

1999 SURVEY OF INDIANA CONTRACT LAW

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INTRODUCTION

Contract law is generally a well-settled area of law in Indiana. In this area, many of the principles taught to first-year law students hold true. For example, it is well-known that courts do not inquire into the adequacy of consideration, and the parties' judgment will not be disturbed by the courts.¹ Even though the principle is well-settled, challenges to the adequacy of consideration continue to be litigated. In our increasingly complex society, novel scenarios arise in which these solidly established principles of law must be applied. When faced with such situations, the courts must be guided by the policy underlying Indiana contract law. As the Indiana Court of Appeals explained, "Our Supreme Court has recently confirmed its commitment to advancing the public policy in favor of enforcing contracts."² In keeping with this *laissez-faire* approach to contract law, the Indiana courts hold a strong presumption of enforceability and will generally refuse to enforce a contract only in limited circumstances, such as when the contract contravenes a statute, clearly injures the public, or is otherwise contrary to the declared public policy of Indiana.³ Application of such policies guides the courts when a seemingly common issue arises in a novel context.

This Article addresses Indiana contract law cases during the survey period with a focus upon the application of these and other well-established principles in different circumstances. During the survey period, the Indiana Supreme Court handed down 293 written opinions,⁴ covering the full spectrum of Indiana law, including attorney discipline cases. However, many of these opinions fell within the supreme court's mandatory jurisdiction over criminal appeals involving sentences in excess of fifty years. Of the civil transfer cases accepted during this period, only five pertained substantially to the question of contracts. The court of appeals, which published 2166 opinions during the survey period, published only forty-four that addressed contract-related issues.⁵ This Article does not

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1. See *Tanton v. Grochow*, 707 N.E.2d 1010, 1013 (Ind. Ct. App. 1999).

2. *Town & Country Ford, Inc. v. Busch*, 709 N.E.2d 1030, 1032 (Ind. Ct. App. 1999) (citing *Trimble v. Ameritech Publ'g, Inc.*, 700 N.E.2d 1128, 1129 (Ind. 1998) (citing *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995))).

3. See *Continental Basketball Ass'n, Inc. v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 139 (Ind. 1996) (citing *Fresh Cut*, 650 N.E.2d at 1130).

4. This figure reflects the actual published opinions October 1, 1998 through September 30, 1999, the dates of the survey period. This figure does not include the large number of cases considered by the court for which transfer was denied.

5. The case statistics used in this survey were derived from electronic searches of head notes and topics. There were 16 reported cases combined from both the supreme court and the court of appeals that had contracts head notes and 49 reported cases with contracts as a topic.

attempt to detail all of the reported cases, but instead focuses upon new statements of law or upon significant cases to which the practitioner's eye should be cast.

I. ENFORCEABILITY

The question of contract enforceability arises in a variety of contexts. During the survey period, the supreme court and court of appeals addressed enforceability in three significant areas: settlement agreements, exculpatory clauses, and non-compete agreements.

A. Settlement Agreements

Contract law governs construction of settlement agreements.⁶ When a settlement agreement contains a condition precedent, the contract is not binding and the parties have no obligation to perform under it unless and until the condition precedent occurs.⁷ In *Indiana State Highway Commission v. Curtis*, the supreme court reviewed a settlement agreement reached between property owners and the Indiana Department of Transportation ("INDOT").⁸ The property owners, having previously granted the State an easement on their property for highway purposes, brought suit claiming that the State had caused property damage and loss of business by its work in the easement area. INDOT's attorney participated in settlement negotiations and signed an agreement presented in writing by the plaintiffs. The agreement included a clause that provided that the agreement was subject to INDOT approval. INDOT took no further action. Forty-five days after the attorney signed the agreement, the plaintiffs filed a motion to enforce the agreement. The trial court found the agreement to be binding, and the court of appeals affirmed.⁹

The supreme court found that INDOT's approval of the settlement agreement was a condition precedent.¹⁰ Further, it explained that when an express condition is part of an agreement between the parties, that "condition must be fulfilled or no liability can arise on the promise that the condition qualifies."¹¹ However, the court also noted that performance of a condition precedent may be waived if the waiver is a "voluntary and intentional relinquishment of a known right."¹² In this case, the supreme court found that failure to gain the requisite approval did not meet the requirements to find the term waived or excused.¹³ It explained that a condition is excused only when the requirement "will involve extreme forfeiture

6. See *Indiana State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998) (citing 5 I.L.E. COMPROMISE & SETTLEMENTS § 21 (1958)).

7. See *id.*

8. See *id.*

9. See *id.* at 1017.

10. See *id.* at 1018.

11. *Id.* (citations omitted).

12. *Id.* at 1019 (quoting 6 WILLISTON, CONTRACTS § 678 (3rd ed. 1961)).

