud section of Article 2] is inapplicable."³⁵³

B. Relationship Between Contract and Tort Law

It is not unusual for cases to have tort and contract law issues in common, e.g., cases with both breach of warranty and product liability claims;³⁵⁴ requiring applicability of the economic loss rule.³⁵⁵ One place where the Venn diagrams of contract and tort law intersect is in respect of a claim of tortious interference with a contractual or business relationship. A tortious interference case with particularly odd facts, *Diamond Quality, Inc. v. Dana Light Axle Products, LLC*, resulted in the Indiana Supreme Court enunciating what it called a "per se rule"

346. IND. CODE § 26-1-2-721 (2025).

347. *Seawin*, 2025 WL 274660, at *9.

348. *Id.* at *9.

349. *Id.*; IND. TRIAL R. 9(B).

350. *Seawin*, 2025 WL 274660, at *9.

351. *Id.*

352. *Id.*

353. *Id.* at *10.

354. *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005).

355. *Indianapolis-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010).

applicable to all future tortious interference cases.³⁵⁶

Dana Incorporated is a major manufacturer of certain kinds of equipment for motor vehicles. It operates through a network of subsidiaries, some of which manufacture or assemble various parts which are subsequently used by other subsidiaries.³⁵⁷ From time to time, one subsidiary alleges another supplied it with faulty parts. To determine which subsidiary is at fault in such situations, at least three Dana subsidiaries had contracts with Diamond Quality, Inc., an industrial inspection concern.³⁵⁸

In 2020, a Dana subsidiary in Fort Wayne (“Dana Fort Wayne”) alleged that it had received several defective parts from another Dana subsidiary (“Dana ETRAC”).³⁵⁹ Dana Fort Wayne, however, refused to allow Diamond Quality on its premises to conduct an inspection, instead hiring a third-party inspection service to do so.³⁶⁰ Diamond Quality filed this lawsuit, claiming that, by barring Diamond Quality from its premises, Dana Fort Wayne had tortiously interfered with Diamond Quality’s contract and business relationship with Dana ETRAC.³⁶¹

After reciting the elements of tortious interference claims and related factors (a quite good summary of the law in this regard),³⁶² the Court strikes a decidedly libertarian tone: it “announce[s] a per se rule that, absent a contractual or statutory duty, a property owner is always justified in excluding another from the owner’s premises.”³⁶³

Now the Court’s carveout for “contractual or statutory” duties is important, to be sure. The Court makes no attempt to examine whether any contractual or statutory duties are present in this case. Presumably there would be such a contractual duty had Diamond Quality’s contracts with each of the Dana subsidiaries contained covenants or other requirements on the part of the subsidiaries to participate or cooperate with Diamond Quality in any inspection conducted at a sibling subsidiary’s facility. A word to the wise in drafting such a contract but such an oversight is certainly understandable given the sibling subsidiary relationships.

The bottom line is that where the performance of a contract requires a party to enter a third party’s property, no claim for tortious interference will lie against the third-party for refusing such entry.

This case came to the Court not as an appeal but as a certified question from

356. 256 N.E.3d 529, 531 (Ind. 2025).

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 533 (citing, inter alia, *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208, 214 (Ind. 2019), and *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994)).

363. *Id.* at 531.

the United States District Court for the Northern District of Indiana.³⁶⁴ The certified question itself was more narrow than the question the court answered; it went to the specifics of whether a sibling subsidiary could refuse entry to its property under such circumstances.³⁶⁵ In rendering the decision it did, the Court was effectively saying that given the per se rule, it didn't matter whether the two corporations were related or not.

Justice Christopher Goff and the majority engage in a spirited debate over the scope and parameters of answering certified questions which the author commends to readers of this Article but that are beyond its scope.³⁶⁶ Justice Goff's dissent focuses on the narrower issue of liability among sibling subsidiaries and finds unresolved questions of fact for determination by the Federal District Court.³⁶⁷

C. Integration Clauses and the Parol Evidence Rule

In *Turner v. KLS Services, LLC*, Stephen Turner contacted Kenneth Shepherd, the principal in KLS Services, LLC ("KLC"), about building a house for Turner on the lot he owned in Greenfield.³⁶⁸ Shepherd made it clear to Turner that the amount due to KLS would be its actual costs to build the house plus ten percent.³⁶⁹ Three versions of a written construction contract were prepared and approved by the parties, with the final version listing the price for construction at \$180,000.00 but omitting the term regarding the ten percent in order to secure a loan to Turner in that amount from which KLS could draw to cover construction costs.³⁷⁰

Construction began in mid-2020 and was completed in August of 2021, and, while KLS received the entirety of the \$180,000.00 loan, its total costs ended up being approximately \$246,000, attributable mostly to pandemic-related, dramatic increase in the cost of building materials. KLS billed Turner for \$264,000.00, and Turner refused to pay. KLS sued Turner for breach of contract.³⁷¹

The Court of Appeals held that the evidence was sufficient to establish that parties' agreement was on a cost-plus basis rather than for a fixed amount.³⁷² In doing so, the court concluded that parol evidence was admissible to establish the cost-plus basis of the agreement because the final construction contract did not contain an integration clause clearly indicating that the contract embodied

364. *Id.* at 530–31.

365. *Id.* at 531.

366. *Id.* at 534; 535–36 (Goff, J., dissenting).

367. *Id.* at 536–38 (Goff, J., dissenting).

368. 254 N.E.3d 1082 (Ind. Ct. App. 2025).

369. *Id.* at 1085.

370. *Id.*

371. *Id.*

372. *Id.* at 1090.

the entire agreement between the parties.³⁷³

D. Mechanic's Lien Releases the Property, Not the Owner

In the contract dispute discussed in the preceding section, Turner also argued that KLS waived any claim it might have had against him when it executed a mechanic's lien waiver upon receiving the proceeds from Turner's loan. Here, the Court of Appeals quotes longstanding precedent that "[t]he common definition of 'lien' is a claim which one person holds on another's property as a security for an indebtedness or charge."³⁷⁴ The lien waiver executed by KLC read in relevant part as follows:

The Contractor, for and in consideration of the sum of [] \$180,000.00, and other good and valuable consideration, the receipt of which is hereby acknowledged, hereby waives and releases any and all liens, claims, or rights to lien of whatsoever kind or character on or against the Premises or the improvements located thereon, on account of labor, design, services, supplies, equipment and/or materials, furnished by the undersigned to or on account of the said Owner for the above described Premises.³⁷⁵

The court properly notes that, "[b]y its own terms, . . . KLS waived liens, claims, or rights against the House and/or improvements located thereon, not Turner."³⁷⁶ Conclusion: KLS did nothing more than waive any security interest in the property, something it was not seeking to enforce in this lawsuit.³⁷⁷

E. Arbitration Clauses

Arbitration has been a hot topic in contract law in recent years, and Indiana has followed the mainstream in holding that the pro-arbitration philosophy embodied in the Federal Arbitration Act makes arbitration clauses generally enforceable. One such case is *Kleinman v. Fifth Third Securities, Inc.*,³⁷⁸ but there are many others. But our policy favoring arbitration comes with a key qualification: "A party cannot be required to submit to arbitration unless it has agreed to do so."³⁷⁹ In *Decker v. Star Financial Group, Inc.* and *Land v. IU Credit Union*, the Indiana Supreme Court dramatically found that consumers

373. *Id.* at 1089–90.

374. *Id.* at 1088 (quoting *Hubble v. Berry*, 103 N.E. 328, 330 (1913)).

375. *Id.* at 1087–88.

376. *Id.* at 1088.

377. *Id.*

378. 68 N.E.3d 1130, 2016 WL 7189993 (Ind. Ct. App. 2016) (unpublished table decision).

