

BANKING, BUSINESS, AND CONTRACT LAW

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INTRODUCTION

This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court (“Supreme Court”) and Indiana Court of Appeals (“Court of Appeals”) between September 1, 2022, and August 31, 2023 (the “Survey Period”).

This Article will not itemize every banking, business, and contract law case decided during the Survey Period. Instead, it will highlight cases illustrating some of the big-picture issues in these fields, as well as some practice pointers for both transaction lawyers and litigators. This Article also gives a brief update on the Supreme Court’s commercial courts initiative.¹

During the Survey Period, the Indiana General Assembly passed and Governor Holcomb signed into law comprehensive amendments to the Uniform Commercial Code addressing emerging technologies, such as artificial intelligence, distributed ledger technology, and virtual currency. The author of this Article reports on these changes in a separate Article appearing in this edition of the Indiana Law Review.²

This Article marks the tenth consecutive year that this author has surveyed Indiana banking, business, and commercial law for the Indiana Law Review. With the kind permission of the Law Review, the Conclusion contains some reflections on some of the major cases, issues, themes, and developments

1. See *infra* notes 4-10 and accompanying text.

2. Frank Sullivan, Jr., *New Law Amends the Uniform Commercial Code to Accommodate Emerging Technologies*, 57 IND. L. REV. 775 (2024).

addressed in the past decade's survey articles.³

I. COMMERCIAL COURTS UPDATE

The Supreme Court established “Commercial Courts” in six Indiana counties in 2019⁴ and added courts in four additional counties two years later.⁵ Commercial courts seek to streamline a court’s efficiency, educate judges and litigants, and create predictable business case law that encourages companies to incorporate or complete transactions within the state.⁶ In this regard, the Court has enhanced the functionality of Odyssey, its statewide online court case management system, to include substantive order searches of commercial court dockets.⁷

During her 2023 State of the Judiciary Speech, Indiana Chief Justice Loretta Rush, gave an exuberant report on the commercial court initiative:

According to the U.S. Chamber of Commerce, nearly 70% of businesses look at a state’s litigation environment when deciding where to locate or expand. In 2015, we committed to a bold overhaul of complex business litigation when we launched our Commercial Courts Project. These specialized courts—now ten statewide—are laser-focused on resolving complicated business disputes. They utilize highly trained and seasoned judges, business-specific resources, and uniquely dedicated legal advisors.

More than 1,600 cases have been filed in our commercial courts, and these complex cases are being decided quickly and in a predictable, consistent, and fair environment. Business owners see these positive outcomes, enabling them to make informed decisions on the costs and risks of potential legal issues. As a result, our commercial courts help make Indiana an attractive state for economic development and expansion.

But we aren’t done. We are working hard to ensure our commercial courts become a preeminent forum for the determination of business disputes. At a recent meeting, attorneys from across the state indicated

3. See discussion *infra* Conclusion.

4. *Order, In re Indiana Commercial Courts*, No. 19S-MS-295 (Ind. May 16, 2019). The counties are Allen, Elkhart, Vanderburgh, Floyd, Lake, and Marion.

5. Sydney Byerly, *New Commercial Courts are Open in 10 Indiana Counties*, THE STATEHOUSE FILE (Sept. 14, 2022), https://www.thestatehousefile.com/briefs/new-state-commercial-courts-are-open-in-10-indiana-counties/article_edb29962-3472-11ed-a95c-9743a225094a.html [<https://perma.cc/MQ3U-5REB>]; *Vigo County to Open a Commercial Court*, TERRE HAUTE TRIBUNE-STAR (Dec. 2, 2020), https://www.tribstar.com/news/local_news/vigo-county-to-open-a-commercial-court/article_fa8db806-1a13-5ce5-95a3-587f853e0a2b.html [<https://perma.cc/CQ9L-TUPT>].

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

7. *Vigo County to Open a Commercial Court*, *supra* note 5.

some businesses are now writing contracts that name Indiana's commercial courts as the arbiter of any dispute. Amazing! Why not lead the nation in this model and strive for our commercial courts to challenge the Delaware Courts of Chancery? We're committed to doing just that.

We could not have realized these achievements without the support of the Indiana Chamber of Commerce, business leaders across the state, our ten commercial court judges, and members of our legislature, including the leadership of Senator Eric Koch.⁸

Shortly after the close of the Survey Period, Marion Superior Court Judge Heather A. Welch announced her resignation from the bench effective in early 2024.⁹ Judge Welch was a leader in establishing commercial courts in Indiana and presided over the busiest commercial court in Indianapolis. Her contributions to the success of the commercial court project and her contribution to the state's business and commercial law cannot be overstated.¹⁰

II. BANKING LAW

The mandate of this Article encompasses "banking," and the author includes within that charge litigation between financial institutions and their borrowers.

A. *Hughley's High Bar in Action*

In *Hughley v. State*, the Indiana Supreme Court declared, "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims. [It is a] relatively high bar[.]"¹¹ That our state's summary judgment standard is professedly non-movant friendly was illustrated in spades by *Olaoye v. Galaxy International Purchasing LLC*, where the Court of Appeals reversed summary judgment in favor of a purported creditor on the basis of two affidavits from the debtor

8. Loretta H. Rush, Chief Justice, Ind. Sup. Ct., *Indiana Courts as Engines of Economic Development, Fairness, and Public Safety*, State of the Judiciary Address (Jan. 11, 2012), in 66 RES GESTAE 12, 14 (2023).

9. *Marion Superior Judge Welch to Retire in February; Applications Open to Fill Vacancy*, IND. LAW. (Oct. 20, 2023), <https://www.theindianalawyer.com/articles/marion-superior-judge-welch-to-retire-in-february-applications-open-to-fill-vacancy> [<https://perma.cc/2HUI-ZA5A>].

10. Another Commercial Court Judge, Hon. Cristal C. Brisco of St. Joseph County, was appointed by President Biden to the United States District Court for the Northern District of Indiana effective January 26, 2024. Daniel Carson, *Following Brisco, Lund Confirmed to IN Northern District, Filling Both Vacancies*, IND. LAW. (Jan. 25, 2024), <https://www.theindianalawyer.com/articles/brisco-confirmed-as-in-northern-district-judge-by-full-senate> [<https://perma.cc/WXU6-MUT9>]. She also made a valuable contribution to Indiana Commercial Courts.

11. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014).

denying the existence of the debt.¹²

The plaintiff alleged that it had acquired the right to collect a loan made by a bank to the defendant that was in default and substantiated its claim with an affidavit of an employee.¹³ The trial court entered summary judgment in favor of the plaintiff, finding that it had “carried its initial burden” of presenting a prima facie case and that the defendant, in turn, had failed to demonstrate a genuine issue of material fact.¹⁴

However, the defendant designated two affidavits denying that the debt was “a valid debt and if it is a valid debt[, denying] the amount sued for . . . is the correct amount” and saying that he had “never entered into any credit transaction, borrowed money, or entered any contract” with either the plaintiff or bank.¹⁵ Quoting *Hughley*, the Court of Appeals said that although the defendant’s “affidavits were clearly self-serving, [his] designated evidence ‘clears [the] low bar’ of creating an issue of material fact that makes summary judgment inappropriate.”¹⁶

B. Not Strict Foreclosure

*U.S. Bank Nat’l Ass’n as Tr. for Manufactured Hous. Cont. Senior/Subordinate Pass-Through Certificate Tr. 1998-7 v. Spencer*¹⁷ involved a half-hearted attempt by U.S. Bank to foreclose on a manufactured home and the 12.47 acre lot on which it sat. The bank filed three separate foreclosure actions in this matter, voluntarily dismissing the first two, and then filing this appeal after the trial court granted dismissal in favor of the defendants on the third.¹⁸ The dismissals appear at least in part due to difficulty in identifying with precision the land involved.¹⁹

Before the second lawsuit was voluntarily dismissed, the trial court entered an *in rem* judgment in favor of the bank and against the manufactured home.²⁰ When the bank sought summary judgment on its third complaint to foreclose, the trial court instead granted dismissal in favor of the defendants.²¹ The Court of Appeals reversed in all respects and ordered summary judgment entered in favor of the bank.²² The author submits that the Court of Appeals was right to do so.

12. *Olaoye v. Galaxy Int’l Purchasing, LLC.*, No. 22A-CC-1905, 2023 WL 526046205, at *1 (Ind. Ct. App. Jan. 27, 2023).

13. *Id.* at *1.

14. *Id.* at *2.

15. *Id.* at *3.

16. *Id.* (quoting *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014)).

17. *U.S. Bank Nat’l Ass’n v. Spencer*, 214 N.E.3d 1017, 1017 (Ind. Ct. App. 2023).

18. *Id.* at 1021.

19. *Id.*

20. *Id.* at 1022.

21. *Id.* at 1023.

22. *Id.* at 1021.

Among the several reasons that the trial court gave for its dismissal—and it relates to that in rem judgment as to the mobile home—was this:

Indiana Code 26-1-9.1-620(g) states: In a consumer transaction, secured party may not accept collateral in partial satisfaction of the obligation it secures. Because the Plaintiff accepted collateral for the mortgage in the form of the mobile home, they had to accept it in full satisfaction of the obligation, and since they received the mobile home in the previous judgment, the obligation has been satisfied.²³

Now there are two things wrong with this. First, Indiana Code section 26-1-9.1-620 is a provision of the Uniform Commercial Code (UCC) and this is not a case governed by the UCC; this is a case governed by real estate law. The UCC itself acknowledges this:

If a security agreement covers both personal and real property, a secured party may proceed: (1) under IC 26-1-9.1-601 through IC 26-1-9.1-628 as to the personal property without prejudicing any rights with respect to the real property; or (2) as to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of IC 26-1-9.1-601 through IC 26-1-9.1-628 do not apply.²⁴

The Court of Appeals correctly holds that because the security agreement in this case covered both the manufactured home (which is personal property) and the real estate and that U.S. Bank chose to proceed—in the second litigation—against both the real estate and the personal property, prevailing in the latter and voluntarily dismissing with respect to the former, the UCC did not apply to the instant matter and could not serve as a sufficient basis for concluding that the U.S. Bank was precluded from foreclosing on the real estate.²⁵

Even if this were a situation where the UCC governed, UCC section 9-620(g) would not be implicated. Section 620 is a special remedies provision in the UCC that governs strict foreclosure.²⁶ Strict foreclosure provides an alternate procedure for cutting off a debtor's rights in collateral after default.²⁷ Rather than going to court at all, the parties agree that the secured party will accept its collateral in satisfaction of a secured obligation.²⁸

It is often mutually advantageous to both a secured party and a debtor to choose strict foreclosure. The secured party receives the collateral without the

23. *Id.* at 1023.

24. IND. CODE § 26-1-9.1-604(a) (2000).

25. *U.S. Bank Nat'l Ass'n*, 214 N.E.3d at 1025-26.

26. *See* U.C.C. § 9-620 (AM. L. INST. & UNIF. L. COMM'N 2022).

27. *See id.*

28. *Id.* § 9-620 cmt. 2.

expense and the delay of a foreclosure sale—and the uncertainties of complying with the UCC’s disposition of collateral rules. The defaulting debtor escapes any further liability for a deficiency.²⁹ Section 620 exists to provide a cheaper and faster way of realizing on collateral.³⁰

In real estate law, strict foreclosure operates through the medium of a “deed in lieu of foreclosure.”³¹ UCC section 620 is the personal property equivalent. But whether real or personal property is involved, strict foreclosure depends upon both the creditor and the debtor agreeing to an extrajudicial resolution of a default situation.³² It does not provide any basis whatsoever for relief to the defendants in this case as there was never any agreement between the bank and the defendants to take the property in lieu of foreclosure.

C. Student Loans

As with residential mortgage and credit card debt, the original obligees of student loan debt often sell or otherwise assign the obligations to third parties. In previous annual surveys of Indiana banking, business, and contract law, the author of this Article has recounted examples of litigation to collect all three such types of debt in which the debtor-defendant prevailed because the purported-creditor plaintiff was unable to prove its ownership of the debt.³³

That was not the case in *Akinlemibola v. National Collegiate Student Loan Trust 2007-1*, where the Court of Appeals affirmed the trial court’s holding that the plaintiff’s designated evidence definitively demonstrated its ownership of the defendant’s student loan and that the plaintiff was therefore entitled to summary judgment as a matter of law.³⁴ The key practice pointer here was that the defendant was able to establish that the sworn affidavit of a “subservicer” of loans for the debtor was sufficient to satisfy the requirements of Evidence Rule 803(6) which provides an exception to the hearsay rule for records of regularly

29. STEPHEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 511 (Foundation Press, 11th ed. 2023).

30. *Id.*

31. *Bobick’s Pro Shop, Inc. v. 1st Source Bank*, 84 N.E.3d 1238, 1240 (Ind. Ct. App. 2017).

32. As to personal property, see U.C.C. § 9-620 (a)(1) and (2) (debtor consent) and (b)(1) (creditor consent). As to real property, see *Bayview Loan Servicing, LLC v. Golden Foods, Inc.*, 59 N.E.3d 1056, 1060 (Ind. Ct. App. 2016).

33. As to residential mortgage debt: see Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 48 IND. L. REV. 1195, 1198 (2015) [hereinafter *2015 Survey*]; Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 51 IND. L. REV. 945, 963 (2018) [hereinafter *2018 Survey*]; credit card debt: *Id.* at 963; and student loan debt: Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 52 IND. L. REV. 635, 639-43 (2019) [hereinafter *2019 Survey*]; Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 55 IND. L. REV. 461, 467-69 (2022) [hereinafter *2022 Survey*].

34. *Akinlemibola v. Nat’l Collegiate Student Loan Tr. 2007-1*, 205 N.E.3d 1014, 1014 (Ind. Ct. App. 2023).

conducted business activity.³⁵

III. BUSINESS LAW

A. *Fiduciary Duty*

In *Zanetis v. Bradburn*, three individuals, Zanetis, Bradburn, and Randolph had equal ownership interests in a company called Capstone Capital Consulting LLC (“CCC”).³⁶ Without going into all the details, the business plan was to purchase life insurance policies from seniors and resell them to investment advisors who securitized them for sale to investors.³⁷ To be financially successful, such a business required highly sophisticated actuarial algorithms to value the policies. An entity called Avidity owned such algorithms and CCC licensed this intellectual property from Avidity.³⁸ However, friction between the owner of Avidity and Zanetis developed over time and became so serious that Avidity exercised its right to terminate the licensing agreement, effectively putting CCC out of business.³⁹ However, Avidity’s owner had no quarrel with Bradburn and Randolph and sought to continue to do business with them.⁴⁰

This lawsuit is the result of failed efforts between Zanetis on the one hand and Bradburn and Randolph on the other to negotiate Zanetis’s withdrawal from CCC on a mutually acceptable basis.⁴¹ The discussions revolved around Zanetis being paid approximately \$1 million for his interest in CCC but this payment was contingent on Bradburn securing financing for this purpose.⁴² When Bradburn failed to obtain the financing, the deal fell apart and Zanetis sued Bradburn and Randolph alleging breach of contract.⁴³

The trial court entered judgment in favor of Bradburn and Randolph, and a unanimous panel of the Court of Appeals affirmed.⁴⁴

This case implicates the core business principle of fiduciary duty. One of Zanetis’s claims was that Bradburn and Randolph were guilty of constructive

35. *Id.* at 1017 (The defendant’s affidavit “demonstrated that the business records were made at, near the time, or from information transmitted by a person with knowledge; that the business records were kept in the course of the regularly conducted business activity of the maker of the loan and for the defendant; the making of the records was a regular practice of the maker, the defendant, and their loan servicers/subservicers; and all of the information came from a source and circumstances that did not indicate a lack of trustworthiness.”)

36. *Zanetis v. Bradburn*, No. 22A-PL-1520, 2022 WL 17829146, at *1 (Ind. Ct. App. Dec. 21, 2022).

37. *Id.* at *1.

38. *Id.* at *1.

39. *Id.* at *2-3.

40. *Id.* at *3.

41. *Id.* at *3.

42. *Id.* at *4.

43. *Id.* at *5.

44. *Id.* at *1.

fraud and the first element of constructive fraud is the existence of a duty.⁴⁵ The duty implicated here, of course, was Bradburn's and Randolph's fiduciary duty to Zanetis as a co-owner of a limited liability company. This is a well-established principle in Indiana business law and needs little explication.⁴⁶

Though couched in terms of Zanetis's failure to establish the elements of his constructive fraud claim, the Court of Appeals essentially analyzes whether Bradburn and Randolph breached their fiduciary duties to Zanetis—and concludes that they did not. Specifically, the Court concluded that Zanetis had failed to prove that Bradburn and Randolph gained any advantage, financial or otherwise, at Zanetis's expense.⁴⁷ The bottom line here is that a breach of fiduciary duty action requires the claimant to prove by a preponderance of the evidence that a party with such a duty has gained an advantage, financial or otherwise, at the claimant's expense.

B. Derivative Actions

Vician v. Bingham Greenebaum & Doll, LLP, involves a law firm, Bowman, Heintz, Boscia & Vician, P.C. (BHBV), that was organized as a professional corporation. Glen Vician was one of four shareholders with an approximately 29% interest.⁴⁸ The firm was in merger negotiations and hired Bingham Greenebaum & Doll, LLP (Bingham) to assist it. Ultimately, the transaction was consummated as an asset purchase over Vician's opposition; the other three shareholders all voted in favor.

Vician had become disenchanted with Bingham's assistance during the negotiations and following the consummation of the transaction, filed a malpractice lawsuit against Bingham, both in his individual capacity and as a derivative action on behalf of BHBV.

The elements of a derivative action are spelled out by Trial Rule 23.1 and Indiana Code section 23-1-32. Here the Court of Appeals summarized them as follows:

- (1) the complaint must be verified,⁴⁹
- (2) the plaintiff must have been a shareholder or member at the time of the transaction of which he or she complains,⁵⁰
- (3) the complaint must describe the efforts made by the plaintiff to obtain the requested action from the board of directors,⁵¹ and

45. *Id.* at *1 (citing *Rapkin Grp., Inc. v. Cardinal Ventures, Inc.*, 29 N.E.3d 752, 759 (Ind. Ct. App. 2015)).

46. *See, e.g.*, *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 241 (Ind. 2001) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

47. *Zanetis*, 2022 WL 17829146 at *6.

48. *Vician v. Bingham Greenebaum & Doll, LLP*, No. 22A-PL-1935, 2023 WL 5624116, at **1 (Ind. Ct. App. Aug. 31, 2023).

49. *Id.* at **8; IND. CODE § 23-1-32-2 (1986); IND. R. TRIAL P. 23.1.

50. *Vician*, 2023 WL 5624116, at **8; IND. CODE § 23-1-32-1; IND. R. TRIAL P. 23.1.

51. *Vician*, 2023 WL 5624116, at **8; IND. CODE § 23-1-32-1; IND. R. TRIAL P. 23.1.