13. See *id.*

or penalty and its existence or occurrence forms no essential part of the exchange for the promisor's performance."¹⁴ Because the condition precedent in this case was essential to the exchange and no evidence of extreme forfeiture or penalty existed, the supreme court held that the condition should not be excused.¹⁵

The supreme court also addressed the plaintiffs' claim that the State's failure to approve the agreement after forty-five days created an estoppel against asserting the condition precedent as a proper reason to avoid the contract. The court held that when the condition is the approval by some party, the party's obligation to make a reasonable and good faith effort to satisfy the condition requires simply that it consider the contract in good faith.¹⁶ The passage of time does not create an inference of bad faith. Rather, when INDOT did not approve the settlement agreement in a timely manner, the plaintiffs were entitled to proceed with their suit against the State.¹⁷

B. Exculpatory Clauses

In 1994, the court of appeals reached conflicting decisions regarding the enforceability of exculpatory clauses in advertising contracts. In *Pigman v. Ameritech Publishing, Inc.*,¹⁸ the court of appeals found that the exculpatory clause contained in Ameritech's Yellow Pages advertising contract was unconscionable and void as against public policy. Shortly thereafter, a different panel of the court of appeals in *Pinnacle Computer Services, Inc. v. Ameritech Publishing Inc.*,¹⁹ held that the exculpatory clause was valid and enforceable. During this survey period, the supreme court granted transfer in *Trimble v. Ameritech Publishing, Inc.*²⁰ to resolve the problem.

The exculpatory clauses in each of the cases limited the liability of the publisher to an amount equal to the contract price or the sum of money actually paid by the customer, whichever is less, as liquidated damages.²¹ The supreme court held that such clauses are enforceable based upon the court's long-expressed position that it is in the best interest of the parties not to restrict unnecessarily their freedom of contract.²² The supreme court then looked to five factors that might indicate that a contract is against public policy:

- (1) the nature of the subject matter of the contract; (2) the strength of the public policy underlying any relevant statute; (3) the likelihood that

14. *Id.* (quoting 5 WILLISTON, CONTRACTS § 769 n.2 (3rd ed. 1961) (quoting RESTATEMENT OF CONTRACTS § 302 (1932))).

15. *See id.*

16. *See id.* (quoting *Hamlin v. Steward*, 622 N.E.2d 535, 540 (Ind. Ct. App. 1993)).

17. *See id.*

18. 641 N.E.2d 1026 (Ind. Ct. App. 1994).

19. 642 N.E.2d 1011 (Ind. Ct. App. 1994).

20. 700 N.E.2d 1128 (Ind. 1998).

21. *See id.* at 1128-29 & 1129 n.2 (noting that the exculpatory clauses in *Pigman* and *Pinnacle Computer Servs.* were similar to the clause in this case).

22. *See id.* at 1129.

refusal to enforce the bargain or term will further any such policy; (4) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (5) the parties' relative bargaining power and [their respective] freedom to contract.²³

The court found that the second and third factors did not apply to this dispute.²⁴ As to the other three factors, the court adopted, without discussion, the reasoning of the court of appeals in *Pinnacle*, in favor of enforceability of the contract.²⁵

In *Pinnacle*, the plaintiff-appellant, Pinnacle Computer Services, engaged in the business of sale, repair, and installation of computer-related equipment.²⁶ Pinnacle's president met with an Ameritech Yellow Pages sales representative to order advertising. The two reviewed changes to Pinnacle's prior advertising, and, when the changes were satisfactory, Pinnacle's president signed the order form. When the Yellow Pages was published, Pinnacle's advertisement was mistakenly placed in the wrong section. Pinnacle filed suit for damages, and the trial court granted summary judgment to Ameritech based upon the exculpatory clause on the reverse side of the advertising order form.²⁷ Pinnacle appealed, claiming that the exculpatory clause was unenforceable for three reasons: "(1) the parties had unequal bargaining power; (2) the clause was unconscionable; and (3) the transaction affected the public interest."²⁸

On appeal, Pinnacle first argued that the provision was unenforceable because it was pre-printed on a form contract and that the parties had unequal bargaining power. The court of appeals rejected the argument that a form contract was per se unenforceable, instead requiring the challenger to establish that the contract is against public policy because one party's limited bargaining power puts him at the mercy of the other's negligence.²⁹ Although the court of appeals agreed that Ameritech was the only supplier of the service that Pinnacle sought, it held that Pinnacle was not an uninformed consumer coerced by a fraudulent company.³⁰

The court of appeals also rejected Pinnacle's argument that it was unaware of the clause.³¹ Specifically, it noted that Pinnacle's president had signed the order form directly under text that said: "I have read and understand the terms and conditions on the face and reverse side, *particularly the paragraph which limits my remedies and publisher's maximum liability in the event of error or*

23. *Id.* at 1130.

24. *See id.*

25. *See id.*

26. *See Pinnacle Computer Servs., Inc. v. Ameritech Publ'g Inc.*, 642 N.E.2d 1011, 1012 (Ind. Ct. App. 1994).

27. *See id.*

28. *Id.* at 1016.

29. *See id.*

30. *See id.*

31. *See id.* at 1017.

omission.”³² The court of appeals found that Ameritech had not denied Pinnacle’s president the opportunity to read the contract and that Pinnacle did not claim that it even attempted to read or discuss the terms of the order.³³ As a result, the court of appeals refused to relieve Pinnacle of its agreement under the contract based upon an argument that it had not read the agreement.³⁴