379. *Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 920 (Ind. 2023).

had not agreed to arbitrate!³⁸⁰

Teachers Credit Union v. Cripe,³⁸¹ is sort of an epilogue to the Indiana Supreme Court decisions in *Decker* and *Land*. Kimberly Cripe, a member of and a checking account holder with Teachers Credit Union (TCU) n/k/a/ Everwise Credit Union, filed a putative class action complaint against TCU regarding the assessment of fees related to overdraft transactions for checking accounts.³⁸² TCU filed a motion to compel arbitration and dismiss Cripe's complaint, arguing that Cripe agreed to arbitrate any and all disputes arising out of or relating to her account.³⁸³ The trial court denied this motion.³⁸⁴

Cripe's account with TCU included an agreement to receive all notifications by email. Some years after opening the account, TCU sent her and other checking account holders a notice informing them of the impending addition of an Arbitration and Waiver of Class Action provision to its standard terms and conditions.³⁸⁵ Prior to that time, there had been no dispute resolution provisions in the customer agreements.³⁸⁶ Included in the notice was a "right to opt-out," exercisable for sixty days after receiving the notice.³⁸⁷ The notice provided that, "If you fail to opt-out within this 60-day time, you will be deemed to have consented to the resolution of your Claims through binding arbitration. In the event you opt-out, it shall not affect other terms and conditions of your Account Agreement or your relationship with the Credit Union."³⁸⁸

In *Decker*, the Supreme Court had held that a customer had not agreed to the addition of an arbitration clause to the customer agreement because the original contract had only permitted "changes" to the original customer agreement and the arbitration clause constituted an addition to the agreement, not just change.³⁸⁹ "Words matter," Justice Slaughter wrote.³⁹⁰

In *Land*, the Supreme Court viewed an opt-out provision and adopted Restatement (Second) of Contracts § 69, which sets forth the conditions where a party's silence or inaction can be deemed to constitute acceptance.³⁹¹ Again, the court found that the customer had not agreed to the addition of the arbitration clause.³⁹²

380. 218 N.E.3d 1282 (Ind. 2023), *aff'd on reh'g*, 226 N.E.3d 194 (Ind. 2024); *Decker*, 204 N.E.3d 918.

381. 248 N.E.3d 1230 (Ind. Ct. App. 2024), *trans. denied*, 257 N.E.3d 776 (Ind. 2025) (transfer denied by a 3-2 vote; Justices Massa and Slaughter voted to grant transfer).

382. *Id.* at 1232.

383. *Id.*

384. *Id.*

385. *Id.* at 1233.

386. *Id.*

387. *Id.* at 1234.

388. *Id.* at 1234–35.

389. *Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 921 (Ind. 2023).

390. *Id.*

391. *Land v. IU Credit Union*, 218 N.E.3d 1282, 1289 (Ind. 2023), *aff'd on reh'g*, 226 N.E.3d 194 (Ind. 2024).

392. *Id.* at 1290.

Here, the Court of Appeals said that *Decker* and *Land* were “at least instructive, and perhaps dispositive, in addressing whether TCU and Cripe agreed to arbitrate.”³⁹³ It went on to hold that the change of terms provision here and in *Decker* were in all material respects identical.³⁹⁴ The Court of Appeals did not explicitly apply *Land*, but it too seems to be identical.

The Supreme Court denied transfer, with both Justices Massa (who dissented in *Land*) and Slaughter (who authored *Decker*) voting to grant transfer.³⁹⁵ But the suggestion is that there are three pretty solid votes in favor of the Supreme Court’s near-sighted approach to determining whether a consumer has agreed to arbitrate.

F. Noncompete Covenants

As in the last two years, there has been an explosion of commentary and nonjudicial action on noncompete enforceability. This Article addresses three of these developments.

1. Indiana Legislation.—On July 1, 2025, Public Law 207-2025, passed as Senate Enrolled Act No. 475, took effect.³⁹⁶ The new law bans new noncompete agreements between physicians and covered health care entities entered into on or after July 1, 2025.³⁹⁷ The ban applies to hospitals, hospital systems, parent companies, and affiliated managers of a hospital.³⁹⁸

Over the last several years, the Indiana General Assembly has passed a series of laws limiting physician noncompete agreements. In 2023, for example, Public Law 165-2023 (Senate Enrolled Act No. 7) prohibited newly entered noncompete agreements with primary care physicians.³⁹⁹ In 2020, Public Law 93-2020 (House Enrolled Act 1004) required inclusion of a “buyout” provision in contracts with physicians, allowing the physician to avoid enforcement of the noncompete in exchange for paying the employer a reasonable amount.⁴⁰⁰ Public Law 207-2025 adds several new sections within the physician noncompete agreement provisions of Title 25 of the Indiana Code.

Beginning July 1, 2025, hospitals, parent companies of hospitals, affiliated managers of hospitals, and hospital systems are all prohibited from entering into noncompete agreements with physicians.⁴⁰¹ However, this noncompete ban does not apply to other physician employers, such as private practices or non-

393. *Cripe*, 248 N.E.3d at 1237–38.

394. *Id.* at 1242.

395. *Teachers Credit Union v. Cripe*, 257 N.E.3d 776 (Ind. 2025) (denying transfer by a 3-2 vote; Justices Massa and Slaughter voted to grant transfer).

396. Act of May 6, 2025, Pub. L. No. 207-2025, 2025 Ind. Acts 2754.

397. IND. CODE § 25-22.5-5.5-2.3(b) (2025).

398. IND. CODE § 25-22.5-5.5-1.3 (2025).

399. Act of May 4, 2023, Pub. L. No. 165-2023, § 3, 2023 Ind. Acts 1714, 1715–16 (codified at IND. CODE § 25-22.5-5.5-2.5 (2025)).

400. Act of Mar. 18, 2020, Pub. L. No. 93-2020, § 8, 2020 Ind. Acts 696, 710–11 (codified at IND. CODE § 25-22.5-5.5-2(a)(4) (2025)).

401. § 25-22.5-5.5-2.3(b).

hospital/non-hospital system-owned physician groups.

Unlike Indiana's prior noncompete ban, which only prohibited noncompete agreements with primary care physicians regardless of employer type, the new 2025 legislation does not make that distinction. Rather, it prohibits any covered entity from having a noncompete prohibiting the "practice of medicine" with any physician licensed to practice medicine in Indiana.⁴⁰²

One item of interest is that the new law does not apply to physician assistants or advanced practice providers. Another is that the "practice of medicine" does not include activities that: (i) are solely and exclusively executive or managerial, and (ii) do not involve direct patient care.⁴⁰³

The law provides the following examples of prohibited noncompete agreements:

1. Provisions that prohibit the physician from engaging in the practice of medicine with a new employer;⁴⁰⁴
2. Provisions that impose financial penalties, repayment obligations or require reimbursement of bonuses, training expenses or similar payments that:
 - are applied after at least three years of employment; and
 - are based solely or primarily on the physician's decision to continue engaging in the practice of medicine with a new employer;⁴⁰⁵
3. Provisions requiring the physician to obtain the employer's consent or submit to equitable relief;⁴⁰⁶ and
4. Provisions imposing indirect restrictions that limit or deter the physician's practice of medicine with a new employer.⁴⁰⁷

The law clarifies that the following are not considered noncompete agreements:

1. Nondisclosure agreements that protect confidential business information or trade secrets;⁴⁰⁸
2. Nonsolicitation agreements restricting the solicitation of current employees for one year after employment ends (so long as they do not restrict patient interactions, referrals, clinical collaboration, or professional relationships);⁴⁰⁹ and
3. Noncompete agreements entered into as part of a sale of a business entity where the physician owns more than 50% of the entity at the time of sale.⁴¹⁰

As stated above, P.L. 207-2025 took effect on July 1, 2025. It also provides that noncompete agreements entered into before July 1, 2025, will not be

402. See IND. CODE §§ 25-22.5-5.5-1.4, -2.3(b) (2025).

403. IND. CODE § 25-22.5-5.5-1.7 (2025).

404. § 25-22.5-5.5-1.4(a)(1).

405. § 25-22.5-5.5-1.4(a)(2).

406. § 25-22.5-5.5-1.4(a)(3).

407. § 25-22.5-5.5-1.4(a)(4).

408. § 25-22.5-5.5-1.4(b)(1).

409. § 25-22.5-5.5-1.4(b)(2).

410. § 25-22.5-5.5-1.4(b)(3).

invalidated, even if renewed or amended after that date.⁴¹¹

With the passage of P.L. 207-2025, Indiana joins Maryland,⁴¹² Pennsylvania,⁴¹³ and Louisiana⁴¹⁴ among states that have recently passed laws restricting noncompetes for health care-related professions. More than ten other states already have laws that prohibit or substantially limit physician noncompete agreements.⁴¹⁵

2. *Federal Trade Commission Regulation Which Would Have Banned Most Non-Compete Agreements Rescinded.*—The development in this regard that is of the greatest potential consequence was the Federal Trade Commission’s proposed regulation to ban most noncompete agreements altogether. President Biden issued an executive order in July, 2021, asking the Federal Trade Commission to “curtail the unfair use of non-compete clauses.”⁴¹⁶ The FTC issued a notice of proposed rulemaking in response to the President’s Executive Order which appeared in the Federal Register on January 19, 2023.⁴¹⁷

It expressly stated that noncompete agreements are an unfair method of competition and generally prohibited all employers from entering into, attempting to enter into, or maintaining a noncompete with a worker.⁴¹⁸ The proposed rule was broad by design, and it did not make any exceptions for particular industry, size of business, type of worker, or level of worker compensation. In other words, the proposed rule would have applied with equal force to a minimum-wage worker and a Fortune 500 CEO.

