

1998 SURVEY OF INDIANA CONTRACT AND BUSINESS LAW

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INTRODUCTION

This Article summarizes and comments upon selected appellate decisions during the survey period (November 1, 1997, to November 1, 1998)¹ in the areas of Indiana contract and business law. This Article does not include in-depth examination of decisions that, although they contain discussion about some contract principles or doctrine, are more appropriately addressed in the context of a survey of another area of substantive law, such as commercial law,² insurance law,³ tort law,⁴ real property law,⁵ and business law.⁶ Similarly, this

1. This Article includes a few cases decided after November 1, 1998. In the interest of maintaining some semblance of brevity, this Article focuses only on federal and state appellate court decisions. There are, however, several published decisions from the United States District Courts in Indiana during the survey period that address and resolve important business and contract disputes. *See, e.g.,* *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667 (S.D. Ind. 1998); *Hayden v. Allstate Ins. Co.*, 5 F. Supp. 2d 649 (N.D. Ind. 1998); *Seegers v. Pioneer Hi-Bred Int'l, Inc.*, 997 F. Supp. 1124 (N.D. Ind. 1998); *Natare Corp. v. Aquatic Renovation Sys., Inc.*, 987 F. Supp. 695 (S.D. Ind. 1998); *Deans v. Tutor Time Child Care Systems, Inc.*, 982 F. Supp. 1330 (S.D. Ind. 1998). In addition, the author's review of Indiana statutes found no significant revisions addressing contract and business law.

2. *See, e.g.,* *Indiana-American Water Co. v. Town of Seelyville*, 698 N.E.2d 1255 (Ind. Ct. App. 1998) (containing a helpful distinction between an indefinite quantities contract and a requirements contract).

3. *See, e.g.,* *American Family Life Assurance Co. v. Russell*, 700 N.E.2d 1174 (Ind. Ct. App. 1998) (interpreting an exclusion); *Jones v. Western Reserve Group*, 699 N.E.2d 711 (Ind. Ct. App. 1998) (interpreting policy language); *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667-69 (Ind. 1997) (recognizing, inter alia, that contracts of insurance are governed by the same

Article does not include an in-depth analysis of those opinions issued during the survey period that apply quasi-contract doctrine.⁷

I. SURVEY OF 1998 INDIANA CONTRACT LAW

A. Contract Formation

1. *Offer and Acceptance.*—In *I.C.C. Protective Coatings, Inc. v. A.E. Staley Manufacturing Co.*,⁸ I.C.C. Protective Coatings, Inc. (“I.C.C.”) specialized in the application of paints, linings, and other types of protective coatings. A.E. Staley Manufacturing Co. (“Staley”) manufactured various types of corn starches.

rules of construction as are other contracts, that interpretation of an insurance policy is generally a question for the court, and that the power to interpret contracts does not extend to changing their terms); *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 294-96 (Ind. Ct. App. 1997) (utilizing contract principles in determining whether term “suit” in policy was ambiguous); *Engelking v. Estate of Engelking II*, 686 N.E.2d 932, 933 (Ind. Ct. App. 1997) (recognizing that an insurance policy is a contract and is subject to the same rules of interpretation as are other contracts) (citing *Iemma v. Adventure RV Rentals, Inc.*, 632 N.E.2d 1178, 1182 (Ind. Ct. App. 1994)).

4. See, e.g., *Hagerman Const., Inc. v. Copeland*, 697 N.E.2d 948, 962-63 (Ind. Ct. App. 1998) (dicta concerning whether a clause in an agreement purporting to provide indemnity for one of the parties’ own negligence was ambiguous); *CSX Transp., Inc. v. Kirby*, 687 N.E.2d 611, 615 (Ind. Ct. App. 1997) (“A party may not contract against his own negligence.”) (quoting *Freigy v. Gargaro Co.*, 60 N.E.2d 288, 292 (1945)).

5. See, e.g., *Rothe v. Revco D.S., Inc.*, 148 F.3d 672 (7th Cir. 1998) (finding that a 1958 lease agreement did not require lessee’s continuous occupation and use of premises as drugstore under doctrine of implied covenant); *Dvorak v. Christ*, 692 N.E.2d 920, 925 (Ind. Ct. App. 1998) (holding that an agreement to purchase a condominium unit was unambiguous); *Beiger Heritage Corp. v. Montandon*, 691 N.E.2d 1334, 1337 (Ind. Ct. App. 1998); (holding that a “due and payable” phrase used in lease agreement setting forth payment of real estate taxes was unambiguous and not intended to be used any differently from the way parties commonly have used the term in Indiana for decades); *Nelson v. Marchand*, 691 N.E.2d 1264, 1269-70 (Ind. Ct. App. 1998) (interpreting and applying a contract that included a warranty that construction of a home would be done in “good and workmanlike manner”); *R.N. Thompson & Assocs. v. Wickes Lumber Co.*, 687 N.E.2d 617 (Ind. Ct. App. 1997) (discussing a purchaser’s claim that the builder of a home breached the implied warranty of habitability).

6. Part II of this Article includes a substantive treatment of Indiana decisions and developments in the rather broad topic labeled “business law.” One example of an Indiana decision containing language that may be helpful in a contract case although it is treated in detail in Part II of this Article under the rubric of “business law” is *Five Star Concrete, L.L.C. v. Klink, Inc.*, 693 N.E.2d 583 (Ind. Ct. App. 1998) (involving a lawsuit brought by a former member of a limited liability company against the company).

7. See, e.g., *Galanis v. Lyons & Truitt*, 698 N.E.2d 368 (Ind. Ct. App. 1998) (applying quasi-contract *quantum meruit* principles in a case involving attorneys’ fees).

8. 695 N.E.2d 1030 (Ind. Ct. App. 1998).

Staley sought bids from various companies for the application of a protective coating on the interior surfaces of three of its reactor tanks.⁹ I.C.C. submitted a bid, which included a price, a list of specifications for the project, and a provision that I.C.C. retained the right to cure any defective work. I.C.C. sent a letter further detailing the bid, which stated the amount of time necessary to complete the contract, as well as travel, manpower, and equipment rates.¹⁰

Staley eventually awarded the contract to I.C.C. in a purchase order that provided in part:

Provide labor & materials to line a total of three reactor tanks w/ceilcote Flakeline 103 matl. per specification outlined in your quotation All work to be performed using time and material rates outlined in your letter Staley to supply tank watch for confined space entry requirements. I.C.C. to supply monitoring and safety equipment for personnel in tank¹¹

The purchase order also stated that the goods and services were to be purchased "in accordance with the terms of this purchase order, including those terms and conditions printed on the reverse hereof."¹² The terms on the order's reverse side provided that "any additional or different terms proposed by [I.C.C.] in any quotation, offer or otherwise are rejected unless expressly asserted in writing by Staley."¹³

I.C.C. signed and returned Staley's purchase order without objection, and began working on the project. I.C.C. purchased 480 gallons of the protective coating to cover all three tanks. After about a month, I.C.C. ceased work, having used 435 gallons while fully lining one tank and having applied only one coat to the second.¹⁴ The day after I.C.C. ceased performance, Staley objected and arranged for an inspection of the work. The inspection revealed visible areas of materials embedded in the lining and that reactor surfaces were rough and jagged. In the opinion of a former employee of the coating liner, "I.C.C.'s work was the worst that he had ever seen and was far below industry standards."¹⁵ At Staley's request, the former coating company employee sent I.C.C. a letter describing how to correct the defective work. I.C.C. sent Staley a letter indicating that I.C.C. would make all necessary arrangements to repair the work according to the manufacturer's specifications.¹⁶ Despite I.C.C.'s letter, Staley canceled its

9. Staley mixed various substances in the reactor tanks. Staley wanted to use a coating called "Flakeline 103" to avoid reactions between the steel in its reactors and caustic substances used in the manufacturing process. *See id.* at 1032-33.

10. *See id.* at 1033 & n.1.

11. *Id.* at 1033.

12. *Id.*

13. *Id.*

14. *See id.*

15. *Id.*

16. *See id.* at 1033-34.

purchase order the following day and contacted another company to correct the defective work.¹⁷

I.C.C. sued Staley for breach of contract and to foreclose on a mechanic's lien. Staley counterclaimed, asserting claims for, inter alia, breach of contract and breach of warranty. Both parties moved for summary judgment.¹⁸ The trial court granted partial summary judgment to Staley, finding that the general terms and conditions, including the right to cure, had not been incorporated into the purchase order.¹⁹ The case went to trial on the remaining counts, after which the trial court found for Staley.²⁰ I.C.C. appealed. The court of appeals affirmed.²¹

The court addressed two issues: (1) "[w]hether the trial court erred when it determined that I.C.C. did not have the right to cure under the parties' contract;" and (2) "[w]hether the trial court erred when it allowed testimony as to Staley's lost production and profits therefrom."²²

With respect to the first issue, I.C.C. argued that Staley breached the contract when it refused I.C.C.'s offer to cure the defective work. "Specifically, I.C.C. argue[d] that its contract bid, which provided for the right to cure, formed the basis of the parties' agreement."²³ In the alternative, I.C.C. contended "that the bid was incorporated by reference into the parties' contract by operation of Staley's purchase order."²⁴ The court of appeals disagreed.²⁵

The court of appeals resolved the "right to cure" issue as a matter of contract formation. The court did not need to decide whether I.C.C.'s bid was sufficiently detailed to constitute a formal offer.²⁶ Even assuming that it did, Staley's purchase order constituted a counteroffer because it varied the terms and conditions of the proposed agreement. The court pointed out that the purchase order reserved Staley's "right to reject, refuse or revoke any nonconforming goods ordered under the bid or to cancel any nonconforming performance."²⁷ The court also recognized that "[t]he order further stated that the remedies expressly provided by the purchase order were not exclusive of any other remedy allowed by law."²⁸ The court reasoned:

Whether viewed as the original offer or as a counteroffer, the purchase

17. *See id.* at 1034.

18. I.C.C.'s motion was for partial summary judgment; Staley's motion was for a summary judgment on all counts. *See id.* at 1032.

19. *See id.*

20. *See id.*

21. *Id.*

22. *Id.* For an in-depth analysis of the damages issues addressed and resolved by the court, see *infra* Part I.G.

23. *Id.* at 1034.

24. *Id.*

25. *Id.*

26. *Id.* at 1035.

27. *Id.*

28. *Id.*

order was the offer which formed the basis of the parties' agreement. By signing and returning the purchase order, I.C.C. accepted the offer and, thus, entered into a binding agreement according to the terms and conditions set forth in the order. Absent a showing by I.C.C. that the parties did not intend the purchase order to be the sole memorial or integration of the contract . . . we must conclude that I.C.C. did not have the right to cure.²⁹

Staley also argued that the purchase order contained an integration clause "confirm[ing] that the order was intended to be the sole memorial of the parties' agreement."³⁰ Indeed, the purchase order included a clause providing that "any additional or different terms proposed by [I.C.C.] in any quotation, offer or otherwise [is to be incorporated into this contract] . . . unless expressly asserted in writing by Staley."³¹ The court agreed and, noting that the foregoing language was clear and unambiguous, concluded: "By signing Staley's purchase order without objection, I.C.C. obligated itself to the terms and conditions set forth in the order. Thus, we hold that the parties' contract was fully integrated and that we cannot consider parol evidence to determine whether I.C.C. had the right to cure."³²

The court also disagreed with I.C.C.'s argument that its contract bid and subsequent letter to Staley were incorporated by reference into the purchase order. The court pointed out that the purchase order referred only to certain, specified sections of I.C.C.'s bid and letter.³³ The order specifically referred to the application process outlined in the bid and to the rates and time specifications outlined in the letter. Thus, according to the court, "the purchase order incorporated only those sections into the parties' agreement. All other sections, including the disputed right to cure, were not incorporated into the agreement."³⁴

2. *Existence of Oral Contract.*—In *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*,³⁵ Wal-Mart acquired several food stores owned by Wholesale Club, Inc. ("Wholesale Club") and afterward operated them under the Sam's Club trade name. Wholesale Club had hired Creative Demos to perform food

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1036.

33. *Id.*

34. *Id.* The *I.C.C.* court also disagreed with I.C.C.'s public policy argument that it was entitled to cure its performance deficiencies as a matter of the agreement. I.C.C. argued "that the opportunity to cure [was] a condition precedent for an action for breach of the implied warranty of fitness for habitation" and "that a right to cure was provided under the statutes controlling the sale of goods, automobiles, and health spas." *Id.* Citing Indiana's presumption that contracts represent the freely bargained agreements of parties and the public's interest not to restrict unnecessarily peoples' freedom of contract, the court determined that the right to cure, although recognized in several settings, is not guaranteed in every contract, regardless of the parties' actual agreement. *Id.*

35. 142 F.3d 367 (7th Cir. 1998).

demonstrations in the stores. In January 1991, a month before Wal-Mart took over, one of Wal-Mart's employees told Creative Demos that Wal-Mart would use its services through September 1991, after which Wal-Mart would conduct demonstrations in-house.³⁶ Wal-Mart replaced Creative Demos in March 1991, and thereafter Creative Demos filed suit. A jury awarded Creative Demos more than \$7 million on their claim of early termination.³⁷

On appeal, the Seventh Circuit Court of Appeals addressed the issues in four distinct areas: contract, promissory estoppel, fraud, and unjust enrichment.³⁸ This Article addresses in detail only the contract issue. In that regard, the Seventh Circuit agreed with the district court's decision to grant summary judgment to Wal-Mart on Creative Demos' claim that the Wal-Mart employee's statement created a contract for a definite term.³⁹ The court found crucial the fact that Wal-Mart and Creative Demos never reached agreement on issues such as whether Creative Demos' work could be terminated and for what cause.⁴⁰

In another case involving an allegedly oral contract, *Lakes & Rivers Transfer v. Rudolph Robinson Steel Co.*,⁴¹ the Rudolph Robinson Steel Company ("Robinson") entered into an agreement with Orion Maritime, Inc. ("Orion") "to ship some imported steel to the United States for sale to Robinson's customers in the Midwest."⁴² A liner owned and operated by Orion was to ship the steel to Detroit and Chicago. Per the agreement, Robinson was to provide and pay for stevedores to unload cargo from the ship.⁴³ "The ship first docked at Detroit, where only a part of the steel bound for Detroit was unloaded. Orion then, on its own initiative, diverted the ship to Burns Harbor, Indiana, which was not one of its scheduled ports."⁴⁴ Stevedores unloaded the remainder of the cargo there.

Because Orion's diversion caused Robinson to incur additional expenses, Orion agreed to order and pay for the stevedoring services associated with the discharge of the cargo when the ship arrived at Burns Harbor.⁴⁵ While Robinson and Orion were negotiating that agreement, a Robinson employee called Lakes and Rivers Transfer ("Lakes & Rivers") to determine their rates for unloading so

36. *See id.* at 368.

37. The district court reduced the award to \$681,263. *See id.* at 369.

38. *Id.* at 369-73.

39. *Id.* at 369.

40. *Id.* With respect to the quasi-contract promissory estoppel issue, the jury concluded that Creative Demos was entitled to \$681,126 because the Wal-Mart employee's statement caused Creative Demos to rely on an expectation of conducting demonstrations through September. *See id.* The award was the jury's estimate of lost profits. As the court pointed out, however, promissory estoppel does not support lost profits damages in Indiana. The court also took issue with whether the reliance worked to Creative Demos' detriment. *Id.*

41. 691 N.E.2d 1294 (Ind. Ct. App. 1998).

42. *Id.* at 1295.

43. *See id.*

44. *Id.*

45. *See id.*

that Robinson could decide whether Orion's offer would adequately defray its additional transportation expenses. During the telephone conversation, no one discussed who would pay for the services.⁴⁶

Before the ship arrived at Burns Harbor, a local agent for Orion called Lakes & Rivers and indicated that the ship would be arriving shortly and needed to be unloaded quickly. The agent did not say who he was representing, but the Lakes & Rivers employee knew the agent and knew that he usually represented ship owners.⁴⁷ The day before the ship arrived, Lakes & Rivers sent a fax to Robinson, inquiring about who would be responsible for the stevedoring charges.⁴⁸ A week after the ship was unloaded, Lakes & Rivers again asked Robinson who would be responsible for the stevedoring costs. Robinson responded that Orion would be responsible.⁴⁹ After repeated unsuccessful attempts to collect from Orion, Lakes & Rivers demanded payment from Robinson.

Lakes & Rivers eventually sued Robinson, and on cross motions for summary judgment, the trial court granted summary judgment for Robinson.⁵⁰ Lakes & Rivers appealed, arguing that the parties entered into an oral contract that bound Robinson to pay for the stevedore services that Lakes & Rivers provided by virtue of Robinson's telephone inquiry about Lakes & Rivers' rates.⁵¹

The court of appeals affirmed the trial court's decision, recognizing first that a completed oral contract under Indiana law requires all parties to agree to all terms of the contract.⁵² According to the appellate court, the parties did not agree on a crucial term of the alleged contract, namely "who was to pay for the services [Lakes & Rivers] was to provide."⁵³ Robinson's employee never represented to Lakes & Rivers, either orally or in writing, that Robinson was going to be responsible for the stevedore services. Rather, according to the court, "the evidence indicate[d] nothing more than that the [Lakes & Rivers] employee who spoke to the Robinson employee 'assumed' Robinson would pay, and assumed Orion was not responsible for the payment."⁵⁴ On those facts, the court was unwilling to hold that a mere inquiry about the price of a product or service, without more, creates a binding contract that obligates the inquiring party to purchase the product or service.⁵⁵ Thus, the court affirmed the trial court's

46. *See id.*

47. *See id.*

48. *See id.*

49. Orion repeatedly acknowledged its responsibility to pay the stevedoring charges, but for reasons not discussed, Orion never paid. *See id.* at 1296.

50. *See id.*

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* In addition, the court disagreed with Lakes & Rivers that Robinson was estopped

decision that the parties never reached an agreement on the terms and conditions alleged.

3. *Implied in Fact Contract.*—*Matter of J.W. v. Hendricks County Office of Family & Children*⁵⁶ marks Indiana's most recent published appellate decision with respect to implied in fact contracts. In *Matter of J.W.*, the Office of Family and Children ("OFC") filed a petition alleging that J.W. was a child in need of services due to his family's inability to adequately supervise him. The juvenile court placed temporary wardship with the OFC.⁵⁷ Among other things, the court ordered J.W.'s family to submit financial statements and insurance information to the OFC and to establish a child support account with the county clerk.⁵⁸ The family opened the account, filed a financial declaration, and provided the OFC case manager with insurance information.

Although J.W. initially stayed in his parents' home, OFC ultimately placed him with a private secure care facility. The juvenile court then entered a dispositional decree, ordering J.W.'s family to reimburse the OFC for placement costs.⁵⁹ After five months, J.W. returned home. The OFC petitioned the juvenile court for an order directing J.W.'s family to reimburse the OFC for J.W.'s total unpaid placement costs of \$39,655.72. After a hearing, the juvenile court granted the motion.⁶⁰

J.W.'s family appealed, raising two issues. The second of the two issues was whether an implied contract existed between the family and the OFC that obligated the OFC to place J.W. in a facility covered by the family's insurance.⁶¹ According to J.W.'s family, the implied contract was created when they provided the OFC with insurance information and informed the case manager that their insurance policy required pre-approval for J.W.'s placement. They further claimed that the OFC breached the implied contract by placing J.W. in a facility not covered by their insurance.⁶²

The court first set forth the requirements for an implied in fact contract in

to deny the existence of a contract. The court pointed out that the evidence did not disclose any representation or concealment by Robinson that induced Lakes & Rivers to act to its detriment. According to the court, "[Lakes & Rivers] unloaded Robinson's cargo at the request of Orion's agent, without first determining who would be responsible for payment. When Robinson was finally asked by [Lakes & Rivers] who would pay for the stevedore services, Robinson responded that Orion was responsible." *Id.* at 1297. The court simply found no support for the suggestion that Lakes & Rivers would not have performed its services had it known Orion, and not Robinson, was responsible for payment. *Id.*

56. 697 N.E.2d 480 (Ind. Ct. App. 1998).

57. *See id.* at 481.

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.* at 484. The first issue was whether the juvenile court erred in ordering J.W.'s family to reimburse the OFC for the placement costs. *See id.* at 481-82.

62. *See id.* at 482.

Indiana:

An implied in fact contract refers to the class of obligations which arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words A contract implied in fact arises out of acts and conduct of the parties, coupled with a meeting of the minds and a clear intent of the parties in the agreement.⁶³

Because there was no evidence of a mutual agreement between the parties and because the OFC did not manifest a clear intent to place J.W. in a facility covered by the family's insurance, the court of appeals refused to reverse the trial court and to imply a contract.⁶⁴

B. Consideration

1. *Unenforceable Promises.*—In *In re Marriage of Arvin*,⁶⁵ the Arvins separated in 1996, at which time they reached a dissolution settlement. Craig Arvin was not represented by counsel. Kim Arvin's attorney drafted the settlement agreement. The trial court entered a decree of dissolution, which merged and incorporated the settlement agreement.⁶⁶ The settlement agreement provided for the settlement of all "issues attendant upon the dissolution of the marriage" and was agreed upon "in consideration of the mutual covenants contained herein."⁶⁷ The agreement also provided that the parties would have joint legal custody of the couple's two children and that the settlement agreement was made with the understanding that each party intended to remain in the Kokomo area to maintain the stability of the children. Another provision stated that no modification of the agreement would be valid unless in writing and executed by both parties.⁶⁸

Immediately after the trial court entered the decree, Kim discharged her attorney, retained new counsel, and filed a motion requesting relief from the agreement. Kim argued that the agreement was entered into "without proper advice and without proper disclosure."⁶⁹ Kim then moved the children and herself over 100 miles from Kokomo to be with her new boyfriend and to obtain more suitable employment. She also filed a notice of intention to leave the

63. *Id.* at 484 (citing *McCart v. Chief Executive Officer in Charge, Indep. Fed. Credit Union*, 652 N.E.2d 80, 85 (Ind. Ct. App. 1995)).

64. *Id.* at 484. The court also supported its decision by noting that the state has a compelling interest in protecting the welfare of children and advancing their best interests. In the case before it, the court pointed out that the OFC determined that it was in J.W.'s best interests to be placed in the facility they chose. *Id.*

65. 689 N.E.2d 1270 (Ind. Ct. App. 1998).

66. *See id.* at 1270-71.

67. *Id.* at 1272.

68. *See id.*

69. *Id.*

jurisdiction.⁷⁰ At that point, Craig filed a motion asking that the court require Kim to show cause why she should not be held in contempt for moving out of the Kokomo area in violation of the settlement/decreed.

The parties ultimately tried all issues to the bench, after which the trial court denied Kim's motion to correct error but refused to hold her in contempt of court, finding that the move was "reasonable and further that she has provided to [Craig] extensive visitation with the children since the move."⁷¹ Craig appealed, and the court of appeals reversed.⁷²

On appeal, Kim argued that the covenant providing that the parties intended the children to remain in the Kokomo area was unenforceable because it was a vague recital of the parties' intentions and understandings. Kim also argued that the prohibition against modification was unenforceable because it violated public policy.⁷³ With respect to the second argument, the court agreed that the prohibition was most likely unenforceable, but the enforceability or the ability to modify the provision was insignificant under the circumstances because it was clear that Kim had no intention of honoring the covenant and instead immediately repudiated it.⁷⁴ According to the court, "[r]egardless of whether the covenant had been legally binding, it constituted sufficient consideration to support the parties' agreement regarding child custody such that [Kim] could not immediately repudiate the covenant without restoring [Craig's] rights to the status quo."⁷⁵

With respect to the provision against moving the children, the court first recognized that even an unenforceable promise may constitute sufficient consideration to support a contract in Indiana.⁷⁶ The court then determined that the parties' covenant that they intended the children to remain in the Kokomo area to maintain their stability constituted sufficient consideration to support the agreement regarding child custody disposition.⁷⁷ Kim's immediate repudiation of her covenant constituted a failure of consideration with respect to the independent covenant of the agreement regarding child custody.⁷⁸ Because Kim made no attempt to return Craig to the status quo by relinquishing the benefit that accrued to her under the independent covenant (i.e., that she be awarded primary physical custody), the court reversed the trial court's decision with instructions that the child custody disposition in the agreement be held voidable at Craig's election and that the initial custody determination of the children be submitted

70. *See id.*

71. *Id.*

72. *Id.* at 1274.