Next, the court of appeals reviewed Pinnacle’s claim of unconscionability in light of the seminal case of *Weaver v. American Oil*.³⁵ Pinnacle argued that the exculpatory clause in this case was like the clause in *Weaver* in that it was printed on the reverse of a pre-printed form contract prepared by Ameritech. The court of appeals rejected this argument based upon the distinctive facts in *Weaver* that demonstrated the unconscionability of that agreement.³⁶ As the court of appeals explained, the plaintiff in *Weaver* was a man with less than a high school education who signed a contract with American Oil for the operation of a service station. The contract contained an exculpatory clause on the reverse of the agreement in small print, blended into text in such a manner that the reader might not even notice it. In addition, the plaintiff in *Weaver* never read the clause and no one ever explained it to him. Further, the clause limited American Oil’s liability for its own negligence and required Weaver to indemnify American Oil for damages resulting from American Oil’s negligence.³⁷ Distinguishing the facts in this case, the court of appeals noted that Pinnacle’s president ran a sophisticated business, had the ability to read the agreement, and was not compelled by the contract to indemnify Ameritech for damages caused by its own negligence.³⁸ As such, the agreement was not unconscionable.³⁹

Pinnacle’s third argument, that the transaction affected the public interest, was likewise rejected.⁴⁰ While generally public policy does not prohibit contracts with exculpatory clauses, Pinnacle argued that the contract fell within an exception for transactions that affect the public interest. Such exceptions include public utilities, common carriers, innkeepers, and public warehousemen, as well as situations when one party’s indispensable need for the services of another deprives the customer of all real bargaining power.⁴¹ Under these exceptions, courts have held that exculpatory clauses are unconscionable when the provider of an indispensable service refuses to serve a customer unless he agrees to limit the service provider’s liability for its own negligence.⁴² The court

32. *Id.* at 1013 (emphasis added).

33. *See id.* at 1017.

34. *See id.*

35. 276 N.E.2d 144, 146 (Ind. 1971).

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.* at 1018-19.

41. *See id.* at 1017-18.

42. *See id.* at 1018.

of appeals, however, found that the Yellow Pages is not a public utility.⁴³ It acknowledged that the Yellow Pages was a subsidiary of Ameritech, Inc., which also owned Indiana Bell Telephone Co., and, that, as a result, Ameritech was subject to regulation.⁴⁴ However, it found the Yellow Pages was a separate legal entity.⁴⁵ The court of appeals concluded that the publication of the Yellow Pages was a wholly private concern, not within the exception for indispensable services.⁴⁶ Although the Yellow Pages might be the preferred advertising mode, there were other alternatives available that would have provided a similar service.

The court of appeals also noted that the failure to enforce the exculpatory clause would subject Ameritech to potentially unlimited consequential damages that would be disproportionately high in comparison to the contract price paid for the advertising.⁴⁷ Significantly, however, the court of appeals also “cautioned” Ameritech that there are limits to the enforceability of exculpatory clauses and circumstances may occur in which unequal bargaining power between the parties or misrepresentation of the terms would support a finding of unconscionability.⁴⁸

By adopting *Pinnacle in Trimble*, the supreme court held the parties to the terms of their freely-bargained contract, including its exculpatory clause.⁴⁹ The court stated that the fact that the clause is a “boilerplate” is not dispositive, so long as the facts show that the accepting party had the opportunity to review and accept the terms. The cautionary language of *Pinnacle* should remind parties to be aware that when there is a challenge to an exculpatory clause, the court will look beyond the face of the agreement to assure that the facts surrounding the contract formation are consistent with public policy.

C. Non-Compete Agreements

Covenants not to compete, or non-compete agreements, are disfavored by law because they are a restraint on trade. Such agreements, however, will be enforced when they meet certain requirements. In *McGlothen v. Heritage Environmental Services, L.L.C.*,⁵⁰ the court of appeals affirmed the trial court’s grant of a preliminary injunction to the former employer.⁵¹ In *McGlothen*, the employer required its employee to sign a non-compete agreement as a condition of employment. The agreement prohibited the employee from soliciting business from the employer’s customers within twelve months of the termination of his employment, engaging in direct competition with the employer within twelve months of termination within the principal places of his employment (including

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *Id.* at 1019.

49. *See Trimble v. Ameritech Publ’g, Inc.*, 700 N.E.2d 1128, 1130 (Ind. 1998).

50. 705 N.E.2d 1069 (Ind. Ct. App. 1999).

51. *See id.* at 1075.

the entire state in which he regularly worked for the employer), and disclosing any “trade secret, plan or method of operation, or special or confidential information employed in and conducive to” the employer’s business.⁵² The employee left the business and was subsequently employed by two of the employer’s competitors. The employer sought a temporary restraining order and preliminary injunction based upon the non-compete agreement. The preliminary injunction was granted, and the employee’s request for certification of an interlocutory appeal was granted.⁵³

The court of appeals set forth the requirements for the enforcement of a non-compete agreement: “(1) the restraint is reasonably necessary to protect the employer’s business; (2) it is not unreasonably restrictive of the employee; and (3) the covenant is not antagonistic to the general public.”⁵⁴ It also noted that the employer must demonstrate some unique facts that give the former employee some special advantage or ability to harm the employer, such as trade secrets, confidential information like customer lists, or the existence of a confidential relationship.⁵⁵ The employer is not entitled to protection for an employee’s knowledge, skill, or general information acquired as a result of the employment.⁵⁶ Further, an employer may have a protectable interest in information that is gleaned from public sources if that information is the result of extensive compiling efforts.⁵⁷

The facts in this case demonstrated that although all project managers were provided with the information the employee retained and used, they were all required to sign confidentiality and non-compete agreements. The employer considered the information “absolutely confidential.” In addition, one of the documents recovered from the employee was stamped “confidential.”⁵⁸ As a result of this evidence, the court of appeals upheld the trial court’s conclusion that the employer had a protectable interest in the information held by the employee.⁵⁹

The employee next argued that the employer had no protectable interest in the good will of the company that would prevent him from contacting his former customers or using his relationship with them to his own advantage.⁶⁰ The court of appeals found that the exclusivity of the employee’s contact with the customer went to the extent and degree of the good will, not to whether the employer is

52. *Id.* at 1071.