The rule even went so far as to requiring employers to rescind their outstanding noncompete agreements and to provide notice to workers formerly subject to such agreements that, upon the end of their employment, they could seek or accept a job with any company or any person—even a competitor—or establish their own competing business, or otherwise compete with their employer in any way.⁴¹⁹

The federal district court’s decision, *Ryan v. Federal Trade Commission*, reviewed the proposed noncompete rule through the prism of the Administrative Procedure Act (APA) as that statute governs judicial review of certain agency actions, findings, and conclusions.⁴²⁰

The court first addressed the statutory authority of the FTC to promulgate

411. IND. CODE § 25-22.5-5.5-2.3(a) (2025).

412. MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2024).

413. Fair Contracting for Health Care Practitioners Act, Pub. L. 846, No. 74 (2024) (to be codified at 15 PA. CONS. STAT. § 4501 *et seq.*).

414. LA. STAT. ANN. § 23:921(M), (N), (O) (2025).

415. Charles F. Knapp & Erik A. Mosvick, *Top 10 Noncompete Developments of 2025*, FAEGRE DRINKER (Jan. 5, 2026), <https://www.faegredrinker.com/en/insights/publications/2026/1/top-10-noncompete-developments-of-2025> [https://perma.cc/NC9D-RMMG].

416. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36992 (July 9, 2021).

417. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

418. *Id.* at 3482.

419. *Id.* at 3483.

420. 746 F. Supp. 3d 369 (N.D. Tex. 2024).

the noncompete rule and found it lacking.⁴²¹ While the court acknowledged that the FTC has some authority to promulgate rules precluding unfair methods of competition, it concluded that the FTC lacked the authority to create substantive rules through this method.⁴²²

The court next held that the rule was arbitrary and capricious because it was “unreasonably overbroad without a reasonable explanation.”⁴²³ The rule, the court said, imposed “a one-size fits-all approach with no end date, which fails to establish a ‘rational connection between the facts found and the choice made.’”⁴²⁴ The court gave several reasons for this conclusion. First, it looked at the materials that the FTC cited in support of the rule and found them to be “based on inconsistent and flawed empirical evidence.”⁴²⁵ Furthermore, the court said that the FTC had failed to consider the positive benefits of noncompete agreements and had disregarded the substantial body of evidence supporting noncompetes.⁴²⁶ And the court said that the FTC had failed “to sufficiently address alternatives to issuing the Rule.”⁴²⁷

Having determined that the FTC lacked statutory authority to promulgate the noncompete rule and that the rule was arbitrary and capricious, the court issued a nationwide injunction against the rule taking effect or being enforced.⁴²⁸

The Biden administration immediately appealed the ruling to the Fifth Circuit. However, following the change in administrations, the FTC voted 3-1 to dismiss its appeal and accede to the holding of the district court.⁴²⁹ In doing so, FTC Chairman Andrew N. Ferguson said that the “[r]ule’s illegality was patently obvious.”⁴³⁰ His sharply worded statement harshly criticized “Democrat [sic] partisans” for their support of the proposed rule.⁴³¹ Yet he struck a tone of hostility to noncompetes as well:

[N]oncompete agreements can be pernicious. They can be, and sometimes are, abused to the effect of severely inhibiting workers’ ability to make a living. That is why English law categorically

421. *Id.* at 384.

422. *Id.*

423. *Id.* at 388.

424. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 389–90.

429. Press Release, Federal Trade Commission, Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule (Sep. 5, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule> [<https://perma.cc/N6HG-PVCJ>].

430. Statement of Andrew N. Ferguson, Chairman, Fed. Trade Comm’n, Joined by Commissioner Melissa Holyoak, Comm’r, Fed. Trade Comm’n 1 (Sep. 5, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-holyoak-statement-re-noncompete-acceding-vacatur.pdf [<https://perma.cc/S53J-UD53>].

431. *Id.* at 2.

prohibited them until the eighteenth century. That is why all fifty States regulate them extensively, and why some outright ban them. And that is why Congress, through the FTC Act and the Sherman Act, gave us the authority to step in when they are onerous enough to become unlawful. The Commission should have been doing everything it could to find unlawful noncompete agreements and eliminate them.⁴³²

It will be interesting to see if the Commission under Ferguson does everything it can to find unlawful noncompete agreements and eliminate them. If so, the Biden administration will have lost the battle but won the war.

3. Norton-King's Daughters' Health, Inc. v. Jenkins.—*Norton-King's Daughters' Health, Inc. v. Jenkins*⁴³³ is a most interesting non-competition agreement case that surprisingly is not published.

The employee is a certified registered nurse anesthetist at a hospital in Madison, Indiana.⁴³⁴ The key provisions of the noncompete are as follows:

- A prohibition on working in competition with the hospital for a period of two years and within a radius of 30 miles.⁴³⁵
- The hospital is entitled to an injunction for any breach of the agreement.⁴³⁶
- “The parties agree that since no adequate remedy exists at law to enforce the covenant not to compete hereunder, injunctive relief may be sought to enforce the terms of Article VI. The parties furthermore agree that [Jenkins] may violate the terms of this covenant not to compete upon the payment to Hospital a lump sum of Fifty Thousand Dollars (\$50,000). Such amount is regarded by the parties hereto in good faith as liquidated damages, and the applicable sum may be paid by [Jenkins] in lieu of Hospital's right to injunctive relief, as liquidated damages in full.”⁴³⁷

The Court of Appeals first works through whether the covenant not to compete was enforceable. The law here is well established: “In arguing the reasonableness of a non-competition agreement, the employer must first show that it has a legitimate interest to be protected by the agreement. The employer also bears the burden of establishing that the agreement is reasonable in scope as to the time, activity, and geographic area restricted.”⁴³⁸ The Court considered whether the hospital had established a protectable interest and held that it had.⁴³⁹ It then went on to consider the reasonableness of the scope of the covenant. (The reasonableness of the time and geographic restrictions was not challenged.) The court reads the agreement “as a whole” and concludes that the noncompete clause only prevents the employee from performing CRNA services and that

432. *Id.*

433. 251 N.E.3d 566, 2024 WL 5165711 (Ind. Ct. App. 2024) (unpublished table decision).

434. *Id.* at **1.

435. *Id.*

436. *Id.*

437. *Id.*

438. Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 729 (Ind. 2008).

439. *Jenkins*, 2024 WL 5165711, at **6.

that is not unreasonable in terms of scope.⁴⁴⁰

Where the case really gets interesting is when it turns to the hospital's attempt to collect the \$50,000 in liquidated damages. The facts of the case show that when the hospital sought its injunction against Jenkins, she stopped working at the competing hospital.⁴⁴¹ Then the hospital went after the \$50,000.⁴⁴² But, following the same analysis used by the trial court, the Court of Appeals said the following:

[T]he Agreement clearly and unambiguously provides that the Hospital's only remedy under the Agreement is to seek injunctive relief following a breach of the noncompete clause. Section 6.3 explicitly gives the Hospital the right to injunctive relief. There is nothing in that clause that allows the Hospital to seek liquidated damages. Similarly, Section 6.4 again provides that the Hospital can seek injunctive relief. But that section goes on to state that Jenkins can choose to pay \$50,000 to the Hospital in order for the Hospital to forgo its right to seek injunctive relief. . . .

Here, by the time the Hospital filed its claim, Jenkins had already ceased her employment with CCMH and was no longer in breach of the Agreement. Thus, the Hospital received the precise outcome contemplated by the Agreement—a cessation of Jenkins' employment at a competing hospital. Because the Hospital's only right under the Agreement was to seek injunctive relief and not liquidated damages, and because Jenkins has already left her employment at CCMH such that there is nothing left to enjoin, we affirm the trial court's grant of summary judgment in favor of Jenkins.⁴⁴³

G. Warranties

1. *UCC Article 2 and the Magnuson-Moss Warranty Act.*—Indiana Code section 26-1-2-314 implies a warranty of merchantability in Indiana contracts for the sale of goods if the seller is a merchant with respect to goods of that kind. The Code permits the seller to exclude the warranty but if the disclaimer is in writing, the writing must be “conspicuous.”⁴⁴⁴

In *Thomas v. Valpo Motors, Inc.*, Valpo Motors sold a vehicle to Mrs. McNally that allegedly was not merchantable.⁴⁴⁵ She sued for breach of the implied warranty of merchantability under not only the Indiana UCC but also

440. *Id.*

441. *Id.* at **2.