- (4) the plaintiff must fairly and adequately represent the interests of the shareholders or members.⁵²

The Court of Appeals zeros in here on the last of these four requirements and says that Vician does not explain or provide support for how he “represents the interests of the shareholders,” given that a majority of the shareholders had voted to approve the asset purchase agreement which is at the root of his malpractice claim.⁵³ This is enough for the Court of Appeals to affirm summary judgment in favor of the law firm on the derivative claim.⁵⁴

As a matter of derivative litigation generally, the requirement of fair and adequate representation of the interests of shareholders is a nuanced and complicated subject and the author submits that care needs to be taken in citing this case as precedent. Many derivative actions are characterized by a single plaintiff shareholder, aligned against all of the others. But this decision does not appear to stand for the proposition that a derivative action cannot be maintained in such circumstances. Here all of the other shareholders did vote in favor of the merger and the court faults Vician for not explaining or providing support for how he represents the interests of the shareholders. The court does not appear to be saying that, as a matter of law, Vician did not represent the interests of the shareholders, but rather that he failed to demonstrate a genuine issue of material fact as to whether he did.

C. Duty of Lawyer for a Corporation to a Minority Shareholder

A second issue in *Vician v. Bingham Greenebaum & Doll, LLP*, warrants attention.⁵⁵ Vician alleged that Bingham had a fiduciary duty to him as a BHBV minority shareholder to keep them fully informed about the transaction and assure that BHBV’s assets were not disposed of at “an unfair and in adequate price over objection of a minority BHBV shareholder.”⁵⁶

Vician acknowledged that current Indiana law does not recognize a duty on the part of a lawyer for a corporation to a minority shareholder of the corporation but he argued for recognition of such a duty.⁵⁷ The Court declined “to create a duty where one does not now exist.”⁵⁸

The author of this Article submits that the Court was correct to do so and that its decision was in accordance with long-established and well-considered law. In *Rice v. Strunk*, two of three equal general partners instructed the partnership’s lawyer (Strunk) not to disclose to the third partner (Rice) that they intended to terminate Rice from a management position with the partnership

52. *Vician*, 2023 WL 5624116, at **8; IND. CODE § 23-1-32-2; IND. R. TRIAL P. 23.1.

53. *Vician*, 2023 WL 5624116, at **8.

54. *Id.*

55. *Id.* at **9.

56. *Id.*

57. *Id.*

58. *Id.*

until after Rice had signed documents refinancing partnership property.⁵⁹ When Rice was terminated, he sued Strunk for malpractice.⁶⁰ Under the written partnership agreement, one of the partners other than Rice was responsible for engaging and instructing the partnership's attorneys.⁶¹ Because of this, the Indiana Supreme Court held that Strunk was not subject to a standard of care to exercise ordinary skill and knowledge on behalf of Rice; rather, Strunk was subject to a standard of care to exercise ordinary skill and knowledge on behalf of the partnership, acting through the managing partner who was the "duly authorized constituent" of the partnership for these purposes.⁶²

While the business entity in *Rice* was a general partnership, subsequent Indiana appellate decisions have made clear that *Rice*'s holding—that the standard of care for a lawyer for an entity is to exercise ordinary skill and knowledge on behalf of the entity acting only through its duly authorized constituents and not all its constituents—extends to other business entities as well, including corporations.⁶³

Rice's holding that counsel for an entity must exercise ordinary skill and knowledge on behalf of the entity acting only through its duly authorized constituents and not all its constituents is well established.

For example, the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1) provides:

When a lawyer is employed or retained to represent an organization:

- (a) the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures; and
- (b) . . . the lawyer must follow instructions in the representation . . . given by persons authorized so to act on behalf of the organization.⁶⁴

The Official Comments to § 96(1) set forth the rationale for this rule:

A lawyer who has been employed or retained to represent an organization as a client owes professional duties of loyalty and competence to the organization. By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all

59. *Rice v. Strunk*, 670 N.E.2d 1280 (Ind. 1996). The author of this Article wrote *Rice*.

60. *Id.* at 1283.

61. *Id.*

62. *Id.* at 1287 (quoting IND. PROF. COND. R. 1.13(a)).

63. *Bell v. Clark*, 670 N.E.2d 1290, 1290 (Ind. 1996) (limited partnerships); *Cutshall v. Barker*, 733 N.E.2d 973, 981 (Ind. Ct. App. 2000) (corporations); *Rosenbaum v. White*, 692 F.3d 593, 593 (7th Cir. 2012) (limited liability companies).

64. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1) (AM. L. INST. & UNIF. L. COMM'N 1998).

or any individuals employed by it or who direct its operations or who have an ownership or other beneficial interest in it, such as its shareholders.⁶⁵

Indeed, the Official Comments continue: “The so-called ‘entity’ theory of organizational representation, stated in Subsection (1), is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations.”⁶⁶

To the same effect is a leading treatise on legal ethics, Geoffrey C. Hazard, Jr., W. William Hodes, and Peter R. Jarvis, *THE LAW OF LAWYERING* (“LAWYERING TREATISE”).⁶⁷

The *LAWYERING TREATISE* begins by setting forth Model Rule of Professional Conduct 1.13: “A lawyer employed or retained by an organization represents the organization acting through its duly-authorized constituents.”⁶⁸ The authors go on to say:

Model Rule 1.13(a) and Restatement of the Law Governing Lawyers § 96 both adopt the so-called entity theory of representation for such situations, rejecting the competing “group theory” that was accepted by some courts and other authorities for a time and may still persist in some settings in a few jurisdictions. The key precept is that a lawyer who represents an entity client does not thereby, as a matter of course and without more, become a lawyer for any of the entity’s members, agents, officers, or other “constituents,” such as directors, employees, shareholders, or others with an interest in the organization.⁶⁹

Vician appears to subscribe to the “group theory” referred to in the foregoing paragraph of the *LAWYERING TREATISE*. The treatise acknowledges that such a “view of representation of an organization” is “tenable” but says that the “entity theory” is “accepted almost universally—in the courts as well as in Model Rule 1.13 and *RESTATEMENT OF THE LAW GOVERNING LAWYERS* § 96.”⁷⁰ As discussed, Indiana has clearly adopted the entity theory in its case law

65. *Id.* § 96(1) cmt. b.

66. *Id.*

67. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* (4th ed. 2020) [hereinafter *LAWYERING TREATISE*].

68. *LAWYERING TREATISE* ¶18.01. The language of Indiana Rule of Professional Conduct 1.13(a) is identical to the Model Rule.

69. *LAWYERING TREATISE* ¶18.03.

70. *LAWYERING TREATISE* ¶18.03.

as well as having adopted Model Rule 1.13.^{71,72}

D. Piercing a Non-profit Corporation's Veil

Stark v. State is the appeal of a man named Timothy Stark in a civil lawsuit brought by the State against him and his non-profit corporation, Wildlife in Need and Wildlife in Deed, Inc.⁷³ In 2019, Stark's nonprofit corporation had been enjoined by the federal District Court for the way it was treating tiger cubs and other "big cats" in a lawsuit brought by People for Ethical Treatment of Animals, Inc.⁷⁴ In 2020, a United States Department of Agriculture Chief Administrative Law Judge revoked Stark's animal exhibitor license due to more than 100 violations of animal welfare regulations and standards and assessed substantial civil penalties against Stark and his corporation.⁷⁵

In this case, Stark individually appealed from a judgment in a civil lawsuit filed against him and his corporation by the Indiana Attorney General in 2020 essentially to shut down the corporation, arrange the placement of all the corporation's animals, recover from Stark misappropriated corporate assets, and prohibit Stark and the corporation from acquiring, owning, or exhibiting any exotic or native animals in the future.⁷⁶

Of relevance to this appeal, the trial court ordered Stark to return misappropriated funds to the corporate receiver because he had breached his fiduciary duty to the corporation. The trial court found that Stark was personally liable under three theories: (1) he had breached his fiduciary duties to a nonprofit corporation and was therefore liable under Indiana Code section 23-17-13-1; (2) he had breached his fiduciary duties to a nonprofit corporation by making unlawful distributions to himself in violation of Indiana Code section 23-17-13-4; and (3) piercing of the corporate veil was appropriate under the circumstances.⁷⁷ On appeal, Stark argued only that the State did not satisfy the legal requirements for piercing the corporate veil.⁷⁸

71. *Rice v. Strunk* expressly couples the common law and Rule 1.13(a): "To the extent that a partnership agreement places responsibility for the management of the partnership in the hands of less than all the partners, those partners to whom management responsibilities have been given become the 'duly authorized constituents' for purposes of Prof. Cond. R. 1.13(a)." *Rice v. Strunk*, 670 N.E.2d 1280, 1287 (Ind. 1996).

72. The Lawyering Treatise is critical of *Rice v. Strunk* in a number of respects. LAWYERING TREATISE ¶18.09. However, the Treatise supports *Rice's* conclusion "that a traditional claim of legal malpractice would not lie, because [Strunk] represented the partnership, not [Rice]." *Id.* ¶¶18-24. In any event, *Rice v. Strunk* remains good law in Indiana.

73. *Stark v. State*, 204 N.E.3d 957, 957 (Ind. Ct. App. 2023).

74. *See* People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc., No. 4:17-cv-00186-RLY-DML, 2019 U.S. Dist. LEXIS 124097 at *1 (S.D. Ind. July 25, 2019).

75. *Stark*, 204 N.E.3d at 961.

76. *Id.*

77. *Id.* at 964.

78. *Id.*

The Court of Appeals held that the trial court's conclusions are not clearly erroneous under any of the three theories.⁷⁹

The conclusions of the trial court and Court of Appeals as to the first two theories—that Stark was financially responsible to the corporation because he breached his duties under Indiana Code sections 23-17-13-1 and 4—seems unassailable and, indeed, Stark appears to have made no attempt to argue otherwise. But the author of this Article is skeptical about the use of the theory of “piercing the corporate veil” in this context.

As noted, Stark's corporation was an Indiana nonprofit corporation. The author of this Article has never seen a claim for piercing the corporate veil of a nonprofit corporation and none of the Attorney General in its briefing to the trial court,⁸⁰ or the Court of Appeals⁸¹, the trial court in its 43-page dispositional order,⁸² nor the Court of Appeals in its 16-page opinion cite to a single case involving the “piercing of the corporate veil” of a non-profit corporation; all of the authority cited is to cases involving for-profit corporations.⁸³

To repeat, the author agrees with the determination that Stark is liable for the amounts assessed against him. But the claim against him was for misappropriating corporate assets and it seems to me that the proper claim sounded in breach of fiduciary duty (as were two of the Attorney General's charges that did prevail) or perhaps theft or conversion, not piercing the corporate veil. Piercing the corporate veil refers to a situation where a creditor of a corporation, faced with a situation where the corporation has insufficient assets to satisfy its claim, seeks to pursue the owners of the corporation—those with equity interests in the corporation—who are otherwise protected by the bedrock principle of limited liability.⁸⁴ A counterpart theory applies to limited liability companies (LLCs).⁸⁵ Said differently, a piercing claim is brought when

79. *Id.*

80. State's Bench Trial Brief at 3-5, *State v. Wildlife in Need & Wildlife in Deed, Inc.*, No. 49D12-2002-PL-006192 (Marion Superior Ct. Feb. 4, 2021) (on file with author).

81. Brief of Appellee the State of Indiana at 10-16, *Stark v. State*, 204 N.E.3d 957 (Ind. Ct. App. 2023) (No. 21A-PL-805).

82. Findings, Conclusions, & Judgment at 40-41, *State v. Wildlife in Need and Wildlife in Deed, Inc.*, No. 49D12-2002-PL-006192 (Marion Superior Ct. Apr. 6, 2021).

83. Most frequently cited was *Aronson v. Price*, 644 N.E.2d 864 (Ind. 1994), which, to repeat, involved piercing the corporate veil of a for-profit corporation. The author wrote *Aronson*.

84. IND. CODE § 23-1-26-3(b) (1986) (“a shareholder of a corporation is not personally liable for the acts or debts of the corporation.”); *see Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994). The best known situation is that a court will “pierce the corporate veil” if a plaintiff can show that “that the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice.” *See 2022 Survey, supra* note 33, at 472-73; *2015 Survey, supra* note 33, at 1207-08 (discussing *Country Contractors, Inc. v. A Westside Storage of Indianapolis, Inc.*, 4 N.E.3d 677 (Ind. Ct. App. 2014)).

85. IND. CODE § 23-18-3-3(a) (1993) (“A member, a manager, an agent, or an employee of a limited liability company is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or

a business owner is trying to hide behind the corporate veil. That's not what was going on here; Stark was not seeking the protection of the corporate veil.

The author's fear is that this case will be used as precedent by creditors of non-profit corporations to go after officers and directors when those entities have insufficient assets to satisfy claims. That in turn could scare people away from serving on non-profit boards in the first place. To repeat, there was ample evidence that Stark was guilty of misappropriating corporate funds. Holding him liable on the theory of piercing the corporate veil was entirely unnecessary.

E. Agency

During the Survey Period, the Court of Appeals decided two rather straightforward cases dealing with the principle of "apparent authority." In both these cases, the presence of "apparent authority" appears to be a no-brainer. Nevertheless, the Court of Appeals was very careful to get the law right—and that's important for the next case where the facts might not be as clear.

In *Gershom v. Triple N LLC*, Sampson Gershom and Jeremy Lee were 51% and 49% shareholders in #1 Construction, Inc. Triple N LLC hired #1 Construction to renovate some residential property in Indianapolis.⁸⁶ Lee was #1 Construction's sole contact with Triple N: he signed the original contract; managed the daily operations of the company; and was responsible for providing services under the contract to Triple N.⁸⁷ Gershom had essentially no role in the day-to-day operations of #1 Construction.⁸⁸

Sometime after construction began, #1 Construction was unable to continue performance and Lee negotiated an arrangement with Triple N in which Triple N agreed to pay unpaid contractors and not to assert any claims against #1 Construction; and #1 Construction agreed that it had been paid in full and had no claims, known or unknown, of any kind against Triple N or any related person.⁸⁹

Following the settlement arrangement described in the previous paragraph, Gershom filed a mechanic's lien against the property, asserting that Triple N owed #1 Construction approximately \$36,800.⁹⁰ Thereupon Triple N filed suit against Gershom and #1 Construction to have the mechanic's lien removed and

omissions of any other member, manager, agent, or employee of the limited liability company."); *MFP Eagle Highlands, LLC v. Am. Health Network of Ind., LLC*, No. 1:07-cv-04240DFH-WGH, 2009 WL 77679, at *9 (S.D. Ind. Jan. 9, 2009) (A party sought "to pierce the veil of limited liability to hold [certain individuals] personally responsible for [an] unpaid lease term. Although [the individuals were owners of] a limited liability company and not a corporation, it makes sense to address the issue in terms of piercing the proverbial corporate veil. The same standards apply equally to corporations and to limited liability companies.").

86. *Gershom v. Triple N LLC*, No. 21A-PL-27922022, 2022 WL 4075374, at *1 (Ind. Ct. App. Sept. 6, 2022).

87. *Id.* at *7.

88. *Id.* at *4.

89. *Id.* at *2.

90. *Id.*

for compensatory and punitive damages.⁹¹ About the same time, Gershom was able to secure the release of the \$36,800 from an escrow maintained with respect to the property by a title insurance company.⁹² At this point, Triple N amended its complaint to add a conversion count, seeking to recover the \$36,800.⁹³

The outcome of this dispute turned on whether Lee had authority to bind #1 Construction to the settlement agreement he signed with Triple N. The Court of Appeals sets forth a quick refresher on the law of agency, including reference to *Gallant Ins. Co. v. Davis*,⁹⁴ an Indiana Supreme Court opinion on the difference between “apparent authority” and “inherent authority.” The Court recognizes that questions of whether an agency relationship exists in of an agent’s authority is generally a question of fact.⁹⁵ But it also made clear that summary judgment is appropriate in agency cases if the evidence is undisputed.⁹⁶

Apparent authority is the authority that a third person reasonably believes an agent to possess because of some manifestation from the agent’s principal.⁹⁷ The necessary manifestation is one made by the principal to a third party, who in turn is instilled with a reasonable belief that another individual is an agent of the principal.⁹⁸ It is essential that there be some form of communication, direct or indirect, by the *principal*, which instills a reasonable belief in the mind of the third party.⁹⁹ Statements or manifestations made by the *agent* are *not sufficient* to create an apparent agency relationship.¹⁰⁰

As had the trial court,¹⁰¹ the Court of Appeals found that the evidence was without conflict that #1 Construction had placed Lee in a position to act on behalf of the Corporation—contracting and performing work while Gershom was absent.¹⁰² These manifestations were such as to give a third-party such as

91. *Id.* at *3.

92. *Id.*

93. *Id.*

94. *Gallant Ins. Co. v. Davis*, 751 N.E.2d 672, 674 (Ind. 2001). The author of this Article wrote *Gallant*.

95. *Gershom*, 2022 WL 4075374, at *7 (citing *Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881, 888 (Ind. Ct. App. 2002)).

96. *Id.* (citing *Cain Fam. Farm, L.P. v. Schrader Real Estate & Auction Co*, 991 N.E.2d 971, 976-77 (Ind. Ct. App. 2013)).

97. *Gallant Ins. Co.*, 751 N.E.2d at 676-77 (citing *Warner v. Riddell Nat’l Bank*, 482 N.E.2d 772, 775 (Ind. Ct. App. 1985)); *see also Grosam v. Laborers’ Int’l Union of N. Am.*, 489 N.E.2d 656, 658 (Ind. Ct. App. 1986).

98. *Gallant Ins. Co.*, 751 N.E.2d at 676-77 (citing *Swanson v. Wabash College*, 504 N.E.2d 327, 332 (Ind. Ct. App. 1987)); *see Storm v. Marsischke*, 304 N.E.2d 840, 842 (Ind. Ct. App. 1973); *Kody Eng’g Co. Inc. v. Fox & Fox Ins. Agency, Inc.*, 303 N.E.2d 307, 311 (Ind. Ct. App. 1973).

99. *Gallant Ins. Co.*, 751 N.E.2d at 676-77 (citing *Swanson v. Wabash College*, 504 N.E.2d 327, 332 (Ind. Ct. App. 1987); *Storm v. Marsischke*, 304 N.E.2d 840, 843 (Ind. Ct. App. 1973)).

100. *Id.* (citing *Swanson v. Wabash College*, 504 N.E.2d 327, 332 (Ind. Ct. App. 1987); *Storm v. Marsischke*, 304 N.E.2d 840, 843 (Ind. Ct. App. 1973)).

101. Order Granting Partial Summary Judgment, *Triple N LLC v. #1 Construction, Inc.*, No. 49D04-2103-PL-008388 (Marion Superior Ct. Nov. 15, 2021).

102. *Gershom v. Triple N LLC*, No. 21A-PL-27922022, 2022 WL 4075374, at *8 (Ind. Ct. App. Sept. 6, 2022).