53. *See id.*

54. *Id.* at 1071-72 (citing *Slisz v. Munzenreider Corp.*, 411 N.E.2d 700, 704 (Ind. Ct. App. 1980)).

55. *See id.* at 1072 (citing *Slisz*, 411 N.E.2d at 704).

56. *See id.* (citing *Century Personnel, Inc. v. Brummett*, 499 N.E.2d 1160, 1163 (Ind. Ct. App. 1986)).

57. *See id.* (citing *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993)).

58. *Id.*

59. *See id.* at 1073.

60. *See id.*

entitled to protection.⁶¹ Thus, evidence that the employee had been involved in direct contact with the employer's customer and garnered repeat business (a source of protectable good will) was sufficient to establish that the employer had a protectable interest in its good will.⁶²

Having concluded that the employer had a protectable interest, the court of appeals reviewed whether the trial court correctly granted the preliminary injunction.⁶³ The employee asserted that the employer had failed to meet its burden on three of the four elements required for the grant of a preliminary injunction, namely: (1) an inadequate remedy at law, causing irreparable harm pending resolution of the substantive action; (2) a reasonable likelihood of success at trial; and (3) that the threatened injury to the employer outweighing the potential harm to the employee.⁶⁴ The employee did not challenge whether the public interest would be disserved by the injunction.⁶⁵

The court of appeals rejected the employee's claim that economic injury alone may not serve as the basis for injunctive relief.⁶⁶ Rather, the court of appeals found that the employer would suffer irreparable harm to its reputation, damage to its good will, and potential downsizing and reduction in force as a result of these losses that were sufficient to support the injunction.⁶⁷ Next, the court of appeals concluded that because the employer was successful on appeal regarding the question of a protectable interest, there was a reasonable likelihood of success on the merits to support the preliminary injunction.⁶⁸ Finally, balancing the competing harms, the court determined that the clause did not prevent the employee from obtaining employment outside the territory specified in the agreement or with one of the employer's customers.⁶⁹ Thus, despite the employee's difficulty finding and keeping employment because of the non-compete agreement, the harm to the employer outweighed the harm to the employee.⁷⁰

Although the employee did not contend that the public interest would be disserved by enforcing the agreement, and it was accordingly not addressed, it is significant to note that the agreement defined the restrictions as:

Employee further agrees that he will not at any time . . . within twelve (12) months after leaving or termination of said services . . . for himself or any other person, firm, or corporation, engage in the business of

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.* at 1074 (citing *Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 692 N.E.2d 905, 908-09 (Ind. Ct. App. 1998)).

65. *See id.*

66. *See id.*

67. *See id.* at 1074-75.

68. *See id.* at 1075.

69. *See id.*

70. *See id.*

industrial waste management or *any other business that is in competition with Employer* (a) within the *principal State* of his employment, or (b) within any other city, county or state where Employee had, within twelve (12) months prior to his leaving . . . rendered services for or on behalf of the Employer.⁷¹

Thus, the agreement did not preclude all employment. However, it prohibited the employee from activities that conflict not only with the specific type of business in which the employee was engaged by the employer, but also with *any other business that competes with the employer*. This certainly raises the question whether such broad language should be enforced if the employer is a subsidiary of a large, multi-industry conglomerate. Such an agreement may effectively create an ever-increasing list of industries in which the employee might be prohibited from working because the other, seemingly unrelated, businesses conflict with some other subsidiary of the employer.

Further, this particular agreement restricted the employee's job market throughout the *entire state* in which the employer conducted its primary business, apparently without regard to the breadth of the employee's actual territory. It also restricted the employee in the localities in which the employee *actually had served* the employer. Presumably then, these might be different areas or different states. Under such circumstances, if the employer's primary business was in Indiana, but the employee's territory covered only one county, this agreement ostensibly could require the employee to leave the state in order to continue his career. Even though this does not appear to have been at issue in the instant case, it does present a question whether the public's interest is disserved by an agreement that could require tax paying citizens to leave Indiana in order to obtain employment.

II. INTERPRETATION

Although Indiana courts enforce agreements in accordance with the parties' intent, the dispute sometimes requires the courts to determine the parties' intent by first interpreting the terms in the agreement itself. During the survey period, the supreme court provided guidance in interpreting marital agreements and terms of uninsured/underinsured motorist liability coverage. Additionally, the court of appeals provided guidance in interpreting employment agreements and policy language coordinating insurance coverage.

A. Marital Agreements

One of the more significant developments from the Indiana Supreme Court during the survey period clarified the treatment of agreements between spouses. In *Pond v. Pond*,⁷² a husband and wife executed an agreement during the marriage, but after the husband filed a petition for legal separation. The couple

71. *Id.* at 1071 (emphasis added).