442. *Id.*

443. *Id.* at **7.

444. IND. CODE § 26-1-2-316(2) (2025).

445. 258 N.E.3d 236, 239 (Ind. 2025).

the federal Magnuson-Moss Warranty Act (MMWA).⁴⁴⁶ As the Seventh Circuit has said, “for all practical purposes, the MMWA operates as a gloss on . . . state law breach of warranty claims.”⁴⁴⁷ “The MMWA allows [a consumer] to bring federal claims premised on state law violations, but also requires them to” comply with certain requirements of the federal act in order to recover.⁴⁴⁸ One of those which figures prominently in this case is that the buyer must give the seller “a reasonable opportunity to cure.”⁴⁴⁹

Why go to the bother of complying with the MMWA? Why not just sue for damages under the UCC straight up? The answer is that if a consumer prevails in an action brought under the MMWA, then the court may award attorney’s fees to the prevailing consumer.⁴⁵⁰

The seller in this case had two defenses. First, it contended that its contract with the buyer had excluded the implied warranty of merchantability as a matter of law.⁴⁵¹ The trial court agreed and granted summary judgment, which the Court of Appeals affirmed over the dissent of Judge Felix.⁴⁵²

Second, the seller maintained that even if its warranty disclaimer was not effective, the buyer had not complied with one of MMWA’s requirements: that the seller be given a reasonable opportunity to cure.⁴⁵³ Given this failure, the buyer was not entitled to recover attorney’s fees under the MMWA.⁴⁵⁴

In a unanimous opinion by Justice Goff, the Supreme Court found as a matter of contract interpretation that the seller had not effectively disclaimed the implied warranty of merchantability as a matter of law!⁴⁵⁵ The court read the sales contract as creating an exception for the disclaimer if the buyer entered into a service contract, and there was evidence that the buyer had done so.⁴⁵⁶

This then brought the court to the question of whether the MMWA “opportunity to cure” requirement had been met, and there the court held that genuine issues of material fact remained.⁴⁵⁷ In this regard, the court laid down the following burden of proof for the buyer in such a situation:

[A] buyer need only show to the satisfaction of the factfinder that the seller had “a reasonable opportunity to cure” its failure to comply with its warranty obligations. And the buyer can meet this burden of proof

446. *Id.* at 239; 15 U.S.C. § 2301 *et seq.*

447. *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 781 (7th Cir. 2011).

448. *Id.*

449. *Id.* (quoting 15 U.S.C. § 2310(e)).

450. 15 U.S.C. § 2310(d)(2).

451. *Thomas*, 258 N.E.3d at 239.

452. *Thomas v. Valpo Motors, Inc.*, 235 N.E.3d 211, 2024 WL 1928643, at *1, *3 (Ind. Ct. App. 2024) (unpublished table decision), *vacated*, *Thomas*, 258 N.E.3d 236; *id.* at *3–*7 (Felix, J., dissenting).

453. *Thomas*, 258 N.E.3d at 240.

454. *Id.* at 240.

455. *Id.* at 238, 245.

456. *Id.* at 242.

457. *Id.* at 245.

by showing that he explicitly asked the seller to cure (i.e., repair, replace, or refund) or that he notified the seller of the purported defect and the seller proposed no remedy in response.⁴⁵⁸

2. *Whether a Disclaimer of Warranties Runs with the Goods.*—In *Poultry & Industry Suppliers, Inc. v. Incubacol, S.A.S.*,⁴⁵⁹ Incubacol, S.A.S., a Colombian company, sued Poultry & Industrial Suppliers, Inc. (“Poultry Suppliers”), a Florida company, and CTB, Inc., d/b/a Chore-Time, an Indiana company, for strict liability (manufacturing defect), negligence, and breach of implied warranty in Florida state court. Eventually, the case ended up in Indiana state court through a series of interesting procedural steps that are beyond the scope of this Article.⁴⁶⁰ An additional interesting procedural development was the decision that Florida law applies to the case, utilizing the Uniform Judicial Notice of Foreign Law Act.⁴⁶¹

Incubacol is involved in the poultry and egg business.⁴⁶² It placed orders with Poultry Suppliers for ventilation and related equipment to construct ten breeding houses.⁴⁶³ Poultry Suppliers then contracted with CTB to manufacture the equipment. This contract included a limited warranty in which CTB expressly disclaimed any implied warranties running in favor of Poultry Suppliers.⁴⁶⁴ Poultry Suppliers then distributed the equipment to Incubacol in Columbia.⁴⁶⁵ Of consequence, the equipment manufactured by CTB incorporated an alarm control panel, called the Mark 220 Informer, which was a part of the ventilation system.⁴⁶⁶ “CTB shipped the equipment, including the Mark 220 Informer, from Indiana, which then passed through Florida on its way to Colombia.”⁴⁶⁷

In April 2015, the equipment was installed for Incubacol.⁴⁶⁸ An agent of Poultry Suppliers installed the equipment, but Poultry Suppliers was still responsible for the final inspection and approval, which occurred in August.⁴⁶⁹ In December, 5,500 chickens died after the ventilation system in one of the breeding houses failed.⁴⁷⁰

458. *Id.* (citations omitted).

459. 250 N.E.3d 448 (Ind. Ct. App. 2024), *trans. denied*, 257 N.E.3d 779 (Ind. 2025).

460. *Id.* at 450–51.

461. IND. CODE § 34-38-4-4 (2025). The controlling precedent here is *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999), a case better known for its holding on the vicarious liability of an employer of an independent contractor. See 2022–2023 Survey Article, *supra* note 1, at 862–63.

462. *Incubacol*, 250 N.E.3d at 451.

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* at 451.

The issue of interest to us here is whether CTB's disclaimer of implied warranties running in favor of Poultry Suppliers also constituted a disclaimer by Poultry Suppliers of implied warranties running in favor of Incubacol. Both sides agreed that the UCC applied, which both Florida and Indiana have adopted in identical form.⁴⁷¹

An express warranty can exclude or modify an implied warranty:

[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.⁴⁷²

Here, CTB, the manufacturer, had an express warranty that disclaimed any implied warranties:

THIS WARRANTY CONSTITUTES [CTB'S] ENTIRE AND SOLE WARRANTY AND [CTB] EXPRESSLY DISCLAIMS ANY AND ALL OTHER WARRANTIES, INCLUDING, BUT NOT LIMITED TO, EXPRESS AND IMPLIED WARRANTIES, INCLUDING, WITHOUT LIMITATION, WARRANTIES AS TO MERCHANTABILITY, FITNESS FOR PARTICULAR PURPOSE SOLD AND DESCRIPTION OR QUALITY OF THE PRODUCT FURNISHED HEREUNDER.⁴⁷³

As Poultry Suppliers argued, CTB's disclaimer of warranties applied to it because the disclaimer "was necessarily incorporated into the sales contract [between Poultry Suppliers and Incubacol] because it is the one and only contract for CTB equipment alleged to exist in the case."⁴⁷⁴ Incubacol responded by arguing that because Poultry Suppliers had no disclaimer of implied warranties in its contract, it was improperly attempting "to piggyback onto CTB's disclaimers of warranties that were included in its manuals," which it cannot do.⁴⁷⁵

The parties could not find any Indiana or Florida cases specifically addressing whether a seller can rely on a manufacturer's disclaimer of warranties—the issue in the case.⁴⁷⁶ The parties consequently cited federal district court cases.⁴⁷⁷ *Florists' Mutual Insurance Co. v. Lewis Taylor Farms*,

471. *Id.* at 457.

472. IND. CODE § 26-1-2-316(2) (2025); *see also* FLA. STAT. § 672-316 (2025).

473. *Incubacol*, 250 N.E.3d at 458.

474. *Id.* (alteration in original).