Triple N the reasonable belief that he had the authority to resolve the contractual dispute.¹⁰³ On this basis, the Court found as a matter of law that he had apparent authority to execute the settlement arrangement on behalf of #1 Construction.¹⁰⁴

In *Booher v. Atlas Servs., Inc.*, an apartment building owned individually by Bret Booher was damaged by an automobile. Brett's wife Rhonda—who, to repeat, did not have an ownership interest in the apartment building—picked up Brett and went and met with the insurance adjuster at the site of the damage.¹⁰⁵ Based on this conversation, the insurance adjuster arranged for a contractor to make temporary repairs.¹⁰⁶ Subsequently, in telephone conversations with Rhonda, the contractor was authorized to and did make permanent repairs.¹⁰⁷ Brett refused to pay, saying that Rhonda did not have authority to contract.¹⁰⁸

Quoting Indiana Supreme Court authority, the Court of Appeals said,

[t]wo main classifications of authority are generally recognized: actual authority and apparent authority. Actual authority is created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account. Apparent authority refers to a third party's reasonable belief that the principal has authorized the acts of its agent[.]¹⁰⁹

However, an employer will not be liable for the torts committed by an employee if the employee falls within the common law definition of an “independent contractor.”

The Court of Appeals then analyzed whether Rhonda had “apparent authority” which, as just noted, refers to a third party's—the contractor here—reasonable belief that the principal has authorized the acts of its agent. In the standard for that, the Court of Appeals said, again relying on Supreme Court authority, is “whether a principal's manifestations induce a third party to reasonably believe there is a principal-agent relationship.”¹¹⁰ Key is that such “‘manifestations’ need not be in the form of direct communications, but rather the placing of the agent in a position to perform acts or make representations that appear reasonable to a third person is a sufficient manifestation to endow

103. *Id.*

104. *Id.*

105. *Booher v. Atlas Servs., Inc.*, No. 22A-CC-2301, 2023 WL 4542149, at *1 (Ind. Ct. App. July 14, 2023).

106. *Id.*

107. *Id.*

108. *Id.* at *2.

109. *Id.* at *3 (quoting *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210 (Ind. 2000)).

110. *Id.* (quoting *Arrendale v. Am. Imaging & MRI, LLC*, 183 N.E.3d 1064, 1068 (Ind. 2022)).

the agent with apparent authority.”¹¹¹

The bottom-line, therefore, was whether Brett’s manifestations induced the contractor to reasonably believe that Rhonda was Brett’s agent. The Court of Appeals finds the requisite manifestations as follows: “Brett and Rhonda jointly participated in the insurance claim process from the beginning. The tenant first reported the accident to Rhonda. She surveyed the damage to the building, and she and Bret both met with the insurance agent at the building after the accident.”¹¹² The contractor “could have reasonably inferred that Rhonda had authority to authorize the more permanent repairs.”¹¹³

Two nice pieces of careful work.

F. Ultra Vires

From the late 19th century, corporation statutes required the articles of a corporation to state the purpose for which it was formed and the common law declared transactions beyond the powers specified in corporate charters to be “ultra vires” and void.¹¹⁴

Over time, corporate drafters pushed the limits of these restrictions and articles of incorporation with purpose clauses running for many pages were quite common. Finally, in the late 1960s, state legislatures realized that the point of the specific purpose clause had been defeated and amended their corporation statutes to permit all-purpose clauses.¹¹⁵

During the time when specific purpose clauses were required, the doctrine of *ultra vires* had potency. But because of the ubiquity of “all purpose clauses,” *ultra vires* is less significant now.¹¹⁶ In fact, the ability of a corporation to invoke *ultra vires* as a defense is sharply circumscribed by statute:

- (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
- (b) A corporation’s power to act may be challenged:
 - (1) in a proceeding by a shareholder against the corporation to enjoin the act;

111. *Id.* (quoting *Rogers v. Sigma Chi Intern. Fraternity*, 9 N.E.3d 755, 764 (Ind. Ct. App. 2014)).

112. *Id.*

113. *Id.* at *4.

114. ROBERT A. RAGAZZO, *CLOSELY HELD BUSINESS ORGANIZATIONS* 336-37 (3rd ed. 2020); ARTHUR. PINTO & LEWIS M. BRANSON, *UNDERSTANDING CORPORATE LAW* 18-19 (LexisNexis, 4th ed. 2013); *see, e.g.*, *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

115. *See, e.g.*, IND. CODE § 23-1-22-1(a) (1986) (“Every corporation incorporated under this article has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.”).

116. ROBERT A. RAGAZZO, *CLOSELY HELD BUSINESS ORGANIZATIONS* 336-37 (West Academic Publishing, 3rd ed. 2020); ARTHUR. PINTO & LEWIS M. BRANSON, *UNDERSTANDING CORPORATE LAW* 18-19 (LexisNexis, 4th ed. 2013).

(2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(3) in a proceeding by the attorney general under IC 23-1-47-1.¹¹⁷

The Court of Appeals invoked the foregoing provision in resolving *M-B-C Corp. v. C&R Shambaugh Family, LLC*.¹¹⁸ The parties to this dispute had executed a settlement agreement that M-B-C Corp. later sought to repudiate.¹¹⁹ Its grounds were that the corporation's bylaws required all contracts to be "signed by the president and attested by the secretary."¹²⁰ The settlement agreement had been signed by two sisters who were at the time each 50% shareholders in the corporation and signed the settlement agreement "[i]ndividually and as a . . . shareholder of . . . MBC."¹²¹ That is, the sisters maintained that because they had not signed the agreement in their capacities as president and secretary, the agreement was not binding on the corporation.¹²²

The Court first rejected the sisters' argument on grounds that a subsequent unanimous consent resolution of the corporation's shareholders ratified the signing of the settlement agreement.¹²³ This appears to be an entirely sufficient and persuasive basis to deny relief.

The Court also rejected the sisters' argument on grounds that, as a matter of law, because all of the corporation's shareholders, *i.e.*, the two sisters, signed the settlement agreement, "the corporation cannot later be heard to complain that the transaction was not authorized."¹²⁴ This, too, appears to be an entirely sufficient and persuasive basis to deny relief.

The Court went on, however, also to conclude that the contract was valid under the statute quoted above—Indiana Code section 23-1-22-5(a)—as the sisters' lawsuit constituted a challenge to corporate action on the ground that the corporation lacks or lacked power to act.¹²⁵ The author of this Article suggests that the Court's analysis here is not quite right, although it is undoubtedly harmless error. The question raised by the sisters does not appear to be a claim that the corporation lacked the power to enter into the settlement agreement, only that the settlement agreement had not in fact been executed by duly authorized representatives of the corporation. If the Court was looking for a third reason to buttress its conclusion, it likely could have found it in agency law.

117. IND. CODE § 23-1-22-5.

118. *M-B-C Corp. v. C&R Shambaugh Fam., LLC*, No. 22A-PL-2671, 2023 WL 3374938 (Ind. Ct. App. May 11, 2023).

119. *Id.* at *1-2.

120. *Id.* at *3.

121. *Id.* at *2.

122. *Id.* at *3.

123. *Id.* at *4.

124. *Id.* at *5 (citing *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 238 (Ind. 2001)).

125. *Id.* at *4-5.

IV. CONTRACT LAW

A. *Promissory Estoppel*

AgReliant Genetics, LLC v. Gary Hamstra Farms, Inc.,¹²⁶ could pass as a law school or bar exam question on promissory estoppel. And it provides a most interesting window into an important dimension of Indiana agriculture.

The defendant, AgReliant Genetics, purchased “seed corn” each year from three Indiana farms, the plaintiffs in this lawsuit.¹²⁷ The Court of Appeals does an impressive job in describing the unique demands that farmers face in growing seed corn, particularly the necessity of isolating seed corn crops from other corn varieties to prevent cross-pollination.¹²⁸ “Because of the preparation required to plant seed corn,” the Court said, “farmers need significant advance notice to prepare a crop plan for the seed corn.”¹²⁹

The three farmers here had grown seed corn for the defendant for many years: one for 26 years; one for 11 years; and one for 7 years.¹³⁰ The farmers would obtain verbal commitments from the defendant’s agent each fall for the upcoming season, although the final acreage would not be determined until January or February of the season in question.¹³¹

In the fall of 2017, the defendant’s agent approached each of the three farmers and asked them to set aside specific acreage to grow seed corn during the following growing season and the farmers agreed to do so.¹³² But in late January, they were informed that the defendant would not be using their services to grow seed corn that year.¹³³ As the Court tells it,

Caught unaware and having already prepared their upcoming crop plans to include growing seed corn for AgReliant, the Farmers scrambled to buy seeds for their land on which they had planned to grow seed corn. This caused them to miss out on discounts they could have received had they purchased the seeds in the fall of 2017.¹³⁴

Each of the farmers grew a combination of field corn and soybeans in 2018, earning substantially less income than they did in 2017 when they grew seed corn for the defendant.¹³⁵

126. 213 N.E.3d 1087 (Ind. Ct. App. 2023).

127. *Id.* at 1089.

128. *Id.* at 1089-90.

129. *Id.* at 1090.

130. *Id.*

131. *Id.*

132. *Id.* at 1091.

133. *Id.*

134. *Id.*

135. *Id.* at 1092.

A party asserting promissory estoppel must establish five elements: “(1) a promise by the promisor (2) made with the expectation that the promisee will rely thereon (3) which induces reasonable reliance by the promisee (4) of a definite and substantial nature and (5) injustice can be avoided only by enforcement of the promise.”¹³⁶

As to the element of promise, the defendant maintained that its agent made no “promises” or “guarantees” during the fall discussion with the farmers of the defendant’s requirements for the following season.”¹³⁷ But the Court says that the promise element requires no particular words but only “deed or conduct” that induces another to act in a particular manner.¹³⁸ It held that the evidence was sufficient to affirm the trial court’s determination that the defendant had promised the farmers that it would grow seed corn on their farms in 2018.¹³⁹

As to the expectation of reliance element, the defendant argued that there was no evidence that it expected the farmers would rely on any promise its agent made because in the past, performance was always pursuant to a written contract.¹⁴⁰ Here the Court turned to the RESTATEMENT (SECOND) OF CONTRACTS §90 which provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise¹⁴¹

Here again the Court held that the evidence was sufficient to affirm the trial court’s determination that the defendant had made a promise upon which it should have reasonably expected the farmers to rely.¹⁴²

As to the element of reliance, the Court easily concluded that there was ample evidence showing that the farmers did, in fact, rely on the defendant’s promises: they not only set aside acreage for growing seed corn but also did not purchase other seeds and fertilizers required to grow other crops.¹⁴³

On the element of damages, however, the Court found fault with the trial court’s analysis that awarded farmers damages equal to their lost profits.¹⁴⁴

136. *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 581 (Ind. 2007) (quoting *First Nat’l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 954 (Ind. 1991)).

137. *AgReliant Genetics, LLC*, 213 N.E.3d at 1094.

138. *Id.* at 1095 (citing *SWL, L.L.C. v. NextGear Cap., Inc.*, 131 N.E.3d 746, 754 (Ind. Ct. App. 2019); quoting *Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001)).

139. *Id.*

140. *Id.*

141. *Id.* at 1095-96. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981) was adopted by the Indiana Supreme Court in *First Nat’l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 954 (Ind. 1991).

142. *AgReliant Genetics*, 213 N.E.3d at 1097-98.

143. *Id.* at 1096.

144. See *id.* at 1099.

When determining damages under promissory estoppel, plaintiffs are only entitled to damages based on their reliance, which does not necessarily equate to lost profits.¹⁴⁵ While the farmers argued that the trial court enjoyed the discretion to award lost profits, the Court held that precedent limited them to only reliance damages.¹⁴⁶ The defendant argued that under this standard, the farmers were entitled to no damages at all.¹⁴⁷ But the Court was persuaded that based on their reliance, the farmers lost the opportunity to receive certain discounts on seeds and fertilizer that they would have otherwise been able to receive by purchasing the products earlier.¹⁴⁸ As such, the Court remanded for a new calculation of damages.¹⁴⁹

B. “Agreements to Agree”

In *Wolvos v. Meyer*, an oft-cited decision of the Indiana Supreme Court, the court explicated the difference between a parties’ non-binding “agreement to agree” and an enforceable contract that obligates them to execute a subsequent final written agreement.¹⁵⁰ The Court cited a well-known treatise for the applicable rule of law:

It is quite possible for parties to make an enforceable contract binding them to prepare and execute a subsequent final agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. That document is understood to be a mere memorial of the agreement already reached. If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called “contract to make a contract” is not a contract at all.¹⁵¹

Precisely this issue presented itself in *Shorewood Forest Utilities, Inc. v. Rex Properties, LLC*, a dispute between a nonprofit corporation that provided sewer service to residential customers and a property developer.¹⁵² After an agreement between the two parties under which the utilities would expand into a new development, the parties’ relationship broke down and a number of lawsuits

145. *Id.* at 1098 (citing *First Nat’l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 956 (Ind. 1991)).

146. *Id.*

147. *Id.* at 1099.

148. *Id.*

149. *Id.*

150. *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996).

151. *Id.* at 674-75 (quoting 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.8 at 133-34 (rev. ed. 1993) (footnotes omitted)).

152. *Shorewood Forest Utilities, Inc. v. Rex Properties, LLC*, No. 22A-PL-2345, 2023 WL 5164020, at *1 (Ind. Ct. App. Aug. 11, 2023).

followed.¹⁵³ After a period of time, the parties attempted to settle their dispute and a breakthrough came when Shorewood's insurance carrier agreed to pay Rex Properties \$950,000 to resolve the litigation.¹⁵⁴ At this point, Shorewood's counsel sent Rex Properties an email, set forth in full in the margin, which set forth the terms of settlement.¹⁵⁵ Rex Properties indicated its assent one hour later.¹⁵⁶

Several weeks later, the insurance company emailed the parties a draft settlement agreement in accord with the earlier email exchange.¹⁵⁷ However, Shorewood refused to sign it.¹⁵⁸ Rex Properties asked the court to enforce the settlement agreement and, in an interesting twist, Shorewood's insurance company joined Rex Properties's request.¹⁵⁹ The trial court agreed the email exchange was an enforceable contract.¹⁶⁰

The Court of Appeals affirmed.¹⁶¹ As had been the case in *Wolvos*, Shorewood argued that the email exchange was nothing more than a non-

153. *Id.*

154. *Id.*

155. As set forth in the Court of Appeals decision, the email read as follows:

Based on your request and that of [counsel for Stratford Insurance], the Board of Directors for [Shorewood] have now provided their consent to reaching a global resolve between all named parties. This will also confirm that [Shorewood] is not and will not be paying any of the settlement funds as this is the sole responsibility of [Stratford Insurance].

During an earlier phone call[,] you were kind enough to confirm that your clients were willing to accept the aforementioned settlement amount/sum contingent on the [Shorewood] Board of Directors consenting to a global settlement . . . I have met with and conferred with . . . [the] Board Members, and they confirm their consent . . .

As we also discussed[,] resolution will be accomplished via a Settlement Agreement and Covenant Not to Sue whereby each of the involved parties (i.e., Rex [Properties], Blum[,] and [Shorewood]) will dismiss their respective complaint, counterclaim, and third-party complaint with prejudice. [Shorewood] and your clients further agree via the Covenant Not to Sue and a Dismissal with Prejudice (by all parties) to end all disputes. I will draft those documents (for your review and input) which will include carve-outs of other claims filed and still pending against other tortfeasors or non-parties in other litigation (not directly involving Rex [Properties] /Blum). . .

The parties will stipulate to the foregoing conditions precedent and at the appropriate time file a Joint Motion to Dismiss with prejudice the complaint, counterclaim[,] and third-party complaint in the state court action.

PLEASE CONFIRM THAT THE FOREGOING IS ACCURATE AND ACCEPTABLE TO REX PROPERTIES, LLC AND ITS SOLE MEMBER-MANAGER DONALD BLUM BY REPLYING TO THIS EMAIL . . .

Id. at *2.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Order Granting Motion to Enforce Settlement at 2-3, *Shorewood Forest Utilities, Inc. v. Rex Properties*, No. 64D02-1810-PL-010020 (Porter Superior Ct. Sept. 9, 2022) (on file with author).

161. *Shorewood Forest Utilities, Inc.*, 2023 WL 5164020, at *5.

binding “agreement to agree.”¹⁶² But, the Court said, because Shorewood’s counsel had stated in the email that “he would memorialize and give effect to the parties’ agreement, . . . once Rex Properties accepted it,” Shorewood was obligated to execute the final written agreement.¹⁶³ “What matters in the formation of a contract is an offer, an acceptance, consideration, and a meeting of the minds over definite and certain essential terms,” the Court said.¹⁶⁴ “Those requirements were met here, and therefore the parties had an enforceable contract.”¹⁶⁵

The Court buttressed its conclusion with a nice policy argument: “allowing, as Shorewood requests, every agreement that is yet to be memorialized to be unenforceable would enable endless dilatory negotiation tactics.”¹⁶⁶

C. Misrepresentation and Non-disclosure

*Event Holding, LLC v. Kidz Heaven, LLC*¹⁶⁷ is a great refresher on the classic contract law principles regarding misrepresentation and nondisclosure. In brief, the third party in the background of this case, R & C Fuller, LLC, sold the franchise rights, personal property, and equipment necessary to operate a daycare center to Kidz Heaven, LLC.¹⁶⁸ Under the terms of the asset sale agreement, Fuller retained a security interest in the personal property and equipment.¹⁶⁹ Kidz Heaven later ceased to operate the business and sold the personal property and equipment to Event Holding, LLC, pursuant to a Bill of Sale that itemized the property being sold.¹⁷⁰ Fuller filed suit against both Kidz Heaven and Event Holding to vindicate its security interest in the property.¹⁷¹ While this litigation was pending, Kidz Heaven and Event Holding negotiated a Mutual Release which released claims against one another, subject to several itemized “reserved claims.”¹⁷²

Event Holding subsequently sued Kidz Heaven, alleging fraud in Kidz Heaven’s execution of the Bill of Sale for failing to disclose Fuller’s security interest.¹⁷³ Kidz Heaven crossclaimed, alleging that Event Holding engaged in misconduct in the removal and storage of the property and breached the Mutual

162. *Id.* at *3.

163. *Id.*

164. *Id.* at *4.

165. *Id.* The Court also rejected Shorewood’s assertion that Rex Properties’s email response “did not mirror the offer made,” finding that it had. *Id.*

166. *Id.*

167. *Event Holding, LLC v. Kidz Heaven, LLC*, No. 22A-PL-658, 2022 WL 17825970 (Ind. Ct. App. Dec. 21, 2022).

168. *Id.* at *1.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at *2. Kidz Heaven and Event Holding settled with Fuller while this litigation was pending.