72. 700 N.E.2d 1130, 1132 (Ind. 1998).

subsequently divorced. The husband claimed that the agreement should be construed the same as an antenuptial agreement.⁷³ The supreme court, noting that it had never directly addressed such a claim, considered the case of *Flansburg v. Flansburg*,⁷⁴ in which the court of appeals addressed the question of interpretation of an agreement entered during marriage. In *Flansburg*, the couple had separated at the time the agreement was signed, but reconciled as a result of the agreement. The supreme court explained that the court of appeals in *Flansburg* had found:

While the property settlement labeled a "Post Nuptial Agreement" was negotiated by the parties well into their marriage, it primarily concerned the distribution of property interests acquired prior to the marriage. Just as marriage is, in and of itself, valued and respected by the law as adequate consideration to support an antenuptial agreement, *the extension of a marriage that would have otherwise been dissolved but for the execution of an agreement to reconcile has been deemed adequate consideration.*⁷⁵

The supreme court concluded that the construction of the spousal agreement was an issue of law requiring a review of the facts surrounding the formation of the agreement.⁷⁶

The court found significant the content of the agreement, as well as its timing in relation to the dissolution of the marriage.⁷⁷ The negotiation of the agreement was initiated by the husband shortly before he filed a Petition for Legal Separation. The negotiation continued after the petition was filed. When the agreement was finally signed by the parties, without the assistance of counsel, it was expressly limited to two years from the date the husband filed the separation petition.⁷⁸ The terms of the agreement detailed the division of the marital property in the event of dissolution, relinquished claims for temporary or spousal support and all statutory inheritance rights, and allocated attorney fees in the event of a challenge to the agreement. It also included a severability clause that declared the remainder of the agreement valid in the event any portion was found to be invalid, unlawful, or void. The only term in the agreement addressing the children was a term for support during the period prior to dissolution.⁷⁹

Immediately after signing the agreement, the parties began dividing and

73. As the supreme court explained, agreements entered in contemplation of marriage are often referred to as prenuptial, premarital, or antenuptial agreements. *See id.* When such agreements are valid, they must be enforced as written. *See id.* However, such agreements may become voidable as unconscionable due to circumstances existing at the time of the dissolution. *See id.* at 1133 n.3.

74. 581 N.E.2d 430 (Ind. Ct. App. 1991).

75. *Pond*, 700 N.E.2d at 1133 (quoting *Flansburg*, 581 N.E.2d at 433-34).

76. *See id.*

77. *See id.* at 1134.

78. *See id.* at 1133.

79. *See id.* at 1134.

distributing the marital property in accordance with its terms, which required distribution to occur within ten days of signing. The husband's attorney began preparing a qualified domestic relations order that divided the husband's pension and retirement benefits as of the date of the filing of the separation petition. Shortly thereafter, the wife filed a petition for dissolution.⁸⁰ The supreme court concluded that these events suggested that the parties entered the agreement in anticipation of dissolution, and therefore the agreement should be treated under the Dissolution of Marriage Act rather than as a reconciliation agreement.⁸¹

The court also addressed the enforceability of the provision shifting attorney fees.⁸² The court explained that settlement agreements are encouraged under the Indiana Dissolution of Marriage Act and declined to construe narrowly the terms of the Act to limit the parties from contracting regarding attorney fees.⁸³ Under the Act, a court is not bound to accept every proffered settlement. Instead the court should concern itself only with fraud, duress, and other imperfections of consent, or with manifest inequities, particularly those deriving from great disparities in bargaining power.⁸⁴ Because the parties are free to make whatever financial arrangements they wish, and a contract for attorney fees is enforceable according to its terms unless contrary to law or public policy, the trial court should exercise its power to disapprove of such an agreement with great restraint.⁸⁵ The trial court did not find that the agreement was a result of fraud, duress, or misrepresentation.⁸⁶ Rather, it found the contract valid, but chose not to enforce the attorney fee provision because it was written to allow only the husband, a wealthy doctor, the power to challenge the agreement, while the wife, who had very little income, would be unable to afford the cost of the challenge.⁸⁷ The supreme court found that the terms of the provision were far narrower than the trial court had considered and applied only to attorney fees "incurred in the prosecution or defense of 'an attack by one party as to the validity of [the] agreement'"⁸⁸ and did not apply to "attorney fees relating to the resolution of property division, maintenance, custody, visitation, support, or other issues often incidental to dissolution proceedings."⁸⁹ Thus, the wife could seek attorney fees pursuant to section 31-1-11.5-16 of the Indiana Code for her fees related to all issues except the validity of the agreement.⁹⁰

This case demonstrates that although the supreme court will give great deference and respect to the judgment of the parties in the formation of their

80. *See id.*

81. *See id.* at 1135.

82. *See id.* at 1135-36.

83. *See id.* at 1136.

84. *See id.* (citing *Voight v. Voight*, 670 N.E.2d 1271, 1278 (Ind. 1996)).

85. *See id.* (quoting *Voight*, 670 N.E.2d at 1277).

86. *See id.*

87. *See id.*

88. *Id.* at 1137 (quoting IND. CODE § 31-1-11.5-16 (1998)).

89. *Id.*

90. *See id.*

contract, it will look beyond labels to the purpose and effect of the agreement to determine how it should be enforced.