475. *Id.*

476. *Id.*

477. *Id.*

Inc.,⁴⁷⁸ a case cited by a party, in turn cites treatises.⁴⁷⁹ As one of the treatises states, “a manufacturer’s disclaimer of warranties does not run with the goods so as to protect any subsequent seller of them, and thus, each subsequent seller must make their own independent disclaimer in order to be protected from warranty liability.”⁴⁸⁰ Another treatise provides similarly, “In the usual case, a distributor or dealer must make his own disclaimer in order to be free from implied warranty liability. He cannot rely on a disclaimer used by the manufacturer even though he passes that documentation on to the ultimate buyer.”⁴⁸¹

Also contained in that treatise is the recognition of an exception when “the ultimate buyer kn[ows] that the seller was the manufacturer’s exclusive distributor and the buyer received the disclaimer directly from the seller and not from the manufacturer.”⁴⁸² If these conditions are satisfied, “the manufacturer’s disclaimer becomes part of the basis of the bargain between the buyer and the seller.”⁴⁸³ “Thus, the seller is not required to republish and restate the manufacturer’s disclaimer to disclaim the implied warranty himself.”⁴⁸⁴

The Court of Appeals agreed with the above authority. It said that “a manufacturer’s disclaimer of warranties does not run with the goods and thus each subsequent seller must make their own independent disclaimer to be protected from warranty liability. Here, Poultry Suppliers didn’t appear to do that. And while there is an exception, it’s unclear whether Poultry Suppliers was an exclusive distributor for CTB and how CTB’s warranty got passed to Incubacol. Because the record needs further development, judgment on the pleadings is inappropriate for the warranty count.”⁴⁸⁵

H. Attorney Fees

In *Osborne v. Small*, Osborne had a contract to sell some real property to a company called Results, LLC.⁴⁸⁶ Small represented himself as an agent of

478. No. 7:05-CV-50 (HL), 2008 WL 875493 (M.D. Ga. Mar. 27, 2008), *aff’d sub nom.*, *Florists’ Mut. Ins. Co. v. DL&B Enterprises, Inc.*, 322 Fed. Appx. 729 (11th Cir. 2009).

479. *Incubacol*, 250 N.E.3d at 458.

480. 63 AM. JUR. 2D *Products Liability* § 697, Westlaw (database updated Feb. 2026); *see also* 67A AM. JUR. 2D *Sales* § 598, Westlaw (database updated Feb. 2026).

481. 1 THE LAW OF PROD. WARRANTIES § 8:14, Westlaw (database updated Jan. 2026).

482. *Id.*

483. *Incubacol*, 250 N.E.3d at 459.

484. *Id.*; *see also* *Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.*, 797 P.2d 835, 838–39 (Colo. App. 1990) (holding that where the buyer knew the seller was the manufacturer’s “exclusive area distributor” and the buyer received the disclaimer of warranties directly from the seller and not from the manufacturer, the manufacturer’s disclaimer became “part of the basis of the bargain” between the buyer and the seller and therefore the seller was not required to restate the manufacturer’s disclaimer to disclaim warranty liability).

485. *Incubacol*, 250 N.E.3d at 459 (internal citation omitted).

486. 255 N.E.3d 496, 2025 WL 659051, at *1 (Ind. Ct. App. 2025) (unpublished table decision).

Results and perhaps is the managing member as well. The deal cratered and Results was found liable to Osborne for damages. In the purchase agreement was a provision that the prevailing party was entitled to attorney fees. This appeal involves Osborne's attempt to collect under that provision against both Results and Small.⁴⁸⁷

The Court of Appeals agrees that Results is liable under the contractual provision, but finds no basis to impose liability against Osborne who was not a party to the contract.⁴⁸⁸ This seems entirely correct.

Talley v. Cheswick Homeowners' Ass'n, Inc., was a dispute between an homeowners association ("HOA") and a homeowner, where the HOA prevailed both at trial and on appeal.⁴⁸⁹ The HOA covenants contained a provision entitling the prevailing party in any action against a defaulting homeowner to "reasonable attorneys' fees."⁴⁹⁰

"Fee-shifting provisions that do not distinguish between trial and appellate fees and costs unquestionably apply to both," the Court of Appeals declared.⁴⁹¹

Our Court has held that a statutory provision entitling a party to "reasonable attorneys fees" must include fees for services on appeal. [That decision] extended this holding to contractual provisions with identical language, finding "no . . . distinction between the scope of a statutory and a contractual provision for 'reasonable attorneys fees.'"⁴⁹²

The court held that this is still good law, and because the covenants provide for the prevailing party to recover attorney fees, it directed that appellate attorney fees be awarded.⁴⁹³

I. Statute of Limitations Defenses

Linda Rothrock Jurus was successful in resolving a dispute with a third party over whether she retained a life estate in some property conveyed to the third party's predecessor.⁴⁹⁴ The dispute arose because the title insurance company that prepared the deed conveying the property allegedly failed to reserve the life estate in accordance with the parties' intentions.⁴⁹⁵ Jurus spent \$26,979.51 in costs and attorney's fees in order to get the deeds reformed and

487. *Id.* at *1.

488. *Id.* at *3.

489. 255 N.E.3d 475, 2025 WL 636230 (Ind. Ct. App. 2025) (unpublished table decision).

490. *Id.* at *2.

491. *Id.* at *5.

492. *Id.* (footnote omitted) (citations omitted) (quoting *Parrish v. Terre Haute Sav. Bank*, 438 N.E.2d 1, 3 (Ind. Ct. App. 1982)).

493. *Id.* at *5–6.

494. *Hamilton Nat'l Title LLC v. Jurus*, 266 N.E.3d 233, 237 (Ind. Ct. App. 2025).

495. *Id.*

to defend an appeal.⁴⁹⁶

In *Hamilton National Title LLC v. Jurus*,⁴⁹⁷ the case resulting from the previous lawsuit, Jurus filed a complaint against Hamilton National Title. She alleged that Hamilton

“had a contractual duty. . . to prepare a deed that would convey the real estate to [the third-party] but reserve to her a life estate as provided in” the contract for the sale of the land. She further alleged that Hamilton had “breached its contract with Jurus when it omitted a reservation for her of a life estate from the deed it prepared for the closing[.]” And Jurus maintained that, “[o]n account of Hamilton’s breach of contract,” she “had been damaged in the amount of the legal expenses she had incurred in order to correct” the erroneous deed.⁴⁹⁸

Hamilton defended arguing that:

Jurus’ claim, while framed as one for breach of contract, “sound[ed] in legal malpractice because it involve[d] allegations that Hamilton negligently drafted the warranty deed.” And Hamilton asserted that legal malpractice claims are subject to a two-year statute of limitations, such that Jurus’ claim, which she filed seven years after she signed the warranty deed, was untimely.⁴⁹⁹

Finding Jurus’s designated evidence showed the existence of a contract, the Court of Appeals concluded that the applicable statute of limitations was ten years.⁵⁰⁰

J. Statute of Frauds Defense and Part Performance

The “Statute of Frauds” is a familiar affirmative defense to claims seeking to enforce purported oral contracts for the sale of land⁵⁰¹ and for the sale of goods for the price of \$500 or more.⁵⁰² *Travis v. V3 Express Carwash, LLC*,⁵⁰³ reminds that the Statute of Frauds applies to any agreement that is not to be performed within one year from the making of the agreement.⁵⁰⁴

Randall Travis, a mortgage broker at a financial institution, sued Leon Baine, who was in the carwash business. According to Travis, the two of them

496. *Id.*

497. *Id.*

498. *Id.* (alterations in original) (citations omitted).

499. *Id.* (alterations in original) (citations omitted).

500. *Id.* at 241.

501. IND. CODE § 32-21-1-1(4)

502. IND. CODE § 26-1-201(1).

503. 267 N.E.3d 440 (Ind. Ct. App. 2025).

504. IND. CODE § 32-21-1-1(5).

had orally agreed to partner in an enterprise in which Travis would locate properties suitable for development as carwashes; that Baine or a company he owned would acquire such properties; that Travis would assist Baine in developing the properties into carwashes; and that Travis would share both in the profits of the carwashes once they were in operation and in the profits from the sale of each of the properties sold after development.⁵⁰⁵

Baine interposed the Statute of Frauds defense that a person may not bring “[a]n action involving any agreement that is not to be performed within one (1) year from the making of the agreement,” “unless the promise, contract, or agreement on which the action is based . . . is in writing and signed by the party against whom the action is brought or by the party’s authorized agent.”⁵⁰⁶ Travis did not dispute that they had no written agreement but argued that their arrangement was not governed by the Statute because the contract could be performed within one year.⁵⁰⁷ The trial court had granted summary judgment in favor of Baine and the Court of Appeals found the designated evidence established that the development of the carwash sites could not be fully performed or completed within one year.⁵⁰⁸

Travis pursued several alternate theories of recovery and the court’s opinion is a good refresher of the elements and requirements of each.