73. *See id.* at 1272-73.

74. *Id.* at 1273.

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.* at 1273-74.

for trial.⁷⁹

2. *Independent Consideration for Unilateral Employment Contracts.*—Although the focus of the case was on the employment-at-will doctrine in Indiana, the Supreme Court of Indiana in *Orr v. Westminster Village North, Inc.*,⁸⁰ recognized in dicta that the court has yet to expressly address and resolve whether unilateral contracts in the employment context always require adequate independent consideration and whether an employee handbook can ever constitute a unilateral contract serving to modify the otherwise at-will employment relationship.⁸¹ The *Orr* court expressly declined to use the case as a vehicle for resolving the issue.⁸² Footnotes in the court's opinion reveal that decisions from the Indiana Court of Appeals on the issue are not "entirely clear and consistent,"⁸³ and that a number of decisions have held, "without discussing the adequate independent consideration requirement, that the terms of an employee handbook are irrelevant unless the employment contract is one for a definite term."⁸⁴

C. Enforceability of Exculpatory Clauses

1. *Advertising Agreement.*—In *Trimble v. Ameritech Publishing, Inc.*,⁸⁵ an Ameritech advertising representative met with Trimble, a business owner who wanted to advertise in the Yellow Pages, to execute a written advertising order. The advertising contract Trimble signed provided "that any damages resulting from Ameritech's failure to publish the advertisement would be limited to the amount paid for the advertising or the contract price, whichever is the lesser."⁸⁶ The contract also contained the following exculpatory clause:

Publisher's liability: . . . if publisher should be found liable for loss or damage due to a failure on the part of the publisher or its directory, in any respect, regardless of whether customer's claim is based on contract, tort, strict liability or otherwise, the liability shall be limited to an amount equal to the contract price for the disputed advertisements, or that sum of money actually paid by the customer toward the disputed advertisements, whichever sum shall be less, as liquidated damages and

79. *Id.* at 1274.

80. 689 N.E.2d 712 (Ind. 1997).

81. *Id.* at 719.

82. *Id.*

83. *Id.* at 719 n.13 (comparing *Tuthill Corp. v. Wolfe*, 451 N.E.2d 72, 75, 78 (Ind. Ct. App. 1983) with *Seco Chems., Inc. v. Stewart*, 349 N.E.2d 733, 738 (Ind. App. 1976)).

84. *Id.* at 720 n.14 (citing *Tri-City Comprehensive Community Mental Health Ctr., Inc. v. Franklin*, 498 N.E.2d 1303, 1305-06 (Ind. Ct. App. 1986); *Mead Johnson & Co. v. Oppenheimer*, 458 N.E.2d 668, 671 (Ind. Ct. App. 1984); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1062 (Ind. Ct. App. 1980); *Shaw v. S.S. Kresge Co.*, 328 N.E.2d 775, 778-79 (Ind. App. 1975)).

85. 700 N.E.2d 1128 (Ind. 1998).

86. *Id.*

not as a penalty, and this liability shall be exclusive. In no event shall publisher be liable for any loss of customer's business, revenues, profits, the cost to the customer of other advertisements or any other special, incidental, consequential or punitive damages of any nature, or for any claim against the customer by a third party. . . .⁸⁷

After Ameritech failed to publish Trimble's advertisement, Trimble filed suit seeking damages for loss of business resulting from the omission of advertisement. When Trimble filed suit, he had not been charged nor had he paid any money for the advertisement. The trial court granted summary judgment for Ameritech.⁸⁸ The court of appeals reversed.⁸⁹ The supreme court reversed the court of appeals, affirming the trial court's original decision to grant summary judgment and holding that exculpatory clauses such as Ameritech's are enforceable.⁹⁰

The *Trimble* court first recognized the existence of two similar court of appeals cases, each of which involved Ameritech's previous failures to publish one of its customer's advertisements in the Yellow Pages: *Pigman v. Ameritech Publishing, Inc.*⁹¹ and *Pinnacle Computer Services, Inc. v. Ameritech Publishing, Inc.*⁹² The court in *Pigman* held that "the exculpatory clause contained in [Ameritech's] Yellow Pages advertising contract was unconscionable and void as against public policy as a matter of law."⁹³ The court in *Pinnacle* rejected *Pigman*, and held that "the exculpatory clause in Ameritech's Yellow Pages order was valid and enforceable."⁹⁴

The *Trimble* court cites several cases recognizing parties' contractual freedom and the public's interest in not restricting that freedom unnecessarily.⁹⁵ The court also identifies five factors that courts and parties should consider when determining whether a contract that is not otherwise prohibited by statute nor tends to injure the public contravenes public policy:

(1) the nature of the subject matter of the contract; (2) the strength of the public policy underlying any relevant statute; (3) the likelihood that refusal to enforce the bargain or term will further any such policy; (4) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (5) the parties' relative bargaining

87. *Id.* at 1128-29.

88. *See id.* at 1128.

89. *See id.*

90. *Id.*

91. 641 N.E.2d 1026 (Ind. Ct. App. 1994).

92. 642 N.E.2d 1011 (Ind. Ct. App. 1994).

93. *Pigman*, 641 N.E.2d at 1035.

94. *Pinnacle*, 642 N.E.2d at 1019.

95. *Trimble*, 700 N.E.2d at 1129 (citing *Continental Basketball Ass'n v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 139 (Ind. 1996); *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995); *Weaver v. American Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971)).

power and freedom to contract.⁹⁶

When applying the foregoing factors to the case at hand, the *Trimble* court pointed out that the second and third factors did not apply.⁹⁷ With respect to the other three factors, the court adopted the reasoning of the court of appeals in *Pinnacle* because the reasoning in that case “correctly resolves these considerations in favor of enforceability of the contract.”⁹⁸ In so doing, the supreme court expressly rejected the decision in *Pigman*.⁹⁹

2. *Lease Agreement*.—In *Vertucci v. NHP Management Co.*,¹⁰⁰ the Vertuccis rented an apartment in the Bent Tree apartment complex in Indianapolis. Before renting the apartment, Vertucci asked about security at the complex because his two teenage daughters would be largely unsupervised during the day while he and his wife were at work. Employees assured him that there was security at the complex.¹⁰¹ In addition, Bent Tree employees issued identification cards to every member of his family. Vertucci understood that the cards were to ensure that only tenants and their guests were using the common areas.

The lease agreement the Vertuccis signed contained the following provision:

Tenant agrees that landlord, its employees, or agents shall not be liable for any damage or injury to Tenant, Tenant's family, agents, employees, or guests, or to any person entering the premises or the building of which the leased premises are a part, for injury to person or property arising from theft, vandalism, fire, or casualty occurring in the premises or the building. LANDLORD IS NOT RESPONSIBLE FOR, AND DOES NOT GUARANTEE, THE SAFETY OF TENANT, TENANT'S GUESTS, FAMILY, EMPLOYEES, AGENTS, OR INVITEES. TENANT AGREES TO LOOK SOLELY TO THE PUBLIC POLICE AUTHORITIES FOR SECURITY AND PROTECTION. ANY SECURITY THAT MAY BE PROVIDED IS SOLELY FOR THE PROTECTION OF LANDLORD'S PROPERTY. . . .¹⁰²

After a non-resident sexually assaulted one of his daughters at the complex's swimming pool, Mr. Vertucci and his wife, as parents and natural guardians for their daughter, sued the complex's management company and related entities. The trial court granted the company's motion for summary judgment, which argued that it did not owe any duty to protect the Vertuccis from a third party criminal attack.¹⁰³

The Vertuccis appealed. The court of appeals ultimately reversed the trial

96. *Id.* at 1130.

97. *Id.*

98. *Id.*

99. *Id.*

100. 701 N.E.2d 604 (Ind. Ct. App. 1998).

101. *See id.* at 605.

102. *Id.* at 606 (emphasis in original).

103. *See id.* at 604.

court's decision with respect to whether the company owed such a duty.¹⁰⁴ In doing so, the *Vertucci* court first determined that the exculpatory clause in the company's lease did not prevent the company from having or assuming a duty to protect the Vertucci's daughter from the criminal actions of a third party.¹⁰⁵

Although much of the court's opinion focuses on the negligence aspects of the case, the court first addressed the company's initial argument that the lease language quoted above effectively disclaimed its liability for injuries to tenants.¹⁰⁶ As the court wrote, the exculpatory clause in Bent Tree's lease form applied specifically to "*theft, vandalism, fire or casualty.*"¹⁰⁷ The parties disagreed about whether the assault at issue was a "casualty" as interpreted by the lease, and the lease itself did not define the term.¹⁰⁸ To resolve the quandary, the court turned to Black's Law Dictionary, which defines "casualty" as "[a] serious or fatal accident" or a "disastrous occurrence due to sudden, unexpected or unusual cause" or an "[a]ccident; misfortune; or mishap; that which comes by chance or without design[.]"¹⁰⁹

The court strictly construed the term "casualty" against Bent Tree, the lease's drafter, concluding that an intentional act such as that perpetrated against the Vertucci's daughter would not be considered a "casualty."¹¹⁰ Accordingly, the court held that the exculpatory clause did not prevent Bent Tree from having or assuming a duty as the Vertuccis alleged.¹¹¹

3. *Health Club Membership Agreement.*—In *Powell v. American Health Fitness Center of Fort Wayne, Inc.*,¹¹² Freda Powell signed a membership agreement to become a member at American Health's fitness center in Fort Wayne. The agreement contained the following exculpatory clause:

17. DAMAGES: By signing this agreement and using the Club's premises, facilities and equipment, Member expressly agrees that the Club will not be liable for any damages arising from personal injuries sustained by member or his guest(s) in, on, or about the Club, or as a result of using the Club's facilities and equipment. Member assumes full responsibility for any injuries, damages or losses which may occur to Member or their guest(s) in, on, or about the Club premises or as a result of using the Club's facilities and equipment. Member agrees that the Club shall not be liable for any loss or theft of personal property in or about the Club premises and does hereby fully and forever release and discharge the Club and all associated clubs, their owners, employees and

104. *Id.* at 608.

105. *Id.* at 606.

106. *Id.*

107. *Id.*

108. *See id.*

109. *Id.* (quoting BLACK'S LAW DICTIONARY 218 (6th ed. 1990)).

110. *Id.*

111. *Id.*

112. 694 N.E.2d 757 (Ind. Ct. App. 1998).

agents from any and all claims, demands, damages, rights of action, or causes of action present or future, whether the same be known or unknown, anticipated or unanticipated, resulting from or arising out of Member's or Member's guest(s) use or intended use of said Club premises, facilities or equipment.¹¹³

About a year later, Powell injured her foot while using a whirlpool at American Health's facility. She sued American Health, alleging that her injury was caused by its negligence. American Health filed a motion for summary judgment based upon the foregoing exculpatory clause. The trial court granted the motion, concluding that there was nothing ambiguous about the agreement, that Powell knowingly signed the agreement, and that, as a matter of law, Powell released American Health from liability for her claims.¹¹⁴ Powell appealed, and the court of appeals reversed.¹¹⁵

The issue on appeal was whether the exculpatory clause in the contract released American Health from any liability for Powell's injuries sustained while on American Health's premises and caused by American Health's negligence.¹¹⁶ Powell argued that the exculpatory clause was invalid because it was ambiguous. Specifically, Powell contended that the clause did not explicitly state that a member was releasing the health center from injuries resulting from the health center's own negligence. According to the court, Powell's argument was one of nonspecificity rather than ambiguity.¹¹⁷ Citing *Indiana State Highway Commission v. Thomas*,¹¹⁸ the *Powell* court recognized that the principle of specificity exists with regard to indemnity contracts and requires "an express stipulation as to the indemnitee's negligence" for the indemnity contract to be valid.¹¹⁹ Recognizing the court's prior opinion in *Thomas*, the court held that an exculpatory clause intending to exculpate one party for liability because of its negligence to the other party must both specifically and explicitly refer to the negligence of the party seeking release from liability.¹²⁰

As the court explained, American Health's exculpatory clause did not do so.¹²¹ American Health's exculpatory clause provides that Powell released it from liability for "any damages" and placed the responsibility on Powell for "any injuries, damages or losses."¹²² The clause also provided that Powell "fully and forever release[s] and discharge[s] [American Health] . . . from any and all claims, demands, damages, rights of action, or causes of action present or future

113. *Id.* at 759.

114. *See id.*

115. *Id.* at 758.

116. *See id.*

117. *Id.* at 760.

118. 346 N.E.2d 252, 263 (Ind. App. 1976).

119. *Powell*, 694 N.E.2d at 760.

120. *Id.* at 761.

121. *Id.* at 760-62.

122. *Id.* at 761.

... resulting from or arising out of Member's ... use ... of said Club premises, facilities or equipment."¹²³

According to the *Powell* court, such language never specifically or explicitly referred to the negligence of American Health.¹²⁴ Thus, the court held that, as a matter of law, the exculpatory clause did not release American Health from liability resulting from injuries sustained by Powell while on American Health's premises and caused by American Health's negligence, and that the clause was void to the extent that it purported to do so.¹²⁵

D. Interpretation of Non-Exculpatory Contractual Terms

1. *Employment Agreements.*—The case of *Ruff v. Charter Behavioral Health System of Northwest Indiana, Inc.*,¹²⁶ is interesting in that it involves both a reformation theory and a dispute about contract terms. Ruff was a clinical psychologist and clinical director at a Charter facility in Michigan City. His employment contract provided that he receive a base salary plus 70% commission on all revenues from psychological testing he performed in excess of \$15,000 per year.¹²⁷ After the facility in Michigan City closed, the facility's CEO, Michael Brown, offered Ruff the same position at a Charter facility in Hobart.

Ruff began working in Hobart without knowing what the terms of his employment would be. Brown eventually notified Ruff that Charter's central office had prepared a contract that Ruff needed to sign. "Ruff signed the contract without reading it."¹²⁸ The agreement provided that Ruff would receive an annual salary equal to what he received in Michigan City, but his 70% commission was based on testing in excess of \$108,000 per year.¹²⁹

Ruff's contract provided in relevant part:

The term of this Agreement will be for one (1) year from August 5, 1996 and this Agreement will be self-renewing for additional one (1) year terms unless the Hospital or Psychologist terminates this Agreement as provided herein. Notwithstanding the preceding sentence, this

123. *Id.*

124. *Id.* at 760.

125. *Id.* at 761-62. The court's opinion further explains that the clause was void even though other decisions from Indiana's appellate courts have upheld exculpatory clauses that have used similar language, *e.g.*, *Shumate v. Lycan*, 675 N.E.2d 749, 752 (Ind. Ct. App. 1997), *Terry v. Indiana State Univ.*, 666 N.E.2d 87 (Ind. Ct. App. 1996); *Marshall v. Blue Springs Corp.*, 641 N.E.2d 92, 95 (Ind. Ct. App. 1994). The *Powell* court determined that such decisions were distinguishable because the nonspecificity of the language used "was not put at issue nor addressed." *Powell*, 694 N.E.2d at 762.

126. 699 N.E.2d 1171 (Ind. Ct. App. 1998).

127. *See id.* at 1173.

128. *Id.*

129. *See id.*

Agreement may be terminated by either party at any time, without cause, upon no less than sixty (60) days notice to the other party. If the Hospital terminates the Agreement, the Hospital may direct Psychologist to immediately cease providing services, although the Hospital will continue to be obligated to pay Psychologist those amounts due pursuant to Section 7 during the notice period.

* * *

Psychologist shall receive and Hospital shall pay a base salary at the rate of ninety thousand dollars (\$90,000) per year (the 'Base Salary'), payable in accordance with the Hospital's standard payroll policies.

* * *

Under the terms of this Agreement, Hospital will bill for, collect and retain all fees for Psychologist's services rendered to all patients treated by Psychologist, provided, however, that Hospital agrees to pay to Psychologist as additional compensation hereunder seventy percent (70%) of all net collections exceeding one hundred eight thousand dollars (\$108,000) for Psychological testing. Psychologist shall not participate in any Hospital bonus plan. Upon the termination of this Agreement for any reason whatsoever, Hospital will continue to bill and collect on behalf of Psychologist, all of Psychologist's then outstanding accounts receivable from Psychologist's clinical practice at the Hospital for a period of one hundred eighty (180) days after such termination. Upon expiration of the Agreement, all uncollected accounts will be the property of the Hospital.¹³⁰

Charter terminated Ruff approximately five months later. Ruff brought suit to reform the contract, claiming that Charter fraudulently induced him into signing the contract without reading it by representing that it was identical to his previous contract.¹³¹ Ruff also sought a pro rata share of his commission based on psychological testing he performed in the five months before his termination. Both parties moved for summary judgment. The trial court denied Ruff's motion and granted Charter's, finding, *inter alia*, that Ruff had an opportunity to read the contract but chose not to and that Charter did not coerce or trick him into signing it.¹³² The court of appeals reversed the trial court, holding that factual disputes remained with respect to both the reformation for fraud claim and the amount of commission claim.¹³³

With respect to the reformation claim, the *Ruff* court pointed out that equity has jurisdiction in Indiana

to reform written documents in only two well-defined situations: 1) where there is a mutual mistake— . . . where both parties mistakenly

130. *Id.* at 1175-76.

131. *See id.* at 1173.

132. *See id.*

133. *Id.* at 1176.

execute a document that does not express the true terms of their agreement; or 2) where there has been a mistake by one party, accompanied by fraud or inequitable conduct by the remaining party with knowledge of the other's mistake.¹³⁴

Apparently because the case involved the second of the two situations, the court's opinion initially spells out the elements of fraud in Indiana and ultimately concludes that whether Brown made a material misrepresentation of a past or existing fact, whether Ruff relied on Brown's representation, and whether Ruff was justified in doing so, were all questions of fact that precluded summary judgment.¹³⁵

Next, the court addressed whether Ruff earned any commission pursuant to the contract's terms. Charter argued that Ruff is entitled to no additional compensation because "the commission due Ruff was figured and payable only when net collections exceeded \$108,000."¹³⁶ Because Ruff did not work for Charter in Hobart until he had generated billing in that amount, he had not earned the commission. On the other hand, Ruff argued that the \$108,000 figure was based on annual revenues for psychological testing and could be pro-rated monthly to figure the commissions he earned for the five months he was at Hobart.¹³⁷

The *Ruff* court recited the familiar propositions that the intentions of parties to a contract are to be determined from the four corners of the document and that the test for determining the existence of an ambiguity is whether reasonably intelligent persons could come to different conclusions about the contract's meaning.¹³⁸ The court then pointed out that the contract Ruff signed did not mention how he was to earn his commission, thus, the contract was ambiguous on its face "as to how Ruff's commission was earned and was to be paid."¹³⁹ The court concluded that the trier of fact would need to hear extrinsic evidence concerning the intention of the parties to resolve the ambiguity.¹⁴⁰

In *Eck & Associates, Inc. v. Alusuisse Flexible Packaging, Inc.*,¹⁴¹ Eck and Alusuisse entered in to a contract whereby Eck would sell Alusuisse's product to Reflectix, Inc. in return for a 5% commission. The contract provided that it would continue indefinitely until terminated for just cause. Indeed, the relevant

134. *Id.* at 1173.

135. *Id.* at 1174-75. Charter also argued that the parole evidence rule barred any evidence of oral representations about the contract. The court quickly pointed out, however, that an exception to the parole evidence rule applies in the case of fraud in the inducement. Because Ruff alleged fraud, the court reasoned that the parole evidence rule did not bar extrinsic evidence concerning the circumstances surrounding the execution of the employment agreement. *Id.* at 1175.

136. *Id.* at 1176.

137. *See id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. 700 N.E.2d 1163 (Ind. Ct. App. 1998).

portions of the agreement provide as follows:

1. *Nature and Term of Service.* [Alusuisse] agrees to engage the broker [Eck] as an independent contractor and [Eck] agrees to act as Broker for [Alusuisse] in the business of selling products produced by Alusuisse . . . This agreement shall commence on the 4th day of August, 1989, and shall continue indefinitely, unless and until terminated by either party as hereinafter provided.

2. *Duties of Broker.* During the continuance of this agreement, the Broker shall devote such time as is necessary to the sale of the products of [Alusuisse], and shall use his best endeavors to promote its business and welfare. [Alusuisse] recognizes, in accordance with the Broker's regular business practice, he shall represent other firms and companies, but it is specifically understood that the Broker is in no event selling the products of, or representing companies which are in competition with, the products sold and manufactured by [Alusuisse]. . . .

* * *

8. *Termination—How Made.* This agreement may be terminated by either party *for just cause*, upon sixty (60) days written notice.

9. *Account.* [Eck] shall operate at, and sell only to Reflectix which is set forth on Exhibit "B".

10. *Nature of Relationship.* The relationship between the parties is that of a sales agent and independent contractor. [Eck] is authorized to accept an order on behalf of [Alusuisse]. To constitute a contract for sale, all orders taken by [Eck] must be duly acknowledged and accepted by [Alusuisse] at its respective authorized offices. Nothing contained in this agreement shall be construed as creating an employer/employee relationship between [Eck] and Alusuisse. [Alusuisse] will indemnify and hold harmless [Eck] against any and all claims for damages which may arise as a result of [Alusuisse's] products, plant or personnel.¹⁴²

Conflicts arose among Eck, Reflectix, and Alusuisse that ultimately led Alusuisse to mail a notice to Eck terminating the contract.

Eck sued Alusuisse for breach of contract, alleging that Alusuisse lacked just cause for terminating the contract. Eck also sued Reflectix for interference with the contract. Reflectix filed a motion for summary judgment that Alusuisse joined. The trial court initially denied the motion, after which Eck and Reflectix settled their portion of Eck's claim.¹⁴³ Alusuisse renewed its motion for summary judgment, which the trial court granted, finding that the contract was

142. *Id.* at 1167-68.

143. *See id.* at 1165.

terminable at-will.¹⁴⁴ The trial court never reached the question of whether Alusuisse had just cause to terminate the contract. The court of appeals reversed the trial court, holding that just cause of the broker's contract rebutted the presumption of an at-will employment and that separate and independent consideration was not a prerequisite to enforceability of the just cause provision.¹⁴⁵

When addressing the substantive issues involved, the court of appeals began by recognizing the employment-at-will doctrine is a rule of contract construction, not a rule imposing substantive limitations on the parties' freedom to contract.¹⁴⁶ "If the parties include a clear job security provision in an employment contract, the presumption that the employment is at-will may be negated."¹⁴⁷ Additional facts revealed that Alusuisse traditionally cultivated broker relationships that were terminable at-will. However, Eck did not agree to a terminable at-will contract.¹⁴⁸ Instead, Eck submitted the modified contract for Alusuisse's approval. "Alusuisse opted to agree to the changes and signed the contract which contained a just cause termination provision, but lacked a unilateral-discretion-to-reassign-accounts provision."¹⁴⁹ As the court explained:

Had Alusuisse intended the discretion which at-will termination affords, Alusuisse could have refused to deal with Eck. No assertion of unequal bargaining power was made. However, for reasons about which we may only speculate, Alusuisse chose to forego the at-will flexibility. The facts further reveal that once reminded of its unique contract with Eck, Alusuisse abided by its terms and did not try to terminate the contract until it arguably could demonstrate just cause.¹⁵⁰

The court went on to hold that a job security provision does not need adequate independent consideration to rebut the at-will employment presumption.¹⁵¹ In doing so, the court quoted extensively from *Streckfus v. Gardenside Terrace Co-op, Inc.*¹⁵² In light of recent supreme court pronouncements making it clear that parties may rebut the presumption of employment at-will if they choose to include a clear job security provision in an employment contract,¹⁵³ and making it clear that parties' freedom to contract has continued to be highly valued, the *Eck* court saw no reason to require independent consideration for an explicit, freely bargained for and written just

144. *See id.* at 1165-66.