Release by suing Kidz Heaven.¹⁷⁴

The trial court ruled in favor of Kidz Heaven on Event Holding's fraud claim.¹⁷⁵ The Court of Appeals affirmed,¹⁷⁶ holding that the fraud claim had not been reserved in the Mutual Release.¹⁷⁷

The Court went on to reach the merits of the fraud claim and in doing so examined the contract law principles regarding misrepresentation and nondisclosure.¹⁷⁸ In law school Contracts courses, the study of these principles usually starts with Chief Justice John Marshall's *Peter Laidlaw v. Hector M. Organ*,¹⁷⁹ which came to stand for *caveat emptor* controlling such matters.¹⁸⁰ But by the time of *Vokes v. Arthur Murray, Inc.*,¹⁸¹ courts recognized a duty to disclose in arms-length transactions.¹⁸² As formulated by the RESTATEMENT, "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."¹⁸³

In *Event Holding*, the Court of Appeals relied on three excellent prior opinions of that Court to enunciate the applicable rules.¹⁸⁴ The first, *Fimbel v. DeClark*, stands for the proposition that, in the absence of some fiduciary relationship, a party owes another party no duty to disclose anything about an item of property being sold.¹⁸⁵ But the second, *Lawson v. Hale*, makes clear that when a buyer makes inquiries about the condition, qualities, or characteristics of property "it becomes incumbent upon the seller to fully declare any and all problems associated with the subject of the inquiry."¹⁸⁶ The third, *Wise v. Hays*, elaborates on the duty enunciated in *Lawson*:

[I]f a seller undertakes to disclose facts within his knowledge, he must disclose the whole truth without concealing material facts and without doing anything to prevent the other party from making a thorough inspection. For, if in addition to his silence, there is any behavior of the seller which points affirmatively to a suppression of the truth or to a

174. *Id.*

175. Findings of Fact and Conclusions of Law at 17, *Event Holding, LLC v. Kidz Heaven, LLC*, No. 29D03-1710-PL-009329 (Hamilton Superior Ct. Feb. 18, 2022).

176. *Event Holding, LLC*, 2022 WL 17825970 at *5.

177. *Id.* at *3.

178. *Id.* at *4-5.

179. *Laidlaw v. Organ*, 15 U.S. 178 (1817) (buyer of tobacco not advised of end of War of 1812).

180. IAN HAYNES & GREGORY KLASS, *STUDIES IN CONTRACT LAW* 520 (9th ed. 2017).

181. *Vokes v. Arthur Murray, Inc.*, 212 So.2d 906 (Fla. Ct. App. 1968) (dancing school customer "subjected to overreaching blandishment and cajolery").

182. *Id.* at 909.

183. RESTATEMENT (SECOND) CONTRACTS § 164(1) (AM. L. INST. 1981).

184. *See generally* *Event Holding, LLC v. Kidz Heaven, LLC*, No. 22A-PL-658, 2022 WL 17825970 (Ind. Ct. App. Dec. 21, 2022).

185. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998).

186. *Lawson v. Hale*, 902 N.E.2d 267, 275 (Ind. Ct. App. 2009) (citation omitted).

withdrawal or distraction of the other parties' attention to the facts, the concealment becomes fraudulent.¹⁸⁷

The Court then applied these rules to the facts and concluded that Event Holding had not shown that it made any inquiries regarding the personal property's "condition, qualities, or characteristics[.]"¹⁸⁸ As such, Event Holding had failed to show that Kidz Heaven's silence regarding Fuller's security interest in the personal property amounted to a material misrepresentation.¹⁸⁹

D. Continued Ferment in the Law of Covenants Not to Compete

The long and interesting history of the law of covenants not to compete in Indiana took a most interesting turn during the Survey Period when the Legislature entered terrain that had previously been occupied only by the courts.

Any discussion of the history of non-competes in Indiana begins in 1955 with the Indiana Supreme Court's astonishing decision in *Donahue v. Permacel Tape Corp.*,¹⁹⁰ where the Court unanimously struck down a non-compete covenant, declaring that "our courts will zealously guard every individual against even his own commitments which would limit or thwart the greatest constructive employment and enjoyment of his faculties from this moment forward, unless the manner of his living would contravene public policy or the personal property rights of another."¹⁹¹

A second notable decision came in 1983 when the Supreme Court enforced a liquidated damages clause against a physician who had breached the non-compete requirements of a medical clinic's partnership agreement.¹⁹²

The Supreme Court did not speak again on non-competes for a quarter-century. Then came *Central Indiana Podiatry, P.C. v. Krueger*,¹⁹³ which the author of this Article submits was a pivotal case. At issue was a non-compete in a podiatrist's employment agreement that extended to 43 counties—the counties in which the podiatry group practiced and counties adjacent thereto.¹⁹⁴ The podiatrist had practiced in northern Marion County; after being fired, he began practicing in adjacent Hamilton County, "ten minutes" from his former practice.¹⁹⁵ The Court found the non-compete reasonable as to the three counties in which the podiatrist had actually practiced but unreasonable as to the counties

187. *Wise v. Hays*, 943 N.E.2d 835, 840 (Ind. Ct. App. 2011) (quoting *Ind. Bank & Trust Co. of Martinsville, Ind. v. Perry*, 467 N.E.2d 428, 431 (Ind. Ct. App. 1984)).

188. *Event Holding, LLC*, 2022 WL 17825970 at *4 (quoting *Lawson v. Hale*, 902 N.E.2d 267, 275 (Ind. Ct. App. 2009)).

189. *Id.* at *5.

190. *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235 (Ind. 1955).

191. *Id.* at 240.

192. *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276 (Ind. 1983).

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

194. *Id.* at 726.

195. *Id.* at 734 (Shephard, J., dissenting).

adjacent thereto.¹⁹⁶ The bottom line was that the podiatrist was able to continue practicing ten minutes away from where he had practiced before.¹⁹⁷

The author submits that the Court's majority in *Krueger* was signaling a move toward heightened skepticism of non-competes. The Court did enforce a covenant not to compete but it did so only after (1) declaring that public policy arguments against enforcing covenants not to compete by health care providers had particular force; (2) citing four of its decisions going back *Donahue* in declaring that it had "long held that noncompetition covenants in employment contracts are in restraint of trade and disfavored by the law;" and (3) blue penciling the geographic scope of the covenant at issue from 43 counties to only three because "noncompetition agreements justified by the employer's development of patient relationships must be limited to the area in which the physician has had patient contact."¹⁹⁸ Although two justices dissented, their dissent was brief and mild, only saying that the blue pencil should not have excluded southern Hamilton County.¹⁹⁹

Whether or not the Supreme Court was signaling skepticism about the enforceability of non-competes in *Krueger*, the Indiana Court of Appeals for the most part vigorously enforced them during the decade that followed.²⁰⁰

Then in 2019, the Supreme Court spoke twice about non-competes.²⁰¹ Neither decision explicitly held that the non-compete covenants at issue were unenforceable as written, but the practical effect of both was to render them so.²⁰² In *Heraeus Med., LLC v. Zimmer, Inc.*,²⁰³ the Court held that the "blue-pencil doctrine" is not available to add, change, or rearrange terms in a noncompetition agreement.²⁰⁴ And in *American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*,²⁰⁵ the Court held unenforceable several liquidated damage provisions that would have been triggered upon breach of the

196. *Id.* at 730 (majority opinion).

197. *Id.* at 734.

198. *Id.* at 728-29, 730.

199. *See id.* at 734 (Shephard, J., dissenting).

200. For Court of Appeals decisions enforcing non-competes, *see* *Duermit v. Odyssey Healthcare, Inc.*, 44 N.E.3d 842 (Ind. Ct. App. 2015); *Janowiak v. Watcon, Inc.*, No. 71A04-1512-PL-2154, 2016 WL 4245426 (Ind. Ct. App. Aug. 11, 2016); *Momar, Inc. v. Watcon, Inc.*, No. 71A03-1603-PL-621, 2016 WL 6584341, (Ind. Ct. App. Nov. 3, 2016); *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863 (Ind. Ct. App. 2016); *Vickery v. Ardagh Glass Inc.*, 85 N.E.3d 852 (Ind. Ct. App. 2017); *SourceOne Grp., LLC v. Gage*, No. 18A-PL-2153, 2019 WL 6334657 (Ind. Ct. App. Nov. 27, 2019). *Contra*: *Buffkin v. Glacier Group*, 997 N.E.2d 1 (Ind. Ct. App. 2013); *Clark's Sales and Service, Inc. v. Smith*, 4 N.E.3d 772 (Ind. Ct. App. 2014).

201. *See infra* text accompanying notes 203-06.

202. *See infra* text accompanying notes 203-06.

203. 135 N.E.3d 150 (Ind. 2019).

204. *Id.* at 153. For further discussion of *Heraeus*, see Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 54 IND. L. REV. 783, 817-18 (2022) [hereinafter *2019-2020 Survey*].

205. 136 N.E.3d 208 (Ind. 2019).

covenants not to compete in the employment agreements at issue.²⁰⁶

As suggested at the outset of this section, the focus of the non-compete debate shifted during the survey period from the courts to the Legislature. Governor Holcomb signed P.L.165-2023 into law on May 4, 2023, which provided:

- Primary care physicians (defined as physicians practicing family, general pediatric, or internal medicine) cannot enter into non-competes with employers.²⁰⁷
- Otherwise permissible non-competes for other types of physicians (i.e., non-primary care physicians) cannot be enforced if the employer terminates the physician’s employment without cause, the physician quits with cause, or “the physician’s employment contract has expired” and the parties “have fulfilled the obligations of the contract.”²⁰⁸
- Where physicians and employers cannot agree on a “reasonable” price for the physician to purchase a release from their non-compete, either party can require the other to participate in—and split the costs of—a mediation that “must take place” in the Indiana city with a population of at least 50,000 that is closest to the physician’s primary place of employment (while employed under the agreement containing the non-compete).²⁰⁹

These new requirements apply only to non-competes “originally” entered into on or after July 1, 2023.²¹⁰

This statute represents a milestone in our state’s historic reckoning with the enforceability of covenants not to compete.

E. Arbitration Clauses

Last year’s survey article discussed the remarkable fact that during the survey period covered, the Court of Appeals had found unenforceable the arbitration clauses in all three of the challenges presented to it—and that following the close of the survey period, the Indiana Supreme Court had affirmed the only one of those determinations appealed to it.²¹¹ In that case, *Decker v. Star Financial Group*,²¹² a purported class of customers sued their bank for the allegedly improper assessment and collection of overdraft fees.²¹³

206. *Id.* at 215. For an extended discussion of Am. Consulting, see Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 53 IND. L. REV. 821, 838-43 (2021) [hereinafter *2021 Survey*].

207. IND. CODE §§ 25-22.5-5.5-1.5, -2.5(b) (2023).

208. *Id.* § 25-22.5-5.5-2(b).

209. *Id.* § 25-22.5-5.5-2.6.

210. *Id.* § 25-22.5-5.5-2(b).

211. See Frank Sullivan, Jr., *Banking Business, and Contract Law*, 56 IND. L. REV. 669, 705-10 (2023) [hereinafter *2023 Survey*]; *infra* Part V and accompanying footnotes.

212. *Decker v. Star Fin. Group*, 187 N.E.3d 937 (Ind. Ct. App. 2022).

213. *Id.* at 939.

Prior to the lawsuit, the bank had issued an “addendum” to the terms of its customer accounts providing that claims against the bank were subject to arbitration and could only be brought in a customer’s individual capacity.²¹⁴

The Court of Appeals had held that there had been no “reasonable notice” to the customers that their contracts had been amended to add the arbitration clause.²¹⁵ Expressing no opinion on the issue of whether there had been reasonable notice, the Supreme Court nevertheless also found the arbitration clause unenforceable.²¹⁶ It gave the terms of the bank’s account agreement a very near-sighted read and held that its provision that permitted the bank to unilaterally *changing* the terms of the agreement did not extend to permitting the bank to *add* terms to the agreement.²¹⁷ Because the account agreement did not mention arbitration, class actions, or dispute resolution at all, the addendum constituted an addition to the agreement that was not enforceable without the consent of the account holder.²¹⁸

Three more cases involving arbitration clauses in financial institution customer agreements reached the Court of Appeals during this Survey Period.²¹⁹ The results are not inconsistent with last year’s but the author submits that it is hard to draw any conclusions as to whether Indiana appellate courts have embarked on a new course of heightened scrutiny of arbitration clauses or these cases mark only a temporary deviation from Indiana’s “strong policy favoring arbitration agreements.”²²⁰

Lending support to the notion of a new course of heightened scrutiny is *Land v. IU Credit Union*,²²¹ in which the Court of Appeals held unenforceable an arbitration clause in a credit union customer agreement under circumstances very similar to those in *Decker*, discussed *supra*.²²² The credit union had sent to its customers a proposed modification to the agreement that permitted either party to require arbitration to resolve disputes without the other party’s consent

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

215. *Decker*, 187 N.E.3d at 947.

216. *Decker*, 204 N.E.3d at 922.

217. *Id.* at 922-23.

218. *Id.* at 923. Justice Goff concurred in the result. He was of the view that the account agreement, fairly read, did permit the bank to add new terms. *Id.* at 923-24 (Goff, J., concurring). He concurred in the result, however, believing that the account holders never assented to the new term. *Id.*

219. A case in which the enforceability of an arbitration provision in an insurance policy is at issue was also decided by the Court of Appeals during the Survey Period and is now pending before the Supreme Court. See *Illinois Cas. Co. v. B&S of Fort Wayne Inc.*, *Illinois Cas. Co. v. B & S of Fort Wayne Inc.*, 201 N.E.3d 690 (Ind. Ct. App.), *reh’g denied* (Mar. 13, 2023), *trans. granted, opinion vacated sub nom.* *Illinois Cas. Co. v. Burciaga*, 212 N.E.3d 1233 (Ind. 2023), discussed *infra* notes 318-28 and accompanying text.

220. *Decker*, 204 N.E.3d at 920 (citing *MPACT Constr. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 905 (Ind. 2004)).

221. *Land v. IU Credit Union*, 201 N.E.3d 246 (Ind. Ct. App. 2022), *aff’d*, 218 N.E.3d 1282 (Ind. 2023), *trans. granted, opinion vacated*, 209 N.E.3d 1168 (Ind. 2023), *vacated*, 218 N.E.3d 1282 (Ind. 2023), *aff’d on reh’g*, 226 N.E.3d 194 (Ind. 2024).

222. See *supra* notes 212-20 and accompanying text.

and prohibited members from initiating or joining a class-action lawsuit.²²³ Not at issue in *Decker*, the proposal in *Land* also specified members’ “right to opt out” of arbitration by sending the credit union written notice within 30 days; otherwise the proposed modification became binding on the member.²²⁴ The Court of Appeals held in this *Land* decision that neither had the credit union given its customers reasonable notice²²⁵ nor had the customer given valid assent²²⁶ to the proposed modification of the customer agreement.

After the conclusion of the Survey Period, the Supreme Court took jurisdiction of the case and issued its own opinion.²²⁷ It reversed the holding of the Court of Appeals as to the reasonableness of the notice: “[the credit union] provided [the customer] with reasonable written notice of its offer to amend the Agreement.”²²⁸ However, the Court affirmed the appellate court’s conclusion that the customer had not given valid assent. The Court adopted RESTATEMENT (SECOND) OF CONTRACTS § 69(1)²²⁹ and found that the credit union had not met its burden thereunder of showing that the customer “in remaining silent and inactive intend[ed] to accept the offer.”²³⁰

In a further, highly unusual, development, the Court issued a second opinion in *Land* more than three months after its initial opinion.²³¹ The Court gave thorough consideration to arguments raised by the credit union as to why the original opinion was incorrect before affirming its original opinion in full.²³² While an appellate court will from time to time issue an opinion on rehearing to correct a mistake in or modify in some way its original opinion, it is highly unusual to grant rehearing to affirm the original opinion in full. The author of this Article suggests that the principal reason for granting rehearing is related to the following two sentences that appear in the Conclusion to the rehearing

223. *Land v. IU Credit Union*, 218 N.E.3d 1282, 1285-86 (Ind. 2023), *aff’d on reh’g*, 226 N.E.3d 194 (Ind. 2024).

224. *Id.* at 1286.

225. *Land*, 201 N.E.3d at 251.

226. *Id.* at 253.

227. *See generally Land*, 218 N.E.3d at 1282. Justice Goff authored this opinion. It closely tracks his concurring opinion in *Decker*. *See supra* note 218.

228. *Land*, 218 N.E.3d at 1289.

229. RESTATEMENT (SECOND) OF CONTRACTS § 69(1) (AM. L. INST. 1981) provides:

Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

230. *Land*, 218 N.E.3d at 1290.

231. *See generally Land v. IU Credit Union*, 226 N.E.3d 194 (Ind. 2024).

232. *Id.* at 198.

opinion:

We recognize the practical difficulties that businesses may face in securing affirmative consent to contract modifications from existing customers. And for that reason, we leave open the possibility of adopting, in some future case, a different standard governing the offer and acceptance of unilateral contracts between businesses and consumers.²³³

Justice Massa had dissented from the Court's original opinion on grounds that the consent standard erected by the majority opinion decision "could upend long-accepted business practices of companies with large customer bases in Indiana — from Netflix to Citibank and thousands of smaller institutions in between."²³⁴ The language in the rehearing opinion seems addressed at assuaging Justice Massa's concern. And it seems to have done the trick as Justice Massa concurred in full with the rehearing opinion.²³⁵

Before summarizing the current state of affairs with respect to arbitration clauses, it is necessary to discuss *Neal v. Purdue Federal Credit Union*.²³⁶ *Neal* too involved a challenge to the enforceability of an arbitration clause amendment and unexercised opt-out provision to a credit union's consumer banking agreement²³⁷—raising essentially the same issues as the *Decker*²³⁸ and *Land*²³⁹ cases discussed *supra*.

As to the reasonableness of the notice, *Neal* held that the issue was not available on appeal for failure to have been raised in the trial court.²⁴⁰ On the issue of the validity of the customer's consent, *Neal* reached exactly the opposite result of the Court of Appeals decision in *Land*, holding that the customer given valid assent to the proposed modification of the customer agreement.²⁴¹

The timing here is of some consequence. First, both *Neal* and the Court of Appeals decision in *Land* were handed down on December 30, 2022.²⁴² (It is a disconcerting anomaly—of Indiana appellate procedure that different panels of the Court of Appeals can issue dueling decisions and, indeed, are not bound by their prior decisions.) Second, on that date, the Supreme Court had taken jurisdiction of *Decker*²⁴³ but had not yet rendered its decision which would come

233. *Id.*

234. *Land*, 218 N.E.3d at 1291-92 (Massa, J., dissenting).

235. *See generally Land*, 226 N.E.3d at 194.

236. *Neal v. Purdue Fed. Credit Union*, 201 N.E.3d 253 (Ind. Ct. App. 2022).

237. *Id.* at 259.

238. *See supra* notes 218-28 and accompanying text.

239. *See supra* notes 221-35 and accompanying text.

240. *Neal*, 201 N.E.3d at 262 n.5.

241. *Id.* at 263.

242. *See generally id.* at 253; *Land v. IU Credit Union*, 201 N.E.3d 246 (Ind. Ct. App. 2022).