To his contention that the Statute of Frauds defense was inapplicable because Travis “substantially performed,” the court held that the doctrine of part performance did not preclude the application of the Statute of Frauds in this case because the designated evidence did not articulate Travis’s specific duties pursuant to the alleged agreement. “[C]ontracts must be reasonably definite in their material terms so the intention of parties may be ascertained,” the court held.⁵⁰⁹

Equally unavailing was Travis’s contention that he had been the victim of fraud on the part of Baine.⁵¹⁰ Recovering for fraud in a breach of contract action requires allegation of a separate and independent tort of fraud resulting in injury distinct from that resulting from the breach of contract claim.⁵¹¹ Travis did not allege a separate and independent tort of fraud, the court held.⁵¹²

Travis also struck out in his claim that the purported oral contract was enforceable under the doctrine of promissory estoppel.⁵¹³ The court’s analysis on this point is particularly impressive. To recover, a claimant must show not only reliance but that the reliance injury “is independent from the benefit of the

505. 267 N.E.3d at 442–43.

506. IND. CODE § 32-21-1-1(5).

507. *Id.* at 445.

508. *Id.*

509. *Id.* at 446 (citing *Zukerman v. Montgomery*, 945 N.E.2d 813, 819 (Ind. Ct. App. 2011), citing in turn *Wenning v. Calhoun*, 827 N.E.2d 627, 629 (Ind. Ct. App. 2005)).

510. *Id.* at 447.

511. *Id.*

512. *Id.*

513. *Id.*

bargain and so substantial as to constitute an unjust and unconscionable injury.”⁵¹⁴ The designated evidence showed that Travis had neither changed anything with regard to his employment as a mortgage broker nor contributed any money to the acquisition or construction of any carwash site. As such, the court concluded, any reliance injury he may have suffered was not so substantial as to be unjust and unconscionable.⁵¹⁵

Travis fared better on his final claim of “quantum meruit” where courts “to avoid unjust enrichment . . . permit recovery of the value of the services rendered just as if there had been a true contract.”⁵¹⁶ Here the court says that the “deposition testimony reveals genuine issues of material fact regarding the services and benefits provided by Travis and accepted by Baine and his companies without compensation, and whether allowing Baine and his companies to avoid payment for Travis’s services would be unjust.” This was enough to reverse the summary judgment that had been entered in favor of Baine on this count.

This result required the court to tackle Baine’s argument that recovery in quantum meruit is only possible when no express contract exists, and that Travis himself had alleged the existence of a contract.⁵¹⁷ But here the court cited Indiana authority going back to 1841 “that one who has rendered services or transferred property under a contract voidable under the statute of frauds may recover the property or the value of such services or property under quantum meruit.”⁵¹⁸

*Adams v. Lazaro*⁵¹⁹ provides an interesting contrast from *Travis v. V3 Express Carwash, LLC*,⁵²⁰ discussed *supra*, as to the doctrine of “part performance.” As in *Travis*, the parties in *Adams* had a purported oral agreement that was unenforceable due to the Statute of Frauds. Specifically, Freddy Lazaro alleged that he and Bruce Adams had a “rent-to-own arrangement” pursuant to which Lazaro would purchase a house from Adams by making a down payment and a specified number of monthly payments in specified amounts thereafter.⁵²¹ There was evidence that Adams subsequently gave Lazaro documents reflecting these terms, but no evidence that either party ever signed them.⁵²²

Over the next several years, Lazaro made regular payments to Adams, made improvements to the house, and paid all utilities except for the sewer bill which

514. *Id.* at 448 (quoting *Spring Hill Devs., Inc. v. Arthur*, 879 N.E.2d 1095, 1103 (Ind. Ct. App. 2008)).

515. *Id.* at 448–49.

516. *Id.* at 449 (citing *inter alia* *Kelly v. Levandoski*, 825 N.E.2d 850, 860–61 (Ind. Ct. App. 2005)).

517. *Id.* at 449 n.3.

518. *Id.* (citing *Martin v. Martin*, 122 Ind. App. 241, 244, 103 N.E.2d 905, 906 (1952) (citing in turn *inter alia* *recovery Barickman v. Kuykendall*, 6 Blackf. 21, 24–25, 1841 WL 2535, at *2 (1841))).

519. 249 N.E.3d 661 (Ind. Ct. App. 2024).

520. 267 N.E.3d 440 (Ind. Ct. App. 2025).

521. *Adams*, 249 N.E.3d at 663.

522. *Id.* at 664.

he claimed he never received.⁵²³

Eventually, Adams sought to evict Lazaro for unpaid rent and failure to obtain insurance.⁵²⁴ Lazaro responded by suing Adams for breach of their purported agreement and asking the court to order Adams to convey the property to him.⁵²⁵ After a bench trial, the court held that Lazaro's claim for breach of contract failed because there was no written, signed contract. But the court concluded that the parties had orally agreed to sell the house, and the agreement was enforceable under the equitable doctrine of part performance. The court ordered Adams to convey the property to Lazaro, although it directed Lazaro to reimburse Adams for unpaid property taxes.⁵²⁶

As both the Court of Appeals says here and said in *Travis*, oral contracts subject to the Statute of Frauds, are voidable, not void, and may be enforced under the doctrine of "part performance."⁵²⁷ The facts that distinguish the part performance analysis in this case from that of *Travis* are apparent.⁵²⁸ Here there was evidence that pursuant to the oral agreement, Lazaro had made what he believed to be a rental payments in an amount that exceeded the agreed-upon purchase price; had paid all utility bills (other than the sewer bill of which he was not aware); and had made repairs to the house "inconsistent with simply renting it, including replacing appliances and the water heater, installing a new staircase and flooring, and painting the exterior."⁵²⁹ Thus, the Court of Appeals concluded in affirming the trial court, "Lazaro took extensive actions in reliance on his oral agreement with Adams."

K. Liquidated Damages

In *Derr Enterprises, LLC v. Union City Indiana Properties, LLC*, a commercial landlord sued after a tenant ceased paying rent and vacated premises six months before lease ended.⁵³⁰ The trial court's judgment of approximately \$120,000 included an award of \$9,950 in late fees of \$50 per day for 199 days

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.* at 665.

527. *Id.* at 666 (citing *Summerlot v. Summerlot*, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980). *Cf. Travis v. V3 Express Carwash, LLC*, 267 N.E.3d 440, 445 (Ind. Ct. App. 2025) (citing *Spring Hill Devs., Inc. v. Arthur*, 879 N.E.2d 1095, 1104 (Ind. Ct. App. 2008) (in turn citing *Summerlot*, 408 N.E.2d at 828)) ("The part performance doctrine is based on the rationale that equity will not permit a party who breaches an oral contract to invoke the statute of frauds where the other party has performed his part of the agreement to such an extent that repudiation of the contract would lead to an unjust or fraudulent result.").

528. As discussed in text accompanying *supra* note 509, the *Travis* court held that the doctrine of part performance did not preclude the application of the Statute of Frauds in that case because the designated evidence did not articulate Travis's specific duties pursuant to the alleged agreement.

529. *Adams*, 249 N.E.3d at 666.

530. 253 N.E.3d 1129 (Ind. Ct. App. 2025).

(the unfulfilled term of the lease) and an additional \$53,750 in late fees of \$50 per day for 1,075 days from the day after the lease expired through the date of the bench trial.⁵³¹ On appeal, the tenant challenged the propriety of the late fees for the period beyond the term of the lease.⁵³²

The court framed the issue as whether the late fee provision in the lease was a valid liquidated damages clause or an unenforceable penalty.⁵³³ This issue has been given frequent and detailed consideration during previous Survey Periods.⁵³⁴

The court held that this determination is a pure question of law for the court, and it considered the facts, the intention of the parties, and the reasonableness of the provision under the circumstances of the case. Relying on an earlier decision of the court on the precise issue of whether a trial court had erred when it awarded a per diem late fee for the period between the expiration of the lease term and the date of judgment,⁵³⁵ the court said that when a sum stipulated in an agreement as liquidated damages is “grossly disproportionate” to the loss that may result from the breach, the courts will treat the sum as a penalty rather than as liquidated damages.⁵³⁶ This was the situation in this case, the court found. “These late fees are more than twice the amount of the unpaid rent of \$23,244.00 and are grossly disproportionate to [the landlord’s] actual loss from late rental payments. . . . [T]he daily late fee should not have continued to be assessed after the expiration of the term of the lease.”⁵³⁷

This decision is certainly consistent with precedent⁵³⁸ and carries the added weight of having been authored by Senior Judge Randall T. Shepard, the former long-serving Chief Justice of Indiana. But Indiana courts as a general rule do not let parties off the hook for the contracts they have made, and it continues to be something of a puzzle as to why liquidated damage clauses are different.⁵³⁹

531. *Id.* at 1133, 1136.