145. *Id.* at 1169-70.

146. *Id.* at 1167.

147. *Id.*

148. *See id.* at 1168.

149. *Id.*

150. *Id.* at 1168-69.

151. *Id.* at 1169.

152. 504 N.E.2d 273, 275-76 (Ind. 1987).

153. *See Orr v. Westminster Village N., Inc.*, 689 N.E.2d 712, 717 (Ind. 1997).

cause provision.¹⁵⁴

In *Sample v. Kinser Insurance Agency, Inc.*,¹⁵⁵ the appellant-plaintiff, Cindy Sample ("Sample") worked for James Kinser ("Kinser") at the Kinser Insurance Agency ("Kinser Insurance"), an insurance agency based in Monroe County. Kinser authorized Sample to write policies for, among others, Erie Insurance Company. Kinser Insurance paid Sample on a commission basis, the terms and conditions of which were set forth in a written agreement as follows:

1. There will be a \$400.00 minium [sic] commission payable monthly unless commissions are in excess of this, then the commission payment will be made vice the minimum.
2. A 75% commission on new business and renewal will be paid to a maximum period of one year and/or six months, depending on the volumn [sic] of business created. At a satisfactory amount of production agreed upon between Cindy Sample and James C. Kinser, the commission will then be reduced to Item #3 below. It is the intent of this agreement to help the agent achieve a level of personal monetary goals quickly and to help her maintain a productive salary until she gains time in the position and establishes a satisfactory renewal base of business.
3. After the goals of Item #1 and Item #2 are achieved and agreed upon, then Item #3 will take effect. This agreement changes the commission schedule to a 50/50 basis on new and renewal business with assignment to the Kinser Insurance Agency Inc. and all business will belong to the Corporation. The Kinser Insurance Agency Inc. will supply and pay all business cards, office expenses, and equipment as required to perform her duties as an agent of this Agency. Film, gas, and all vehicles expenses are to be supplied by the agent.¹⁵⁶

Initially, Sample had binding authority to write policies for Erie as a sub-agent of Kinser Insurance. Subsequently, Kinser terminated that authority. Sample, relying on Kinser's representation, quit her job with Kinser Insurance.¹⁵⁷ Shortly thereafter, Kinser Insurance gave Sample a check that it contended

154. *Eck & Assocs.*, 700 N.E.2d at 1169. In reaching such a decision, the court specifically recognized the general principle that the at-will presumption applies to both oral and written employment contracts. Despite that recognition, the court distinguished the cases dealing with adequate independent consideration. Those cases, according to the court, were inapplicable, but not due to their lack of explicit, freely bargained-for just cause provisions. *Id.* Rather, the distinction was that they simply did not address the situation before the court. They involved employees arguing that some other consideration transformed what normally would have been an at-will employment situation into one that could only be terminated for just cause. *See id.*

155. 700 N.E.2d 802 (Ind. Ct. App. 1998).

156. *Id.* at 803.

157. *See id.*

represented the commissions Sample earned through the date on which she quit. Sample refused the check, contending that she also was entitled to receive commissions she had generated before termination, but that had not accrued until after her termination.¹⁵⁸ After the parties were unable to reach an agreement concerning the commissions, Sample sued Kinser and Kinser Insurance for breach of contract and for fraud. Kinser Insurance responded by filing a motion for summary judgment, which the trial court granted.¹⁵⁹ The trial court agreed that Sample was not entitled to receive commissions after her employment terminated.¹⁶⁰ The court of appeals reversed the trial court on the breach of contract claim and affirmed the trial court with respect to the fraud claim.¹⁶¹

The court of appeals noted that the contract Sample signed provided for commissions based on new and renewal business.¹⁶² However, as counsel for Kinser Insurance correctly argued, the contract made no provision for commissions following her termination. Kinser Insurance also submitted the affidavit of Kinser, which stated "that the standard in the insurance industry is that commissions are not paid after a person leaves the employ of an insurance agency."¹⁶³

Although the court conceded that industry standards may be important for some purposes, they were not relevant in this case:

Although an employer and employee are free to agree that commissions will not be paid after the employee's termination, the general rule is that a person employed on a commission basis is entitled to those commissions when the order is accepted by the employer. . . . Stated differently a person employed on a commission basis is entitled to commissions on business she has secured even though payment is not received by the employer until a later date.¹⁶⁴

Just because the agreement at issue in *Sample* was silent about whether Sample was entitled to commissions after her termination as an employee, did not, according to the court, mean that she is not entitled to commissions.¹⁶⁵ Rather, the court applied the foregoing rule. The court held that Sample was entitled to be paid commissions for renewal business she had secured before her termination.¹⁶⁶ According to the court, they were earned commissions; the sales had been consummated and Sample's right to the commissions had fully accrued,

158. *See id.*

159. *See id.*

160. *See id.* at 804.

161. *Id.* at 802.

162. *Id.* at 804.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

subject only to actual receipt of the premium payments.¹⁶⁷

In *Haxton v. McClure Oil Corp.*,¹⁶⁸ Crystal Haxton ("Haxton"), was a cashier for McClure Oil Corporation ("McClure"). Haxton signed an employment agreement with McClure to work as a cashier. The agreement contained the following relevant terms:

Term. The term of this agreement shall begin on October 19, 1995 and shall be an "at will" agreement. The Employee may terminate this agreement at any time by giving a required two weeks notice in writing. This notice is to be given to the Employee's immediate supervisor.

* * *

Conditions of Wage Reduction. The Employee agrees that their [sic] weekly paycheck can be reduced to the Federal Minimum wage rate if the following conditions exist:

* * *

Upon resignation, the Employee does not give the required written two weeks notice to their [sic] immediate supervisor.¹⁶⁹

"On January 29, 1997, Haxton gave McClure a two-week written notice of her resignation. She quit working on February 2, 1997, four days after she gave notice."¹⁷⁰ McClure's last paycheck to Haxton compensated her for the hours she had worked and for one week's vacation. The amount McClure paid her, however, was based on the Federal Minimum Wage of \$4.75 per hour rather than her hourly wage of \$6.70 per hour.¹⁷¹

Haxton sued McClure in small claims court, seeking lost wages, statutory penalties, and attorney fees. After a trial, the court entered judgment against Haxton, determining that she had violated the terms of the employment agreement when she terminated her employment without working the full two weeks after she gave written notice.¹⁷² Haxton appealed, citing two errors. The second of the two issues raised on appeal involved an interpretation of the employment agreement.¹⁷³ The court of appeals affirmed the trial court on that

167. *Id.*

168. 697 N.E.2d 1277 (Ind. Ct. App. 1998).

169. *Id.* at 1279.

170. *Id.*

171. The total amount McClure paid Haxton was \$459.11. Haxton was earning \$6.70 per hour before she terminated her employment. *See id.*

172. *See id.*

173. The first issue was whether Haxton was entitled to her full rate of pay for the hours worked. *See id.* She contended on appeal that the employment agreement was an assignment of wages in violation of section 22-2-6-1 of the Indiana Code. She also argued that McClure, by reducing her pay assessed a fine against her in violation of section 22-2-81 of the Indiana Code. The court of appeals disagreed on both points, holding that both statutes were inapplicable. *Id.* at 1280.

issue.¹⁷⁴

With respect to the allegedly ambiguous contract terminology, Haxton contended that she complied with the terms by giving two weeks written notice, even though she did not work the full two weeks. She claimed that she was entitled to be paid at her regular rate (\$6.70 per hour), rather than at the minimum wage (\$4.75 per hour) because the employment agreement was unclear as to whether she was required to work the full two weeks after her notice.¹⁷⁵ The court disagreed, concluding that the two-week notice provision in the employment agreement should be construed as requiring an employee to work for the period of his or her two-week notice.¹⁷⁶ According to the court, “[t]o hold otherwise would render the two-week notice element of the contract completely meaningless.”¹⁷⁷

In *Salin Bank & Trust Co. v. Review Board of Indiana Department of Workforce Development*,¹⁷⁸ Frances Hatfield (“Hatfield”) worked for Salin in Columbus, Indiana in the bank’s loan department when Salin decided to transfer the loan operations to Indianapolis. Hatfield chose to stay in Columbus until her position was eliminated. Hatfield understood that she was to receive compensation at the rate of one or two weeks’ pay for each year of service up to a limit of twenty-six weeks of pay.¹⁷⁹ Hatfield signed what was, for lack of a better term, a termination agreement, which provided in part:

Salin Bank and Trust Company agrees to pay you the total lump sum of \$12,353.04, including all 1996 vacation, on the day following the ‘Effective Date’ of this Agreement, as that date is defined in paragraph 7.

It is understood that this lump sum does not represent any moneys to which you are currently owed or have otherwise earned or accrued by the Effective Date pursuant to any compensation plans, practices, policies, programs or procedures. Payment of such earned or accrued moneys shall be made upon your request or when applicable, pursuant to the terms of any compensation plans, practices, policies, programs or

174. *Id.*

175. *See id.*

176. *Id.*

177. *Id.* Although the court affirmed the trial court’s disposition of the case with respect to the terms of the employment agreement, the court agreed with Haxton that McClure should not have reduced her vacation pay to the minimum wage level. The court equated vacation pay with a vested or accrued right where only the time of payment is deferred. Entitlement to vacation pay, according to the *Haxton* court, is not a gratuity but rather “is in the form of compensation for services.” *Id.* at 1281 (citing *Die & Mold, Inc. v. Western*, 448 N.E.2d 44, 46 (Ind. Ct. App. 1983)). Absent an agreement to the contrary, the court concluded that Haxton should be entitled to the accrued vacation pay at the time of termination. Thus, the court remanded the issue to the trial court to compute and award Haxton the amount of her claim as it related solely to vacation pay. *Id.*

178. 698 N.E.2d 1 (Ind. Ct. App. 1998).

179. *See id.* at 2.

procedures.

You agree to accept the above sum in full and final accord, satisfaction, compromise and settlement of any and all claims and rights, whether disputed or undisputed, accrued or unaccrued, liquidated or unliquidated, vested or nonvested, arising in any way out of or under your employment with Salin Bank and Trust Company¹⁸⁰

Hatfield filed a claim with the Review Board of the Indiana Department of Workforce Development (the "Board") seeking unemployment compensation benefits, which were, of course, in addition to the lump sum payment Salin outlined in the termination agreement.¹⁸¹ The Board awarded unemployment compensation benefits to Hatfield. Salin appealed, contending, *inter alia*, that the Board's decision contravened public policy because it failed to enforce a valid and unambiguous contractual agreement. The court of appeals disagreed, pointing out what it determined were ambiguities in the agreement.¹⁸² First, the court recognized that although the agreement recites that the lump sum payment to Hatfield does not constitute "any moneys to which you are currently owed or have otherwise earned or accrued," the amount specifically includes payment of "all 1996 vacation."¹⁸³ Thus, the court agreed that "[a] clear ambiguity exists as to whether a portion of the lump sum payment is attributable to salary or other compensation owed to Hatfield."¹⁸⁴ The court pointed out another ambiguity by recognizing that the agreement specifically contemplated payment of other compensation even though it stated that the agreement constituted the full and final resolution of all matters arising out of the employment relationship.¹⁸⁵ The court concluded:

[W]here the provisions of the agreement are ambiguous and Hatfield testified that she did not understand that the agreement intended to prevent her from filing a claim for unemployment compensation benefits, Salin cannot rely upon a public policy argument to enforce its intended purpose of the agreement.¹⁸⁶

In *Schoemer v. Hanes & Associates, Inc.*,¹⁸⁷ Hanes & Associates ("Hanes") was the Indiana licensee of Dale Carnegie & Associates ("Carnegie"). Hanes offered various Carnegie courses on leadership and management. Hanes hired

180. *See id.* at 2-3.

181. One of the issues resolved before the Board was whether Hatfield was laid off or whether she resigned her position. *See id.* at 4. The Administrative Law Judge found that she did not resign, but was laid off due to a lack of work, which is not a disqualifying condition for the denial of unemployment insurance in Indiana. *See id.* at 3-4.

182. *Id.* at 5.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. 693 N.E.2d 1333 (Ind. Ct. App. 1998).

Schoemer as a training consultant under a contract that provided, in relevant part:

The Training Consultant hereby acknowledges that he/she is an independent contractor for Hanes & Associates, Inc. . . .

As an independent contractor, the Training Consultant:

1. Is paid strictly on commission;
2. Is considered self-employed, and therefore;
 - a. Will have no County, State or Federal Income taxes withheld and must fulfill this obligation himself/herself;
 - b. Will have no Social Security taxes withheld from his commission and must fulfill this obligation himself/herself;
 - c. Will have no State Disability Insurance (SDI) premium withheld from his commission;
 - d. Will have no unemployment insurance premium withheld;
[and]
 - e. Is not covered by the Workers Compensation Act.
3. As an independent contractor, the association with Hanes & Associates, Inc. can be terminated at will by either party.¹⁸⁸

Schoemer received commissions for "paid enrollments."¹⁸⁹ Any refunds were to be subtracted from Schoemer's next pay period. The employment contract also provided, in relevant part:

In the event of termination, [Schoemer's] final check will be withheld until all outstanding leads, account files, office supplies, equipment, training material and/or selling aids are returned to [Hanes].

In the event of termination, either voluntary or involuntary, [Schoemer] will be paid for all completed enrollments he/she has sold up to the date of termination. After that [Schoemer] will be paid only once more. The final pay will be made at the next regular end-of-the-month payday which is at least [thirty] days away from [Schoemer's] termination date. At the final payday, all completed enrollments will be paid for, as well as the appropriate commission rate on all money collected for pending enrollments, minus any 'buybacks,' cancellations, etc. After this final pay, the company will absorb any buybacks, cancellations, etc., normally charged to [Schoemer] and, likewise, will get credit for any future monies collected on [Hanes'] pending enrollments.

* * *

If legal action is necessary to enforce the terms and conditions of this agreement, . . . [t]he prevailing party in any such action shall be entitled to recover all costs of suit and reasonable attorney's fees as determined

188. *Id.* at 1336.

189. *Id.*

by the court.¹⁹⁰

On November 18, 1993, Schoemer sold a customer relations training course to Citizen's Gas. Schoemer subsequently received a commission for the sale. On December 4, 1993, Hanes terminated its association with Schoemer, which Schoemer acknowledged on December 7, 1993.¹⁹¹ Schoemer received his commission on December 21, 1993. However, in early January 1994, Citizen's Gas canceled its order and demanded a refund. Hanes immediately gave Citizen's Gas a refund and then demanded the commission from Schoemer.¹⁹²

After Schoemer refused to return the commission, Hanes filed suit, seeking the reimbursement of the commission from Schoemer. The trial court entered judgment in favor of Hanes, including an award of attorney fees.¹⁹³ Schoemer filed a motion to reduce the judgment, which the trial court granted.¹⁹⁴ Both parties raised issues in the court of appeals.

Schoemer first argued that he was entitled to the statutory damages contemplated by Indiana Code section 22-2-5-1 for the alleged nonpayment of wages. The court disagreed, writing that relief available under section 22-2-5-1 of the Indiana Code is only available to employees and not independent contractors.¹⁹⁵ In this case, the court found that Schoemer was an independent contractor based on the language in the contract that provided that Schoemer was an independent contractor and would be paid strictly on commissions.¹⁹⁶

Schoemer next argued that he was entitled to retain the commission paid with respect to the sale of training courses to Citizen's Gas. Again the court of appeals disagreed, holding that Schoemer was required to refund the commission.¹⁹⁷ The court reasoned that the terms of the contract stated that "[t]he final pay date will be made at the next regular end-of-the-month payday which is at least [thirty] days away from [Schoemer's] termination date."¹⁹⁸ Thus, because Citizen's Gas canceled its order and demanded a refund before Schoemer's final pay date, Schoemer was required under the contract to refund the commission to Hanes.¹⁹⁹

2. *Purchase Agreements.*—*Francis v. Yates*²⁰⁰ is a case in which the court of appeals addressed whether the right of first refusal contained in a contract for the

190. *Id.* at 1336-37.

191. *See id.* at 1337.

192. *See id.*

193. *See id.*

194. *See id.*

195. *Id.* at 1338.

196. *Id.*

197. *Id.* at 1339.

198. *Id.*

199. *See id.* The court addressed whether Schoemer was entitled to additional compensation and Hanes' cross-appeal concerning their right to amend pleadings to conform to the evidence. *Id.* at 1339-40.

200. 700 N.E.2d 504 (Ind. Ct. App. 1998).

purchase and sale of real property violated the rule against perpetuities, thus rendering the contract void. Helen Yates (“Yates”), the owner of land in Bloomington, entered into a written agreement for the sale and purchase of such land with Donald Francis (“Francis”). The agreement described the three tracts of land to be sold and the purchase price. The terms of the agreement also gave Francis the option to purchase a fourth tract of land.²⁰¹ The details of the option were contained in a section of the agreement entitled “Option with Right of First Refusal to Purchase Real Property Part of Offer and Option to Purchase Real Property.”²⁰² The option was effective for shortly over one year from the date of the execution of the agreement. The agreement contained a clause that provided:

This option and the contract resulting from the exercise thereof shall bind and inure to the benefit of the heirs, administrators, executors, successors, and assigns of the respective parties. All rights of Purchaser hereunder may be assigned without restriction, but notice of each assignment shall be given in writing to Seller.²⁰³

Francis purchased the first three tracts in a timely manner. However, after over nine years had passed without Francis having exercised his option to purchase the fourth tract,²⁰⁴ Yates sued Francis, seeking declaratory judgment that the right of first refusal violated the rule against perpetuities. Yates moved for summary judgment, which the trial court granted.²⁰⁵ Francis appealed. The court of appeals reversed, concluding that fact issues concerning whether the term “option” referred to only the option provision or to the right of first refusal.²⁰⁶

On appeal, Francis conceded that the language extending the contract to the heirs, administrators, executors, successors, and assigns violated the common law Rule Against Perpetuities because his preemptive right to purchase the fourth tract attempted a non-donative transfer of a non-vested property interest.²⁰⁷ Francis argued, however, that the extending language applied only to the option portion of the contract and not the right of first refusal.

After reciting well-settled Indiana law with respect to construction of written contracts,²⁰⁸ the court recognized that the situation before it was one in which the

201. *See id.* at 505.

202. *Id.* at 505.

203. *Id.*

204. *See id.*

205. *See id.*

206. *Id.* at 507.

207. *See id.* at 506.

208. Among the principles the court recognized were: (1) that the construction of written contracts are questions of law for which summary judgment is particularly appropriate; (2) that if ambiguity does not exist, then the court will not look beyond the four corners of the document to determine the parties' intent; (3) that specific words and phrases cannot be read exclusive of other contractual provisions; (4) that the parties intentions must be determined from the contract read in

agreement did not unequivocally include "extending language" applicable to the entire contract.²⁰⁹ Rather, the applicable provision reads: "This option and the contract resulting from the exercise thereof shall bind an inure to the benefit of the heirs, administrators, executors, successors, and assigns of the respective parties."²¹⁰ From such language, it was not apparent to the court whether the parties intended the word "option" to refer to the option section of the agreement or if the parties intended the language to apply to both the option and right of first refusal.

Because the designated materials did not allow the court to determine the meaning of the term "option" as used in the agreement, the intent of the parties was unclear.²¹¹ The court concluded that the contract was ambiguous and that the ambiguity could only be resolved by facts extrinsic to its four corners.²¹² As such, summary judgment was inappropriate.

In *Salcedo v. Toepp*,²¹³ Dr. Salcedo contracted with Dr. Toepp to purchase his podiatry practice. The transaction was effected through four written contracts, including a Purchase Agreement, an Employment Agreement for Dr. Toepp, and a Lease Agreement. A fifth contract, a written Employment Agreement, was executed by Dr. Salcedo and Dr. Toepp's wife so that she could continue receiving health insurance through the practice.²¹⁴ Ultimately, litigation ensued on all of the contracts. A jury trial resulted in verdicts in favor of Dr. Salcedo on the Purchase Agreement, on Dr. Toepp's counterclaim on the Purchase Agreement, and on Ms. Toepp's claim under her Employment Agreement, and for Dr. Toepp on the Employment Agreement and on the Lease Agreement.²¹⁵ The trial court set aside the two verdicts for Dr. Salcedo on the Purchase Agreement and entered judgment on the remaining verdicts.²¹⁶ Dr. Salcedo appealed and the Toepps likewise raised several issues for cross-appeal. The court of appeals reversed and remanded with instructions that the trial court enter judgment on all of the jury's verdicts.²¹⁷

Much of the appellate opinion concentrates on issues not germane to this Article.²¹⁸ However, the court's treatment of Ms. Toepp's claim under the

its entirety; and (5) that courts strive to construe contractual provisions so as to harmonize the agreement. *Id.* at 506.

209. *Id.* at 507.

210. *Id.*

211. *Id.*

212. *Id.*

213. 696 N.E.2d 426 (Ind. Ct. App. 1998).

214. *See id.* at 428.

215. *See id.*

216. *See id.*

217. *Id.*

218. The first issue the court addressed involves the propriety of setting aside the verdicts for Dr. Salcedo under the Purchase Agreement. The issues addressed by the court on that issue are best left to substantive treatment as a labor/employment matter. *Id.* at 433-34. Similarly beyond the

Employment Agreement is interesting and worthy of a brief comment. Ms. Toepp's Employment Agreement read, in pertinent part:

For all services rendered to [Dr. Salcedo] by [Ms. Toepp], [Dr. Salcedo] agrees to pay a gross monthly salary of Seven Hundred Dollars, less withholding and social security taxes. [Dr. Salcedo] will carry health and life insurance coverage on [Mrs. Salcedo] with the same coverage, terms and deductibles as is currently being carried by [Dr. Toepp]. . . .²¹⁹

Ms. Toepp contended that because Dr. Salcedo owed her \$7350 worth of wages under the Employment Agreement,²²⁰ the jury's verdict in favor of Dr. Salcedo was contrary to law. In rejecting the argument, the court pointed out that the purpose of Ms. Toepp's Employment Agreement was to enable her to continue her health insurance through the practice. Thus, despite the plain language of the agreement, the parties never intended or expected that she perform any services for Dr. Salcedo. "Thus, the jury could reasonably have concluded that, just as Dr. Salcedo had waived his right to receive services from [Ms.] Toepp under the contract, [Ms.] Toepp had waived her right to compensation over and above the health insurance coverage that Dr. Salcedo provided through the practice."²²¹

3. *Settlement Agreements.*—In *Silkey v. Investors Diversified Services, Inc.*,²²² the court of appeals affirmed the trial court's determination that an agreement between parties mediating a dispute was enforceable. The Silkeys sued Investors Diversified Services, Inc. and a broker named Mark Powers (collectively, "Brokers") for misrepresentation, violations of state securities law, breach of fiduciary duty, and constructive fraud, all stemming from investments that did not meet the Silkeys' expectations. The trial court ordered mediation, which resulted in an oral settlement agreement.²²³ At the mediation, the mediator recorded a recitation of the terms of the agreement that his office later transcribed and forwarded to the parties. Counsel for the Brokers prepared a

scope of this Article is the court's resolution of the adequacy of the damage award with respect to the Employment Agreement. *Id.* at 434.

219. *Id.* at 430.

220. The amount represented the agreed upon wage rate of \$700 per month less amounts deducted for taxes and health insurance. *See id.* at 434.