B. Employment Agreements

A frequent issue in Indiana law is the interpretation of employment contracts upon termination of employment. During the survey period, the court of appeals addressed a breach of contract claim based upon an employment contract.⁹¹ The trial court concluded that the employment contract was terminable at will because there was no termination date in the contract.⁹² On appeal, the employee argued that the trial court's grant of summary judgment was erroneous due to a security provision in the contract. The employee argued that the parties had modified the standard employment contract to permit termination only for just cause and, although the contract contained no express time limits, the discontinuation of sales to the specific company identified in the contract would terminate the employer's obligation under the contract.⁹³

In contrast, the standard contract provided for termination by either party with sixty days written notice, with or without cause. It also allowed the employer to change the employee's responsibilities as it deemed advisable. However, the employee negotiated these terms and the employer agreed to provisions that provided, among other things, that the employment "shall continue indefinitely, unless and until terminated by either party as hereinafter provided" and "this agreement may be terminated by either party *for just cause*, upon sixty (60) days written notice."⁹⁴

The court of appeals noted that the determination of whether a party is employed at will is a legal question.⁹⁵ Further, it stated the doctrine of employment at will is a rule of contract construction, not a rule imposing substantive limitations on the parties' freedom to contract.⁹⁶ Thus, the presumption of at-will employment may be negated when the parties include a clear job security provision in the employment contract.⁹⁷ The court of appeals concluded that the parties had freely negotiated the security provisions in the contract, and it could not change its terms through interpretation.⁹⁸ Accordingly, the agreement to add the just cause provision rebutted whatever presumption of at-will employment might be raised by the use of the term "indefinitely" in the

91. See *Eck & Assoc., Inc. v. Alusuisse Flexible Packaging, Inc.*, 700 N.E.2d 1163 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 167 (Ind. 1999) (mem.).

92. See *id.* at 1166.

93. See *id.*

94. *Id.* at 1168 (emphasis added).

95. See *id.*

96. See *id.* at 1167 (citing *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 717 (Ind. 1997) (citing *Streckfus v. Gardenside Terrace Co-op, Inc.*, 504 N.E.2d 273, 275 (Ind. 1987))).

97. See *id.*

98. See *id.* at 1169.

contract.⁹⁹

The court of appeals also rejected the employer's argument that the job security provision required adequate independent consideration to rebut the presumption of at-will employment.¹⁰⁰ In doing so, it explained that the cases requiring adequate independent consideration were not applicable in this case, not due to the lack of written contracts, but because they lacked explicit, freely bargained-for "just cause" provisions.¹⁰¹ According to the court of appeals, those cases presented employees arguing that some consideration transformed a clearly at-will employment situation into one that could be terminated only for cause.¹⁰² In this case, the court of appeals found the at-will employment was transformed by the freely-bargained-for, express just cause provision and thus, no additional consideration was necessary to transform the employment term.¹⁰³

C. Insurance Contracts

An insurance contract is subject to the same rules of interpretation as other contracts under Indiana law and its interpretation is primarily a question of law for the court.¹⁰⁴ Clear and unambiguous policy language is given its plain and ordinary meaning, but ambiguities are construed in favor of the insured.¹⁰⁵

1. *Uninsured/underinsured Motorist Coverage.*—In some cases, the terms of a contract are supplemented by statutory requirements for coverage. Recently, the Seventh Circuit Court of Appeals certified a question to the Indiana Supreme Court, asking the court to evaluate an umbrella or excess liability policy in light of Indiana's uninsured/underinsured motorist statute.¹⁰⁶

In *United National Insurance Co. v. DePrizio*, the supreme court determined that interpretation of such insurance policies requires consideration of the uninsured/underinsured motorist statute's objectives.¹⁰⁷ An umbrella or excess liability insurance policy is an insurance contract that affords coverage to the insured in excess of the underlying policy's limits for liability to third persons. In this case, the court was asked to determine whether such a policy is an "automobile liability or a motor vehicle liability policy" that would be required by statute to include uninsured or underinsured coverage.¹⁰⁸ The court specifically noted that there was no dispute that the umbrella policy covered the

99. *Id.*

100. *See id.*

101. *Id.*

102. *See id.* at 1169-70.

103. *See id.* at 1170.

104. *See American Family Life Assurance Co. v. Russell*, 700 N.E.2d 1174, 1174 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 168 (Ind. 1999) (mem.).

105. *See id.*

106. *See United Nat'l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 457 (Ind. 1999).

107. *See id.* at 459.

108. *Id.* at 458.

insured for liability to third persons.¹⁰⁹ One of the policy's provisions covered automobile liability, clearly including liability arising out of the ownership, maintenance, or use of a motor vehicle by or on behalf of the insured.¹¹⁰

The supreme court noted that, in contrast to uninsured/underinsured motorist statutes in other states, Indiana's statute is a "mandatory coverage, full-recovery, remedial statute"¹¹¹ that is "considered a part of every automobile liability policy the same as if written therein."¹¹² As a result, even when an insurance contract fails to provide such coverage, the beneficiary is entitled to it unless it is expressly waived in accordance with the law.¹¹³ After reviewing the statute's history, the supreme court concluded that the legislature intended to give insured motorists the opportunity for full compensation when injuries were caused by financially irresponsible motorists.¹¹⁴ Thus, the court concluded that legislative intent compelled a finding that an umbrella policy falls within the scope of the uninsured/underinsured motorist statute when the umbrella policy by its terms covers risks above those insured in an underlying automobile policy.¹¹⁵