532. *Id.* at 1135–36.

533. *Id.* at 1136.

534. *See, e.g., 2020–2021 Survey Article, supra* note 1, at 496–98 (discussing *Symons v. Fish*, 158 N.E.3d 352 (Ind. Ct. App. 2020)); *2018–2019 Survey Article, supra* note 1, at 838–43 (discussing *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208 (Ind. 2019)).

535. *Derr Enters.*, 253 N.E.3d at 1136 (citing *Gershin v. Demming*, 685 N.E.2d 1125 (Ind. Ct. App. 1997)).

536. *Id.*

537. *Id.*

538. *See, e.g., Skendzel v. Marshall*, 301 N.E.2d 641 (1973); *Sterne v. Fletcher Am. Co.*, 181 N.E. 37 (1932); *Jaqua v. Headington*, 16 N.E. 527 (1888); *Olcott Int’l & Co. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063 (Ind. Ct. App. 2003); *Symons v. Fish*, 158 N.E.3d 352 (Ind. Ct. App. 2020); *Gershin v. Demming*, 685 N.E.2d 1125 (Ind. Ct. App. 1997). *But see Raymundo v. Hammond Clinic Ass’n*, 449 N.E.2d 276 (Ind. 1983).

539. *Cf. Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208, 220 (Ind. 2019) (Slaughter, J., dissenting) (“[C]ourts should get out of the business of deciding whether the parties’ estimate of the harm underlying liquidated damages is reasonable.”); *Time Warner Ent. Co., L.P. v. Whiteman*, 802 N.E.2d 886, 894 (Ind. 2004) (“Despite the longstanding

L. Specific Performance

Although the Court of Appeals did not invoke Shakespeare's aphorism, "What's in a name? That which we call a rose by any other name would smell as sweet,"⁵⁴⁰ the Court's conclusion in *Farmhouse Investments, LLC v. Quattro Real Estate Holdings, LLC*,⁵⁴¹ is consistent with the Bard's.

Farmhouse Investments, LLC (Series B) ("Farmhouse") signed an agreement to purchase real estate from Quattro Real Estate Holdings, LLC ("Quattro").⁵⁴² The evidence showed that Farmhouse had planned to use the Property to grow marijuana, on the hopes that the Indiana General Assembly would legalize marijuana cultivation. When that did not occur, Farmhouse decided that it "w[as not] going to allocate funds to this project."⁵⁴³ Quattro sued for specific performance.⁵⁴⁴

Farmhouse's first defense was that the real estate purchase agreement named the seller as "Quattro, LLC," when, as indicated in the caption of this litigation, the seller was in fact Quattro Real Estate Holdings, LLC.⁵⁴⁵ Specifically, Farmhouse argued that the difference between the names violated various corporate law requirements as to the use of assumed business names,⁵⁴⁶ and raised a question of whether Quattro Real Estate Holdings, LLC, was "the proper party to enforce the Agreement."⁵⁴⁷

The Court found, in effect, that "Quattro LLC" smelled just as sweet as "Quattro Real Estate Holdings, LLC." First, the Court noted that the purchase agreement had been drafted by Farmhouse's counsel such that there was no apparent misrepresentation on Quattro's part.⁵⁴⁸ Second, Quattro Real Estate Holdings, LLC, was shown as owning title to the property in the title commitments issued in connection with the transaction.⁵⁴⁹ And third, the Court cited long-standing precedent that a contract mis-naming a party cannot be invalidated when the counterparty has "no question regarding the identity" of the mis-named party.⁵⁵⁰

Of greater significance, Farmhouse also argued that granting specific performance of the Agreement was not appropriate because Quattro had an

principles represented by [the cases cited in the preceding footnote] we are left with some unease over any decision where what appears to be the freely bargained agreements of the parties are set aside.").

540. WILLIAM SHAKESPEARE, *ROMEO & JULIET* 60 (Burton Raffel ed. 2004).

541. 268 N.E.3d 765 (Ind. Ct. App. 2025).

542. *Id.*

543. *Id.* at 770 n.1.

544. *Id.* at 770.

545. *Id.* at 772.

546. *Id.* The statutes alleged to be violated are IND. CODE §§ 23-0.5-3-4(e) and -1(a)(1).

547. *Id.*

548. *Id.*

549. *Id.*

550. *Id.* (quoting *Parker v. Rod Johnson Farm Serv., Inc.*, 179 Ind. App. 190, 192, 384 N.E.2d 1129, 1131 (1979)).

adequate remedy at law via monetary damages.⁵⁵¹ While the Court acknowledged the existence of at least one decision in which the court had declined to exercise its equitable discretion in awarding specific performance when adequate monetary damages were available,⁵⁵² the court here found that the parties had agreed in their contract that Quattro was entitled to seek specific performance.⁵⁵³ The case, therefore, is an important reminder that while we frequently speak of specific performance as an equitable remedy, it can be a contractual one as well if appropriate language is included in the contract.⁵⁵⁴

*Devlin v. de Gorter*⁵⁵⁵ is a case that could serve as a law school exam question on specific performance. At issue is whether David J. de Gorter had an oral agreement to purchase 2,010 shares of closely held stock in ClearPoint Federal Bank & Trust from Curragh Capital Partners II, L.P. (“Curragh”).⁵⁵⁶ The question turned on whether the stock sale agreement was part of de Gorter’s employment contract with the bank or whether it was a distinct and wholly separate arrangement from his employment package.⁵⁵⁷ Simplifying, if it was an employment contract, Curragh would win the litigation; if a stand-alone, de Gorter would win.⁵⁵⁸

The defendants in the case, Curragh and one of its directors, Michael H. Devlin, sought a directed verdict on the question.⁵⁵⁹ But the trial court found the evidence sufficiently conflicting that it allowed the question to go to trial.⁵⁶⁰ The jury found that Curragh had breached its agreement to sell 2,010 shares of ClearPoint stock to de Gorter.⁵⁶¹ The Court of Appeals agreed with this determination, finding that the subsequent trial demonstrated that both sides had evidence arguably supporting their respective positions.⁵⁶²

The trial court subsequently ordered specific performance, ordering that Curragh complete the stock sale once de Gorter had received all necessary approvals from the appropriate regulatory agency.⁵⁶³

Curragh argued that the trial court abused its discretion in awarding de Gorter specific performance of the stock sale, arguing that specific performance was unwarranted because an adequate remedy, i.e., monetary damages, was

551. *Id.* at 775–76.

552. *Id.* at 776 (discussing *Kesler v. Marshall*, 792 N.E.2d 893 (Ind. Ct. App. 2003)).

553. *Id.* at 776–77 (citing *Metro Holdings One, LLC v. Flynn Creek Partner, LLC*, 25 N.E.3d 141 (Ind. Ct. App. 2014)).

554. This is a lesson Elon Musk learned as well when he tried to renege on his contract to purchase Twitter, Inc., as alluded to in the text accompanying *supra* note 132.

555. 257 N.E.3d 807 (Ind. Ct. App.), *trans. denied sub nom.*, *Devlin v. DeGorter*, 265 N.E.3d 1000 (Ind. 2025).

556. *Id.* at 812.

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.*

561. *Id.*

562. *Id.* at 816.

563. *Id.* at 812.

available at law.⁵⁶⁴ The Court of Appeals reports that the trial court was “not persuaded” by the foreign authority relied on by Curragh and “instead applied relevant Indiana law.”⁵⁶⁵

In point of fact, the Court of Appeals had held in 1911 that closely-held stock is unique such that monetary damages may not be an adequate remedy for a breach of a sales agreement for closely-held stock.⁵⁶⁶ More recently, the Court reaffirmed that “[i]t is well settled in Indiana that a trial court sitting in equity has the authority to mold its decree to meet the case in the record when the plaintiff’s complaint contains a general prayer as well as a specific prayer for relief.”⁵⁶⁷

De Gorter had argued to the trial court that “shares in a closely-held, highly-regulated entity such as ClearPoint should be treated as unique property similar to real estate for the purposes of determining whether specific performance is appropriate.”⁵⁶⁸ The trial court agreed, finding that “the evidence shows that shares in ClearPoint are unique properties for which specific performance can be an appropriate remedy.”⁵⁶⁹

The Court of Appeals concluded:

Given our prior decisions indicating that specific performance may be appropriate in cases involving the sale of closely-held stock coupled with the facts and circumstances of this case, we cannot say that the trial court abused its discretion in finding that monetary damages would not be an adequate remedy in this case.⁵⁷⁰

Curragh also argued that the trial court abused its discretion in ordering specific performance because the sale could not be completed without approval from the Office of the Comptroller of the Currency (“OCC”), a federal banking regulator.⁵⁷¹ Generally, “[a] court may not grant specific performance when the subject matter of the contract no longer exists or is beyond the control of the parties.”⁵⁷²

The trial court in fact acknowledged that “[i]t is axiomatic that courts of equity will only order specific performance when the contract is capable of

564. *Id.* at 820.