221. *Id.* at 435. The court also resolved a dispute about entitlement to attorney fees. Indeed, both parties asserted that they were entitled to fees; Dr. Salcedo as a prevailing party under the Purchase Agreement and Dr. Toepp as the prevailing party under the Employment Agreement and the Lease Agreement for successfully defending against Dr. Salcedo's claim. *See id.* To resolve the matter, the court examined all three agreements, ultimately concluding that Dr. Salcedo was entitled to fees as the prevailing party under the Purchase Agreement and that Dr. Toepp was entitled to fees under the Lease Agreement. *Id.* at 436. Dr. Toepp, however, was not entitled to fees under the Employment Agreement. *See id.*

222. 690 N.E.2d 329 (Ind. Ct. App. 1997).

223. *See id.* at 331.

“Settlement Agreement and Mutual General Release” and sent it to the Silkeys for signature. The Silkeys refused to sign the written agreement and, thereafter, Brokers filed a “Motion to Enforce Mediation Agreement and Request for Sanctions.”²²⁴

The trial court found as a matter of fact that the document accurately reflected the mediation agreement and that the Silkeys simply were attempting to repudiate the agreement.²²⁵ The trial court also found that the audio tape recording was a legally binding form of the agreement that set forth with reasonable certainty the terms and conditions of the parties’ agreement.²²⁶ The trial court then directed that the terms of the audio tape recording be reduced to writing for signature of all parties.²²⁷

The investors appealed, and the court of appeals affirmed.²²⁸ The central issue before the court of appeals was whether the oral agreement reached by the parties at the conclusion of the mediation was enforceable.²²⁹ The Silkeys acknowledged that the parties reached an agreement at the mediation and that it was reduced to writing. However, they argued that they rescinded their verbal assent to the terms of the agreement and that the agreement was unenforceable because they neither signed it, nor filed it with the court.²³⁰

After an initial examination of the purposes of Indiana’s Rules of Alternative Dispute Resolution (“ADR rules”), the court concluded that although the ADR rules control the process of mediation, “the enforcement of any valid agreement is within the authority of the trial court under the existing law in Indiana.”²³¹ In response to the Silkeys’ argument that they should not be held to an agreement about which they changed their minds, the court quickly recognized that such a rule “would clearly create a disincentive for settlement” and that it would “allow mediation to serve not as an aid to litigation, but as a separate and additional impetus for litigation.”²³² The court concluded: “Having found that a settlement agreement had been reached, the trial court acted within its authority under the A.D.R. rules and the case law in Indiana in directing the parties to reduce their agreement to writing and sign and file it with the court.”²³³

224. *See id.*

225. *See id.*

226. *See id.*

227. *See id.*

228. *Id.*

229. *Id.* at 331-32.

230. *See id.* at 332.

231. *Id.*

232. *Id.* at 333.

233. *Id.* at 334. The court also rejected the Silkeys’ argument that the agreement was not final or binding because it was oral and that it violated the Statute of Frauds. The court initially recognized that a settlement agreement in Indiana is not required to be in writing. *Id.* With respect to the Statute of Frauds issue, the court disagreed with the Silkeys’ argument that the agreement could not be performed within one year of its making:

In *Indiana State Highway Commission v. Curtis*,²³⁴ the Suttons owned real estate adjoining State Road 10 in Jasper County. In 1985, they granted the State of Indiana an easement for highway drainage work to be performed. In 1988, the Suttons sued the State and a contractor, alleging that the work had damaged their property and had resulted in an involuntary taking of their property.²³⁵ Four days before trial, counsel for the State contacted counsel for the Suttons to discuss settlement and advised that a monetary settlement required the governor's approval, and that any easement over state property required Indiana Department of Transportation ("INDOT") approval. Ultimately, counsel arrived at an agreed amount for a monetary settlement from the State and the State's grant of an easement onto the State's property for the Suttons to install a new septic system. Counsel for the Suttons faxed a written agreement to counsel for the State, which he signed and returned.²³⁶ Part of the agreement granted the Suttons access over State property, specifically: "[A]ccess through State Road 10's existing guardrail and any driveway therefrom as described in paragraph five (5) of this agreement is subject to approval by INDOT."²³⁷

After the State failed to deliver the money within the agreed forty-five days or to authorize installation of a septic system, the Suttons filed a motion to enforce the settlement agreement. The trial court found that the parties entered into a binding settlement agreement and granted the Suttons' motion to enforce the settlement. The trial court ordered the State to pay the settlement, permit the easement for the septic system, and pay attorney's fees to the Suttons.²³⁸ The State appealed, and the court of appeals: (1) affirmed the trial court's enforcement of the agreement; (2) found sufficient evidence to demonstrate an agreement was reached; and (3) reversed the award of attorney's fees.²³⁹

The supreme court granted the State's petition to transfer and issued an opinion reversing the trial court's decision with respect to the enforcement of the agreement.²⁴⁰ The supreme court first concluded that the agreement could not be held enforceable because the terms of the agreement required INDOT's approval of the easement provisions and there was no evidence in the record and no

It is possible that the agreement could be fully performed within one year of its making if the underlying investment were to pay a distribution equal to or greater than the guarantee amount within the first year. There is no express stipulation between the parties that the agreement would not be performed within one year.

Id.

234. 704 N.E.2d 1015 (Ind. 1998).

235. *See id.* at 1017.

236. *See id.*

237. *See id.*

238. *See id.*

239. *Indiana State Highway Comm'n v. Curtis*, 695 N.E.2d 143 (Ind. Ct. App. 1998).

240. The supreme court's opinion summarily affirms the court of appeals' decision with respect to attorney's fees. *Curtis*, 704 N.E.2d at 1020.

finding by the trial court to indicate that approval was given or waived.²⁴¹ The trial court had found that “it is not equitable for the State to settle a case upon certain agreements . . . and then some eight months later repudiate the agreement.”²⁴² The supreme court disagreed, writing:

Failure to gain a required approval is not repudiation of the agreement. Rather it is insistence on compliance with the terms of the agreement. “The mere fact that a promise or condition is somewhat harsh or unfair in its operation is not enough to furnish such an excuse.” . . . Because the condition—approval by the Governor and INDOT—is an essential part of the exchange and there is no evidence of extreme forfeiture or penalty the condition in this case is not excused. There are obvious public safety concerns involved in the granting of an easement that affects a safety rail on a public highway. It is quite reasonable that the contract required that INDOT approve such an arrangement, and that it be quite specific as to where and when and how rights under the easement are to be exercised.²⁴³

The supreme court recognized that even in non-public contracts, it is not uncommon for a settlement agreement to require approval by some agency or organization for one reason or another. Thus, the court concluded:

[U]pholding the right of a party to insist on such a condition ultimately facilitates settlement by permitting an agreement to be made with an enforceable condition, even if the condition is likely to be fulfilled. Accordingly, as a matter of contract law, because INDOT approval was required by the settlement, and that approval was not obtained, the agreement, as to the easement provisions, is not enforceable.²⁴⁴

With respect to the second issue addressed, the *Curtis* court agreed with the State that the governor’s approval is required for any compromise of a claim against the State:

[I]n the area of tort claims we do have a separate body of law—the Tort Claims Act—that is applicable only to claims against governmental entities. . . . [O]nly the Governor has ultimate authority to compromise a claim. . . . Whatever its objective, the legislature is free to change that requirement, but unless and until this occurs, the Governor’s approval is required before the State can compromise a tort claim.²⁴⁵

4. *Loan Agreement.*—In *Bastin v. First Indiana Bank*,²⁴⁶ Janet Bastin

241. *Id.* at 1018.

242. *Id.*

243. *Id.* at 1019.

244. *Id.* at 1019-20.

245. *Id.* at 1020.

246. 694 N.E.2d 740 (Ind. Ct. App. 1998).

("Bastin") obtained an adjustable rate mortgage loan from First Indiana in the amount of \$23,750. The loan was evidenced by a note and had been serviced by First Indiana from its inception.²⁴⁷ The note allowed First Indiana to adjust Bastin's interest rate on September 1 and March 1 of each year. Attached to the note was an Adjustable Rate Rider that provided, in relevant part:

The interest rate that I will pay may change on the first day of March, 1985 and on that day every 6th month thereafter. Each date on which my interest rate could change is called an "Interest Change Date."

* * *

Beginning with the first Interest Change Date, my interest rate will be based on an Index. The "Index" is the weekly auction average rate for United States Treasury bills with a maturity of 6 months, as made available by the Federal Reserve Board. The most recent Index figure available as of the date 45 days before each Interest Change Date is called the "Current Index."

* * *

Before each Interest Change Date, the Note Holder will calculate my new interest rate by adding two and 25/100ths percentage points (2.25%) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (.0125%). This rounded amount will be my new interest rate and will be effective on each Interest Change Date and will remain in effect until the next Interest Change Date.²⁴⁸

The sources of the rates are found in the Federal Reserve Board's issuance of the Statistical Release H.15, which is released each Monday. Other sources are *The Wall Street Journal* and an electronic service known as *Telerate*, which provides updated information daily.²⁴⁹ When interest rates are rising, the borrower benefits from a bank's use of either the *Telerate* or *The Wall Street Journal*. When interest rates are falling, the buyer benefits from the H.15.²⁵⁰

"From the date of inception of Bastin's [n]ote until sometime in 1987, First Indiana relied on the index figure as published in *The Wall Street Journal*."²⁵¹ Subsequently, First Indiana began to obtain the index figure from the H.15 publication. First Indiana continued to provide Bastin with interest rate changes. "However, First Indiana never informed Bastin that it had switched from *The Wall Street Journal* to the H.15 publication as the source for the index figure."²⁵²

Bastin filed suit against First Indiana on behalf of herself and other similarly situated buyers, alleging that First Indiana charged excessive interest on its

247. See *id.* at 742.

248. *Id.*

249. See *id.*

250. See *id.* at 742-43.

251. *Id.* at 743.

252. *Id.*

loans.²⁵³ Bastin claimed that First Indiana breached the note because it was using the H.15 figure, which was not the most recent figure available. Bastin argued that the bank should have used *The Wall Street Journal* index. In the alternative, Bastin argued that even if use of the H.15 was proper, First Indiana still breached the note by previously using *The Wall Street Journal* as its source for the index figure.²⁵⁴

The trial court granted First Indiana's cross-motion for summary judgment and Bastin appealed.²⁵⁵ The court of appeals held that the note was not ambiguous.²⁵⁶ The fact that First Indiana interpreted the note differently by utilizing both the H.15 figure as well as *The Wall Street Journal* figure did not mean that the language in the note itself was ambiguous. The court reasoned that it is not bound by an erroneous interpretation placed on the contract by a party.²⁵⁷ The fact that the note previously had been interpreted differently did not change its meaning.²⁵⁸

The court further wrote that the note's interest rate provision was subject to only one interpretation.²⁵⁹ The word "index" as used in one part of the note was determined to be the same one as the "Current Index" used in the latter portion of the note.²⁶⁰ The court reasoned that the note's language did not require First Indiana to use the index figure as published in *The Wall Street Journal* or as published by the *Telerate* method.²⁶¹ Rather, the "Current Index" or "Index" to be implemented by First Indiana was to be the "most recent index figure" that was "made available by the Federal Reserve Board."²⁶² Despite the availability of the weekly auction average through various secondary sources, the court agreed that the note clearly permitted First Indiana to use the index figure that was made available by the Federal Reserve Board.²⁶³

5. *Agreement Between Spouses*.—In *Pond v. Pond*,²⁶⁴ the Supreme Court of Indiana addressed an interesting situation in which a husband and wife executed an agreement after the husband filed a petition for legal separation, but before the wife filed a petition for dissolution. The focus of the agreement was the division of marital property. The document recites that the parties were married at the time of the signing, that the husband had filed a petition for legal separation, and

253. *See id.*

254. *See id.*

255. *See id.*

256. *Id.* at 747.

257. *Id.* at 745.

258. *See id.*

259. *Id.* at 746.

260. *See id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. 700 N.E.2d 1130 (Ind. 1998).

that the husband would attend counseling sessions.²⁶⁵ According to the agreement's terms, the husband's failure to attend counseling would void the agreement. Also part of the agreement was that the parties relinquished claims for temporary or permanent spousal support and all statutory inheritance rights. Finally, "the agreement include[d] a clause purporting to allocate certain attorney fees and contain[ed] a severability clause that declare[d] the remainder of the agreement to be enforceable if any portion [was] adjudged to be invalid, unlawful, or void."²⁶⁶

The attorney's fees clause provided: "In the event an attack by one party as to the validity of this agreement is unsuccessful, the party initiating such action shall be responsible for all attorney's fees and costs incurred by both parties in the prosecution or defense of such action."²⁶⁷

The trial court approved the parties' agreement except for the attorney's fees paragraph, which it held to be unconscionable.²⁶⁸ Instead, the trial court ordered the husband to pay a substantial portion of the wife's attorney fees.²⁶⁹ The court of appeals affirmed that decision without addressing whether the agreement was a reconciliation agreement, but reversed and remanded on other grounds.²⁷⁰

The Supreme Court of Indiana granted transfer and affirmed the trial court's decision to treat the agreement as a settlement agreement, but reversed the trial court's decision not to enforce the attorney's fees provision.²⁷¹ Before the supreme court, the husband contended that the agreement was a reconciliation agreement, which, he argued, the court should strictly enforce in the same manner as an antenuptial agreement. The wife countered that the agreement should be construed as a dissolution settlement agreement, which would allow the trial court to partially enforce or to modify it under Indiana Code section 31-1-11.5-10, part of the Indiana Dissolution of Marriage Act (the "Act").²⁷²

The supreme court found that the parties' agreement was not a reconciliation agreement and should not be treated as an antenuptial agreement.²⁷³ Instead, the court pronounced that the agreement "clearly" fell within the ambit of the Act:

This agreement was formed between the parties to a marriage, and its substance was directed at the amicable settlement of 'disputes that have arisen or may arise . . . attendant upon the dissolution of their marriage.' . . . The agreement was signed after the husband had commenced proceedings pursuant to the Act. The trial court did not err in construing

265. See *id.* at 1134.

266. *Id.*

267. *Id.* at 1135-36.

268. See *id.* at 1134.

269. See *id.* at 1136.

270. *Marriage of Pond*, 676 N.E.2d 401, 408-09, 412-13 (Ind. Ct. App. 1997).

271. *Pond*, 700 N.E.2d at 1137.

272. See *id.* at 1132.

273. *Id.* at 1135.

the parties' agreement in accordance with the Act.²⁷⁴

With respect to the attorney's fees paragraph, the husband argued that the general principles of contract law require enforcement of the paragraph unless the contract is contrary to law or public policy. Although the court wrote that a contract for attorney fees is, as a general rule, enforceable according to its terms unless contrary to law or public policy, the court also pointed out that Indiana courts are not bound to accept every proffered settlement.²⁷⁵ "In reviewing a settlement agreement, a court should concern itself only with fraud, duress, and other imperfections of consent, or with manifest inequities, particularly those deriving from great disparities in bargaining power."²⁷⁶

The trial court had refused to enforce the attorney's fees clause because it would have caused an economic impossibility to anyone but the husband to challenge the agreement, and because the court was concerned about the disparity of income between the parties.²⁷⁷ According to the *Pond* court, such reasons "are insufficient to establish fraud, duress, other imperfections of consent, or manifest inequities."²⁷⁸ Thus, the court reversed the trial court to the extent that the judgment of dissolution rejected and refused to enforce the attorney's fees clause.²⁷⁹

6. *Construction Agreements.*—In *Indiana Erectors, Inc. v. Trustees of Indiana University*,²⁸⁰ the facts of the case were not disputed. In December of 1990, Indiana University (the "University") contracted with a general contractor, which general contractor contracted with a subcontractor ("SCI"), which subcontractor in turn entered into a subcontract with Indiana Erectors, Inc. ("Erectors") for the renovation of the Student Building on the Bloomington, Indiana campus. On December 17, 1990, employees of Erectors caused a fire that damaged the Student Building.²⁸¹ The University's general insurance carrier, the Allendale Mutual Insurance Company ("Allendale") paid the University approximately \$1.9 million for the loss. No additional insurance policy had been obtained to cover the renovation of the Student Building and none of the contractors or subcontractors were specifically named as insureds in the Allendale policy.²⁸² Allendale brought an insurance subrogation action in the name of the University against Erectors, seeking damages under alternative

274. *Id.*

275. *Id.* at 1136.

276. *Id.* (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1278 (Ind. 1996)). Citing *Voigt*, the court was quick to add that "the power to disapprove a settlement agreement must be exercised with great restraint. A trial judge should not reject such agreements just because she believes she could draft a better one." *Id.*

277. *See id.* at 1137.

278. *Id.*

279. *Id.*

280. 686 N.E.2d 878 (Ind. Ct. App. 1997).

281. *See id.* at 879.

282. *See id.*

theories of negligence and breach of the SCI/Erectors contract, of which the University was a third party beneficiary.²⁸³ At trial, the jury returned a verdict in favor of the University in the amount of \$1.9 million.²⁸⁴ “The amount of the verdict/judgment reveals that the judgment was based on a breach of contract theory.”²⁸⁵

The first issue addressed by the court was whether Erectors was an intended insured of the Allendale policy. Citing *LeMaster Steel Erectors, Inc. v. Reliance Insurance Co.*,²⁸⁶ the court noted that when a party agrees to purchase insurance for the benefit of both parties to the contract, the first party in effect agrees to waive the intended insured’s liability.²⁸⁷ Thus, the first party would be precluded from bringing an action against the intended insured for any matter that was to be insured from, regardless of the fault of the intended insured.²⁸⁸ Erectors asserted that it was entitled to judgment as a matter of law because it had been an intended insured under the interdependent, contractual relations between the University, its general contractor and the subcontractors. The trial court determined that Erectors was not an intended insured under the Allendale policy.²⁸⁹ Accordingly, the trial court denied Erector’s Motion for Summary Judgment.²⁹⁰

The trial court determined whether Erectors was an intended insured of the Allendale policy by reviewing the Construction Contract (the “Contract”) between the University and its general contractor. Article 11 of the Contract governed insurance and stated that: “Owner shall maintain during the course of construction, Builder’s Risk Insurance . . . *The insured shall be the Owner and the Contractor(s) as their interests may appear . . .*”²⁹¹ Erectors argued that it was an intended insured as one of the “Contractors” involved in the project.

The court disagreed. In reviewing Article 4.1.1.2 of the Contract, the court noted that the term “Contractor” was defined as “all of the Prime Contractors, unless reference is made to the intended specific Prime Contractor.”²⁹² Article 4.1.1.1. of the Contract identified the “Prime Contractors” as the “General

283. *See id.* at 879-80.

284. *See id.* at 880.

285. *Id.* This proposition is based on the *Indiana Erectors* court’s observation that the jury, in its verdict forms, “had reduced [the University’s] recovery under its negligence theory by 25% (representing fault allocated to [the University]) producing a verdict in the amount of \$1.425 million.” *Id.*

286. 546 N.E.2d 313, 316-17 (Ind. Ct. App. 1989)

287. *Indiana Erectors*, 686 N.E.2d at 880.

288. *See LeMaster Steel Erectors*, 546 N.E.2d at 317.

289. *See Indiana Erectors*, 686 N.E.2d at 882.

290. *See id.* at 880.

291. *Id.* at 881 (quoting contract between the parties) (emphasis added by court). The Contract was a standard form construction contract. Article 11 of this form had been deleted and replaced with typewritten terms. *Id.*

292. *Id.*

Contractor,” the “Mechanical Contractor” and the “Electrical Contractor.”²⁹³ This was significant, given that the University had hired a general, a mechanical, and an electrical contractor.²⁹⁴ In addition, the court noted that the term “Subcontractor” was defined under Article 5.1.1. as “a person or entity who has a direct contract with the Contractor to perform any of the Work at the site.”²⁹⁵ Additionally, Article 5.2.4 provided that “nothing in this Contract shall create any contractual relation between any subcontractor and the Owner.”²⁹⁶

Based on the above articles, the court concluded that the term “Contractor(s)” unambiguously referred only to the Prime Contractor, but did not include subcontractors.²⁹⁷ The court then compared the case to *LeMaster*²⁹⁸ in that under the unambiguous language of Article 11 of the Contract, the general contractor was an intended insured but the subcontractor was not. Thus, the insurance subrogation could properly proceed against the subcontractor.²⁹⁹ Thus, the court affirmed the trial court’s denial of Erector’s motion for summary judgment.³⁰⁰ Under the reasoning of the *LeMaster* case, the court refuted Erector’s argument that its contract with SCI and SCI’s subcontract with the general contractor gave rise to legitimate expectation on Erector’s behalf that it was an intended insured under the University’s construction contract. As in *LeMaster*, “[n]either [the] owner nor the owner’s insurer can be bound by any subcontract to which neither was party.”³⁰¹

E. Repudiation/Mutual Mistake of Fact

In *Jay County Rural Electric Membership Corp. v. Wabash Valley Power Ass’n*,³⁰² Jay County Rural Electric Membership Corp. (“Jay County”), a rural electric membership corporation that purchased wholesale electricity for

293. *Id.*

294. Paragraph 4.1.1.1. provides “the work of this Project has been divided into the following parts, for which there will be separate, prime contractors as indicated below: 1) General Construction work, by the General Contractor, 2) Mechanical Construction work, by the Mechanical Contractor, 3) Electrical Construction work by the Electrical Contractor and 4) Other.”
Id.

295. *Id.*

296. *Id.*

297. *Id.*

298. *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.*, 546 N.E.2d 313, 317-20 (Ind. Ct. App. 1989).

299. See *Indiana Erectors*, 686 N.E.2d at 881. The court noted that because Article 11 of the standard construction contract had been revised, the court’s holding in *South Tippecanoe School Building Corp. v. Shambaugh & Son, Inc.*, 395 N.E.2d 320 (1979), where the court held that the subcontractor was an intended beneficiary under the construction contract, was inapplicable. *Indiana Erectors*, 686 N.E.2d at 881-82.

300. *Indiana Erectors*, 686 N.E.2d at 882.

301. *Id.*

302. 692 N.E.2d 905 (Ind. Ct. App. 1998).

distribution, sued the Wabash Valley Power Association (“WVPA”), an electric generation and transmission cooperative, as well as the Kosciusko County REMC. In 1977, Jay County became a member of the WVPA by signing an all-requirements wholesale power supply contract. The contract required Jay County to purchase all of its power and energy requirements for its system from WVPA.³⁰³

In December of 1996, Jay County sent notices purporting to withdraw its membership in the WVPA and to terminate the all-requirements contract with WVPA. Jay County then filed suit against the WVPA, seeking that the trial court declare its withdrawal and termination valid.³⁰⁴ “It also negotiated a contract with Cinergy that would guarantee better prices for electricity.”³⁰⁵ WVPA moved for a temporary restraining order and preliminary injunction to require Jay County to purchase its electricity exclusively from WVPA during the pendency of the litigation. The trial court issued the injunction, and Jay County timely initiated an interlocutory appeal.³⁰⁶

When determining whether the trial court erred in issuing the injunction, one of the factors the *Jay County* court examined was the likelihood of success at trial.³⁰⁷ In that context, Jay County offered three arguments in support of its contention that it likely would have succeeded at trial, the first two of which were anticipatory repudiation and mutual mistake.³⁰⁸ Jay County first argued that WVPA repudiated its contract when it notified Jay County of its desire to merge with another cooperative, Hoosier Energy. On that issue, the trial court found that WVPA began having conversations with Hoosier Energy in late 1996 about the possibility of merger.³⁰⁹ In February 1997, Jay County was informed that WVPA and Hoosier Energy would consider merger at their February board meetings. Before the board meetings, Jay County decided to formally terminate its corporate and contractual relationship with WVPA.

The trial court, therefore, concluded that at the time Jay County treated the all-requirements contract as terminated, WVPA had not communicated a positive, absolute, and unconditional repudiation of the contract, and ultimately concluded that there was a likelihood that WVPA would prevail at trial on this issue.³¹⁰ According to the court of appeals:

The trial court was well within its discretion in so concluding, as questions remain as to whether (1) Jay County prematurely reacted to WVPA’s preliminary statements of intent to merge; (2) whether a merger

303. *See id.* at 908.