243. Order Granting Petition to Transfer, *Decker v. Star Fin. Grp. Inc.*, No. 22S-PL-00305 (Ind. Sept. 1, 2022).

on March 21, 2023.²⁴⁴

In summary:

- On the reasonableness of notice of the arbitration clause amendments to the customer agreements, the Supreme Court has now held that the method of notice used by the credit union in *Land* gave the customer in that case “reasonable notice.”²⁴⁵ Furthermore, the Court of Appeals decision to the contrary as to the method used in *Decker* has been vacated when the Supreme Court granted jurisdiction in that case.²⁴⁶
- On the validity of the customer assent to the amendment, the Supreme Court has now held that there was no valid customer in *Lamb*²⁴⁷ and has explicitly disapproved of *Neal*’s holding to the contrary on that issue.²⁴⁸ But the Court has held open the prospect of adopting a different standard on assent in the future.²⁴⁹

Fralish v. Discover Bank,²⁵⁰ is an apt coda to this lengthy saga of financial institutions’ strenuous efforts to inject arbitration clauses into their customer agreements. One wonders if they ever stopped to reflect on what would happen if customers elected to arbitrate collection actions.

Discover Bank filed a routine action to collect an allegedly overdue credit card balance against its customer, John Fralish, in St. Joseph Superior Court.²⁵¹ The customer agreement provided that “Any Claim ... may be resolved by binding arbitration if either side requests it. THIS MEANS IF EITHER YOU OR WE CHOOSE ARBITRATION, NEITHER PARTY WILL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT....”²⁵² Rather than answer the complaint, Fralish filed a motion to compel arbitration.²⁵³

Discover squealed like a pig, raising four arguments as to why it should not be stuck with arbitration. But to no avail; the Court of Appeals rejected them all. “By the plain terms of the arbitration clause, Fralish’s demand to have the Claim resolved by arbitration was a request that Discover had no right to reject.”²⁵⁴

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

245. *Land v. IU Credit Union*, 218 N.E.3d 1282, 1289 (Ind. 2023).

246. Order Granting Petition to Transfer, *Decker*, No. 22S-PL-00305 (Ind. Sept. 1, 2022); see *Neal*, 201 N.E.3d at 262 n.5.

247. *Land*, 218 N.E.3d at 1290.

248. *Id.* at 1291 n.8.

249. *Land v. IU Credit Union*, 226 N.E.3d 194, 198 (Ind. 2024).

250. *Fralish v. Discover Bank*, No. 23A-CC-211, 2023 WL 3710225 (Ind. Ct. App. May 30, 2023)

251. Complaint, *Discover Bank v. Fralish*, No. 71D04-2210-CC-002508, 2022 WL 21697120 (Ind. St. Joseph Superior Ct. Oct. 4, 2022).

252. *Fralish*, 2023 WL 3710225 at *1 (formatting in original).

253. *Id.* at *2.

254. *Id.* at *3.

F. Clauses Providing for Attorney Fees

Indiana follows the “American rule” that a party must pay its own attorney’s fees absent an agreement between the parties, a statute, or other rule to the contrary.²⁵⁵ The rationale for the American rule was enunciated many years ago by Chief Justice Earl Warren:

[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel. Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney’s fees would pose substantial burdens for judicial administration.²⁵⁶

However, a contractual provision agreeing to pay attorney’s fees is enforceable if the contract is not contrary to law or public policy.²⁵⁷

On the one hand, the availability of attorney fees in *M-B-C Corp. v. C&R Shambaugh Family*,²⁵⁸ presented the court with a straightforward question. A settlement agreement between the parties provided that “[t]he prevailing party of any legal proceedings based on or arising out of this Agreement shall be entitled to recover from the opposing party or parties reasonable attorneys’ fees, costs, and expenses[.]”²⁵⁹ A subsequent lawsuit between the parties was decided against the plaintiff on grounds that it was barred by the settlement and attorneys’ fees were awarded. The plaintiff appealed, contending that the settlement agreement was not enforceable against it because it had not been executed in accordance the plaintiff’s bylaws.²⁶⁰ Finding that the plaintiff’s challenge unavailing, the Court of Appeals enforced the attorney fee clause in favor of the defending party.²⁶¹

On the other hand, the availability of attorney’s fees under the contract at issue in *Center Market of Indiana, Inc. v. Hinsdale Bank, N.A.*,²⁶² presented the

255. *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d 453, 458 (Ind. 2012); *Gavin v. Miller*, 54 N.E.2d 277, 280 (Ind. 1944).

256. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (citations omitted). For a discussion comparing the American rule with the English rule (“loser pays”), see *State Bd. of Tax Comm’rs v. Town of St. John*, 751 N.E.2d 657, 658 (Ind. 2001).

257. *Dempsey v. Carter*, 797 N.E.2d 268, 275 (Ind. Ct. App. 2004); *Holliday v. Crooked Creek Villages Homeowners Assoc., Inc.*, 759 N.E.2d 1088, 1095 (Ind. Ct. App. 2001); *Brendonwood Common v. Franklin*, 403 N.E.2d 1136, 1143 (Ind. Ct. App. 1980).

258. *M-B-C Corp. v. C&R Shambaugh Family*, No. 22A-PL-2671, 2023 WL 3374938 (Ind. Ct. App. May 11, 2023).

259. *Id.* at *6.

260. *Id.* at *5.

261. *Id.* at *6.

262. *Cent. Mkt. of Ind., Inc. v. Hinsdale Bank, N.A.*, No. 22A-MF-870, 2023 WL 2566125 (Ind. Ct. App. Mar. 20, 2023).

Court of Appeals with a novel question.

The case was an appeal from the grant of summary judgment in favor of a bank after the borrowers of a commercial loan of approximately \$1.8 million defaulted.²⁶³ The judgment itself amounted to approximately \$2.9 million, including attorney's fees of approximately \$450,000.²⁶⁴ The borrowers' arguments on appeal were unavailing and so the Court turned to the question of the propriety of the attorney's fee award. The note evidencing the loan specifically permitted the bank to recover "reasonable attorney fees and costs" and, indeed, borrowers did not dispute that the bank was entitled to recover attorney's fees; they argued that a portion of the attorney's fees awarded was unreasonable.²⁶⁵

At issue were attorney's fees incurred by the bank in collateral litigation between it and a party who had guaranteed the bank's loan to the borrowers. The Court framed the issue as "whether a lender can seek reimbursement of attorney's fees from a borrower based on its involvement in collateral actions with third parties other than the named borrowers on the note."²⁶⁶ In these circumstances, at least, the Court concluded that the bank could not.²⁶⁷

The bank took the position that it was because the borrowers had defaulted that it had instituted the litigation against the guarantor.²⁶⁸ But the Court pointed out that the guarantor was not referred to as a borrower under the promissory note and that the borrowers did not participate in the litigation between the bank and the guarantor.²⁶⁹ The Court went on to say that it did not appear that the litigation was necessary to enforce the note and seemed to have no bearing on the bank's effort to collect the amount due.²⁷⁰ The Court concluded that the bank was not entitled to additional attorney's fees for the collateral litigation because they were not integral to the enforcement of the note.²⁷¹

G. Contracts with or Between Governmental Bodies

Contracts with or between governmental bodies can raise unanticipated questions of enforceability for the parties when their terms are circumscribed by

263. *Id.* at *3.

264. *Id.* at *7.

265. *See Cent. Mkt. of Ind., Inc.*, 2023 WL 2566125. The court said that the promissory note had not been included in the record but that the court had obtained a copy from Odyssey, the uniform electronic case management system utilized by Indiana courts. In this regard, the court noted that a record on appeal includes all matters before the trial court, even those not transmitted to the Court on appeal. IND. R. APP. P. 27.

266. *Cent. Mkt. of Ind., Inc.*, 2023 WL 2566125 at *8.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at *9. The Court gave considerable emphasis to the fact that the collateral litigation occurred outside of Indiana but that does not appear to the author of this Article 2 of been in any way outcome determinative.

statutes.²⁷² Such was the case in *Performance Services, Inc. v. Randolph E. School Corp.*,²⁷³ where the Indiana Supreme Court declared void and unenforceable a contract between a public school corporation and Performance, a wind turbine company, related to the company's wind turbine facility.

The terms of the contract provided that the school corporation would have access to the wind turbine facility and the records related to it so that it could "incorporate the Facility and data in offering educational opportunities to its students, [including but not] limited to vocational training, science and math classes, and environmental educational programs."²⁷⁴ The school corporation was to have access to the facility from 7:00 a.m. to 4:30 p.m., Monday through Friday, and after hours upon request.²⁷⁵ As consideration for such access and use, the school Corporation agreed to pay Performance \$77,000 semi-annually. For this amount, the company was also to provide the school corporation "directly or indirectly" with electricity.²⁷⁶

However, the contract had another provision that provided that if Performance achieved certain levels of "net revenues" as defined in the agreement from the operation of the facility, the amount due from the school corporation would be reduced and, indeed, at certain levels of net revenues, the school corporation would be entitled to payments from Performance.²⁷⁷ At the outset of the transaction, the school superintendent estimated that these rebates could total as much as \$3.1 million over the 25-year life of the contract.²⁷⁸

At some point, the State Board of Accounts, a state entity that audits the finances of school corporations and other public entities for compliance with financial requirements imposed by state law and state regulation, concluded that the contract violated state law.²⁷⁹ Indiana's Home Rule Act states that a school corporation does not have the power "to invest money, except as expressly granted by statute."²⁸⁰ And Indiana's Public Investment Act does not grant a school corporation the power to invest public funds in a wind turbine.²⁸¹ Specifically, the State Board concluded that these statutes did "not permit a school to invest in a wind turbine or wind farm."²⁸²

Thereafter, the school corporation sought a declaratory judgment that its contract with Performance was void on grounds, among others, that it

272. See, e.g., 2019-2020 Survey, *supra* note 204.

273. *Performance Servs., Inc. v. Randolph E. Sch. Corp.*, 211 N.E.3d 508 (Ind. 2023), *rev'g*, 196 N.E.3d 208 (Ind. Ct. App. 2022).

274. *Performance Servs., Inc. v. Randolph E. Sch. Corp.*, 196 N.E.3d 208, 211 (Ind. Ct. App. 2022), *rev'd*, 211 N.E.3d 508 (Ind. 2023).

275. *Performance Servs., Inc.*, 196 N.E.3d at 211.

276. *Id.* at 212.

277. *Id.*

278. *Performance Servs., Inc.*, 211 N.E.3d at 510.

279. *Performance Servs., Inc.*, 196 N.E.3d at 213.

280. IND. CODE §§ 20-26-3-7(1), 36-1-3-8(a)(11) (2021).

281. See *id.* §§ 5-13-9-0.3 to -11.

282. *Performance Servs., Inc.*, 196 N.E.3d at 213.

constituted an illegal investment by a political subdivision.²⁸³ But the Court of Appeals rejected the school corporation's claim. The Court held that the relationship between the school corporation and the company

“never amounted to more” than the School Corporation owing payments for services rendered by Performance. Indeed, the School Corporation's only argument on appeal to the contrary is that *Performance* realized a profit under that relationship, and therefore the Contract reflects that the School Corporation invested in the wind turbine. But the plain definition of “invest” applies the hoped-for financial return to the same person or entity that provides the initial commitment of money, not to the recipient of that money. Therefore, the Contract here does not reflect an illegal investment by a political subdivision. . . .²⁸⁴

The Supreme Court granted transfer and vacated the decision of the Court of Appeals.²⁸⁵ The question, the Court said, was “whether, under the parties’ contract, [the school corporation] agreed to commit money in hopes of obtaining a financial return.”²⁸⁶ To the Court, the potential of the school corporation to earn credits and even rebates of its payment obligations constituted such a hope of obtaining a financial return.²⁸⁷ As such, there was no question that the contract violated the Indiana Public Investment Act.²⁸⁸ The Court put an exclamation point on its decision by holding that the educational benefits provided in the contract did “not preclude the contract from also constituting an investment.”²⁸⁹ The Court declare the contract “void and unenforceable.”²⁹⁰

The Court's conclusion that the commitment of school corporation funds under the terms of the contract at issue in this case constituted an unauthorized investment under the Indiana Public Investment Act seems to the author of this Article to be correct. But the Court's determination that the entire contract was void and unenforceable seems startling and far-reaching in its implications.

First, neither the Home Rule Act nor the Public Investment Act mandate that contracts made in violation of their provisions are automatically void and unenforceable.²⁹¹ By declaring them so, the Court has provided any Indiana

283. *Id.* at 214.

284. *Id.* at 216 (internal citations omitted).

285. *Performance Serv., Inc. v. Randolph E. Sch. Corp.*, 211 N.E.3d 508, 511 (Ind. 2023), *rev'g*, 196 N.E.3d 208 (2022).

286. *Id.* at 512.

287. *Id.* at 513.

288. *Id.* at 513.

289. *Id.* at 513.

290. *Id.* at 513.

291. *Cf.* IND. CODE § 4-13.6-5-11 (2022) (declaring that “[a]ll public works contracts not let in conformity with [the bidding requirements for state public works projects contained in that]

school corporation or political subdivision a unilateral, no-risk method of exit from any contract with respect to which it can convince a court that its commitment of funds was made with the “hope of obtaining a financial return.” While such protectionism of school corporations and political subdivisions may be warranted,²⁹² this is a door that can swing both ways: private enterprise may well be more reluctant to deal with Indiana school corporations and political subdivisions given the risks of contracts being deemed void and unenforceable.

Second, taken at face value, Performance contracted to provide the school corporation here access to its facility for educational and training programs and to receive electricity produced by the facility.²⁹³ The Court says that neither party argued for severability and that there was no evidence to support a claim that the contract would have been executed absent the “investment” component.²⁹⁴ However, the Court’s declaration that contracts in derogation of the Public Investment Act are void precludes any determination as to whether a private party is entitled to any compensation under such contracts.

The implications of the Court declaring this contract void and unenforceable extend beyond the Home Rule and Public Investment Act to any contract between a private enterprise and an Indiana public entity. The private enterprise needs to assure itself, perhaps by obtaining a legal opinion addressed to it, that in entering the contract, the public enterprise is not violating or otherwise contravening any statute or regulation.

chapter are void”); IND. CODE § 20-1-19-19 (repealed by PL 1-2005, § 240) (providing that “[a]ny obligation, negotiable or non-negotiable, providing for payment for a course or courses of instruction shall be void if the postsecondary proprietary educational institution is not accredited to operate in the State of Indiana”); IND. CODE § 26-2-5-1 (2022) (declaring that “[a]ll provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract, except those pertaining to highway contracts, which purport to indemnify the promisee against liability for: (1) death or bodily injury to persons; (2) injury to property; (3) design defects; or (4) any other loss, damage, or expense arising under either (1), (2) or (3); from the sole negligence or willful misconduct of the promisee [or the promisee’s agents, servants or independent contractors who are directly responsible to the promisee] are against public policy and are void and unenforceable”) (emphases supplied).

292. The plea for such protectionism for Indiana school corporations from Amicus Indiana School Boards Association is candid: “[T]he the proper outcome here is to relieve this school corporation from the consequences of the poor decisions made here. Let the loss fall on the experienced, for-profit company that should have known better and had the experience and resources to ensure the law’s dictates were followed.” Brief for Indiana School Boards Association as Amicus Curiae Supporting Appellee’s Petition to Transfer at 7, *Performance Servs., Inc. v. Randolph E. Sch. Corp.*, 196 N.E.3d 208 (Ind. Ct. App. Nov. 9, 2022) (No. 22A-CP-00361).

293. *Performance Servs., Inc. v. Randolph E. Sch. Corp.*, 196 N.E.3d 208, 210 (Ind. Ct. App. 2022), *rev’d*, 211 N.E.3d 508 (Ind. 2023).

294. *Performance Servs., Inc.*, 211 N.E.3d at 513.

H. Guaranties

Shoaff v. First Merchants Bank,²⁹⁵ is a quick refresher on the special rules that apply when collecting on a guaranty.²⁹⁶

Thomas Shoaff was a guarantor of a loan upon which an insurance company had defaulted.²⁹⁷ He maintained that he had been discharged of liability under the guaranty when the original obligation was materially altered.²⁹⁸ The Court of Appeals agreed that “[u]nder Indiana common-law principles, when parties cause a material alteration of an underlying obligation without the consent of the guarantor, the guarantor is discharged from further liability whether the change is to his or her injury or benefit.”²⁹⁹ But, the Court continued, “material alteration” in this context is limited to three categories: “a change which alters the legal identity of the principal’s contract, substantially increases the risk of loss to the guarantor, or places the guarantor in a different position. The change must be binding.”³⁰⁰

The changes propounded by Shoaff did not fit any of these categories of materiality, the Court concluded.

“[T]he legal relationship between the parties here was never altered. Their business relationship was not altered. The only changes were to the structure of the loan, the dates associated with its repayment, and the manner in which it was to be repaid. Those changes . . . clearly fall within the language of the Agreement, demonstrating that Shoaff contemplated their possibility and prospectively consented to them.”³⁰¹

The Court of Appeals does an impressive job recognizing that this is a nuanced area of law. “We recognize that our jurisprudence in this area exhibits an internal tension,” the Court acknowledges.³⁰² It then explores the tension and explains that it results from a failure in some cases to distinguish between whether an alteration is material, and whether it is contemplated and consented to by a contract.³⁰³ Here, the Court said, the changes about which Shoaff complained, “interest, late fees, and future debts,” were contemplated by the

295. *Shoaff v. First Merchs. Bank*, 201 N.E.3d 646 (Ind. Ct. App. 2022).

296. *See 2019 Survey, supra* note 33, at 677-78.

297. *Shoaff*, 201 N.E.3d at 649.

298. *Id.* at 653.

299. *Id.* at 654 (citing *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246, 1251 (Ind. Ct. App. 2007); quoting *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585-86 (Ind. Ct. App. 2001)).

300. *Id.* (citing *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246, 1251 (Ind. Ct. App. 2007); quoting *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585-86 (Ind. Ct. App. 2001)).

301. *Id.* at 655.

302. *Id.*

303. *Id.*

guaranty agreement. “He assumed those risks.”³⁰⁴

I. Insurance Contracts

Within the ambit of contract law is the interpretation of insurance contracts, including questions of coverage. During the Survey Period, several insureds litigated claims that their policies provided coverage for some unusual risks.

1. Business Closure Due to Covid-19 Virus Particles.—Last year’s survey article reported the decision of the Court of Appeals that the temporary closure and loss of use of the Indiana Repertory Theatre due to the general societal danger presented by the COVID-19 pandemic did not constitute “physical loss” or “physical damage” to the theatre that would trigger business-income coverage under the theatre’s property and casualty insurance policy.³⁰⁵

During the Survey Period, the theatre and its intrepid counsel, Plews Shadley Racher & Braun, LLP, returned to the Court of Appeals with a different theory based on the specific conditions inside the theatre: whether virus particles caused physical loss or damage to the air and surfaces in the theatre. The Court held, as had the trial court,³⁰⁶ that as a matter of law, virus particles do not cause physical loss or damage to property so as to qualify as a covered loss under the terms of IRT’s policy.³⁰⁷

2. Lead Poisoning of Children from Inhaling Dust from Lead Paint.—*Indiana Farmers Mutual Insurance Co. v. HomeWorks Management Corp.*³⁰⁸ began with a lawsuit filed by a mother and father, individually, and on behalf of their two children against their landlord and various affiliates called HomeWorks alleging various torts related to the presence of lead-based paint, including that one of the children was the victim of lead poisoning.³⁰⁹ HomeWorks looked to its commercial general liability insurance carrier for coverage but the insurer filed this action, seeking a declaratory judgment that its policy’s “Lead Exclusion” excluded coverage for any claims resulting from

304. *Id.* at 656.