In reaching its decision, the supreme court noted that the cases relied upon by the insurance company, notably *Marshall v. Universal Underwriters*¹¹⁶ and *Hastings Mutual Insurance Co. v. Webb*¹¹⁷ relied upon the supreme court's earlier interpretation of the uninsured/underinsured motorist statute in *City of Gary v. Allstate Insurance Co.*,¹¹⁸ construing the 1986 version of the statute.¹¹⁹ The supreme court noted that *City of Gary* accurately reflected the language of the statute in effect in 1986, but also that significant subsequent legislation modified the statute.¹²⁰ Accordingly, the supreme court disapproved the court of appeals' decisions that failed to make this distinction, including the two cases cited by the insurance company.¹²¹

2. *Coordination of Insurance Policies.*—The court of appeals addressed a question that could be likened to coordination of benefits under automobile policies. In *General Accident Insurance Co. of America v. Hughes*,¹²² a driver was permitted to test drive a vehicle from a dealer lot. While on the test, the driver was involved in an accident resulting in her injury and the death of one of the passengers in the other car, as well as an injury to a second passenger in that

109. See *id.* at 457.

110. See *id.* at 458.

111. *Id.* at 460 (citing IND. CODE § 27-7-5-2).

112. *Id.* (quoting *Indiana Ins. Co. v. Noble*, 265 N.E.2d 419, 425 (1970)).

113. See *id.* (quoting *Noble*, 265 N.E.2d at 425).

114. See *id.* at 461.

115. See *id.*

116. 673 N.E.2d 513 (Ind. Ct. App. 1996).

117. 659 N.E.2d 1049 (Ind. Ct. App. 1995).

118. 612 N.E.2d 115 (Ind. 1993).

119. See *DePrizio*, 705 N.E.2d at 461.

120. See *id.*

121. See *id.*

122. 706 N.E.2d 208 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 299 (Ind. 1999) (mem.).

car. The driver carried insurance at the minimum levels required by Indiana law and the dealership maintained a “garage general liability” policy on the permissive driver of the vehicle.¹²³ Under the terms of the respective policies, it was unclear which policy would cover the passengers and to what extent.¹²⁴

The driver’s personal policy provided that if other liability insurance was responsible for payment, the driver’s insurance provider would pay only its share of liability. It also provided that when the driver did not own the vehicle, any collectible insurance on the vehicle would be the primary insurance, and the driver’s policy would provide excess coverage. Likewise, the garage policy provided that when a vehicle was operated by a customer of the dealership with other coverage, the driver’s individual coverage would be primary and the garage policy would provide excess coverage.¹²⁵ The garage policy also provided that it would cover such an individual only up to the statutory minimum in the event that primary coverage failed to meet those minimums.

After reviewing the text of both policies, the court of appeals concluded that Indiana law requires that “[r]ecovery may not be made under the garage liability policy until the limits of all coverage available to the [driver] have been exhausted.”¹²⁶ Thus, the driver’s policy was primary.¹²⁷ In addition, limiting the coverage to the gap between the primary insurance and the statutory minimum was valid and did not violate public policy because it met the legislative policy of assuring minimum levels of uninsured motorist coverage.¹²⁸

The court of appeals addressed similar difficulties in coordinating insurance payments in *Wildman v. National Fire and Marine Insurance Co.*¹²⁹ In *Wildman*, the plaintiff was injured in an automobile-motorcycle collision while on the job and subsequently received worker’s compensation benefits. Ultimately, he reached a settlement agreement with the driver of the other vehicle for \$100,000 and the worker’s compensation carrier enforced a lien in excess of \$31,000 against the settlement. The plaintiff then sought underinsured motorist coverage from the defendant, National, which provided underinsured motorist liability coverage for the plaintiff’s employer with a policy limit of \$300,000. National claimed that it should be able to set off the total worker’s compensation benefit paid to the plaintiff, without adjusting the amount repaid under the lien.¹³⁰

The contract language provided “[a]ny amount payable under this coverage shall be reduced by all sums paid or payable under any worker’s compensation disability benefits or similar law.”¹³¹ The court of appeals found the phrase

123. *Id.* at 209.

124. *See id.*

125. *See id.*

126. *Id.* at 211 (quoting IND. CODE ANN. § 27-8-9-10 (Michie 1994)).

127. *See id.*

128. *See id.* (citing *Harden v. Monroe Guar. Ins. Co.*, 626 N.E.2d 814 (Ind. Ct. App. 1993)).

129. 703 N.E.2d 683 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 173 (Ind. 1999) (mem.).

130. *See id.* at 685.

131. *Id.* at 686.

“sums paid or payable” ambiguous and construed the contract in favor of the insured, permitting a set-off of only the benefits received that were not subject to a repayment obligation.¹³² The court of appeals noted that this construction was consistent with public policy concerns because it reduced the insurer’s liability only to the extent that the plaintiff actually received other compensation.¹³³

3. *Exclusionary Clauses.*—Also during the survey period, the court of appeals considered the question of an exclusionary clause denying insurance coverage in *American Family Life Assurance Co. v. Russell*.¹³⁴ An exclusionary clause is ordinarily entitled to enforcement, but it must clearly and unmistakably bring within its scope the particular act or omission that will bring the exclusion into play.¹³⁵ Any doubts regarding coverage must be construed against the insurer to further the policy’s primary purpose of indemnity.¹³⁶