304. *See id.*

305. *Id.*

306. *See id.* at 907.

307. *Id.* at 909.

308. *See id.* at 910. Jay County also argued that the WVPA failed to comply with statutory preconditions for conducting business. *Id.* The third factor is beyond the scope of this Article.

309. *See id.* at 911.

310. *See id.*

would actually constitute a repudiation of the all-requirements contract; and (3) whether Jay County read 'repudiation' into WVPA's intentions because it wanted out of the contract in order to preserve its more favorable contract with Cinergy.³¹¹

The *Jay County* court next turned its attention to Jay County's mistake of fact argument. "Jay County argue[d] that a material feature of the all-requirements contract was both parties' understanding that WVPA's involvement in [the Marble Hill nuclear power facility] would result in more reliable and economical power, an understanding that constituted a mutual mistake."³¹² On that issue, the trial court found that, at the time it entered into the contract, the Jay County Board understood that the contract was a long-term commitment that obligated Jay County to purchase its total requirements from WVPA regardless of whether WVPA ever received power from Marble Hill.³¹³ The trial court also found that the investment in Marble Hill, like many investments, was risky and that the doctrine of mutual mistake did not apply.³¹⁴ Thus, the trial court concluded that there was a likelihood that WVPA would prevail at trial.³¹⁵ In affirming that decision, the court of appeals simply held that "the [trial] court's conclusions were well within its discretion."³¹⁶

F. Rescission

1. *Rescission for Fraud.*—In *Drudge v. Brandt*,³¹⁷ Louise Drudge ("Drudge") sued her daughter, Jean Brandt ("Brandt") for alleged breach of contract and constructive fraud. The dispute arose out of two separate events. First, Drudge advanced to Brandt approximately \$50,000 so that Brandt could buy a new home in Indiana. Drudge contended that she advanced the funds with the understanding that Brandt would pay her back when Brandt's home in Florida sold.³¹⁸ A few months later, Drudge agreed to transfer money into an annuity that was placed in Brandt's name. In exchange, Brandt agreed to pay the interest income on the annuity to Drudge. According to Drudge, Brandt did not repay the advancement even after she sold her Florida home and Brandt failed to pay her the interest income from the annuity as promised. As a result, "Drudge claimed that Brandt's actions constituted a breach of contract as well as constructive

311. *Id.* The court also addressed Jay County's argument that the trial court erred in determining that WVPA provided the "adequate assurance of performance" required by section 26-1-2-609 of the Indiana Code. *Id.* Because that issue is more appropriately addressed in the commercial law survey, it is beyond the scope of full treatment here.

312. *Id.* at 912.

313. *See id.*

314. *See id.*

315. *See id.* at 911.

316. *Id.* at 912.

317. 698 N.E.2d 1245 (Ind. Ct. App. 1998).

318. *See id.* at 1246.

fraud.”³¹⁹

Brandt denied that she took advantage of Drudge. She admitted that Drudge had given her money to buy her home in Indiana and that she originally agreed to repay Drudge when she sold her house in Florida, but claimed that the parties later modified the agreement.³²⁰ Brandt also “denied that there was any agreement to pay the interest income from the annuity to Drudge.”³²¹

The trial court entered judgment for Drudge, declaring that all interest payments on the annuity were for Drudge’s benefit and could be paid directly to her, but refusing to allow Drudge to rescind the agreement and recover the principal amount of the annuity.³²² The first of the two issues Drudge appealed was whether the trial court erred in failing to order that the agreement pertaining to the annuity be rescinded and the annuity transferred to her.³²³ Drudge relied on three cases in support of her position, *Dowell v. Jolly*,³²⁴ *Tibbetts v. Krall*,³²⁵ and *Cree v. Sherfy*.³²⁶ All three “cases involv[ed] aged or infirm persons who transferred land to others in exchange for an agreement to provide care and maintenance during the transferor’s lifetime.”³²⁷

The *Drudge* court was not persuaded by the foregoing cases, concluding that they did not compel rescission of the agreement.³²⁸ The court reasoned and concluded:

First, the property transferred in this case was not land. Rather, it was money used to purchase an annuity in Brandt’s name. Second, the transfers of land in the earlier cases were in exchange for agreements to provide personal services to the transferor, and not merely the repayment of accrued interest on an annuity. Because of the unique character of both land and the provision of personal care and maintenance to an aged and infirm person as consideration for the transfer of such property, rescission as the only practical remedy to be afforded in the event of a breach. . . . Here, neither the property conveyed, i.e., money with which to purchase an annuity, nor the property promised in exchange, i.e., the accrued interest on the annuity during Drudge’s lifetime, were unique.

319. *Id.*

320. *See id.* at 1247.

321. *Id.*

322. *See id.* at 1249. The trial court also refused to impose a constructive trust. *See id.* at 1250.

323. *See id.* at 1248-49. The second issue the court of appeals addressed was whether the trial court erred in not finding that Brandt had committed constructive fraud and in not ordering that the annuity be placed in a constructive trust. The court of appeals affirmed on both issues. *Id.* at 1249-50, 1250.

324. 159 N.E.2d 590 (Ind. App. 1959).

325. 145 N.E.2d 577 (Ind. App. 1957).

326. 37 N.E. 787 (Ind. 1894).

327. *Drudge*, 698 N.E.2d at 1249.

328. *Id.*

Under the circumstances presented in this case, we cannot say that the judgment entered by the trial court is contrary to law or that the trial court erred in failing to grant a rescission of the contract.³²⁹

2. *Rescission for Failure to Meet Conditions Precedent and Subsequent.*—In *Barrington Management Co. v. Paul E. Draper Family, Ltd. Partnership*,³³⁰ the parties entered into a written Purchase Agreement under which Draper agreed to sell a parcel of commercial real estate to Barrington. The Purchase Agreement provided that “[t]ime is of the essence of this Contract” and an Addendum also noted that “[t]ime is important.”³³¹ The closing was to take place after all conditions had been satisfied or waived. The Addendum also provided that a condition of the offer was that utilities, city water, electric, gas, and storm drainage were available to the property line and were in adequate supply and capacity to serve the development. The agreement gave the purchaser 180 days from the date of the agreement to satisfy or waive the condition.³³²

Barrington experienced delays in satisfying the condition because it had problems obtaining the land use and drainage approvals necessary to develop the property. The parties agreed to extend the period in which Barrington could satisfy or waive the condition. Barrington requested a second extension, but Draper refused.³³³ Barrington then demanded that Draper close the transaction and forward the closing documents. Draper refused to close and filed suit, requesting that the Purchase Agreement be rescinded to enable it to sell the real estate to another purchaser. Barrington counterclaimed, requesting specific performance.³³⁴ The parties agreed to disposition by “summary proceedings,” after which the trial court entered judgment in Draper’s favor, thereby granting rescission of the Purchase Agreement and that Draper could retain the earnest money deposit.³³⁵ Barrington appealed.

On appeal, Barrington argued that Draper breached the Purchase Agreement by refusing to close the transaction and that the trial court erred by considering parol evidence on the issue of whether the land use and drainage approvals were a condition constituting a material part of the consideration benefitting Draper that could not be waived.³³⁶ The court of appeals disagreed, pointing out that it could affirm the trial court’s judgment notwithstanding consideration of parol evidence because the trial court also found that Draper was entitled to rescind the Purchase Agreement upon the failure of a condition subsequent (the expiration of the time allotted for Barrington to satisfy or waive the condition regarding the

329. *Id.* at 1250.

330. 695 N.E.2d 135 (Ind. Ct. App. 1998).

331. *Id.* at 138.

332. *See id.* at 142.

333. *See id.* at 139.

334. *See id.*

335. *See id.*

336. *See id.* at 141.

procurement of land use and drainage approvals).³³⁷ Citing favorably both the “time of the essence” provisions in the Purchase Agreement and *Dvorak v. Christ*,³³⁸ the court held that the Purchase Agreement became legally defunct once the time period of the parties’ first extension expired.³³⁹ Thus, the trial court did not abuse its equitable discretion when it granted Draper’s request for rescission.³⁴⁰

Because Indiana law requires that the party seeking rescission of a contract must return the defaulting party to the status quo, the court of appeals determined that Draper had to return the earnest money paid under the contract.³⁴¹ Accordingly, the court reversed that portion of the trial court’s decision allowing Draper to retain the earnest money.³⁴²

G. Breach/Damages

Judge Staton’s opinion in *Bee Window, Inc. v. Stough Enterprises, Inc.*³⁴³ addresses a single issue under Indiana law: Whether a party breached a written services contract. Bee Window entered into an agreement with Stough Enterprises, the management corporation for Indianapolis Blood Plasma, Inc. (collectively, “Stough”), whereby Bee Window would furnish and install twenty-three windows and perform incidental work at the Blood Plasma building located on North Capitol Avenue in Indianapolis.³⁴⁴

Bee Window fabricated the windows on site using raw materials including lumber, glass, and vinyl framing material received from a supplier. The vinyl material proved unsuitable. “[T]he windows rattled, leaked, and deflected inward and outward up to seven inches during windstorms.”³⁴⁵ Stough complained to Bee Window and withheld final payment. Bee Window failed to cure the problem and Stough sued Bee Window for breach of contract.³⁴⁶ After a bench trial, the trial judge awarded Stough damages and denied Bee Window’s motion to correct error. Bee Window appealed.³⁴⁷ The court of appeals affirmed.³⁴⁸

The first of the two issues Bee Window raised was whether the trial court’s

337. *Id.*

338. 692 N.E.2d 920, 924 (Ind. Ct. App. 1998). *See supra* note 6 and accompanying text.

339. *Barrington Management*, 695 N.E.2d at 141.

340. *See id.* at 142.

341. *Id.*

342. *Id.* The court next addressed the issue of attorneys fees, *id.* at 142-43, this Article does not address this issue in detail.

343. 698 N.E.2d 328 (Ind. Ct. App. 1998).

344. *See id.* at 329.

345. *Id.*

346. *See id.*

347. *See id.*

348. *Id.*

determination that Bee Window breached its contract was clearly erroneous.³⁴⁹ With respect to that issue, Bee Window relied on the case of *Millner v. Mumbry*,³⁵⁰ a case in which the plaintiff, who claimed to be an engineer, developed his own plans and specifications for a "berm house."³⁵¹ Those specifications were written into the agreement and the defendant, a concrete contractor, poured concrete walls in accordance with the plaintiff's plans. After completion of the house, the walls began to develop cracks and the plaintiff sued. The *Millner* trial court found for the contractor and the court of appeals affirmed because it would not require the contractor to pay for doing exactly what the plaintiff required.³⁵²

The *Bee Window* court distinguished *Millner* on its facts because Stough did not supply the specifications for constructing the windows.³⁵³ "Stough specified only that [they] retain an aesthetic vertical and horizontal pattern."³⁵⁴ The court concluded:

In this case, the parties agreed that Bee Window would provide windows for twenty-three openings. Inherent in that agreement was an understanding that the windows would function as windows. Yet the record indicates they leaked rain, deflected inward and outward with changes in air pressure, failed to meet building code regulations and, more compelling, created a serious threat to life because they could explode or implode into razor-sharp pieces of glass. The trial court's ruling that Bee Window breached its contract with Stough is not clearly erroneous.³⁵⁵

349. The second of the two issues on appeal concerned whether the \$45,615 damage award was within the scope of the evidence. *See id.* On that issue, the *Bee Window* court could not agree that the conclusion was erroneous. *Id.* at 330-31. The trial court arrived at the damage award by subtracting the amount Stough initially refused to pay Bee Window for the original work from the lowest bid to remove and replace the window system. The trial court concluded that the existing windows Bee Window installed had no value and, in fact, subjected Stough to "the threat of tremendous tort liability[.]" *Id.* at 330-31 (quoting the trial court).

350. 599 N.E.2d 627 (Ind. Ct. App. 1992).

351. According to the *Bee Window* court's description, a "berm house" is a structure built into embanked earth. *Bee Window*, 698 N.E.2d at 330.

352. *See id.*

353. *Id.*

354. *Id.* Bee Window recommended a vinyl window frame that would perform better than aluminum. Bee Window also contended that it installed the windows in conformance with specific design specifications provided by a third party supplier/manufacturer and agreed to by Stough. *See id.* The court of appeals wrote that the trial court was free to accept or reject Bee Window's testimony regarding the existence and compliance with a specific design. In either event, the court of appeals concluded, "Stough did not develop technical expertise." *Id.*

355. *Id.*

In *Holloway v. Bob Evans Farms, Inc.*,³⁵⁶ Dorothy Holloway (“Holloway”) sued Bob Evans Farms, Inc. (“Bob Evans”) and Norpac Foods, Inc. (“Norpac”) in negligence and breach of contract after finding a worm in her meal while eating at a Bob Evans restaurant. Norpac supplied the frozen vegetables in which the worm was allegedly found. The trial court granted both Bob Evans’s and Norpac’s motions for summary judgment.³⁵⁷ The court of appeals reversed in part and affirmed in part.³⁵⁸

The first issue the court of appeals addressed was a procedural one: Whether Holloway’s complaint sufficiently asserted a breach of contract claim under Indiana’s notice pleading practice.³⁵⁹ Count I of Holloway’s complaint provided in relevant part:

9. Bob Evans knowingly invited [Holloway] into its restaurant and expressly offered by its menu and staff to prepare and deliver to [Holloway] wholesome food in return for a price set by which [she] agreed to pay.
10. Norpac knowingly delivered frozen food products to Bob Evans with the intention that the same be prepared and sold to the public who were invitees to Bob Evans.
11. Bob Evans recklessly and negligently failed to exercise reasonable care in the preparation of the food ordered by [Holloway], and Norpac negligently packaged the food products sold to [her].
12. As a direct and proximate result of [bob Evans’s and Norpac’s] negligence and failure to exercise reasonable care, [Holloway] suffered injury to her person of a continuing nature and out-of-pocket losses as hereinabove set forth.³⁶⁰

According to the *Holloway* court, the above-cited passage sounded in both tort and contract. The court determined that Paragraph 9 sufficiently alleged, per Rule 8 of the Indiana Rules of Trial Procedure, an offer, acceptance, and consideration.³⁶¹ Further, the court agreed that Paragraph 10 sufficiently alleged that Norpac breached its obligation to deliver unadulterated frozen food to Bob Evans.³⁶²

The court next examined, in turn, both Bob Evans’s and Norpac’s substantive claims that Holloway failed to set forth sufficient evidence to justify damages for

356. 695 N.E.2d 991 (Ind. Ct. App. 1998).

357. *See id.* at 993.

358. *Id.* at 997.

359. *Id.* at 994.

360. *Id.*

361. *Id.*

362. *Id.*

breach of contract. Bob Evans argued "that the only damages placed at issue by Holloway were her emotional distress damages and that such damages are not recoverable for breach of contract."³⁶³ The court agreed that emotional distress damages are not recoverable under a pure breach of contract theory, but that Holloway sought, in addition to recovery for emotional distress, recovery for her physical illness, multiple doctor visits, medications, and her absence from work.³⁶⁴ Accordingly, the court reversed the trial court's grant of summary judgment, concluding that a genuine issue of material fact existed on whether Bob Evans's breach was a substantial factor that contributed to Holloway's aforementioned damages.³⁶⁵

Norpac made a similar argument, maintaining that Holloway failed to present sufficient evidence to support her breach of contract claim with respect to it. The court agreed, recognizing first that Holloway's breach of contract claim against Norpac was based on a third party beneficiary theory.³⁶⁶ Holloway's claim failed because she did not designate any evidence regarding the terms of the contract between Norpac and Bob Evans, nor did she demonstrate that Norpac or Bob Evans intended that she receive a benefit by performance of the contract.³⁶⁷ Thus, the court determined that the trial court did not err when it granted summary judgment to Norpac on the breach of contract issue.³⁶⁸

Finally, in *I.C.C. Protective Coatings, Inc. v. A.E. Staley Manufacturing Co.*,³⁶⁹ the facts of which are discussed in detail earlier in this Article,³⁷⁰ the appellate court affirmed a trial court's decision to allow Staley's "principal process engineer" to offer an opinion that the company "lost 2.6 million pounds of starch, at a cost of approximately \$130,000, due to I.C.C.'s defective performance."³⁷¹ I.C.C. claimed that evidence of Staley's lost profits was irrelevant and speculative, and that the employee was incompetent to testify about lost profits.

According to the court, the Staley employee was familiar with the manufacturing process and that part of his job required him to estimate the

363. *Id.* at 995.

364. *Id.* (citing *Plummer v. Hollis*, 11 N.E.2d 140 (Ind. 1937)).

365. *Id.*

366. *Id.* The court acknowledged that a third party beneficiary contract in Indiana exists when: (1) the parties intend to benefit the third party, (2) the contract imposes a duty on one of the parties in favor of the third party, and (3) the performance of the terms of the contract renders a direct benefit to the third party intended by the parties to the contract.

Id. at 995 (citing *National Bd. of Examiners for Osteopathic Physicians and Surgeons, Inc. v. American Osteopathic Ass'n*, 645 N.E.2d 608, 618 (Ind. Ct. App. 1994)).

367. *See Holloway*, 695 N.E.2d at 996.

368. *Id.*

369. 695 N.E.2d 1030 (Ind. Ct. App. 1998).

370. *See supra* Part I.A.1.

371. *I.C.C. Protective Coatings*, 695 N.E.2d at 1037.

revenue that would be created by a new project to determine whether the project was cost-effective.³⁷² The employee was also familiar with Staley's marketing and sales procedures. As such, the court was satisfied that he was competent to testify about lost profits and that his testimony provided a sufficient basis for the trial court's damage award.³⁷³ The court also agreed that lost profit evidence was relevant because I.C.C.'s failure to comply with the specifications set forth in the agreement forced Staley to delay reactor operations until the work was corrected.³⁷⁴

H. Choice of Law

Indiana appellate courts resolved three cases during the survey period in which the parties raised choice of law issues in contract disputes, *Schaffert v. Jackson National Life Insurance Co.*,³⁷⁵ *Cox v. Nichols*,³⁷⁶ and *Hartford Accident & Indemnity Co. v. Dana Corp.*³⁷⁷ All three cases involved construction of insurance policies and, as such, this limited Article will not treat the underlying facts or their substantive resolution in detail. They are, however, notable in the contract context because they each confirm Indiana's "most intimate contacts"³⁷⁸ test for choice of law in contract cases involving interpretation of insurance policies. The "most intimate contacts" test focuses on five factors: (1) place of contracting; (2) place of negotiation; (3) place of performance; (4) location of subject matter of contract; (5) domicile, residence, nationality, place of incorporation and place of business of parties.³⁷⁹

372. *Id.*

373. *Id.* In estimating lost profits, the engineer multiplied the number of pounds of starch that would have been produced during the delay by the net profit Staley earned per pound of starch. The court agreed that the evidence supported the damage award. *Id.*

374. *Id.*

375. 687 N.E.2d 230 (Ind. Ct. App. 1997).

376. 690 N.E.2d 750 (Ind. Ct. App. 1998).

377. 690 N.E.2d 285 (Ind. Ct. App. 1997).

378. The "most intimate contacts" test has been succinctly stated as follows: "The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply the law of that state with which the facts are in most intimate contact." *Schaffert*, 687 N.E.2d at 233 (quoting *Eby v. York-Div., Borg-Warner*, 455 N.E.2d 623, 626 (Ind. Ct. App. 1983) (citation omitted)).

379. See *Hartford*, 690 N.E.2d at 291-94 (utilizing test to resolve whether to apply Ohio or Indiana law, ultimately determining that application of Indiana law was appropriate); *Schaffert*, 687 N.E.2d at 232-33 (applying factors to conclude that Illinois law applied rather than Indiana law); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). Although it recognizes the "most intimate contacts" choice of law test when construing an insurance contract, the court's opinion in *Cox v. Nichols*, 690 N.E.2d 750 (Ind. Ct. App. 1998), never sets forth each of the test's factors in detail. Regardless, because the *Cox* court ultimately determined that it could not resolve the choice of law issue solely by looking to the contract itself, the *Cox* opinion also includes

II. SURVEY OF 1998 INDIANA BUSINESS LAW

A. Interest

1. *Construction Contracts*.—In *Indiana Erectors, Inc. v. Trustees of Indiana University*,³⁸⁰ the facts of which are discussed in detail earlier in this Article,³⁸¹ Erectors appealed the trial court's award of prejudgment interest because the University had failed to comply with section 34-4-37-1 of the Indiana Code.³⁸² Citing the decision of *In re Johnson*,³⁸³ the court noted that this statute provided for new substantive right to *tort* claimants, enabling such plaintiffs to recover prejudgment interest as a component of compensatory damages.³⁸⁴ The court also noted that prejudgment interest had been permitted as a component of contract damages prior to the enactment of section 34-4-37-1 of the Indiana Code.³⁸⁵ Given that the trial court awarded damages based on a breach of contract theory, the court held that the provisions of section 34-4-37-1 were inapplicable and affirmed the trial court's award of prejudgment interest.³⁸⁶

In *Hooker Builders, Inc. v. Smalley*,³⁸⁷ Hooker Builders, Inc. ("Hooker") entered into an agreement with the Smalleys to construct their residence. After construction, a dispute arose regarding the amount owed by the Smalleys under the agreement.³⁸⁸ The matter was submitted to an arbitrator, who determined that the Smalleys owed Hooker the cost of construction plus eight percent, resulting in an award of \$82,571.92 for Hooker. Hooker filed a motion to reconsider, asking the arbitrator to include interest on the award.³⁸⁹ The arbitrator denied Hooker's request and reaffirmed the arbitrator's award. Hooker then filed a motion to correct the arbitrator's award in Bartholomew County Superior Court No. 2. The trial court denied the motion and confirmed the award.³⁹⁰ Thereafter, a subcontractor of Hooker's filed a mechanic's lien on the property. The Smalleys petitioned the court to order Hooker to accept the award of \$82,571.92. The trial court granted the Smalleys request, ordering the Smalleys to pay the

Indiana's three factor test utilized to determine choice of law in tort cases. *Cox*, 690 N.E.2d at 752 (citing *Hubbard Mfg. Co., Inc. v. Greeson*, 515 N.E.2d 1071, 1073 (Ind. 1987)).

380. 686 N.E.2d 878 (Ind. Ct. App. 1997)).

381. *See supra* Part I.D.6.

382. *Indiana Erectors*, 686 N.E.2d at 882.

383. 120 B.R. 461 (Bankr. N.D. Ind. 1990).

384. *Indiana Erectors*, 686 N.E.2d at 882.

385. *Id.* (citing *Indianapolis Mach., Co. v. Cohen*, 378 N.E.2d 931, 935 (1978)).

386. *Id.*

387. 691 N.E.2d 1256 (Ind. Ct. App. 1998).

388. *See id.* at 1257. The Smalleys contended the Hooker was due only the balance of the estimated contract price while Hooker contended the actual cost of construction controlled. *See id.*

389. *See id.*

390. *See id.*

award into the court, which award was eventually delivered to Hooker.³⁹¹

Hooker appealed the trial court's denial of Hooker's motion to correct the arbitrator's award to include interest.³⁹² The court noted that an award of interest is available only if damages are readily ascertainable.³⁹³ Because, Hooker failed to provide the court with a record of the trial court's proceedings, the court held that Hooker was not entitled to interest prior to the date of the arbitrator's award. However, because both parties agreed that the arbitrator's award was binding, the court awarded Hooker interest from the date of the award to the date of the trial court's judgment.³⁹⁴

2. *Tender of Payment.*—In *4-D Buildings, Inc. v. Palmore*,³⁹⁵ 4-D Buildings, Inc. ("Builder") brought an action against The Golden Post, Inc. ("Kennel") requesting foreclosure of a mechanics lien for the construction of a building. Kennel counterclaimed against Builder claiming defective construction.³⁹⁶ "Kennel admitted that it owed the amount secured by the mechanic's lien."³⁹⁷ Builder agreed to accept a sum of \$4,933.56 from Kennel in exchange for releasing Kennel from any further accumulation of prejudgment interest.³⁹⁸ However, Kennel paid said amount, over Builder's objection, to the trial court. The trial court ruled that it would hold the payment pending resolution of the trial.³⁹⁹ The trial court subsequently held that such payment to the court constituted proper tender by the Kennel to discontinue accumulation of prejudgment interest.⁴⁰⁰ Builder appealed.