305. *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App.), *trans. Denied sub nom.*, 193 N.E.3d 372 (Ind. 2022). All justices concurred in the denial of the theatre’s petition to transfer.

306. Order Granting Defendant’s Cross-Motion for Summary Judgment, *Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, No. 49D01-2004-PL-013137 (Ind. Marion Superior Ct. Dec. 13, 2021) (on file with author).

307. *Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, 203 N.E.3d 555, 555-56 (Ind. Ct. App.), *trans. denied*, 211 N.E.3d 1014 (Ind. 2023). Chief Justice Rush and Justice Goff voted to grant the theatre’s petition to transfer; Justices Massa, Slaughter, and Molter voted to deny the petition.

308. *Ind. Farmers Mut. Ins. Co. v. HomeWorks Mgmt. Corp.*, 201 N.E.3d 666 (Ind. Ct. App. 2022), *trans. denied*, 209 N.E.3d 1170 (Ind. 2023).

309. *See* Complaint for Damages, *Wiley v. HomeWorks Mgmt. Corp.*, No. 71C01-2011-CT-000404 (Ind. St. Joseph Cir. Ct. Nov. 2, 2020) (on file with author).

exposure to lead.³¹⁰

The policy's lead exclusion is quite explicit, defining "lead" as "lead or compounds or products containing lead in any form or a mixture or combination of lead and other dust or particles,"³¹¹ and excluding claims for "[a]ctual or alleged, threatened or suspected 'bodily injury', 'property damage', 'personal and advertising injury' or medical payments arising out of . . . 'lead'"; testing, monitoring, remediation, and similar costs.³¹² Nevertheless, the trial court found the exclusion "overbroad" and "ambiguous" and under authority established in several well-known pollution exclusion cases—*American States Insurance Co. v. Kiger*³¹³, and *State Automobile Mutual Insurance Co. v. Flexdar Inc.*³¹⁴—denied the insurer's request for summary judgment as to coverage.³¹⁵

The Court of Appeals reversed, finding that the policy "specifically excluded 'lead' and defined 'lead' and the alleged harm in the underlying complaint arose from lead poisoning."³¹⁶ In doing so, it gave a very thorough examination of both *Kiger* and *Flexdar*, and persuasively distinguished both.³¹⁷

3. *Posting of Models' Photographs in Online Advertising Without Permission.*—The underlying litigation in *Illinois Casualty Company v. B&S of Fort Wayne Inc.*³¹⁸ was an action in federal district court between several adult entertainment clubs and thirty-three professional models from around the world who claimed that the clubs used their photographs in advertisements without permission and posted those advertisements on the clubs' social media accounts between December 2014 and October 2020.³¹⁹

The clubs took the position that they were entitled to coverage for the models' claims under multiple business owners' insurance policies with effective dates ranging from May 5, 2014, through August 29, 2020. The policies were largely identical and provided payment for "those sums that the insured becomes legally obligated to pay as damages because of . . . 'personal and advertising injury' to which this insurance applies."³²⁰ The insurance applied to "'personal and advertising injury' caused by an offense arising out of your business, but only if the offense was committed in the 'coverage territory'

310. Complaint, *Ind. Farmers Mut. Ins. Co. v. HomeWorks Mgmt. Corp.*, No. 71C01-2101-PL-000019, 2021 WL 12137606 (Ind. St. Joseph Cir. Ct. Jan. 21, 2021) (on file with author).

311. *Ind. Farmers Mut. Ins. Co. v. HomeWorks Mgmt. Corp.*, 201 N.E.3d 666, 668 (Ind. Ct. App. 2022), *trans. denied*, 209 N.E.3d 1170 (Ind. 2023).

312. *Id.* at 668.

313. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996).

314. *State Auto. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 850 (Ind. 2012).

315. Order, *Ind. Farmers Mut. Ins. Co. v. HomeWorks Mgmt. Corp.*, No. 71C01-2101-PL-000019 (Ind. St. Joseph Cir. Ct. Feb. 16, 2022) (on file with author).

316. *Ind. Farmers Mut. Ins. Co.*, 201 N.E.3d at 676.

317. *Id.* at 672-75.

318. *Illinois Cas. Co. v. B & S of Fort Wayne Inc.*, 201 N.E.3d 690 (Ind. Ct. App.), *reh'g denied* (Mar. 13, 2023), *trans. granted, opinion vacated sub nom.*, *Illinois Cas. Co. v. Burciaga*, 212 N.E.3d 1233 (Ind. 2023).

319. *Id.* at 692.

320. *Id.* at 693.

during the policy period.”³²¹ Of central importance to the coverage dispute was a “Cyber Protection Endorsement” added to the personal and advertising injury coverage in 2016 and included in six of the policies. This endorsement included a stipulation that “any irreconcilable dispute between us and an ‘insured’ is to be resolved by arbitration in accordance with the then current rules of the American Arbitration Association.”³²²

The underlying litigation between the clubs and the models was settled on terms that included the clubs agreeing to a consent judgment against them for approximately \$1.9 million, of which the clubs agreed to pay approximately \$177,000. As for the remainder of the consent judgment, the clubs assigned their rights against their insurers to the models and the models agreed to not execute the unsatisfied judgment against the clubs.³²³

Before the consent judgment was approved by the district court, an insurer filed this declaratory judgment action, seeking a court determination that its policies did not provide coverage on multiple grounds.³²⁴ The clubs and models responded by filing a motion to compel arbitration.³²⁵ The trial court granted the request, finding that the arbitration language contained in the Cyber Protection Endorsement “was very broad, and not specifically limited to the Cyber Protection Endorsement.”³²⁶ and then certified its order for interlocutory appeal.

The Court of Appeals reversed, holding that the arbitration clause clearly and unambiguously did not apply to the parties’ dispute for two reasons. With respect to the models’ pre-2016 claims, the policies at issue did not contain an arbitration provision. With respect to models with 2016 and later claims, the arbitration provision applies only to claims brought under the Cyber Protection Endorsement, and the models did not bring timely claims under the Cyber Protection Endorsement.³²⁷

The Supreme Court has taken jurisdiction of the case³²⁸ and held oral argument on October 10, 2023, with the enforceability of the arbitration provision squarely at issue.

V. CONCLUSION: A REVIEW OF A DECADE’S SURVEY ARTICLES

This Article marks the tenth consecutive year that the author has written a

321. *Id.*

322. *Id.* at 694.

323. *Id.* Among the many contentious issues in the dispute is whether the assignment was made in violation of the terms of the policies. *Id.*

324. Illinois Casualty Company’s Complaint for Declaratory Judgment, Illinois Cas. Co. v. Burciaga, No. 02D02-2107-PL-000273 (Ind. Allen Superior Ct. July 1, 2021).

325. *Illinois Cas. Co.*, 201 N.E.3d at 695.

326. Amended Order Granting Motion to Compel Arbitration at 9, Illinois Cas. Co. v. Burciaga, No. 02D02-2107-PL-000273 (Ind. Allen Superior Ct. March 15, 2022).

327. *Illinois Cas. Co.*, 201 N.E.3d at 692.

328. Illinois Cas. Co. v. Burciaga, 212 N.E.3d 1233 (Ind. 2023) (granting transfer).

survey of Indiana banking, business, and contract law for the Indiana Law Review. With the permission of the editors, the author will use this Conclusion to reflect upon some of the major cases, issues, themes, and developments addressed in the past decade's survey articles.

It is only appropriate to begin this ten-year review with a salute and thank you to former Indiana Court of Appeals Judge Margret G. Robb. It was Judge Robb who first organized the Indiana law survey, and it was Judge Robb who both invited the author to speak at the survey in 2013 and persuaded the Indiana Law Review to publish the ensuing research. She made a prodigious contribution to Indiana law as a judge of the Court of Appeals and has been a great leader in law as well, both as Chief Judge of that Court and in the National Association of Women Judges, Appellate Judges Conference of the American Bar Association and its affiliated Appellate Judges Education Institute, the National Conference of Chief Judges of Courts of Appeals, and the prestigious American Law Institute. Judges and lawyers throughout our nation are very much in her debt.

The author would like to offer three other salutes in reflecting on the past decade of Indiana banking, business, and contract law.

The first is to the late Indiana Court of Appeals Judge, Michael P. Barnes, for his contributions to Indiana jurisprudence. Judge Barnes had a very distinguished career as a prosecutor before being appointed to the Court of Appeals and so had particular expertise in criminal law.³²⁹ In addition, Judge Barnes made a major contribution to business and commercial law, notably writing two UCC decisions that are published in casebooks and treatises: *Belden, Inc. v. American Electronic Components, Inc.*,³³⁰ and *Indianapolis Car Exchange, Inc. v. Alderson*.³³¹

The second is to the law firm of Plews Shadley Racher & Braun, LLP, for its innovative and effective advocacy on behalf of businesses against their property, casualty, and liability insurance carriers. Most notably, the firm secured coverage for pollution damage suffered by its clients in two famous decisions of the Indiana Supreme Court, *American States Insurance Co. v. Kiger*³³² and *State Automobile Mutual Insurance Co. v. Flexdar, Inc.*³³³ More recently (though less successfully), the firm has deployed the *Kiger* and *Flexdar* precedents on behalf of the National Collegiate Athletic Association to seek

329. See 2019 Survey, *supra* note 33, at 638-39.

330. *Belden, Inc. v. Am. Elec. Components, Inc.*, 885 N.E.2d 751, 754 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1229 (Ind. 2008).

331. *Indianapolis Car Exch., Inc. v. Alderson*, 910 N.E.2d 802 (Ind. Ct. App. 2009).

332. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996). The author dissented in this case while a member of the Supreme Court. *Id.* at 949 (Sullivan, J., dissenting).

333. *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 848 (Ind. 2012). The author also dissented in this case while a member of the Supreme Court. *Id.* at 852 (Sullivan, J., dissenting).

coverage for antitrust litigation filed by college athletes;³³⁴ a commercial enterprise to seek coverage for damages from a ransomware attack,³³⁵ and a theatre to seek coverage for Covid business interruption.³³⁶

The third is the Indiana Court of Appeals for the uniformly consistent high quality of its decisions, including those euphemistically labeled “not for publication.”³³⁷ The Court has earned praise both for the prodigious volume and rapid turn-around time of its work. This is all well-deserved but what has been so impressive to the author in the decade of writing these survey articles—as it was to him during his 19 years on the Supreme Court—is the uniform care and attention the Court gives to providing carefully reasoned analysis of and answers to the questions presented in each appeal, no matter how novel or routine. Whether an opinion is published in the official reporter or is an unpublished disposition, the parties always receive due process.

A. Hughley’s *High Hurdle*

Looming above not only banking, business, and contract litigation but all litigation in Indiana is the non-movant friendly summary judgment standard enunciated by the Indiana Supreme Court in its 2014 blockbuster decision, *Hughley v. State*.³³⁸ *Hughley* has been the subject of frequent treatment in the past decade’s survey articles, including review of its progeny,³³⁹ an apparent example of its abuse,³⁴⁰ an allegation by a dissent that it had been ignored in the majority opinion,³⁴¹ and a prediction by the author that the Court might reconsider *Hughley* before too long³⁴²—a prediction which, 18 months later, shows no sign of materializing. There is no question that *Hughley* has been the most important development in banking, business, and contract law during the past decade and that it will continue to influence greatly the conduct and outcome of such litigation.

334. *NCAA v. Ace Am. Ins.*, 151 N.E.3d 754 (Ind. Ct. App. 2020), *trans. denied*, 166 N.E.3d 909 (Ind. 2021); *see 2019-2020 Survey*, *supra* note 204, at 814-17.

335. *G&G Oil Co. of Ind., Inc. v. Cont’l Western Ins. Co.*, 165 N.E.3d 82 (Ind. 2021); *see 2022 Survey*, *supra* note 33, at 494-95.

336. *Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, 203 N.E.3d 555, 555-56 (Ind. Ct. App.), *trans. denied*, 211 N.E.3d 1014 (Ind. 2023); *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App.), *trans. denied*, 193 N.E.3d 372 (Ind. 2022).

337. *See 2021 Survey*, *supra* note 206, at 862-63.

338. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (“Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims. [It is a] relatively high bar[.]”).

339. *See 2023 Survey*, *supra* note 211, at 710-11.

340. *See 2019 Survey*, *supra* note 33, at 638-39.

341. *See 2021 Survey*, *supra* note 206, at 842 n.182.

342. *See 2023 Survey*, *supra* note 211, at 710-11.

B. Commercial Courts

The most ambitious and successful developments in Indiana banking, business, and contract law during the past decade has been the creation and maturation of the Indiana commercial court. With strong leadership from Chief Justice Loretta Rush, commercial courts have evolved from a pilot project to fully operational venues in ten Indiana counties. The most recent developments on the commercial court front are described elsewhere in this Article.³⁴³

C. New Business and Commercial Law Statutes

On the legislative front, the past decade has seen three major amendments to Indiana business entity law and substantial amendments to the Uniform Commercial Code.

1. *B-Corps.*—The General Assembly enacted and the Governor signed legislation effective January 1, 2016, authorizing a new form of corporation which must have as one of its purposes the creation of “general public benefit.”³⁴⁴ Such new entities are called “benefit corporations” and have been nicknamed “B-corps.” An argument can be made that the powers and protections conferred on B-corps by the new statute were already available under the Indiana Business Corporation Law but there is no question that other states are using B-corps and that Indiana needed to get with the “social enterprise” movement in a visible way.³⁴⁵

2. *Series LLCs.*—The following year, the Legislature authorized “series LLCs.”³⁴⁶ A series LLC structure permits a limited liability company to segregate within the entity both assets and ownership, protecting them from general creditors or creditors of other series. As expected, the series LLC has proven to be a fairly specialized business entity without too many users. But its adoption demonstrated that Indiana is on the cutting edge of states making novel business structures available to entrepreneurs, enabling them to organize their innovative enterprises here.³⁴⁷

3. *Business Entity Statute Harmonization.*—The 2017 session of the General Assembly adopted and Governor Eric Holcomb signed into law legislation that consolidated in a single place in the Indiana Code and harmonized certain administrative provisions and provisions governing transactions that had previously been contained in five different business entity

343. See *supra* notes 4-10 and accompanying text.

344. Ind. Pub. L. No. 93-2015, § 3, Ind. Acts 640-58 (codified at IND. CODE § 23-1.3 (2018)) (effective Jan. 1, 2016).

345. See Frank Sullivan, Jr., *Banking Business, and Contract Law*, 49 IND. L. REV. 981, 987-90 (2016).

346. Ind. Pub. L. No. 170-2016, § 19, 2016 Ind. Acts 1713-17 (codified at IND. CODE § 23-18.1 (2016)) (effective Jan. 1, 2017).

347. See Frank Sullivan, Jr., *Banking Business, and Contract Law*, 50 IND. L. REV. 1179, 1187-88 (2017).

statutes.³⁴⁸ In doing so, the new law brought about an unprecedented amount of procedural simplification.³⁴⁹

The business entity statutes affected were those governing corporations, limited liability partnerships, limited partnerships, nonprofit corporations, and limited liability companies.³⁵⁰ The administrative provisions so consolidated and harmonized were those governing business filings, names, registered agents, and foreign entities, and administrative dissolution.³⁵¹ The transaction provisions so harmonized were those governing business mergers, interest exchanges, conversions, and domestications.³⁵²

4. *Uniform Commercial Code—2022 Amendments.*—The 2023 General Assembly adopted and Governor Holcomb signed into law a comprehensive package of amendments to the Uniform Commercial Code recommended by the American Law Institute and the Uniform Law Commission to accommodate emerging technologies, such as artificial intelligence, distributed ledger technology, and virtual currency.³⁵³ Indiana was among the very first states to adopt the new amendments and, in fact, the new amendments took effect in Indiana before any other state!³⁵⁴ These amendments are discussed in detail in another article in this issue of the *Indiana Law Review*.³⁵⁵

D. Debtor-Creditor Relations

The “banking law” sections in the annual surveys have not addressed banking regulation but rather discussed the relationship between lenders and borrowers.

1. *Who Owns the Debt?*—These survey articles began in the wake of the Great Recession’s mortgage foreclosure crisis, and many defendant mortgagors were challenging plaintiffs’ documentation of their entitlement to recovery. In fact, several mortgage loan servicers temporarily halted foreclosure proceedings in 2010 following allegations that the documents accompanying judicial

348. Ind. Pub. L. No. 118-2017, S.E.A. No. 443, 2017 Ind. Acts 813-974 (effective Jan. 1, 2018).

349. Valerie Warycha, *Lawson Hails New Act That Modernizes Business Laws New Law Simplifies Business Formation and Creates Consistent Rules for Business*, IN.GOV (Apr. 24, 2017), <https://calendar.in.gov/site/sos/event/sos-lawson-hails-new-act-that-modernizes-business-laws-newlaw-simplifies-business-formation-and-creates-consistent-rules-for-business/> [https://perma.cc/FMP8-LD52].

350. *See 2018 Survey*, *supra* note 33, at 946-48.

351. *See id.* at 948-49.

352. *See id.* at 949-51.

353. Ind. Pub. L. 199-2023, Ind. Acts 2337-471 (effective July 1, 2023).

354. UNIF. L. COMM’N & AM. L. INST., UNIFORM COMMERCIAL CODE AMENDMENTS (2022), at 1 (2023) [hereinafter 2022 U.C.C. AMENDMENTS].

355. *See Sullivan, Jr.*, *supra* note 2.

foreclosures had been inappropriately signed or notarized.³⁵⁶ Then in 2011, a major study of the issue by the United States Government Accountability Office reported “pervasive problems with [mortgage servicers’] document preparation.”³⁵⁷

The very first of these surveys discussed a number of cases in which mortgagors were quick to demand evidence that parties bringing foreclosure actions against them were actually the successors in interest to their original mortgagees.³⁵⁸ But mortgagors rarely prevailed, and by 2019, real estate lenders had pretty much gotten their act together on this.³⁵⁹ On the other hand, there have been cases where credit card lenders³⁶⁰ were denied summary judgment because they did not have their paperwork and, in addition, lenders have had difficulties collecting on student loans for exactly the same reason.³⁶¹

2. *Statute of Limitations for Debt Collection.*—In 2020, a unanimous Supreme Court disapproved several decisions of the Court of Appeals as to when the statute of limitations begins to run to collect what the court called “closed installment contracts” like a promissory note for a fixed amount of debt that specifies installment payments and a fixed maturity date.³⁶² In doing so, the Court distinguished such “closed installment contracts” from “open accounts” like a credit card account which is kept open in anticipation of future transactions, for which the rule as to when the statute of limitations begins to run is quite different.³⁶³

3. *Courts’ Dance with the Legislature.*—Court decisions sometimes provoke a legislative response followed by additional court decisions—a sort of

356. U.S. GOV’T ACCOUNTABILITY OFF., PUB. NO. 11-433, MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEALED NEED FOR ONGOING REGULATORY OVERSIGHT 1 (2011), <http://www.gao.gov/new.items/d11433.pdf> [<http://perma.cc/9VXE-9ZRJ>].