565. *Id.*

566. *See* *Vernon, G. & R.R. Co. v. Washington Civil Twp.*, 95 N.E. 599, 602 (Ind. App. 1911).

567. *Krukemeier v. Krukemeier Mach. & Tool Co.*, 551 N.E.2d 885, 889 (Ind. Ct. App. 1990).

568. *Devlin*, 257 N.E.3d at 820.

569. *Id.* at 820–21.

570. *Id.* at 822.

571. The Court of Appeals said that for de Gorter to acquire ten percent or more of ClearPoint’s stock, with respect to which he would be deemed a “Control Party” under federal banking regulations, he was required to obtain approval from the OCC. *Id.* at 813.

572. *Id.* at 822.

being performed.”⁵⁷³ However, the trial court noted that de Gorter had previously obtained the required OCC approval, the approval for which only lapsed due to Curragh’s breach.⁵⁷⁴ As the Court of Appeals noted:

While the trial court acknowledged that de Gorter would have to re-obtain approval to become a Control Party from the OCC, it noted that “the ClearPoint shares at issue remain in the possession of Curragh,” and that it had the “authority to order Curragh to comply with an equitable remedy that results from this action, which can include the specific performance of its contract with [de Gorter].”⁵⁷⁵

The Court of Appeals agreed with the trial court that “it would be inequitable to deny de Gorter specific performance when he ‘had attempted to comply with the conditions of sale by obtaining OCC approval[,]’ only for that approval to lapse ‘due to the actions of [Curragh] in failing to follow through on the sale.’”⁵⁷⁶

The trial court also ordered that Curragh and Devlin be jointly and severally liable for payment of the attorneys fees incurred by de Gorter during the regulatory-approval process.⁵⁷⁷ Here’s what the Court of Appeals said:

While Devlin was not found personally responsible for any alleged breach of duty, it was alleged that he was the individual responsible for orchestrating Curragh’s breach. Given the trial court’s broad discretion in fashioning equitable remedies, coupled with the complete lack of any authority cited by Appellants supporting their claim of error, we conclude that the trial court did not abuse its discretion in this regard.⁵⁷⁸

It seems to this Article’s author that Devlin would be protected by both the bedrock principle of limited liability and the business judgment rule. However, the defendants did not raise this issue in their transfer petition which in any event was denied.⁵⁷⁹

M. Quantum Meruit

In *Menendez v. Hahn Surveying Group, Inc.*, Menendez had a contract with Hahn for Hahn to prepare a survey of some property, split the parcel into two

573. *Id.*

574. *Id.*

575. *Id.* (alteration in original).

576. *Id.* at 823 (first alteration in original).

577. *Id.*

578. *Id.*

579. *Devlin v. DeGorter*, 265 N.E.3d 1000 (Ind. 2025) (denying transfer).

tracts, and prepare a “secondary REPLAT certified drawing” for \$2,950.⁵⁸⁰ After doing the first survey, Hahn says he told Menendez that the property was too small to split into two tracts and that Menendez said he would look into it.⁵⁸¹ After some time passed, Hahn sent Menendez a bill for \$1,950.⁵⁸² This case is Hahn’s small claims case to collect.⁵⁸³ The Small Claims Court ruled in favor of Hahn, and the Court of Appeals affirmed.⁵⁸⁴

But Judge Mathias writes a strong dissent, arguing that the evidence is clear that Hahn never completed the second part of the contract and that the basis that the majority uses to provide Hahn with partial payment—the doctrine of quantum meruit—is not applicable here, saying that “the general rule in Indiana is that the *nonbreaching* party is the party with options for its remedies, including any quantum-merit [sic] recovery.”⁵⁸⁵

CONCLUSION

One issue of agency law that is a major focus of this Article’s author’s teaching is a business’s liability for torts committed by its agents. This is often called the doctrine of respondeat superior or vicarious liability, and for such liability to exist, the torts must be committed within the scope of the agent’s employment. The “scope of employment” requirement has often made it difficult to find an employer vicariously liable for its employee’s sexual assault precisely because of the difficulty of proving a sexual assault was within the scope of employment.

During the Survey Period, the prestigious American Law Institute enacted a new section of the Restatement of Torts at its 2025 annual meeting, providing a special rule on vicarious liability for sexual assault.⁵⁸⁶ The new section relies heavily on a decision of the Indiana Supreme Court, *Cox v. Evansville Police Dep’t*,⁵⁸⁷ written by Chief Justice Loretta Rush. The new rule provides as follows:

(a) Notwithstanding [the Restatement’s general rules on vicarious liability of employers for torts of employees committed within the scope of employment], a factfinder may find an employer vicariously liable for its employee’s sexual assault of a victim if:

580. 245 N.E.3d 676, 2024 WL 4285435, at *1 (Ind. Ct. App. 2024) (unpublished table decision).

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.* at *3.

585. *Id.* at *3–4 (Mathias, J., dissenting) (citing *Fischer v. Heymann*, 12 N.E.3d 867, 872–73 (Ind. 2014)).

586. *Torts: Miscellaneous Provisions Is Approved*, A.L.I. (May 19, 2025), <https://www.ali.org/news/articles/torts-miscellaneous-provisions-approved> [<https://perma.cc/L8LZ-MWC2>].

587. 107 N.E.3d 453, 464 (Ind. 2018).

- (1) the nature or conditions of the employee's employment creates a reasonably foreseeable risk of sexual assault;
- (2) the victim is particularly vulnerable, by reason of age, mental capacity, disability, incarceration, detention, confinement, medical need, or other similar circumstance;
- (3) the employer facilitates the sexual assault by providing the employee with substantial power, authority, or influence over the victim;
- (4) the sexual assault occurs when the employee is performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.

If the plaintiff fails to satisfy Subparagraphs (1)-(4), whether an employer is vicariously liable for its employee's sexual assault is governed by § 5.

(b) Notwithstanding Subsection (a), an employer is not vicariously liable under this Section for a sexual assault committed by a supervisor on a subordinate. Whether an employer is vicariously liable for its employee's sexual assault of a fellow employee is governed by [the Restatement's general rule on vicarious liability of employers for torts of employees committed within the scope of employment].⁵⁸⁸

The Reporters' Note references *Cox* on several occasions. In particular, in explaining the rationale for the new rule, the Note starts with an extensive quotation from *Cox*:

The scope of employment extends beyond authorized acts for two key reasons. First, it is equitable to hold people responsible for some harms arising from activities that benefit them. When employees carry out assigned duties, those employment activities "further the employer's business" to an appreciable extent, benefiting the employer. But delegating employment activities also carries an inherent risk that those activities will naturally or predictably give rise to injurious conduct. When that happens, the employer is justly held accountable since the risk accompanies the employer's benefit.

Second, holding employers liable for those injurious acts helps prevent recurrence. Employers can take measures—like selecting employees

588. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 11 (A.L.I., Tentative Draft No. 4, 2025).

carefully and instituting procedures that lessen employment dangers—to reduce the likelihood of tortious conduct. Since employers have some control over the risk of injurious conduct flowing from employment activities, imposing liability on employers for that conduct encourages them to take preventive action.⁵⁸⁹

In explaining the relevance of the employee's power, authority, or influence over the victim, the Note again began by quoting *Cox* at some length:

Cities are endowed with the coercive power of the state, and they confer that power on their police officers. Those officers, in turn, wield it to carry out employment duties—duties that may include physically controlling and forcibly touching others without consent. For this reason, when an officer carrying out employment duties physically controls someone and then abuses employer-conferred power to sexually assault that person, the city does not, under respondeat superior, escape liability as a matter of law for the sexual assault.⁵⁹⁰

It is a source of great pride that our Supreme Court has made such a demonstrable contribution to the development of American common law in this extremely important area.

589. *Id.* § 11 reporters' note cmt. c (quoting *Cox*, 107 N.E.3d at 461–62).

590. *Id.* § 11 reporters' note cmt. j. (quoting *Cox*, 107 N.E.3d at 456).