The *4-D Buildings* court noted that the award of prejudgment interest is based upon the idea that the plaintiff, during the course of litigation, is deprived of funds and is not made whole unless interest is included in the award.⁴⁰¹

391. *See id.*

392. As a threshold issue, the court rejected the Smalleys' claim that Hooker, by accepting the award and simultaneously executing a waiver for its receipt, waived the right to bring further claims. *Id.* The court's ruling was based on the facts that Hooker accepted the award at the Smalleys' request to remove the lien and was merely a credit against the ultimate judgment. *Id.*

393. *Id.* at 1258 (citing *City of Indianapolis v. Twin Lakes Enters., Inc.*, 568 N.E.2d 1073, 1087 (Ind. Ct. App. 1991) (finding that damages are readily ascertainable where the trier of fact need not exercise its judgment to determine the amount of damages)).

394. *Id.* The court awarded further interest from the date of judgment to the date the Smalleys' paid the amount of the award to the trial court based on section 24-4.6-1-101 of the Indiana Code. *Id.*

395. 688 N.E.2d 918 (Ind. Ct. App. 1997).

396. *See id.* at 920.

397. *Id.*

398. *See id.*

399. *See id.*

400. *See id.*

401. *Id.* (citing *Wayne Township v. Lutheran Hosp. of Ft. Wayne, Inc.*, 590 N.E.2d 1130, 1134 (Ind. Ct. App. 1992)).

However, a proper tender ends any further obligation to pay additional interest.⁴⁰² The court noted that a proper tender “generally requires full payment of the debt due, and *if refused*, the tender must be kept open by paying the full amount into court.”⁴⁰³ Because Kennel did not pay the tendered sum to Builder, Builder did not receive compensation for deprivation of sums due to Builder. Therefore, the court held that the tender was improper and did not serve to stem the accumulation of prejudgment interest.⁴⁰⁴

B. Banks and Banking

1. *Fiduciary Relationship with Debtors.*—In *The Huntington Mortgage Co. v. DeBrotta*,⁴⁰⁵ debtors on home mortgage loans originated by The Huntington Mortgage Company (the “Bank”)⁴⁰⁶ brought suit against the Bank for its collection private mortgage insurance (“PMI”).⁴⁰⁷ The Bank moved for summary judgment, which was denied by the trial court,⁴⁰⁸ and then brought an interlocutory appeal. In its appeal, the Bank requested that the court grant its summary judgment motion against the debtors’ claims for breach of contract, suppression of material facts, conversion, unjust enrichment, civil conspiracy, bailment and breach of fiduciary duty.⁴⁰⁹

In addressing the debtors’ breach of contract claim, the court noted that the mortgage executed by the debtors contained sections requiring the payment of PMI premiums if payment of such conditions were a requirement for making the loan.⁴¹⁰ In determining whether PMI was a requirement for making the loan, the

402. *See id.* (citing IND. CODE §§ 26-1-3.1-603(c), 34-2-24-1 (1998)).

403. *Id.* (emphasis in original) (citing IND. CODE § 34-2-24-1 (1998); *Maddox v. Wright*, 489 N.E.2d 133, 138 (Ind. Ct. App. 1996)).

404. *Id.* at 921. The court also addressed Builder’s appeal of certain damages awarded Kennel on its counterclaims. Builder claimed that the trial court awarded Kennel damages for corrective actions that were for items beyond those contained in the agreement for construction between Builder and Kennel. *See id.* Thus, Builder argued, the trial court put Kennel into a better position than it would have been under the contract. While the court agreed with Builder’s argument that an award for contractual damages is limited to the loss actually suffered, it noted that the additional items were necessitated to cure Builder’s breach and therefore were permissible. *Id.* at 921-22.

405. 703 N.E.2d 160 (Ind. Ct. App. 1998).

406. The loans subsequently were sold by the Bank to Fannie Mae. *See id.* at 163.

407. *Id.* As the court notes, the secondary market requires debtors to pay PMI premiums when the loan to value ratio for the home mortgage loan is greater than eighty percent. *Id.* PMI protects the lender in the event that unpaid balance of a loan is greater than the value of the mortgaged property at foreclosure. *See id.* at 163 n.3.

408. *Id.* at 163.

409. *Id.*

410. *Id.* at 164. The court cited the following provision:

Funds for Taxes and Insurance. Subject to applicable law or to a written waiver

court reviewed the Bank's commitment letter, which specifically required such payments.⁴¹¹ Moreover, the court pointed to the debtors' own testimony, wherein they admitted that they were aware that PMI would be required for their loan.⁴¹² The court rejected the debtors' argument that the Bank was obligated contractually to enter into an agreement to discontinue PMI payments based on the plain meaning of the language in the mortgage permitting cessation of PMI payments when such requirement ends upon written agreement between a debtor and the Bank.⁴¹³ In addition to disagreeing regarding the "plain meaning" of the said language, the court further noted that the mortgage stated that PMI premiums are to be paid "until the Note is paid in full."⁴¹⁴ The debtor next argued that the Bank had the right to cancel PMI premiums given that the Fannie Mae servicing guidelines permit the Bank to cancel such premiums when the loan to value ratio of the loan reaches eighty percent.⁴¹⁵ The court, however, held that Fannie Mae's policy places discretion with the lender and confers no rights upon debtor.⁴¹⁶ Moreover, the court stated that the debtors' argument ignores the fact that lenders may desire PMI when the loan to value ratio is less than eighty percent for high risk borrowers, and that the Bank's policies included criteria for discontinuance of PMI insurance, such as reappraisal of the mortgaged property.⁴¹⁷ Therefore, the court held that the Bank had a contractual right to continue collection of PMI premiums from debtors.⁴¹⁸

by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum of ("Funds") for : . . . (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payments of mortgage insurance premiums.

* * *

Mortgage Insurance. If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain mortgage insurance in effect . . . until the requirement for mortgage insurance ends in accordance with any written agreement between Borrower and Lender or applicable law.

Id. at 164.

411. The commitment letter stated: "THIS COMMITMENT IS CONTINGENT UPON THE CONDITIONS AS NUMBERED BELOW: . . . (4) Receipt of mortgage insurance approval by coverage at 22%, AT TIME OF CLOSING." *Id.*

412. *Id.* at 165.

413. *Id.* at 164.

414. See *supra* note 409 and accompanying text.

415. *Huntington Mortgage*, 703 N.E.2d at 165.

416. *Id.* at 166 (citing *Hinton v. Federal Nat'l Mortgage Ass'n*, 945 F. Supp. 1052, 1056, 1059 (S.D. Tex. 1996)).

417. *Id.*

418. *Id.* In holding that the Bank had a right to collect the PMI premiums, the court found it unnecessary to address the debtors' claims for conversion and unjust enrichment. *Id.*

The court next considered whether the Bank had a fiduciary duty to debtors, such that the Bank was obligated to make certain disclosures to debtors.⁴¹⁹ The court first noted that, in Indiana, the general rule is that “the mere existence of a relationship between parties of bank and customer or depositor does not create a special relationship of trust and confidence.”⁴²⁰ The court noted that, for a fiduciary relationship between bank and customer to be implied, special circumstances must exist wherein a weaker, less knowledgeable and/or dependant party puts confidence in the other, and that party wrongfully abuses the confidence.⁴²¹ The debtors asserted that the Bank’s superior knowledge regarding PMI, control over the premiums and the purchase PMI, and its duties to provide an accounting for and properly escrow said funds gave rise to a fiduciary relationship. The court noted, however, that such circumstances exist in almost every relationship between a lender and a borrower.⁴²² The court cited the Eastern District of Louisiana’s holding that although a lender, as an escrow agent for insurance premiums and taxes, does have certain fiduciary duties to safeguard and properly disburse funds, such duties do not encompass a duty secure the lowest premium rate, the best terms, or the best company any more than the escrow of tax payments imposes a duty to secure lower assessments.⁴²³ Thus, the court held that the debtors had failed to establish special circumstances that would give rise to a fiduciary relationship.⁴²⁴

2. *Wrongful Dishonor.*—In *Wells v. Stone City Bank*,⁴²⁵ Wells obtained a loan from the Stone City Bank (the “Bank”) in the amount of \$15,000 and opened a checking account with the Bank, into which the loan proceeds were

419. *Id.* at 166-69. Specifically, the debtors alleged that [the Bank] had a duty to disclose the following: 1) that there was no written agreement or applicable law which required [the debtors] to pay PMI; 2) the true nature of the purpose and requirements for PMI; 3) the fact that [the debtors] could obtain PMI from the insurer of their choice; 4) the point at which [the debtors] were no longer required to pay PMI, if at all; 5) the criteria for discontinuing payment of PMI insurance premiums; . . . [and that] the premiums for PMI did not decrease as [the debtors] paid down the principal of the loan.

See id. at 166-67.

420. *Id.* at 167 (quoting *Peoples Trust Bank v. Braun*, 443 N.E.2d 875, 879 (Ind. Ct. App. 1983)).

421. *Id.*

422. *Id.*

423. *Id.* at 167-68 (citing *Blair v. Source One Mortgage Servs. Corp.*, No. CIV.A. 96-2497, 1997 WL 250040, at *11 (E.D. La. May 9, 1997)).

424. *See id.* at 168. The court dispensed with the civil conspiracy claim because the debtors failed to raise any action of the Bank with regard to collection of PMI that was unlawful. *Id.* The bailment claim was dismissed by the court because it had held the Bank had a right to collect such PMI premiums and was not required to return said premiums to the debtors. *Id.* at 169. Therefore, no bailment had been created.

425. 691 N.E.2d 1246 (Ind. Ct. App. 1998).

deposited. Afterwards, Wells wrote three checks totaling \$9,534.20, which the Bank did not honor.⁴²⁶ Approximately three years later, Wells sued the Bank for wrongful dishonor, breach of contract, breach of the duty of good faith, and fraud, asking for \$17.5 million in lost income, punitive damages, costs, and attorney fees.⁴²⁷ The Bank moved for summary judgment, arguing that Wells' claims were barred by the two-year statute of limitations for personal injury claims.⁴²⁸ Wells appealed, contending that his claims sounded in breach of contract, and therefore were subject to the six-year statute of limitations for contract claims.⁴²⁹

In determining which limitations period applied to Wells' claim, the court noted that if either of two statutes of limitation apply to a claim, any doubt as to which one to apply should be resolved in favor of applying the longer period.⁴³⁰ Citing *Black's Law Dictionary*, the court noted that "a tort is a legal wrong to person or property, *independent of contract*."⁴³¹ However, the relationship between bank and depositor, particularly with regard to a checking account, is contractual in nature.⁴³² The court noted that Wells did not allege the breach of any duty in his claim against the Bank outside of the Bank's failure to comply with the terms of his contract for services.⁴³³ The court rejected the Bank's argument that because some of Wells' claims, such as the claim for damage to reputation, are generally only available for libel, slander, abuse of process, malicious prosecution and interference with third party contract, that his claim was a tort action. The court noted that the reason damage to reputation was permitted in such claims is because such damages are a foreseeable results of such torts.⁴³⁴ The court reasoned that a trial court, looking at the facts of this case, might determine that damage to reputation was a foreseeable result of the Bank's breach of its contract with Wells.⁴³⁵ The court concluded that the possibility that a particular injury is not a foreseeable result of a particular breach of contract should not preclude a contract claim just because the consequential damage sought sounds more appropriately in tort.⁴³⁶

426. *See id.* at 1248.

427. *See id.*

428. *See id.*; *see also* IND. CODE § 34-1-2-2 (1998).

429. *See Wells*, 691 N.E.2d at 1248; *see also* IND. CODE § 34-1-2-1 (1998).

430. *Wells*, 691 N.E.2d at 1249.

431. *Id.* (emphasis added by the court) (citing BLACK'S LAW DICTIONARY 1489 (6th ed. 1990)).

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* at 1250. The court cited *Lawyers Title Insurance Corp. v. Pokraka*, 595 N.E.2d 244, 247 (Ind. 1992), for the proposition that recovery theories of fraud or breach of oral contract always involve injury to person or property and that applying the two-year statute of limitations to such claims would be tantamount to repealing the six-year statute of limitations for fraud and breach of

The court rejected Wells' claim of fraud in the Bank's misrepresentation that it would honor Wells' checks by opening an account and accepting his deposit.⁴³⁷ The court observed that fraud requires a misrepresentation of a past or present fact.⁴³⁸ However, the court noted that Wells' claims stated a cause of action for constructive fraud, which does not require a false statement of a past or present fact.⁴³⁹ The elements of constructive fraud are: 1) a duty existing by virtue of the relationship between the parties; 2) representations or omissions made in violation of that duty; 3) reliance thereon by the complaining party; 4) injury to the complaining party as a proximate result thereof; and 5) the gaining of an advantage to the duty-bound party to this disadvantage of the complaining party.⁴⁴⁰ The court held that the Bank's superior position with regard to its depositors, who depend on the bank to safeguard their funds and honor their checks, imposes a duty on a Bank sufficient for the first element of constructive fraud.⁴⁴¹ The court further held that Wells' allegations satisfied the remaining elements of constructive fraud.⁴⁴² Therefore, the court reversed the trial court's grant of summary judgment on the allegation of fraud.⁴⁴³

3. *Failure to Abide by Loan Commitment.*—In *Ohio Valley Plastics v. National City Bank*,⁴⁴⁴ a loan officer for National City Bank (the "Bank") continued to assure the principal of Ohio Valley Plastics, Inc. (the "Borrower") that the Bank had approved Borrower's request for a line of credit, when, in fact, the loan request had never been submitted to the Bank's loan committee and had not been approved. Borrower then brought an action against the Bank for fraud and promissory estoppel alleging reliance damages including lost business opportunities, costs in delaying business plans, damage to reputation, stationary and other costs and increased interest costs due to a higher rate on the loan Borrower obtained with another lender.⁴⁴⁵ The trial court granted the Bank's

oral contract. *Wells*, 691 N.E.2d at 1249-50.

437. *Id.* at 1251.

438. *Id.* at 1250.

439. *Id.*

440. *Id.* at 1250-51 (citing *Mullen v. Cogdell*, 643 N.E.2d 390, 401 (Ind. Ct. App. 1994)).

441. *Id.* at 1251. The court declined to determine that the Bank's duty was a fiduciary one, but the court held that a fiduciary duty is not required for constructive fraud. *Id.*

442. *Id.* The second criteria is satisfied by the allegation that the Bank breached its duty to honor Wells' checks, the third by the allegation that Wells relied on the Bank to honor his checks, the fourth by Wells' allegation that he was injured, and the fifth by the allegation that the Bank gained interest income from the sham transaction. *See id.*

443. *Id.* In his dissent, Judge Rucker disagreed with the majority's holding that the cause of action sounded in contract. *Id.* (Rucker, J., dissenting). Focusing on the substance of the cause of action, rather than the manner in which it was pleaded, Judge Rucker noted that the claims for damage to reputation and credibility are for personal injuries, which are properly recoverable in a tort action. *Id.* at 1252.

444. 687 N.E.2d 260, 262 (Ind. Ct. App. 1997).

445. *See id.*

motion for summary judgement based on the Statute of Frauds.⁴⁴⁶

The Borrower appealed, arguing in the alternative that: (i) its claim did not rise out of a credit agreement but from the Bank's misrepresentations and therefore the Statute of Frauds does not apply or (ii) even if the Statute of Frauds does apply, equitable theories of constructive fraud and promissory estoppel remove the case from the Statute.⁴⁴⁷ In addressing the Borrower's first contention, the court noted that "[t]he substance of an action, rather than its form, controls whether a particular statute" applies.⁴⁴⁸ The court further noted the Indiana Supreme Court's admonition in *Ball v. Cox*⁴⁴⁹ that courts closely adhere to the Statute of Frauds, less it be rendered impotent.⁴⁵⁰ The court held that Indiana Code section 32-2-1.5-5, which applies to "an action upon *an agreement* with a creditor *to enter into a new credit agreement*,"⁴⁵¹ applies to all actions arising out of an agreement of a bank to loan money, whether they be characterized as breach of contract, fraud, deceit or promissory estoppel.⁴⁵²

In addressing the Borrower's second contention, the court noted that, based on *Whiteco Industries, Inc. v. Kopani*,⁴⁵³ a claim of fraud or estoppel will not remove a case from the Statute of Frauds.⁴⁵⁴ To so rule, the court continued, would render the statute meaningless as every plaintiff would assert an oral promise estopped the statute's requirement of a writing.⁴⁵⁵ In order for promissory estoppel to remove a case from the Statute of Frauds, the plaintiff must demonstrate the "infliction of an unjust and unconscionable injury."⁴⁵⁶ In the case at bar, the court held that Borrower's reliance damages did not rise to that level.⁴⁵⁷ The court went on to dismiss the Borrower's claim for constructive fraud because the Borrower's allegations did not satisfy the requirement that the Bank gain from its alleged fraud.⁴⁵⁸ Lastly, the court distinguished the case of

446. See *id.* Indiana's Statute of Frauds, IND. CODE § 32-2-1.5-5 (1998), provides in part: "A debtor may bring an action upon an agreement with a creditor to enter into a new credit agreement . . . only if the agreement: (1) is in writing; (2) sets forth all the material terms and conditions of the agreement; and (3) is signed by the creditor and debtor."

447. *Ohio Valley Plastics*, 687 N.E.2d at 263.

448. *Id.* (citing *Shideler v. Dwyer*, 417 N.E.2d 281, 285-86 (Ind. 1981); *INB Nat'l Bank v. Moran Elec. Serv., Inc.*, 608 N.E.2d 702, 706 (Ind. Ct. App. 1993)).

449. 7 Ind. 453 (1856).

450. *Ohio Valley Plastics*, 687 N.E.2d at 263.

451. IND. CODE § 32-2-1-1.5-5 (1998) (emphasis added).

452. *Ohio Valley Plastics*, 687 N.E.2d at 263-64.

453. 514 N.E.2d 840 (Ind. Ct. App. 1987).

454. *Ohio Valley Plastics*, 687 N.E.2d at 264.

455. *Id.* (citing *Whiteco Indus.*, 514 N.E.2d at 844).

456. *Id.* (quoting *Whiteco Indus.*, 514 N.E.2d at 845).

457. *Id.*

458. *Id.* See *supra* note 418 and accompanying text (discussing the elements of constructive fraud).

First National Bank v. Logan Manufacturing Co.,⁴⁵⁹ wherein the Indiana Supreme Court did permit a borrower to collect reliance damages for breach of an oral agreement to loan money, because that case was decided prior to the effective date of the statute in question.⁴⁶⁰

4. *Conversion of Negotiable Instruments Fraudulently Endorsed by Fiduciary.*—In *UNR-Rohn, Inc. v. Summit Bank of Clinton County*,⁴⁶¹ the court of appeals addressed whether a bank could be held liable when it cashed hundreds of checks for an authorized signor on a corporate account, which funds later were determined to be embezzled.⁴⁶² An employee of UNR-Rohn, Inc. (“Depositor”) had authorized a certain employee to endorse checks payable to Depositor. In 1984, the employee began to cash third-party checks at NBD Bank (the “Bank”) payable to Depositor and continued this practice until 1991, by which time the employee had embezzled approximately \$182,000.⁴⁶³ Depositor brought an action against the Bank under Indiana Code section 26-1-3-419⁴⁶⁴ for breach of an alleged duty to deposit said checks to Depositor’s account rather than cash them. The Bank moved for summary judgment based on the Uniform Fiduciary Act (“UFA”)⁴⁶⁵ and the statute of limitations. The trial court granted the Bank’s motion with regard to the UFA but denied its motion with regard to the statute of limitations defense.⁴⁶⁶ Both parties appealed.

The court first reviewed Indiana Code sections 30-2-4-4 and 30-2-4-9 and determined that, if a fiduciary is empowered to endorse checks, the UFA protects a bank cashing a check endorsed by such fiduciary unless the bank has (i) actual knowledge that the fiduciary is breaching its duty or (ii) knowledge of sufficient facts that the bank’s action in dealing with such fiduciary is in bad faith.⁴⁶⁷ Although the UFA does not define “bad faith,” the court noted that other courts addressing whether a bank acted with bad faith under the UFA have examined “whether it was “commercially” unjustifiable for the payee to disregard and refuse to learn facts readily available.”⁴⁶⁸ Because the Bank was the moving party, the Bank had the burden of establishing that no genuine issue of material fact existed with regard to whether it acted in bad faith. The court noted that the Bank permitted the employee of Depositor to deposit several hundred corporate checks into his personal account, yet “merely relied upon general assertions in

459. 577 N.E.2d 949 (Ind. 1991).

460. *Ohio Valley Plastics*, 687 N.E.2d at 265.

461. 687 N.E.2d 235 (Ind. Ct. App. 1997).

462. *Id.* at 236-37.

463. *See id.*

464. IND. CODE § 26-1-3-419 (repealed by P.L. 222-1993, § 58, effective July 1, 1994) (recodified as amended at IND. CODE § 26-1-3.1-420 (1998)).

465. IND. CODE §§ 30-2-4-1 to -14 (1998).

466. *UNR-Rohn*, 687 N.E.2d at 237.

467. *Id.* at 238-39 (citing IND. CODE §§ 30-2-4-4, -9 (1998)).

468. *Id.* at 239 (quoting *Appley v. West*, 832 F.2d 1021, 1031 (7th Cir. 1987) (stating that “[a]t some point, obvious circumstances become so cogent that it is ‘bad faith’ to remain passive”).

its pleadings that it acted in good faith and that it lacked any knowledge of any breach of [the employee's] fiduciary duty."⁴⁶⁹ The court then held that the Bank did not meet its burden of establishing that no genuine issue of material fact existed by merely asserting good faith, and reversed the trial court's grant of summary judgement on this issue.⁴⁷⁰

In addressing the Bank's cross appeal for denial of summary judgment, the court focused on determining the point in time at which the Depositor's cause of action accrued under Indiana Code section 34-1-2-2⁴⁷¹ for the purpose of determining whether the statute of limitations had lapsed.⁴⁷² The court first noted that Indiana courts, in determining when a cause of action accrues under Indiana Code section 34-1-2-2, consistently have applied the discovery rule whereby a cause action begins accruing at the time the plaintiff knew, or with the exercise of ordinary diligence, could have discovered that a cause of action against another has arisen.⁴⁷³ The court concluded that in Indiana, the discovery rule applies to the accrual of any tort action.⁴⁷⁴ The Bank argued that no Indiana court had applied the discovery rule to a cause of action involving the conversion of negotiable instruments and cited a litany of cases from other jurisdictions that declined to apply the discovery rule to Indiana Code section 26-1-3-419.⁴⁷⁵ The court, however, reasoned that it would be inconsistent with Indiana's system of jurisprudence to carve out an exception to the discovery rule for tort actions involving conversion of negotiable instruments.⁴⁷⁶ Therefore, the court remanded the case to the trial court to apply the discovery rule to the Depositor's cause of action under Indiana Code section 26-1-3-419 and to determine whether the Depositor's claims were time barred.⁴⁷⁷

469. *Id.* at 239.

470. *Id.*

471. IND. CODE § 34-1-2-2 (1998).

472. *UNR-Rohn*, 687 N.E.2d at 239. The court also noted that both parties agreed that the two year statute of limitations set forth in Indiana Code section 34-1-2-2(1) (1998) applied to the Depositor's claims. *Id.* at 240.

473. *Id.* at 240 (noting that the discovery rule "is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring [a] cause of action" before the plaintiff could know, with due diligence, that such cause of action existed).

474. *Id.* (citing *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 842-43 (Ind. 1992); *Habig v. Bruning*, 613 N.E.2d 61, 64 (Ind. Ct. App. 1993)).