357. *Id.*

358. *See 2015 Survey, supra* note 33, at 1195-98.

359. *See 2021 Survey, supra* note 206, at 824-26.

360. *See, e.g., Menendez v. CACH, LLC*, No. 29A02-1511-CC-2026, 2016 WL 4442487 (Ind. Ct. App. Aug. 23, 2016); *Reef v. Asset Acceptance, LLC*, 43 N.E.3d 652 (Ind. Ct. App. 2015), discussed in *2018 Survey, supra* note 33, (citing Frank Sullivan, Jr., *Banking Business, and Contract Law*, 50 IND. L. REV. 1179, 1187 (2017) [hereinafter *2017 Survey*]; *but see Yuan v. Wells Fargo Bank, N.A.*, 162 N.E.3d 481, 481 (Ind. Ct. App. 2020), and *Taylor v. Public Serv. Credit Union*, No. 20A-CC-2233, 2021 WL 2643646 (Ind. Ct. App. June 28, 2021), discussed in *2022 Survey, supra* note 33, at 467-68.

361. *See Jones v. Shenandoah Funding Tr.*, No. 20A-CC-553, 2020 WL 6040233 (Ind. Ct. App. Oct. 13, 2020), discussed in *2022 Survey, supra* note 33, at 468-69; *but see Nat’l Collegiate Student Loan Tr. 2006-4 v. Vance*, No. 18A-CC-1061, 2018 WL 5316987 (Ind. Ct. App. Oct. 29, 2018), discussed in *2021 Survey, supra* note 206, at 826-27.

362. *Blair v. EMC Mortgage, LLC*, 139 N.E.3d 705 (Ind. 2020).

363. *Id.* at 709-10. For an example showing the proper application as to the rule for open accounts, see *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153 (Ind. Ct. App. 2010). The decisions of the Court of Appeals disapproved by *Blair* had erroneously applied the rule enunciated in *Smither* to closed installment contracts.

“dance” or “dialogue.”³⁶⁴ An example of this phenomenon materialized in a 2015 mortgage foreclosure priority dispute.

In 2011, the Supreme Court had decided *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, holding in favor of a judgment lien creditor in a mortgage foreclosure priority dispute relying on a doctrine called “merger.”³⁶⁵

Here is where the “dance” with the legislature began. The real property community beat a line to the General Assembly and in its next session, the Legislature passed a statute overruling *Citizens State Bank* by abolishing the doctrine of merger.³⁶⁶

Now the “dance” shifted back to the courts. In a 2015 case called *U.S. Bank v. Miller*, essentially the same thing had happened as in *Citizens State Bank*. But when the judgment creditor claimed that, under the authority of *Citizens State Bank*, it had priority, the Court of Appeals held that under the new statute, the first mortgagee had priority and that the statute prevailed over the holding of the prior Supreme Court opinion.³⁶⁷ The Indiana Supreme Court denied transfer, with the three justices still on the Court who were part of the *Citizens State Bank* majority joining the unanimous vote!³⁶⁸

4. *A Fine Final Opinion from Justice Robert D. Rucker.—McCullough v. CitiMortgage, Inc.*,³⁶⁹ a 2017 decision of the Indiana Supreme Court, is a particular favorite of the author because it is something of a window into the jurisprudential soul of former Indiana Supreme Court Justice Robert D. Rucker, his colleague on the Court for almost 13 years. *McCullough* was handed down at the very end of Justice Rucker’s term of distinguished service on both the Supreme Court and Court of Appeals.³⁷⁰

The McCulloughs had been through bankruptcy, after which CitiMortgage foreclosed on their home.³⁷¹ The McCulloughs believed themselves protected against CitiMortgage taking their home because their debt was discharged in

364. Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991) (expanding on the William B. Lockhart Lecture that Justice Abrahamson delivered at the University of Minnesota in March 1990).

365. *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, 949 N.E.2d 1195, 1201-02 (Ind. 2011).

366. Pub. L. No. 130-2012, § 7, 2012 Ind. Acts 2704-07 (codified at IND. CODE § 32-29-8-4 (2016)) (effective Mar. 19, 2012).

367. *U.S. Bank, N.A. v. Miller*, 44 N.E.3d 730 (Ind. Ct. App. 2015).

368. *U.S. Bank, N.A. v. Evansville*, 43 N.E.3d 1278 (Ind. 2016) (denying transfer)

369. *McCullough v. CitiMortgage, Inc.*, 70 N.E.3d 820 (Ind. 2017).

370. Of those judges who have served on both the Indiana Supreme Court and Court of Appeals, Justice Rucker has the longest combined service, although there are a number of judges whose service on either the Supreme Court or Court of Appeals alone exceeds his combined service. Compiled by the author from data available at <https://mycourts.in.gov/JR/Default.aspx> [<https://perma.cc/K6BC-RDJG>].

371. *McCullough*, 70 N.E.3d at 826.

bankruptcy.³⁷²

Justice Rucker can't help them. The law is that while bankruptcy protected the McCulloughs from personal liability on their debts otherwise due, the mortgage lien survived and was enforceable as an *in rem* action.³⁷³ Justice Rucker would never disregard the rule of law, even if he didn't like the consequences. However, his opinion recites in careful and complete detail why it is that the law mandates that the McCulloughs lose their home.³⁷⁴

Why did the state court of last resort feel it necessary to accept jurisdiction and write at length on a matter of well-settled law? The McCulloughs' appeal had been dismissed by the Court of Appeals on technical grounds.³⁷⁵ The author believes that Justice Rucker just couldn't bear to see these people lose their home without a written explanation of why the law required it, especially since they, like him, were decorated Vietnam veterans.³⁷⁶

E. Business Entity Law

1. The Bedrock Principle of Limited Liability.—It is the law of Indiana that a shareholder of a corporation is not personally liable for the acts or debts of the corporation.³⁷⁷ The law is the same for members and managers of limited liability companies.³⁷⁸ This general rule is an absolutely bedrock principle of American law.³⁷⁹ Indeed, many economic historians take the position that this principle, along with the constitutional protection given to the sanctity of contracts, explains the remarkable growth and strength of the American economy in the two centuries since our nation's founding.³⁸⁰

In the author's view, the best explication of the bedrock principle during the past decade was the 2014 decision of the Court of Appeals in *Country Contractors, Inc. v. A Westside Storage of Indianapolis, Inc.*³⁸¹ There, the Court dealt sternly with the findings the trial court had made in allowing the plaintiff to "pierce the corporate veil."³⁸² The trial court had said that due to the corporation's bankruptcy, the plaintiff "[had] no other recourse" except against

372. *Id.* at 827.

373. *Id.* at 827-28 (citing *Long v. Bullard*, 117 U.S. 617 (1886)).

374. *See generally id.*

375. *Id.* at 822.

376. *Id.*

377. IND. CODE § 23-1-26-3(b) (1986).

378. IND. CODE § 23-18-3-3(a) (1993).

379. *United States v. Bestfoods*, 524 U.S. 51, 62 (1998); *Escobedo v. BHM Health Assocs., Inc.*, 818 N.E.2d 930, 933 (Ind. 2004).

380. *See, e.g.*, BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 121 (1992); Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 155 (1992); E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1378 (1948).

381. *Country Contractors, Inc. v. A Westside Storage of Indianapolis, Inc.*, 4 N.E.3d 677 (Ind. Ct. App. 2014).

382. *Id.* at 686.

the individual shareholders.³⁸³ “The same could be said,” the Court of Appeals declared, “for any entity that contracts with a company that ends up in bankruptcy. . . . Lack of other recourse simply is not a proper basis for piercing the corporate veil.”³⁸⁴ The court’s fine and strong opinion should remind the bench and bar of the bedrock principle of limited liability for owners of corporations and LLCs and about how rarely a piercing claim will be availing.³⁸⁵

2. *Informal Creation of Partnerships*.—A general partnership is unique among business entity types because it may be created informally.³⁸⁶ It is formed when two or more persons associate for the purpose of engaging in a business for profit and no other form of business organization is chosen by the associates.³⁸⁷ It exists even if the associates do not have any written agreement and they may not even be aware that they have formed a partnership.³⁸⁸ A general partnership may be created without filing any organizational documents with the state.³⁸⁹ And in disputes among partners, a partner’s available rights and remedies will be governed by partnership law.³⁹⁰

Exactly this was held by the Court of Appeals to have happened in its 2021 decision in *Wolfe v. Agro*.³⁹¹ The defendants operated a business raising “rare birds” and the plaintiff had delivered to them approximately \$23,000 worth of birds and associated equipment to be raised and sold for profit.³⁹² The birds did not survive, no profits were earned,³⁹³ and the plaintiff sued the defendants for conversion of his property and related theories.³⁹⁴ The trial court held the defendants guilty of conversion of the plaintiff’s birds and associated equipment,³⁹⁵ but the Court of Appeals reversed and remanded.³⁹⁶ “Despite the lack of any written agreement,”³⁹⁷ the Court said, the evidence established that the plaintiff and defendants had a partnership.³⁹⁸ The plaintiff’s birds and associated equipment were an investment in that partnership and became

383. *Id.* at 687.

384. *Id.* at 690-91.

385. *See 2015 Survey, supra* note 33, at 1207-08.

386. *See generally* ROBERT A. RAGAZZO, *CLOSELY HELD BUSINESS ORGANIZATIONS* (3rd ed. 2020).

387. IND. CODE § 23-1-4-6(1), -7.

388. UNIFORM PARTNERSHIP ACT (1997) § 202 (cmt.). Although Indiana has not adopted the Uniform Partnership Act (1997), this comment refers to the earlier version of Uniform Partnership Act (1914) in effect in Indiana.

389. *See generally* ROBERT A. RAGAZZO, *CLOSELY HELD BUSINESS ORGANIZATIONS* (3rd ed. 2020).

390. IND. CODE §§ 23-4-1-38 through -40 (1987).

391. *Wolfe v. Agro*, 163 N.E.3d 913 (Ind. Ct. App.), *trans. denied*, 168 N.E.3d 739 (Ind. 2021).

392. *Id.* at 915-17.

393. *Id.* at 920.

394. *Id.* at 916.

395. *Id.* at 922.

396. *Id.* at 924.

397. *Id.* at 923.

398. *Id.*

partnership property, not his own personal property.³⁹⁹ Because the parties were in a partnership, the plaintiff's proper remedy for any losses from the partnership was not an action in tort for conversion⁴⁰⁰ but instead an action for a decree of dissolution and an accounting and recovery under the Uniform Partnership Act.⁴⁰¹

3. *Fiduciary Duty*.—Owners of closely held business organizations in Indiana owe each other the “duty of the finest loyalty.”⁴⁰² The leading Indiana case is *G & N Aircraft, Inc. v. Boehm*,⁴⁰³ in which a defendant majority shareholder was held liable for compensatory and punitive damages for breach of fiduciary duty after engaging in “oppressive” conduct that included terminating the plaintiff minority shareholder’s employment and shutting off cash distributions, leaving the plaintiff a shareholder in a Subchapter S corporation receiving taxable income, but no cash to pay the taxes.

“Fiduciary duty” was the shield the plaintiff used in *G & N Aircraft* to protect against oppression.⁴⁰⁴ But it was a sword in the hands of the plaintiff in *Smith v. Taulman*,⁴⁰⁵ a 2014 decision of the Indiana Court of Appeals. In that case, a 52% majority shareholder and four employees contributed additional capital to a business in deep financial distress.⁴⁰⁶ The plaintiff, a 48% shareholder, refused to contribute additional capital, believing the company was doomed.⁴⁰⁷ As a consequence of this recapitalization, the plaintiff’s interest was diluted to 9.8%.⁴⁰⁸ When the business recovered and became profitable, the plaintiff sued the majority shareholder and other employees for breach of fiduciary duty for allegedly concealing the company’s promising prospects.⁴⁰⁹

399. *Id.*

400. *Id.*

401. *Id.* at 924.

402. *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928); see *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 241 (Ind. 2001) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928)). The canon of Indiana fiduciary duty is reflected in *Barth v. Barth*, 659 N.E.2d 559, 561 (Ind. 1995) (“[S]hareholders 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.”); *G & N Aircraft, Inc.*, 743 N.E.2d at 240 (citing *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 157 Ind. App. 546, 552, 301 N.E.2d 240, 243 (1973)) (“The standard imposed by a fiduciary duty is the same whether it arises from the capacity of a director, officer, or shareholder in a close corporation. ‘The fiduciary must deal fairly, honestly, and openly with his corporation and fellow stockholders. He must not be distracted from the performance of his official duties by personal interests.’”); *Purcell v. S. Hills Invs., LLC*, 847 N.E.2d 991, 997 (Ind. Ct. App. 2006) (citing *Credentials Plus, LLC v. Calderone*, 230 F.Supp.2d 890, 900 (N.D. Ind. 2002) (“[C]ommon law fiduciary duties, similar to the ones imposed on partnerships and closely-held corporations, are applicable to Indiana LLCs.”)).

403. *G & N Aircraft, Inc.*, 743 N.E.2d at 241.

404. *Id.* at 227.

405. 20 N.E.3d 555 (Ind. Ct. App. 2014).

406. *Id.* at 561. Indeed, the Court of Appeals said that the company “faced the prospect of bankruptcy.” *Id.*

407. *Id.* at 562.

408. *Id.*

409. *Id.*

While the majority shareholder ultimately prevailed, it took two trips to the Court of Appeals, summary judgment having been denied the majority shareholder on the first.⁴¹⁰

4. *Agency*.—Over the decade, there were important decisions in four distinct segments of agency law.

Apparent Authority. An agent must have requisite authority for an agent's acts to bind the principal.⁴¹¹ An agent has apparent authority in dealing with a third person when the principal's words or conduct, "reasonably interpreted, causes the third person to believe" that the agent has authority.⁴¹² Apparent authority is often at issue because it is the interpretation of the principal's words or conduct, not of the agent's words or conduct, that will be determinative. In one 2018 case discussed in an earlier Survey Article,⁴¹³ and two discussed in this Article,⁴¹⁴ the Court of Appeals ably explicated this issue.

Scope of Employment. It is a general rule of agency law that an employer will be liable for the torts committed by the employee if the employee's acts fall within the common law definition of "scope of employment."⁴¹⁵ *Cox v. Evansville Police Dep't*, a spectacular 2018 decision of the Indiana Supreme Court, examined whether sexual assaults committed by on-duty city police officers against citizens in their care could be within the scope of their employment, thereby subjecting their employer cities to vicarious liability for their actions.⁴¹⁶

Full discussion of *Cox* is not possible here but a key point worth emphasizing is that the Court says that the "scope-of-employment rule is "[t]he general rule" of vicarious liability for both government and private employers."⁴¹⁷ So while this is a case about police officers—and the court spends quite a bit of time talking about the specifics of policing—the author submits there is no doubt that this case articulates the law for private employers and, for that matter, all government employees and not just law enforcement officers.

410. *Smith v. Taulman*, No. 32A01-1605-PL-10132017, WL 491186, at *11 (Ind. Ct. App. Feb. 7, 2017).

411. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. L. INST. 2006).

412. *Id.*; *Fid. Nat. Title Ins. Co. v. Mussman*, 930 N.E.2d 1160, 1165 (Ind. Ct. App. 2010).

413. *Indy Auto Man, LLC v. Keown & Kratz, LLC*, 114 N.E.3d 32, 35 (Ind. Ct. App. 2018), discussed in *2021 Survey*, *supra* note 206, at 827-30.

414. *See supra* notes 86-113 and accompanying text discussing *Gershom v. Triple N LLC*, No. 21A-PL-27922022, 2022 WL 4075374, at *1 (Ind. Ct. App. Sept. 6, 2022), and *Booher v. Atlas Services, Inc.*, No. 22A-CC-2301, 2023 WL 4542149, at *1 (Ind. Ct. App. July 14, 2023).

415. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006).

416. *Cox v. Evansville Police Dep't*, 107 N.E.3d 453 (Ind. 2018). The author failed to discuss this important case in the relevant survey article. He expresses appreciation to his former student, J. Cecilia Shaulis, for bringing this serious oversight to his attention. *See J. Cecilia Shaulis, One Strike and You Are Out: Why Indiana Should Enact Legislation to Prevent the Rehiring of Sexual Abusers in Government Positions*, 55 IND. L. REV. 193 (2022).

417. *Cox*, 107 N.E.3d at 460.

Ultimately, the scope of employment encompasses the activities that the employer delegates to employees or authorizes employees to do, plus employees' acts that naturally or predictably arise from those activities. This means that the scope of employment—which determines whether the employer is liable—may include acts that the employer expressly forbids; that violate the employer's rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal.⁴¹⁸

Liability of an Employer for the Torts of Independent Contractors. As just discussed, an employer will generally be liable for the torts committed by the employee if the employee's acts fall within the "scope of employment."⁴¹⁹ However, an employer will not be liable for the torts committed by an employee if the employee falls within the common law definition of an "independent contractor."⁴²⁰ Notwithstanding the general rule of non-liability of independent contractors, the Indiana Supreme Court held in the sensational 1999 decision, *Sword v. NKC Hospitals., Inc.*, that a hospital can be held liable for the alleged negligence of an independent contractor anesthesiologist under RESTATEMENT (SECOND) OF TORTS § 429.⁴²¹

Sword was the key precedent for two agency cases decided by the Supreme Court in 2022: *Arrendale v. American Imaging & MRI, LLC*, and *Wilson v. Anonymous Defendant*.⁴²² *Arrendale* followed *Sword* in holding that RESTATEMENT (SECOND) OF TORTS § 429 permitted the plaintiff to sue for a medical imaging facility for the alleged negligence of an independent contractor radiologist hired by the facility to read the plaintiff's MRI.⁴²³ *Wilson* permitted the plaintiff to sue an orthopedic practice for the alleged negligence of a physical therapist employed by a physical therapy facility to which the practice had referred the plaintiff but which appeared from the record to be unaffiliated with

418. *Id.* at 461.

419. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006).

420. RESTATEMENT (SECOND) OF AGENCY § 250 (AM. L. INST. 1958).

421. *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 147 (Ind. 1999). RESTATEMENT (SECOND) OF TORTS § 429 (AM. L. INST. 1965) provides: "One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants."

422. *Arrendale v. Am. Imaging & MRI, LLC*, 183 N.E.3d 1064 (Ind. 2022); *Wilson v. Anonymous Def. 1*, 183 N.E.3d 289 (Ind. 2022). *Arrendale* and *Wilson* followed closely in the wake of *Webster v. CDI Ind., LLC*, 917 F.3d 574 (7th Cir. 2019), *aff'g*, 337 F. Supp. 3d 818 (S.D. Ind. 2018), a diversity case decided under Indiana law for which *Sword* was also the key precedent. *Sword*, *Webster*, *Arrendale*, and *Wilson* are discussed in *2023 Survey, supra* note 211, at 677-81.