In *American Family Life Assurance Co. v. Russell*,¹³⁷ the court of appeals applied these standards to an exclusionary clause that provided, in part: “We will not pay benefits for an accident that is caused by or occurs as a result of a covered person . . . [p]articipating in any activity or event, including the operation of a [motor] vehicle, while intoxicated.”¹³⁸ The decedent was legally intoxicated at the time of his death and was struck by a train while lying unconscious on the tracks. The court of appeals found that the evidence designated by the insurer did not demonstrate that the decedent was participating in any activity or event at the time of his death.¹³⁹ In its response to an interrogatory asking what activity or event the insurer found the decedent had engaged in causing his death, the insurer responded that “the fact that [the decedent] was intoxicated . . . satisfies the exclusion of coverage under its policy and prohibits payment to any beneficiary.”¹⁴⁰

The court of appeals, applying the plain meaning of the terms “participate,” “activity,” and “event,” concluded that the decedent was not participating in any activity or event when he was lying unconscious on the tracks.¹⁴¹ Thus, the exclusion did not apply.¹⁴²

132. See *id.* at 687 (quoting ALAN I. WIDIS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 41.7, at 304-05 (2d ed. 1995)).

133. See *id.*

134. 700 N.E.2d 1174 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 168 (Ind. 1999) (mem.).

135. See *id.* at 1177.

136. See *id.*

137. *Id.* at 1174.

138. *Id.* at 1176.

139. See *id.* at 1178.

140. *Id.*

141. *Id.*

142. See *id.*

III. SANCTIONS

In a recent case involving the release of one tortfeasor and her insurance company, the court of appeals took the extraordinary step of awarding, *sua sponte*, appellate attorney fees as a sanction for the bad faith actions of another insurance company's counsel. In *GEICO Insurance Co. v. Rowell*,¹⁴³ the plaintiff was injured in an automobile accident involving two other vehicles and their drivers. Rowell subsequently settled her claim against one driver and her insurance carrier and executed a release provided by that insurance company. When Rowell's attorney reviewed the release prior to submitting it, she discovered it incorrectly purported to release all other parties.¹⁴⁴ Rowell's attorney called this to the attention of the two insurance companies, and both companies' attorneys agreed to allow Rowell to correct the release by attaching a stipulation to be signed by all parties, clarifying that the release would discharge only the first driver and her carrier, American States.¹⁴⁵ Rowell's attorney submitted the agreed stipulation and it was signed by all parties. After Rowell dismissed American States and its insured from the action, GEICO filed a motion for summary judgment based upon the release. In order to adequately respond to the motion, Rowell was forced to obtain several time extensions because she was unable to depose the attorney from American States to establish that all parties had agreed that only American States and its insured would be released and dismissed from the action.¹⁴⁶

The court of appeals reviewed the history of the summary judgment action and found that, although the release itself purported to release all parties, it must be interpreted in accordance with the intent of the parties at the time it was signed.¹⁴⁷ Accordingly, the court found that the stipulation limiting the release was executed as part of the transaction.¹⁴⁸ As a result, the court agreed with the trial court that the stipulation should be considered a contemporaneous document and that GEICO's motion for summary judgment should be denied.¹⁴⁹ In reaching this decision, the court of appeals noted that GEICO asked the court to "close its eyes" to the stipulation it signed.¹⁵⁰ Addressing this, the court said: "There was a time in the practice of law when an attorney's word was his bond. . . . GEICO 'knew full well that the release was specifically directed [at the other driver and her insurance carrier].'"¹⁵¹

However, GEICO also sought sanctions against Rowell and her attorney, alleging they had taken a "course of conduct for no good purpose other than to

143. 705 N.E.2d 476 (Ind. Ct. App. 1999).

144. *See id.* at 478.

145. *See id.*

146. *See id.* at 479.

147. *See id.* at 480-81.

148. *See id.* at 482.

149. *See id.*

150. *Id.* at 481.

151. *Id.* (quoting the trial court's findings of fact) (footnotes omitted).

obfuscate the issues, delay the proceedings and circumvent the meaning and intent of the Rules of Appellate Procedure.”¹⁵² Although the court of appeals acknowledged it had rejected two motions filed by Rowell, it denied GEICO’s motion for sanctions.¹⁵³ The court of appeals did not simply reject GEICO’s claim, but instead made the following comment:

Furthermore, we find it ironic that GEICO is requesting the imposition of sanctions against Rowell. In light of the actions of GEICO’s counsel and pursuant to our authority under App. R. 15 (G), we find *sua sponte* that damages should be assessed against GEICO’s counsel in the amount of Rowell’s appellate attorney fees.¹⁵⁴

This action by the court of appeals is a strong reminder that the courts expect forthright behavior from parties in the creation and enforcement of contracts. Further, when read in conjunction with the court’s statement regarding an attorney’s word being his bond, this should serve as a strong reminder that attorneys are expected to perform within the full letter of the professional rules when making representations to the parties and to the court.

CONCLUSION

Indiana contract law during the survey period demonstrates that Indiana’s appellate courts practice what they preach—they accord great respect to the parties who crafted their contracts and generally enforce the terms as written, so long as the facts surrounding the agreement support enforcement. Although the cases reviewed in this survey set precedent that will guide litigants in specific new areas of law, the rules espoused are clearly in line with Indiana contract policy. This policy—and the stability that such consistent contract law provides—creates a solid foundation for the application of these principles in the novel circumstances we may expect as the social landscape and the citizens’ needs change with the advent of more sophisticated technology.

152. *Id.* at 482.

153. *See id.*

154. *Id.* at 483 (footnotes omitted).