475. The court may have actually meant to refer to U.C.C. 3-419 based upon the court's reference to this statute in footnote 5. *Id.* at 241 & n.5.

476. *Id.* at 241. The court did recognize in a footnote that other jurisdictions had declined to apply the discovery rule to causes of action under U.C.C. 3-419 in the absence of fraudulent concealment based on "U.C.C. policies of finality, negotiability and uniformity." *Id.* at 241 n.5.

477. *Id.* at 241.

C. Associations

1. *Barring Claims by Members Against Associations.*—In *Biereichel v. Smith*,⁴⁷⁸ the court of appeals held that a member of an unincorporated association could not sue the association for the tortious acts of another member. In *Biereichel*, the plaintiff, a member of a union, went to the union's "office to obtain information regarding work opportunities."⁴⁷⁹ After a discussion with a union member employed by the union as its business manager/representative, the plaintiff was attacked by the union business manager and was severely injured.⁴⁸⁰ The plaintiff filed an action against the union and the union was granted partial summary judgment by the trial court based "on the general rule in Indiana that members of an unincorporated association cannot sue the association for the tortious acts of one or more of its members."⁴⁸¹

On appeal, the plaintiff contended that the court of appeal's recent ruling in *Hanson v. St. Luke's United Methodist*⁴⁸² required the court to reverse the summary judgment ruling.⁴⁸³ In *Hanson*, the court of appeals carved out an exception to the general rule and refused to dismiss a lawsuit brought by a member against her church for injuries she sustained during a fall in the church's parking lot.⁴⁸⁴ However, because the Indiana Supreme Court had granted transfer in *Hanson*, that decision did not constitute binding precedent.⁴⁸⁵ The *Biereichel* court then reviewed the supreme court's decision in *Calvary Baptist Church v. Joseph*,⁴⁸⁶ which articulated the general rule that "members of an unincorporated association cannot sue the association for the tortious acts of one or more of its members."⁴⁸⁷ In *Calvary*, the supreme court noted that other jurisdictions had created an exception to this general rule for highly organized and centralized associations and cited the California Supreme Court's decision in *Marshall v.*

478. 693 N.E.2d 634, 638 (Ind. Ct. App. 1998).

479. *Id.* at 635.

480. *See id.*

481. *Id.* at 636.

482. 682 N.E.2d 1314 (Ind. Ct. App. 1997).

483. *Biereichel*, 693 N.E.2d at 636.

484. *Id.*

485. *See id.*

486. 522 N.E.2d 371 (Ind. 1988).

487. *Biereichel*, 693 N.E.2d at 636. The court quoted from *Calvary* the theory behind the general rule:

[T]he members of an unincorporated association are engaged in a joint enterprise. The negligence of each member in the prosecution of that enterprise is imputable to each and every other member so that the member who has suffered damages through the tortious conduct of another member of the association may not recover from the association for such damage. It would be akin to the person suing himself as each member becomes both a principal and an agent as to all other members for the actions of the group itself.

Id. (quoting *Calvary Baptist Church*, 522 N.E.2d at 374-75).

International Longshoremans' and Warehousemans' Union.⁴⁸⁸ The *Biereichel* court noted that, although the Supreme Court in *Calvary* did recognize the wisdom of this exception, the *Calvary* court declined to adopt it.⁴⁸⁹ The *Biereichel* court likewise declined to adopt the exception, as it believed that any abrogation of a general rule of law would be best left to the Indiana Supreme Court.⁴⁹⁰

The plaintiff then argued that the general rule in Indiana should not be applied when the member committing the tortious conduct was not engaged in an association activity or joint enterprise.⁴⁹¹ The *Biereichel* court rejected this argument finding that the *Calvary* court did not set out any such requirement for application of the general rule.⁴⁹² Finally, the plaintiff argued that summary judgment was inappropriate because the association manager's acts arguably were intentional and therefore the general rule set forth in *Calvary* does not apply.⁴⁹³ The *Biereichel* court declined to address this argument because the plaintiff failed to support this contention with an argument or relevant authority.⁴⁹⁴ Therefore, the *Biereichel* court affirmed the trial court's grant of summary judgment in favor of the defendant union.⁴⁹⁵

In *Menard Inc. v. Dage-MTI, Inc.*,⁴⁹⁶ the court of appeals addressed whether the president of a corporation could bind the corporation when he did not have express authority to sell the corporation's property. Dage-MTI, Inc. ("Dage") is a closely held Indiana corporation whose president was Arthur Sterling ("Sterling").⁴⁹⁷ Menard, Inc. ("Menard") forwarded a formal offer to Sterling for the purchase of certain real estate owned by Dage. Sterling circulated the offer to the Dage directors who had a disfavorable opinion of the sale.⁴⁹⁸ Thus, Sterling let the offer lapse. Later, Sterling informed Menard's agent that the Dage board of directors had objected to various provisions contained in the offer.⁴⁹⁹

Subsequently, Menard indicated that it would make a second offer for a

488. 371 P.2d 987 (1962) (recognizing an exception for large international labor unions satisfying the following "two-part test: (i) whether the association possesses a separate legal existence from its members, and (ii) whether the members retain direct control over the operations of the association").

489. *Biereichel*, 693 N.E.2d at 637.

490. *Id.*

491. *See id.*

492. *Id.* at 637.

493. *Id.* at 637-38.

494. *Id.* at 638.

495. *Id.*

496. 698 N.E.2d 1227, 1229 (Ind. Ct. App. 1998).

497. *See id.*

498. *See id.*

499. *See id.*

larger portion of the real estate.⁵⁰⁰ Sterling drafted a resolution that authorized Sterling to "offer and sell" the real estate. Sterling was told by the board of directors to revise the resolution to read "offer for sale."⁵⁰¹ Sterling was further informed by the board that he could only offer the real estate to Menard at a particular price and could not negotiate the terms of a sale without board acceptance.⁵⁰² When Menard forwarded a second proposal to purchase the real estate, the agreement contained the same objectionable provisions found in the first proposal. Nevertheless, Sterling negotiated several minor changes to the agreement and then signed the revised offer on behalf of Dage without approval of the board of directors.⁵⁰³ The offer included a provision stating that Sterling was duly authorized to sign the agreement and to bind Dage.⁵⁰⁴ Once the board of directors became aware of the Menard agreement, the board ordered Sterling to "extricate Dage from the agreement" and retained counsel to put Menard on notice that the board questioned and intended to contest the agreement's enforceability.⁵⁰⁵ Menard ultimately filed suit for specific performance against Dage. The trial court ruled in favor of Dage and Menard appealed.

On appeal, Menard first argued that the trial court erred concluding that Sterling lacked express authority to sign the agreement.⁵⁰⁶ The *Menard* court stated a fundamental tenet of agency law that "an agent has no authority to act contrary to the known wishes and instructions of his principal."⁵⁰⁷ Moreover, "an agent is authorized to do [only] what is reasonable for him to infer that the principal desires him to do in light of the principal's manifestations and the facts as he knows . . . them or should know them at the time."⁵⁰⁸ The *Menard* court noted that the resolution drafted by Sterling was specifically altered to change the language to "offer for sale." Further, the Dage board of directors "informed Sterling that any offer made by Menard would require board review and acceptance."⁵⁰⁹ Thus, the *Menard* court concurred with the trial court's ruling that Sterling lacked express authority to bind Dage to the terms of Menard's agreement.⁵¹⁰ Menard cited *Blairex Laboratories, Inc. v. Clobes*,⁵¹¹ wherein the court of appeals held that an agent had express authority from its principal despite the fact that one member of the board of directors indicated that he would

500. *Id.*

501. *Id.* at 1229-30.

502. *See id.* at 1230.

503. *See id.*

504. *See id.*

505. *Id.*

506. *See id.*

507. *Id.* (quoting *Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co.*, 740 F.2d 1384, 1391 (7th Cir. 1984)).

508. *Id.* at 1230-31 (quoting RESTATEMENT (SECOND) OF AGENCY § 33 & cmt. a (1957)).

509. *Id.* at 1231.

510. *Id.*

511. 599 N.E.2d 233 (Ind. Ct. App. 1992).

like to see the agent enter into a contract with certain provisions which the contract ultimately did not contain.⁵¹² The *Menard* court distinguished *Blairex* because the Dage board of directors' expressions were not merely a desire to see certain terms in the agreement, but rather specific directives that Sterling's authority was limited only to solicitation of offers.⁵¹³

Menard also argued that the trial court erred in finding that Sterling did not have apparent authority to enter into a binding agreement.⁵¹⁴ "Apparent authority refers to a third party's reasonable belief that the principal has authorized the acts of its agent."⁵¹⁵ Apparent authority "arises from the principal's indirect or direct manifestations to a third party, and it cannot arise from the representations or acts of the agent."⁵¹⁶ *Menard* relied on *Pollas v. Hardware Wholesalers, Inc.*,⁵¹⁷ and related cases for the proposition that the use of Sterling as a sole negotiator was an indirect manifestation of Sterling's apparent authority. Although a communication of authority made solely by an agent normally will not result in apparent authority, the *Pollas* court held that when a principal "places an agent in the position of sole negotiator on [its] behalf, it may be reasonable for a third person to believe that the agent possesses authority to act for the principal."⁵¹⁸ However, in *Menard*, "the trial court concluded that, because Sterling had informed *Menard* of his need for board approval before entering into the agreement . . . , *Menard* could not have reasonably believed that Sterling possessed authority to bind Dage to the agreement."⁵¹⁹ *Menard* further argued that *Pollas* and related cases require a finding that an agent has apparent authority when the principal appoints that agent as a sole negotiator.⁵²⁰ The *Menard* court dismissed this argument, stating that *Pollas* and its progeny permit a finding of apparent authority but do not require such a finding.⁵²¹

2. *Court's Reluctance to Interfere with Internal Affairs of Voluntary Associations.*—In *Indiana High School Athletic Ass'n v. Reyes*,⁵²² the Indiana Supreme Court declined to interpret and enforce the rules of the Indiana High School Athletic Association ("IHSAA") leaving the interpretation of IHSAA rules to its members. In *Reyes*, a student baseball player was prohibited from playing high school baseball by the IHSAA because that student, who had been

512. *Menard*, 698 N.E.2d at 1231.

513. *Id.*

514. *See id.*

515. *Id.* (citing *Pepkowski v. Life of Ind. Ins. Co.*, 535 N.E.2d 1164, 1166-67 (Ind. Ct. App. 1989)).

516. *Id.* (citing *Drake v. Maid-Rite Co.*, 681 N.E.2d 734, 737-38 (Ind. Ct. App. 1997), *reh'g denied*; *Pepkowski*, 535 N.E.2d at 1166-67).

517. 663 N.E.2d 1188 (Ind. Ct. App. 1996), *reh'g denied*.

518. *Menard*, 698 N.E.2d at 1232 (quoting *Pollas*, 663 N.E.2d at 67).

519. *Id.*

520. *See id.*

521. *Id.*

522. 694 N.E.2d 249, 257 (Ind. 1997).

held back one year in school in Puerto Rico before moving to Indiana, would play more seasons of high school sports than permitted by IHSAA eligibility rules.⁵²³ The IHSAA's Eight Semester Rule places a maximum on the number of semesters that a student athlete may play high school sports.⁵²⁴ The student petitioned the IHSAA for an additional year of eligibility under the IHSAA Hardship Rule and was denied.⁵²⁵ The student filed suit for injunctive relief, arguing that the IHSAA Executive Committee's decision in his case was arbitrary and capricious and violated his right to equal privileges and immunities under Article 1, Section 23, of the Indiana Constitution.⁵²⁶ The trial court issued a temporary restraining order preventing the IHSAA and the high school from enforcing the Eight Semester Rule against the student.⁵²⁷ The trial court subsequently rejected the findings of the IHSAA's decision with regard to the student's eligibility and issued a permanent injunction against the IHSAA and the high school from enforcing the Eight Semester Rule against the student.⁵²⁸ The trial court also prohibited the IHSAA from sanctioning the high school under its Restitution Rule for the school's compliance with the court order.⁵²⁹ The IHSAA initiated an appeal and filed a petition to stay the judgment pending appeal with the trial court.⁵³⁰ The trial court denied the petition to stay.⁵³¹ The court of appeals reversed the trial court's ruling

and held that (i) the IHSAA's determination to deny [the student's] application for an exception under the hardship rule was not arbitrary and capricious; (ii) the IHSAA's decision to deny [the student's] request for another year of eligibility was state action subject to review under Article 1, Section 23 of the Indiana Constitution; (iii) the Eight Semester Rule and the hardship rule did not violate the [student's] right to equal

523. *Id.* at 252-53.

524. *Id.* at 253.

525. *Id.* The IHSAA hardship rule provides:

The Commissioner or his designee or the Committee shall have the authority to set aside the effect any Rule when, in the opinion of the Commissioner or his designee or the Committee:

- a. Strict enforcement of the Rule in the particular case will not serve to accomplish the purpose of the Rule;
- b. The spirit of the Rule has not been violated; and
- c. There exists in the particular case circumstances showing undue hardship which would result from enforcement of the Rule.

Id. at 253 n.2.

526. *Id.* at 253.

527. *See id.*

528. *See id.*

529. *Id.*

530. *Id.*

531. *Id.*

privileges and immunities under Article I, Section 23 of the Indiana Constitution; and (iv) the IHSAA Restitution Rule is valid.⁵³²

The high school then appealed the IHSAA's application of the Restitution Rule to it, which required the school to forfeit victories, return trophies and awards and return certain funding in the event that an ineligible student athlete participated in violation of the IHSAA eligibility rules, even if such participation was in accordance with an injunction or restraining order that is later vacated.⁵³³

On appeal, the high school did not challenge the first three parts of the court of appeal's decision, but did challenge the validity of the Restitution Rule.⁵³⁴ The high school apparently relied upon the court of appeals case, *Indiana High School Athletic Ass'n v. Avant*,⁵³⁵ for the proposition that the IHSAA Restitution Rule violates the public policy of Indiana by penalizing schools and students for complying with court orders.⁵³⁶ The *Avant* court analogized the application of the Restitution Rule to a situation where a court finds a statute to be unconstitutional, noting that because of "the de facto existence and reliance upon [the statute's] validity, [the statute] has practical consequences which cannot be justly ignored."⁵³⁷ The *Reyes* court found fault in the *Avant* court's analogy, which was based on the reasoning in *Martin v. Ben Davis Conservancy*

532. *Id.*

533. *Id.* at 254. The Restitution Rule provides:

If a student is ineligible according to [IHSAA] Rules but is permitted to participate in interschool competition contrary to [IHSAA] Rules but in accordance with the terms of a court restraining order or injunction against the student's school and/or the [IHSAA] and injunction is subsequently voluntarily vacated, stayed, reversed or it is finally determined by the courts that injunctive relief is not or was not justified, any one or more of the following action(s) against such school in the interest of restitution and fairness to competing schools shall be taken:

- a. Require individual or team records and performances achieved during participation by such ineligible student to be vacated or stricken;
- b. Require team victories to be forfeited to opponents;
- c. Require team or individual awards earned be returned to the association; and/or
- d. If the school has received or would receive any funds from an [IHSAA] tournament series in which the ineligible individual has participated, require the school to forfeit its share of net receipts from such competition, and if said receipts have not been distributed, authorize the withholding of such receipts by the [IHSAA].

Id. at 254 n.3.

534. *Id.* at 253-54. The high school contended that a split in authority existed between decisions by two courts of appeal and asked that the supreme court resolve the dispute. *See id.*

535. 650 N.E.2d 1164 (Ind. Ct. App. 1995).

536. *See Reyes*, 694 N.E.2d at 254-55.

537. *Id.* at 255 (quoting *Avant*, 650 N.E.2d at 1171 (quoting *United REMC v. Indiana Mich. Power Co.*, 648 N.E.2d 1194 (Ind. Ct. App. 1995))).

District.⁵³⁸ In *Martin*, the Indiana Supreme Court held that although an action generally is not sustainable if based upon an unconstitutional statute, a final judgment that is based upon the unconstitutional statute but rendered prior to the declaration of unconstitutionality is sustainable.⁵³⁹ The *Avant* court concluded that the rationale of *Martin* renders the Restitution Rule unreasonable in that it penalizes persons relying on a trial court's ruling.⁵⁴⁰ The *Reyes* court disagreed with the *Avant* court's reasoning, stating that the *Martin* exception does not apply because the trial court's injunction in *Reyes* was not a final judgment.⁵⁴¹

The high school next argued that, despite the general Indiana rule that courts exercise limited interference with the internal affairs and rules of a voluntary membership associations, courts historically have applied heightened scrutiny to IHSAA decisions.⁵⁴² The *Reyes* court noted that there are some exceptions to this general rule.⁵⁴³ For example, in *State ex Rel. Givens*,⁵⁴⁴ the supreme court carved out an exception where the decision of the voluntary membership association infringed upon a member's liberty or property rights.⁵⁴⁵ Another exception noted by the *Reyes* court is where the association's decision constitutes fraud or other illegality.⁵⁴⁶ The *Reyes* court noted that certain courts of appeal decisions suggested a further exception where the association applies its rules in an arbitrary, discriminatory or malicious manner or the association rules require due process.⁵⁴⁷ The *Reyes* court rejected any additional exceptions to the general rule stating that "[a]bsent fraud, other illegality, or abuse of civil or property rights having their origin elsewhere in law, Indiana courts will not interfere in the internal affairs of voluntary membership associations."⁵⁴⁸ The *Reyes* court distinguished cases applying an arbitrary and capricious standard to the actions of the IHSAA based on the fact that those cases involved a student athlete's challenge to an IHSAA decision rather than a school's challenge to an IHSAA rule.⁵⁴⁹ Although the *Reyes* court held that Indiana courts will continue to apply an arbitrary and capricious standard to IHSAA decisions affecting students, it will not apply such standard to the IHSAA's decisions regarding member schools.⁵⁵⁰

538. 153 N.E.2d 125 (1958).

539. *Reyes*, 694 N.E.2d at 255.

540. *Id.* (quoting *Avant*, 650 N.E.2d at 1171).

541. *Id.*

542. *See id.*

543. *Id.* at 256.

544. 117 N.E.2d 553 (1954).

545. *Reyes*, 694 N.E.2d at 256.

546. *Id.* (citing *Randolph v. Leeman*, 146 N.E.2d 267, 272 (Ind. App. 1957)).

547. *Id.* (citing *United States Auto Club v. Woodward*, 460 N.E.2d 1255, 1261 (Ind. Ct. App. 1984); *Terrell v. Palomino Horse Breeders of Am.*, 414 N.E.2d 332, 335 (Ind. Ct. App. 1980)).

548. *Id.*

549. *Id.* at 257.

550. *Id.*

Finally, the high school argued that the Restitution Rule was inherently contemptuous of the judiciary⁵⁵¹ by punishing schools for following a court's orders. However, the *Reyes* court likened voluntary membership and membership association rules to contracts. First, the court noted a variety of circumstances where contracts will allocate risks of unfavorable litigation results between parties.⁵⁵² For example, the *Reyes* court noted that "[c]ouples may sign prenuptial agreements dictating what is to occur should a trial judge determine that the prenuptial agreement is unenforceable."⁵⁵³ The court concluded that such agreements show no disrespect for the courts, and neither did the Restitution Rule that constitutes an agreement between the IHSAA members allocating the risks of litigating IHSAA rules and balancing competing member interests.⁵⁵⁴

*D. Limited Liability Companies: Allocation for Tax Purposes
Requiring Cash Distributions*

In *Five Star Concrete, L.L.C. v. Klink, Inc.*,⁵⁵⁵ the court of appeals addressed whether a dissociated member of a limited liability company had a right to receive a cash distribution equal to the net income allocated to such member for tax purposes. A company ("Klink") formed a limited liability company called Five Star Concrete, L.L.C. (the "Five Star") with four other corporations, all engaged in supplying ready mix concrete, "in order to furnish concrete to large construction projects."⁵⁵⁶ After a period of time, Klink disassociated from Five Star and, pursuant to the operating agreement for Five Star, received a payment from it for the market value of the limited liability company's units.⁵⁵⁷ At Five Star's fiscal year end, it allocated \$31,889 in profits to Klink for tax purposes.⁵⁵⁸ Klink subsequently sued Five Star for a distribution of cash equal to the profits allocated to Klink for tax purposes.⁵⁵⁹ The trial court granted Klink's motion for summary judgment and denied Five Star's cross motion for summary judgment.⁵⁶⁰ Five Star appealed the trial court's grant of summary judgment on the issue of whether Klink, as a dissociated member of Five Star, had a legal right to receive a cash distribution equal to the net income allocated to Klink for tax purposes.⁵⁶¹ In appealing the denial of its cross motion for summary judgment, Five Star raised two additional issues: (i) whether Klink affirmatively divested itself of all economic interests in Five Star when it sold its membership units to

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.* at 257-58.

555. 693 N.E.2d 583, 584 (Ind. Ct. App. 1998).

556. *Id.* at 585.

557. *See id.* at 585, 587.

558. *See id.* at 585.

559. *See id.*

560. *See id.*

561. *See id.* at 586.

Five Star and (ii) whether the method of valuing Klink's economic interest demonstrates that Klink was paid the current fair market value of its entire interest in Five Star⁵⁶²

First, the *Five Star* court addressed whether Klink had a legal right to receive a cash distribution based on the facts stated above.⁵⁶³ The *Five Star* court noted that no provision in the Indiana Business Flexibility Act (the "Act")⁵⁶⁴ "creates an automatic legal right to receive a distribution in the amount of [allocated] income, even when a member is withdrawing from the [limited liability company]."⁵⁶⁵ The court further noted that such distributions, in some instances, would be unlawful.⁵⁶⁶ In particular, the court noted that a distribution may be unlawful when it would cause a limited liability company to become insolvent.⁵⁶⁷ The court further noted that Five Star's operating agreement was silent regarding the timing and amount of distributions and that, under the Act, such decisions are made by a majority of the members.⁵⁶⁸ Finally, the *Five Star* court noted that limited liability companies, like partnerships, are pass-through entities receiving conduit treatment under income tax law, meaning "that allocations occur regardless of the magnitude or timing of distributions."⁵⁶⁹ Therefore, the *Five Star* court held that Klink was not entitled, as a disassociated member of a limited liability company, to a cash distribution equal to its allocations of profits for the year.⁵⁷⁰

The *Five Star* court next addressed Five Star's argument that, because Klink sold its membership units, it divested itself of any economic interest in any

562. *See id.* at 587.

563. *Id.* at 586.

564. IND. CODE §§ 23-18-1-1 to -13-1 (1998).

565. *Five Star Concrete*, 693 N.E.2d at 586.

566. *Id.* (citing IND. CODE § 23-18-5-6 (1998); *United States v. Basye*, 410 U.S. 441, 453 (1973)).

567. *Id.* at 586 n.4. The court specifically identifies Indiana Code section 23-185-6 (1998), which states that

A distribution may not be made if after giving effect to the distribution:

(1) [t]he limited liability company would not be able to pay its debts as the debts become due in the usual course of business; or (2) the limited liability company's total assets would be less than the sum of its total liabilities plus, unless the operating agreement permits otherwise, the amount that would be needed if the affairs of the limited liability company were to be wound up at the time of the distribution to satisfy any preferential rights that are superior to the rights of members receiving the distribution.

IND. CODE § 23-185-6 (1998).

568. *Five Star Concrete*, 693 N.E.2d at 586. The court noted that Five Star had made an earlier distribution to its members in which Klink received \$12,500. *Id.*

569. *Id.* (citing BLACK'S LAW DICTIONARY 75 (6th ed. 1990)).