423. *Arrendale*, 183 N.E.3d at 1066.

the orthopedic practice.⁴²⁴ The Court acknowledged that *Sword* and RESTATEMENT (SECOND) OF TORTS § 429 required “legal relationship between the alleged principal and the alleged apparent agent” which was absent in *Wilson*.⁴²⁵ But the Court instead applied RESTATEMENT (SECOND) OF AGENCY § 267,⁴²⁶ quite similar to RESTATEMENT (SECOND) OF TORTS § 429 and, indeed, quoted in *Sword* with approval though not applied,⁴²⁷ which does not require a legal relationship between an employer and an independent contractor for vicarious liability to accrue.⁴²⁸

Authority of Attorneys to Settle on Clients’ Behalf. The 2016 decision of the Court of Appeals, *B&R Oil Co. v. Stoler*, reminds that the question of a lawyer’s agency is a critical one when it comes to settlement negotiations.⁴²⁹ One side of the dispute maintained that during face-to-face negotiations, both sides agreed to the terms of settlement of pending litigation; the other maintained that none of its representatives at the negotiations, who included outside counsel, had authority to bind the companies.⁴³⁰ The Court made clear that “the sole act of retaining an attorney does not give the attorney the implied or the apparent authority to settle or compromise a claim in an out of court proceeding.”⁴³¹ Nevertheless, the trial court concluded, and the Court of Appeals affirmed, the individuals at issue here, including outside counsel, enjoyed at least apparent authority if not actual authority to bind the distributors.⁴³²

F. Contract Law

1. *IBM Litigation.*—An epic contract dispute, *International Business Machines Corp. v. State on behalf of Ind. Family & Social Services Admin.*, which reached the Supreme Court twice in the past decade, grew out of the State’s termination of a contract with IBM in which the company had agreed to

424. *Id.* at 295.

425. *Id.*

426. *Id.* at 297.

427. *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 149 (Ind. 1999).

428. *Arrendale*, 183 N.E.3d at 296. RESTATEMENT (SECOND) OF AGENCY § 267 (AM. L. INST. 1958) provides: “One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.”

429. *B&R Oil Co. v. Stoler*, No. 71A03-1503-PL-114, 2016 WL 276722 (Ind. Ct. App. Jan. 21, 2016); *see also* *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299 (Ind. 1998) (In *Koval*, the settlement agreement at issue was also found enforceable.) *B&R Oil Co.* is discussed in *2017 Survey*, *supra* note 360, at 1191-92.

430. *B&R Oil Co.*, 2016 WL 276722 at *1.

431. *Id.* at *7 (“retention of an attorney alone is not a manifestation by the client to third parties that an attorney has apparent authority to settle”).

432. *Id.*

modernize and improve the State's welfare eligibility system.⁴³³

After a six-week bench trial in 2012, the Marion Superior Court had held order that the State failed to prove that IBM's alleged breach was material and awarded IBM damages for fees attributable to the State assuming IBM's subcontracts and retaining equipment upon termination of the contract. It also awarded termination payments and pre-judgment interest.⁴³⁴

The Supreme Court reversed, most significantly holding that IBM had materially breached the contract.⁴³⁵ The Court reversed IBM's termination payment and pre-judgment interest awards, but affirmed its assignment and equipment fees in the amount of approximately \$49.5 million.⁴³⁶ The Court then remanded the case to the trial court with instructions to determine any appropriate offsets to the State as a result of IBM's material breach of the contract.⁴³⁷

The trial court awarded the State \$128 million in damages and credited IBM the \$49.5 million assignment and equipment fees.⁴³⁸ Denying IBM's request for post-judgment interest on the \$49.5 million award, IBM was ordered to pay the State \$78.2 million, after offsets.⁴³⁹

In the second appeal, the State's requests for additional damages were rejected.⁴⁴⁰ However, IBM was held entitled to post-judgment interest on the \$49.5 million damages award, dating back to the time of the judgment on remand.⁴⁴¹

2. *Arbitration Agreements.*—During the decade, the survey articles made regular mention of Indiana's "strong policy favoring arbitration agreements."⁴⁴² Yet even at the outset of the decade, the Court of Appeals did not rubberstamp

433. *Intl Bus. Mach. Corp. v. State*, 124 N.E.3d 1187 (Ind. 2019); *State v. Int'l Bus. Mach. Corp.*, 51 N.E.3d 150 (Ind. 2016). For discussion of the 2019 decision, see *2021 Survey, supra* note 206, at 860-62. For discussion of the 2016 decision, see *2017 Survey, supra* note 360, at 1193-96.

434. Judgment at 47, *State v. Intl Bus. Mach. Corp.*, No. 49D10-1005-PL-021451 (Ind. Marion Superior Ct. July 18, 2012).

435. *Int'l Bus. Mach. Corp.*, 51 N.E.3d at 162.

436. *Id.*

437. *Id.* at 168-69.

438. Findings of Fact, Conclusions of Law, and a Final Judgment on All Issues on Remand from the Indiana Supreme Court at 81, *State v. Intl Bus. Mach. Corp.*, No. 49D01-1005-PL-21451, (Ind. Marion Superior Ct. Aug. 4, 2017).

439. *Id.*

440. *Intl Bus. Mach. Corp. v. State*, 124 N.E.3d 1187, 1191 (Ind. 2019).

441. *Id.*

442. *Kleinman v. Fifth Third Sec., Inc.*, No. 49A02-1603-CC-624, 2016 WL 7189993, at *5 n.1 (Ind. Ct. App. Dec. 12, 2016) (citing *Koors v. Steffen*, 916 N.E.2d 212, 215 (Ind. Ct. App. 2009)); see *2018 Survey, supra* note 33, at 981-84; *2017 Survey, supra* note 360, at 1209-10; see also *PSI Energy, Inc. v. AMAX, Inc.*, 644 N.E.2d 96, 98-99 (Ind. 1994) (discussing the history of arbitration in Indiana).

claims of arbitration clause enforceability.⁴⁴³ And at the end of the decade the Court of Appeals set a different tone in several cases.⁴⁴⁴ Arbitration is no “magic wand” that prevails over the language of parties’ contract, the Court said in one of the cases.⁴⁴⁵ Nor can an arbitration requirement be “shoehorn[ed]” into an agreement where it does not reasonably fit, it said in another.⁴⁴⁶ And in point of fact, the Supreme Court found arbitration clauses unenforceable in two cases: *Decker v. Star Fin. Grp., Inc.* (2023) and *Land v. IU Credit Union*.⁴⁴⁷

It will be interesting to see whether these three cases are aberrations or mark the start of a trend of skepticism over the enforceability of arbitration clauses.

3. *Non-competition Agreements.*—Throughout most of the decade, the Indiana Court of Appeals for the most part vigorously enforced agreements not to compete.⁴⁴⁸ Then in 2019, the Supreme Court spoke twice about non-competes.⁴⁴⁹ Neither decision explicitly held that the non-compete covenants at issue were unenforceable as written, but the practical effect of both was to render them so.⁴⁵⁰ In 2023, the focus of the non-compete debate shifted from the courts to the Legislature which enacted a statute outlawing non-compete agreements covering physicians practicing family, general pediatric, and internal medicine.⁴⁵¹ This statute represents a milestone in our state’s historic reckoning with the enforceability of covenants not to compete; it will be interesting to see what comes next. A more complete discussion of non-competes and the new legislation is contained elsewhere in this Article.⁴⁵²

4. *Three Cases Illustrating the Principle of Freedom of Contract and Its Limitations.*—As a Justice of the Supreme Court for almost 19 years, the author frequently wrote of Indiana’s “very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties.”⁴⁵³ But not every contract is enforced according to its terms. Contract law itself provides

443. See, e.g., *Riley v. AAA Auto., LLC*, 67 N.E.3d 1131, 1136 (Ind. Ct. App. 2017) (refusing to enforce an arbitration award where arbitration had been ordered by the trial court without evidence of a meeting of the minds concerning the arbitration’s scope and terms).

444. See *2023 Survey*, *supra* note 211, at 705-10 (2023).

445. *Fin. Ctr. First Credit Union v. Rivera*, 178 N.E.3d 1245, 1253 (Ind. Ct. App. 2021).

446. *Haddad v. Properplates, Inc.*, 192 N.E.3d 219, 221 (Ind. Ct. App. 2022).

447. *Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 919 (Ind. 2023), *aff’g*, 187 N.E.3d 937, 943 (Ind. Ct. App. 2022); *Land v. IU Credit Union*, 218 N.E.3d 1282, 1285-86 (Ind. 2023), *aff’d on reh’g*, 226 N.E.3d 194 (Ind. 2024). The Court currently has pending a case challenging the enforceability of an arbitration clause in an insurance policy. See *supra* note [203?].

448. See *supra* cases cited in footnote 198.

449. See *supra* notes 201-04 and accompanying text.

450. See *supra* notes 201-04 and accompanying text.

451. See *supra* notes 205-08 and accompanying text.

452. See *supra* notes 205-08 and accompanying text.

453. See, e.g., *Time Warner Ent. Co., L.P. v. Whiteman*, 802 N.E.2d 886, 895 (Ind. 2004); *Trimble v. Ameritech Pub., Inc.*, 700 N.E.2d 1128, 1129 (Ind. 1998); *Cont’l Basketball Ass’n, Inc. 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).

defenses such as incapacity,⁴⁵⁴ mistake,⁴⁵⁵ misrepresentation and nondisclosure,⁴⁵⁶ and duress and undue influence.⁴⁵⁷ Unconscionable contracts will not be enforced.⁴⁵⁸ Nor will contracts void as against public policy.⁴⁵⁹ Notable Indiana cases holding contracts unenforceable on these grounds are noted in the margin.

During the last decade, the author found the following three decisions of the Supreme Court challenging the enforceability of contracts to be particularly intriguing. In the first, the Court unanimously held the contract enforceable. In the second, unanimously unenforceable. And in the third, unenforceable by a vote of 3-2.

*Hartman v. BigInch Fabricators & Construction Holding Co.*⁴⁶⁰ In this case, the Supreme Court said that while public policy pointed in favor of holding the contract unenforceable, the parties' freedom to contract required the contract be upheld as written.⁴⁶¹

The contract was between the ten shareholders of a closely held Indiana corporation and the corporation. It required the corporation to purchase the shares of any shareholder who was involuntarily terminated as an officer or director.⁴⁶² Hartman, one of the founders of the corporation and its president from 1998 to 2014, was involuntarily terminated at a point in time when he owned 17.77% of the shares of the corporation.⁴⁶³ The agreement provided that a departing shareholder was to be paid "the appraised market value on the last day of the year preceding the valuation, determined in accordance with generally accepted accounting principles by a third-party valuation company[.]"⁴⁶⁴ The third-party valuation company's appraisal of Hartman's interest was \$3,526,060.⁴⁶⁵ However, the valuation company discounted this amount down to \$2,398,000 as a consequence of lack of marketability and lack of control.⁴⁶⁶

"While we recognize the public policy rationale underlying the shareholder's position," the Court said, "we hold that the parties' freedom to

454. *Alvey v. Reed*, 115 Ind. 148, 17 N.E. 265 (1888); *Fetters v. Fetters*, 26 N.E.3d 1016 (Ind. Ct. App. 2015).

455. *Wilkin v. 1st Source Bank*, 548 N.E.2d 170 (Ind. Ct. App. 1990).

456. *Fimbel v. DeClark*, 695 N.E.2d 125 (Ind. Ct. App. 1998).

457. *Denney v. Reber*, 63 Ind. App. 192, 114 N.E. 424, 426 (1916).

458. *Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971).

459. *Performance Servs., Inc. v. Randolph E. Sch. Corp.*, 211 N.E.3d 508 (Ind. 2023); *Straub v. B.M.T. by Todd*, 645 N.E.2d 597 (Ind. 1994).

460. *Hartman v. BigInch Fabricators & Constr. Holding Co.*, 161 N.E.3d 1218 (Ind. 2021), *rev'g*, 148 N.E.3d 1017 (Ind. Ct. App. 2020).

461. *See 2022 Survey, supra* note 33, at 475-76; *2019-2020 Survey, supra* note 204, at 790-94 (discussing the Court of Appeals decision in *Hartman*).

462. *Hartman v. BigInch Fabricators & Constr. Holding Co., Inc.*, 148 N.E.3d 1017, 1019 (Ind. Ct. App. 2020).

463. *Id.*

464. *Id.* at 1021.

465. *Id.* at 1024.

466. *Id.* at 1019.

contract may permit these discounts, even for shares in a closed-market transaction. And under the plain language of this shareholder agreement—which calls for the ‘appraised market value’ of the shares—the discounts apply.”⁴⁶⁷

Rainbow Realty Group, Inc. v. Carter.⁴⁶⁸ In this case, the Supreme Court held that the parties’ contract was unenforceable because the legislature had interdicted enforcement of the parties’ freely bargained agreement.⁴⁶⁹

Rainbow Realty signed a contract denominated “Agreement (Rent-to-Own)” with a couple, Katrina Carter and Quentin Lintner, in respect of an uninhabitable house.⁴⁷⁰ In it, the couple agreed to make 24 “rental payments” of \$549 due on the first of the month, for which they could be evicted for not paying on time.⁴⁷¹ If the couple made those payments, the parties would execute a separate “Conditional Sales Contract (Land Sale)” with monthly payments in the same amount for 28 years.⁴⁷² The couple was responsible for all repairs although, as noted, the house was uninhabitable.⁴⁷³ Almost from the beginning, the couple failed to make consistent payments and Rainbow filed suit to terminate the Agreement, seeking not only immediate possession but also damages and attorney’s fees.⁴⁷⁴

On appeal, the case turned on whether the Agreement was a “land sale contract”—this was Rainbow’s argument—or, as the couple maintained, a lease subject to the Indiana Landlord-Tenant Act and its warranty of habitability.⁴⁷⁵ The Supreme Court held in a unanimous opinion that the parties’ “rent-to-buy” agreement was not a land-sale contract but a rental agreement subject to Indiana’s residential landlord-tenant statutes, including the obligation to deliver the premises in a “safe, clean, and habitable condition.”⁴⁷⁶

If this case were simply about the parties’ freedom of contract, [Katrina and Quentin] would have no legal recourse. [Rainbow Realty] disclaimed the warranty of habitability, informed [Katrina and Quentin] that the [h]ouse required significant renovation, and forbade them from taking up residence there before it was habitable. [Katrina and Quentin] agreed to these terms but soon thereafter violated them. Were it not for the governing [residential landlord-tenant statutes], [Rainbow Realty]

467. *Hartman v. BigInch Fabricators & Constr. Holding Co., Inc.*, 161 N.E.3d 1218, 1220 (Ind. 2021).

468. *Rainbow Realty Grp., Inc. v. Carter*, 131 N.E.3d 168 (Ind. 2019), *rev’g* 112 N.E.3d 716 (Ind. Ct. App. 2018).

469. *See 2021 Survey*, *supra* note 206, at 833-35.

470. *Rainbow Realty*, 131 N.E.3d at 171.

471. *Id.*

472. *Id.*

473. *Id.* at 171-72.

474. *Id.*

475. *Id.* at 173-77.

476. *Id.* at 176 (citing IND. CODE § 32-31-8-5(1) (2002)).

would be entitled to relief against [Katrina and Quentin] for having breached their Agreement. But the [s]tatutes are not about vindicating parties' freely bargained agreements. They are, rather, about protecting people from their own choices when the subject is residential property and their contract bears enough markers of a residential lease. Unless a statute is unconstitutional, the legislature is entitled to enact its policy choices. The disputed statutes at issue here reflect those choices.⁴⁷⁷

*American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*⁴⁷⁸ In this case, the Supreme Court held that the parties' contracts were unenforceable because its stipulated damages provisions constituted unenforceable penalties; two dissenting justices would have "honor[ed] the parties' freedom of contract."⁴⁷⁹

The contracts were employment agreements between three executives and their employer requiring the executives to pay certain amounts upon breach of the agreements covenants concerning competition and recruitment of employees.⁴⁸⁰ The amounts payable were to be computed by a formula tied to their own compensation and that of any recruited employees.⁴⁸¹

The employees in this case were high-level, equity owning executives; one would think that principles of freedom of contract and private ordering would carry particular force here, as they had in *Hartman*. There certainly were no intervening statutory considerations as in *Rainbow Realty*. But the common law has long recognized that enforcing penalties and forfeitures at times offended society's sense of justice.⁴⁸² Today the common law limits the availability of stipulated or liquidated damages:

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.⁴⁸³

While the Court's majority in *American Consulting* gave a nod to freedom

477. *Id.* at 177.

478. *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208 (Ind. 2019), *rev'g* 104 N.E.3d 573 (Ind. Ct. App. 2018).

479. *Id.* at 220 (Rush, C.J., David, J. and Goff, J., voting to hold the contract unenforceable; Massa, J., and Slaughter, J., dissenting, voting to hold the contract enforceable). *See 2021 Survey*, *supra* note 206, at 838-43.

480. *Id.* at 210.

481. *Id.*

482. William H. Loyd, *Penalties and Forfeitures*, 29 HARV. L. REV. 117, 122-23 (1915). For an early Indiana example, see *Sterne v. Fletcher Am. Co.*, 181 N.E. 37 (Ind. 1932) (holding a "guaranty" posted by entrepreneurs as part of a contract with investors in a downtown Indianapolis office building venture to be an unenforceable penalty).

483. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (AM. L. INS'T. 1981).

of contract, it said that “this alone is not enough to enforce a liquidated damages provision.”⁴⁸⁴ The Court viewed the dispute entirely through the lens of whether the liquidated damages clauses were reasonable and took the position that such determination was a question of law for the Court to decide.⁴⁸⁵ Specifically, it required the employer to prove “that the liquidated damages are somehow correlated with the actual damages.”⁴⁸⁶ Finding the employer failed to do so, the Court found that “all of the liquidated damages provisions at issue were unenforceable penalties.”⁴⁸⁷

Justice Slaughter dissented. He invoked Judge Richard A. Posner of the United States Court of Appeals for the 7th Circuit:

[I]t is hard to see why the parties shouldn't be allowed to substitute their own ex ante determination for the ex post determination of a court. Damages [are] just another contract provision that parties would be permitted to negotiate under the general rubric of freedom of contract. One could even think of a liquidated damages clause as a partial settlement, as in cases in which damages are stipulated and trial confined to liability issues.⁴⁸⁸

“This approach to liquidated damages here would have the virtue of honoring the parties' freedom of contract,” Justice Slaughter concluded.⁴⁸⁹ The author shares his view.

484. *Am. Consulting, Inc.*, 136 N.E.3d at 212.

485. *Id.* at 211.

486. *Id.* at 213.

487. *Id.* at 214.

488. *XCO Int'l Inc. v. Pac. Sci. Co.*, 369 F.3d 998, 1001 (7th Cir. 2004), quoted in 136 N.E.3d 208, 220 (Ind. 2019).

489. 136 N.E.3d 208, 220 (Slaughter, J., concurring and dissenting).