570. *Id.*

distributions of the limited liability company.⁵⁷¹ In examining the operating agreement for Five Star, the *Five Star* court observed that a “unit” is defined as “an interest in the Company representing a contribution to capital.”⁵⁷² The *Five Star* court observed that this definition of the term “unit” supported Klink’s argument that it sold less than all of its economic rights in Five Star when it sold its membership units.⁵⁷³ However, the *Five Star* court observed that under the same operating agreement, “each unit generally entitled the members to one vote and to a proportionate share of the [limited liability company’s] net income, gains, losses, deductions and credits.”⁵⁷⁴ The *Five Star* court concluded that parties could reasonably differ as to the meaning of the word “unit” under the operating agreement and whether the sale of a unit constituted a transfer of all rights to future distributions of Klink.⁵⁷⁵ Thus, the *Five Star* court held that the trial court properly denied Five Star’s motion for summary judgment.⁵⁷⁶

Finally, the court addressed whether the trial court properly denied Five Star’s motion for summary judgment based on its argument that, based on the fair market value of Klink’s interest in Five Star, Five Star’s purchase price for Klink’s units included all potential distributions from Five Star.⁵⁷⁷ The *Five Star* court noted that the “[v]aluing of an interest of a member is a ‘complex task,’ more of a business matter than a legal one.”⁵⁷⁸ Thus, the *Five Star* court concluded that a determination of market value is an issue of fact and not appropriate for summary judgment.⁵⁷⁹

E. Corporations

1. *Dissenter’s Right Statute as Exclusive Remedy*.—In *Settles v. Leslie*,⁵⁸⁰ The Indiana Court of Appeals discussed “whether the Indiana Dissenters Right statute⁵⁸¹ [(“IDR”)] provides the exclusive remedy for minority shareholders of a closely held corporation claiming breach of fiduciary duty by the corporation’s majority shareholders.”⁵⁸² In *Settles*, the majority shareholders (the “Majority Shareholders”) of Mi-Tech Metals, Incorporated (“Mi-Tech”) decided to sell the

571. *Id.* at 587.

572. *Id.* (quoting Five Star Concrete, Inc. Operating Agreement).

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.*

578. *Id.* (citing PAUL J. GALANTI, 17 INDIANA PRACTICE, BUSINESS ORGANIZATIONS § 6.7 (1991)).

579. *Id.*

580. 701 N.E.2d 849 (Ind. Ct. App. 1998).

581. IND. CODE §§ 23-1-44-1 to -20 (1998).

582. *Settles*, 701 N.E.2d at 850.

company after the death of a key employee.⁵⁸³ Mi-Tech successfully negotiated the merger of Mi-Tech with another company, which merger was objected to by minority shareholders (the "Minority Shareholders").⁵⁸⁴ A special meeting of the shareholders of Mi-Tech was scheduled for September 12, 1994 to consider the proposed merger.⁵⁸⁵ Just three days prior to the special meeting on September 9, 1994, the Minority Shareholders filed a complaint for a temporary restraining order to enjoin Mi-Tech's directors from voting on the proposed merger.⁵⁸⁶ In their complaint, the Minority Shareholders alleged that the Majority Shareholders misappropriated Mi-Tech's funds by "(1) overcompensating themselves, (2) failing to pay dividends, and (3) receiving excessive compensation for employment contracts and non-competition agreements in connection with a corporate merger." The court denied the Minority Shareholders' request for the temporary restraining order.⁵⁸⁷ At the special shareholders meeting, the Minority Shareholders, represented by counsel, delivered a Notice of Dissent regarding the merger stating that:

Notice is hereby given that [the Minority Shareholders] . . . express and state their dissent with the proposed Plan of Merger of Mi-Tech Metals, Inc. with Birco, Inc.:

1. That [the Minority Shareholders] are shareholders entitled to vote on the proposed merger.
2. That it is the intent of [the Minority Shareholders] to demand payment for their shareholder's shares if the proposed action is effectuated.
3. That [the Minority Shareholders] further intend to retain all other rights of a shareholder, and further they are willing to deposit the shareholder's shared certificate[s] as the corporation may require.
4. The dissenters further hereby notify the corporation that the dissenter's own estimate of the fair value of the dissenter's share is the sum of \$19,018.40 per share.⁵⁸⁸

The merger proposal was adopted at the special meeting despite the Minority Shareholder's efforts. Subsequently, Mi-Tech delivered to each dissenting shareholder a Notice of Dissenter's Rights, which stated that any dissenting shareholder electing to demand payment pursuant to the IDR should provide notice of such to the company by means of the attached form on or before sixty days after the date of the Notice of Dissenter's Rights. Also, the Notice informed the dissenting shareholders that they must deposit their shares with the company

583. *Id.* at 850-51.

584. *See id.* at 851. The Minority Shareholders were tenants in common of the shares held by the employee who had died. *See id.* at 850.

585. *Id.* at 851.

586. *Id.*

587. *Id.* at 850, 851.

588. *Id.* at 851.

on or before the expiration of the sixty day period.⁵⁸⁹ In addition, Mi-Tech offered to exchange the Minority Shareholder's shares for \$14,000 per share.⁵⁹⁰ The Minority Shareholders did not demand payment or deposit their shares within the prescribed time period⁵⁹¹ and instead filed suit against the Majority Shareholders.⁵⁹² The Majority Shareholders filed their answer, claiming that the Minority Shareholder's exclusive remedy was the IDR statute.⁵⁹³ The trial court granted the Majority Shareholder's motion for summary judgment without explanation or elaboration.⁵⁹⁴

On appeal, the Minority Shareholders contended their claims of breach of fiduciary duty and fraud were outside the scope of the IDR statute.⁵⁹⁵ The *Settles* court noted that the Indiana Supreme Court's recent decision in *Fleming v. International Pizza Corp.*⁵⁹⁶ held that the IDR statute "provides the exclusive remedy for minority shareholders challenging a proposed merger."⁵⁹⁷ The Minority Shareholders contended that they declined to invoke their dissenter's rights and instead were pursuing individual fraud and breach of fiduciary duty claims against the Majority Shareholders.⁵⁹⁸ However, the *Settles* court, in reviewing the complaint of the Minority Shareholders, came to the conclusion that the claims regarding fraud and breach of fiduciary duty were essentially claims regarding the fair value of the Minority Shareholder's share price in conjunction with the merger.⁵⁹⁹ The *Settles* court held that the Minority Shareholders could not circumvent the remedy established by the legislature for valuing stock held by dissenting shareholders to a merger⁶⁰⁰ simply by refusing to pursue their statutory remedies and filing common law claims for fraud and breach of fiduciary duty against the individuals controlling the corporation.⁶⁰¹

589. *See id.*

590. *Id.*

591. *Id.*

592. *See id.*

593. *See id.*

594. *See id.*

595. *Id.* at 852.

596. 676 N.E.2d 1051 (Ind. 1997).

597. *Settles*, 701 N.E.2d at 853 (citing *Fleming*, 676 N.E.2d at 1056). The IDR Statute provides in part:

(a) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of . . . [c]onsumation of a plan of merger to which the corporation is a party (b) A shareholder: (1) who is entitled to dissent and obtain payment for the shareholder's shares . . . may not challenge the corporate action creating . . . the shareholder's entitlement.

IND. CODE §§ 23-1-44-8(a), (c) (1998).

598. *Settles*, 701 N.E.2d at 853.

599. *Id.* at 853-54.

600. *Id.* at 852.

601. *Id.* at 854.

However, the *Settles* court went on to hold that, under the IDR statute, the dissenting shareholders were permitted to a judicial appraisal of the value of their shares.⁶⁰² The *Settles* court noted that a judicial appraisal was sufficiently comprehensive to incorporate any claims for wrongdoing brought by either the corporation or its shareholders in valuing just compensation to the dissenting shareholders.⁶⁰³

In reaching its decision, the *Settles* court relied heavily on the supreme court's decision in *Fleming*.⁶⁰⁴ In *Fleming*, the plaintiff claimed dissenter's rights in connection with the sale by the sole majority shareholder of substantially all of the assets of the corporation.⁶⁰⁵ In addition to claiming fair value for its shares, the *Fleming* plaintiff alleged that the majority shareholder had breached its fiduciary obligations to the plaintiff with regard to the asset sale. The *Fleming* court held that the IDR statute "did not foreclose the ability of dissenting shareholders to litigate their breach of fiduciary duty or fraud claims within the appraisal proceeding."⁶⁰⁶ The *Settles* court concluded that the trial court is authorized to create a comprehensive scope of valuation of claims for appraisers under the IDR statute in order to protect the rights of dissenting shareholders,⁶⁰⁷ such as the Minority Shareholders. Thus, the court held that the IDR statute was the sole avenue of recourse for the Minority Shareholder's fraud and breach of fiduciary duty claims in conjunction with the merger and affirmed the trial court's grant of summary judgment.⁶⁰⁸

2. *Direct Action Against the Corporation.*—In *Barth v. Barth*,⁶⁰⁹ ("Barth III") the court of appeals determined whether a minority shareholder in a corporation having a total of three shareholders could bring an action in its own name against the majority shareholder as opposed to a derivative action on behalf of the corporation. A minority shareholder of an electric company, Robert Barth ("Robert"), brought an action against the majority and controlling shareholder, Michael Barth ("Michael"), alleging that Michael had taken certain actions that had the effect of substantially reducing the value of Robert's shares of stock. The alleged actions included: (i) payment of excessive salaries to Michael and members of his immediate family; (ii) use of corporate employees to perform services on Michael's and his son's homes without proper compensation to the corporation; (iii) lowering dramatically dividend payments; and, (iv) appropriation of corporate funds for Michael's personal investments.⁶¹⁰ Michael

602. *Id.*

603. *Id.* (citing *Fleming v. International Pizza Supply Corp.*, 676 N.E.2d 1051, 1057 n.9 (Ind. 1997)).

604. *Fleming*, 676 N.E.2d at 1051.

605. *See Settles*, 701 N.E.2d at 855.

606. *Id.* (quoting *Fleming*, 676 N.E.2d at 1057 (emphasis supplied)).

607. *Id.* at 856.

608. *Id.*

609. 693 N.E.2d 954, 955 (Ind. Ct. App. 1998) [hereinafter *Barth III*].

610. *Id.*

and the corporation moved to dismiss for failure to state a claim “arguing that a derivative action suit was required to redress claims of this nature.”⁶¹¹ The trial court granted Michael’s motion to dismiss and such ruling was reversed by the court of appeals.⁶¹²

Upon transfer, the Indiana Supreme Court cited the general rule in Indiana that “shareholders of a corporation may not maintain actions at law in their own names to redress an injury to the corporation, even if the injury has the effect of impairing the value of their stock.”⁶¹³ The supreme court explained that the general rule was established to prevent disregard for the corporate entity that would result if an individual lawsuit were permitted by disgruntled shareholders.⁶¹⁴ In addition, the general rule promotes the protection of all shareholders rather than allowing one shareholder to prejudice the interests of the other shareholders by receiving funds justly due the corporation.⁶¹⁵ Finally, the supreme court noted that the general rule protects corporate creditors by putting the proceeds of recovery back into the corporation.⁶¹⁶ The supreme court, however, indicated two reasons why the general rule will not always apply in the case of closely held corporation.

“First, the shareholders in a close corporation stand in a fiduciary relationship to each other, and as such, must deal fairly, honestly, and openly with the corporation and with their fellow shareholders. Second, shareholder litigation in the closely-held corporation context will often not implicate the policies that mandate requiring derivative litigation when more widely-held corporations are involved.”⁶¹⁷

Thus, the supreme court held that a court has exempted a shareholder claim from the restrictions applicable to derivative actions if it determines that the lawsuit will not “(i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of the creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.”⁶¹⁸ The supreme court then remanded the case back to the trial court.

On remand, the trial court held that, because the corporation had three

611. *Id.*

612. *See* *Barth v. Barth*, 651 N.E.2d 291, 292 (Ind. Ct. App. 1995) [hereinafter *Barth I*].

613. *See Barth III*, 693 N.E.2d at 957 (citing *Barth v. Barth*, 659 N.E.2d 559, 560 (Ind. 1995) [hereinafter *Barth II*]).

614. *See id.* (quoting *Barth II*, 659 N.E.2d at 651).

615. *See id.* (citing *Barth II*, 659 N.E.2d at 561 (noting that the plaintiff shareholder receives adequate compensation by increasing its shares value when recovery is put back into the corporation)).

616. *Id.* (citing *Barth II*, 659 N.E.2d at 561).

617. *Id.* (quoting *Barth II*, 659 N.E.2d at 561).

618. *Id.* at 958 (quoting AMERICAN LAW INSTITUTE, PRINCIPALS OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.01(d) (1994)).

shareholders, one of which was not a party to Robert's action and would not be bound by any judgment in that case, by allowing Robert to proceed in a direct, rather than a derivative, action could expose Michael and the corporation to a multiplicity of lawsuits.⁶¹⁹ Reviewing the trial court's decision under an abuse of discretion standard, the *Barth III* court agreed that because there the remaining shareholder of The company had not joined in Robert's action, that third shareholder could bring a separate action against the corporation and Michael for its own damages to the price of its shares.⁶²⁰

Next, the *Barth III* court addressed whether Robert's lawsuit, if treated as a direct action, would prejudice creditors.⁶²¹ The *Barth III* court noted that Robert had petitioned the court for the corporation to pay damages to him, not its creditors; such a result, the *Barth III* court concluded, would be inherently prejudicial to creditors.⁶²² Finally, the court addressed whether Robert's action would result in a fair distribution of the corporation's assets.⁶²³ The *Barth III* court agreed with the trial court that, because all damages would go to Robert, "the result . . . would constitute an unfair distribution of the assets of the corporation to only one of its shareholders."⁶²⁴ Thus, the *Barth III* court concluded that the trial court did not abuse its discretion when it determined that Robert did not satisfy the supreme court's requirements set forth in *Barth II* for a direct action and affirmed the trial court's ruling.⁶²⁵

3. *Foreign Corporations "Transacting Business" in Indiana.*—In *Lackmond Products, Inc. v. Construction Supply, Inc.*,⁶²⁶ the court of appeals addressed whether a Georgia corporation was "transacting business" in Indiana by selling goods to Indiana customers through the mail and by taking orders through an independent contractor located in Ohio. Lackmond sold products to Construction Supply, Inc. ("CSI"), an Indiana corporation, by taking orders in Georgia and shipping the goods to CSI at various locations in Indiana. When Lackmond filed suit against CSI for its alleged failure to pay for such goods, CSI moved to dismiss, arguing that Lackmond lacked the capacity to bring an action because it was a foreign corporation "transacting business" in Indiana without a certificate of authority.⁶²⁷ The trial court dismissed the action and Lackmond appealed.

Under Indiana Code section 23-1-49-1(a),

619. *See id.* at 958.

620. *Id.* (contrasting *W & W Equipment Co. v. Mink*, 568 N.E.2d 564, 570 (Ind. Ct. App. 1991), wherein the corporation only contained two shareholders and thus there was no potential for multiple shareholder suits).

621. *Id.*

622. *Id.*

623. *Id.* at 959.

624. *Id.*

625. *Id.*

626. 691 N.E.2d 494, 495 (Ind. Ct. App. 1998).

627. *See id.*

[a] foreign corporation may not “transact business” in Indiana until it obtains a certificate of authority from the secretary of state. Indiana Code [section] 23-1-49-2(a) further states that a foreign corporation transacting business in Indiana without a certificate of authority may not maintain a proceeding in any court in Indiana until it obtains a certificate of authority.⁶²⁸

However, the *Lackmond* court noted that, under Indiana Code section 23-1-49-1(b), certain activities do not constitute transacting business, including but not limited to ““(5) [s]elling through independent contractors[,] (6) [s]oliciting or obtaining orders, whether by mail or through employees or agent or otherwise, if the orders require acceptance outside Indiana before they become contracts . . . [, and] (11) [t]ransacting business in interstate commerce.”⁶²⁹ Finally, the *Lackmond* court noted that the allegation that a foreign corporation does not have the capacity to sue is an affirmative defense and the burden was upon CSI to support its contentions.⁶³⁰

The *Lackmond* court observed that CSI did not argue that Lackmond, by taking orders in Georgia and using an Ohio corporation to take orders, did not fall within the exceptions set forth in Indiana Code sections 23-1-49-1(b)(5), (6) and (11). Instead, CSI argued that Lackmond’s contacts with Indiana were ““more regular, systematic or extensive than interstate sales activities described in’ Indiana Code [section] 23-1-49-1(b).”⁶³¹ The *Lackmond* court, however, stated that Lackmond’s sales contracts with CSI were formed in Georgia because “Lackmond accepts [an] order by shipping the requested inventory to Indiana from its Georgia warehouse.”⁶³² With these facts, the *Lackmond* court held that Lackmond’s activities of filing customer-placed purchase orders sent to Lackmond’s Georgia office by phone or facsimile specifically excluded from the definition of “transacting business” under Indiana Code section 23-1-49-1(b).⁶³³ Thus, the court of appeals reversed the trial court’s dismissal of Lackmond’s action.

4. *Corporation’s Liability for Acts of Employee.*—In *Coble v. Joseph Motors, Inc.*,⁶³⁴ the court of appeals addressed whether a corporation would be deemed to have committed an intentional tort against an employee due to a

628. *Id.* (citing IND. CODE §§ 23-1-49-1(1), -2(a) (1998)).

629. *Id.* at 495-96 (quoting IND. CODE §§ 23-1-49-1(b)(5), (6), (11) (1998)).

630. *Id.* at 496.

631. *Id.*

632. *Id.* The court also found CSI’s offer of Lackmond sales invoices, which accompanied each shipment to CSI, to evidence that the purchase orders did not require acceptance outside Indiana before they became contracts unpersuasive, because the invoices were issued after Lackmond’s acceptance of CSI’s offer to purchase and therefore, after contraction formation. *Id.* at 496 n.3.

633. *Id.* at 496.

634. 695 N.E.2d 129, 133 (Ind. Ct. App. 1998).

supervisor's tortious acts. The plaintiff in *Coble* was injured in an accident at work that sliced off the tip of her finger.⁶³⁵ The tip of the finger found its way to the human resources manager of the corporation, who used the severed fingertip as a prop in presentations to the employees regarding company safety. *Coble* brought a claim for emotional injuries against the corporation.⁶³⁶ The trial court dismissed *Coble*'s claim for want of jurisdiction based upon the exclusivity provision of the Worker's Compensation Act.⁶³⁷

On appeal, the employee argued that the corporation had committed an intentional tort against her, which was not covered by the Worker's Compensation Act.⁶³⁸ The *Coble* court observed that, pursuant to the Supreme Court's decision in *Perry v. Stitzer Buick GMC, Inc.*,⁶³⁹ "tortious intent will be imputed to an employer that is a legal entity or artificial person where either (1) the corporation is the tortfeasor's alter ego or (2) the corporation has substituted its will for that of the individual who committed the tortious acts."⁶⁴⁰ Thus, the *Coble* court concluded that in order for the corporation to be responsible for the human resource manager's intentional acts, the human resource manager must be the alter ego of the corporation or the corporation "must have intended the injury or actually known that the injury was certain to occur."⁶⁴¹ In reviewing the facts, the *Coble* court noted that the human resource manager was not an owner or controller of the corporation nor was there any evidence that the corporation intended to commit the torts against the employee or know that the injury was certain to occur. The human resource manager's actions were not undertaken pursuant to any policy of the corporation nor did management instruct the manager to display the employee's severed fingertip.⁶⁴² The employee argued that the corporation ratified the human resources manager's offensive acts by raising his salary subsequent to the incident.⁶⁴³ However, the *Coble* court was not persuaded for two reasons: (i) the employee presented no evidence that the raise and the offensive conduct were linked, and (ii) the corporation subsequently fired the human resource manager in part because of this incident.⁶⁴⁴ Thus, the *Coble* court affirmed the trial court's ruling.

635. *Id.* at 131.

636. *Id.* at 131-32.

637. *See id.* at 132. This Article does not address the *Coble* court's discussion of issues regarding the Worker's Compensation Act.

638. *See id.* at 133.

639. 637 N.E.2d 1282 (Ind. 1994).

640. *Coble*, 695 N.E.2d at 134 (quoting *Perry*, 637 N.E.2d at 1287 (citations omitted in original)).

641. *Id.* at 134.

642. *See id.* at 134-35.

643. *See id.* at 135.

644. *Id.*

5. *Corporations Rights and Responsibilities with Regard to the Acts of Others.*—In *Summit Account & Computer Service, Inc. v. RJH of Florida, Inc.*,⁶⁴⁵ the court of appeals determined whether a corporate successor in interest may be awarded punitive damages and attorney's fees for damages incurred by its predecessor pursuant to the Indiana Criminal Conversion Statute.⁶⁴⁶ In *Summit*, a leasing company brought an action against a collection agency for conversion of property under Indiana Code section 35-43-4-3, a proven violation of which permits a recovery of treble damages, costs of the action and reasonable attorney's fees.⁶⁴⁷ The trial court awarded the leasing company treble damages, costs and attorney's fees and defendants appealed.⁶⁴⁸

On appeal, the collection agency argued that the leasing company's successor in interest (the "successor corporation"), could not recover for damages incurred by the leasing company because, under the ruling of *Hart Conversions, Inc. v. Pyramid Seating Co.*,⁶⁴⁹ such tort claims are not assignable.⁶⁵⁰ In *Summit*, the leasing company had sold all of its assets, including its claims against the collection agency, to a third party that in turn sold the assets to the successor corporation.⁶⁵¹ One individual was the sole shareholder, director and officer of all three corporations, and the corporations conducted business of the same nature from the same place.⁶⁵² Citing the court of appeals' decision in *Mishawaka Brass Manufacturing v. Milwaukee Value Co.*,⁶⁵³ the trial court held that the successor corporation was a direct continuation of the ownership and operations of the leasing company with only a change of name.⁶⁵⁴ Under the ruling in *Mishawaka Brass*, "a direct continuation of the ownership and operations of the first corporation,' with only a change of name 'will not cut off liability to a creditor of the first corporation.'"⁶⁵⁵ Applying this rule, the *Summit* court

645. 690 N.E.2d 723, 724 (Ind. Ct. App. 1998).

646. IND. CODE § 35-43-4-3 (1998).

647. *Summit Account & Computer Serv.*, 690 N.E.2d at 725-26. See also IND. CODE § 34-1 (1998) (providing for civil actions against persons who violate Indiana Code section 35-43-4-3, and providing what damages are available in such suits). This Article focuses on the issue of damages available under this statute to a corporate successor in interest.

648. See *Summit Account & Computer Serv.*, 690 N.E.2d at 726.

649. 658 N.E.2d 129 (Ind. Ct. App. 1955).

650. See *Summit Account & Computer Serv.*, 690 N.E.2d at 728.

651. See *id.*

652. See *id.*

653. 444 N.E.2d 855 (Ind. Ct. App. 1983).

654. See *Summit Account & Computer Serv.*, 690 N.E.2d at 728.

655. *Id.* (quoting *Mishawaka Brass*, 444 N.E.2d at 858).

affirmed the trial court's determination that the successor corporation was a direct continuation of its predecessors and should have the same rights and liabilities thereof.⁶⁵⁶

656. *Id.* A third case addressing this topic but not discussed in this survey is *Wabash Grain, Inc. v. Smith*, 700 N.E.2d 234, 235 (Ind. Ct. App. 1998). In *Wabash Grain*, the court of appeals addressed whether an action filed against a related corporation in federal court would toll the statute of limitations with regard to a subsequent action against a related corporation in state court. The *Wabash Grain* court noted that although both corporations were controlled by the same individual, each corporation is a distinct legal entity under the law; therefore, an action against one corporation will not toll the statute of limitations against an affiliated corporation. *Id.* at 240. The plaintiff also argued that equitable tolling should apply given that the corporation it sued first in federal court was controlled by or controlled the affiliated corporation it sued second in state court. *See id.* However, the *Wabash Grain* court noted that the plaintiff presented no evidence to establish that either corporation “so ignored, controlled or manipulated” the other, or “that the misuse of the corporate form would constitute a fraud or promote in justice.” *Id.* (quoting *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1231 (Ind. 1994)).