

## RECONSTRUCTING PROPERTY LAW IN INDIANA: ALTERING FAMILIAR LANDSCAPES

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One of the many functions served by law is to provide a framework for the orderly transaction of business; in fact, no meaningful business would be possible without a legal system to provide for the realization of legitimate expectations and for the enforcement of relied-upon promises.<sup>1</sup> One indispensable component of a party's decision to enter into a transaction or of his "pricing" of his good or service, in the form of the consideration he will demand of the other party, is the degree to which the law can be expected to promote or to hinder the realization of the desired goal of the deal.<sup>2</sup> Whenever the legal framework is altered, either by judicial decision in the case of the common law or by legislative enactment in the case of statutory law, the dynamics of the relationships between or among parties to a transaction are also altered. Customs and practices that were formerly appropriate can become unsuitable and require change, and previous bargaining decisions may have to be rethought if changes to the law alter the allocation of risks and rewards. Significant changes to the law produce a corresponding increase in the degree of uncertainty about the legal framework underlying business transactions. Such changes can take the form of a new allocation of substantive rights among parties or new statutory terms with uncertain definitions.

In 1999 the Indiana Legislature enacted statutes and the Indiana appellate

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1. See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 209 (Beacon Press, 1963).

2. See, e.g., Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599, 620-26 (1999). Although not individually reviewed in this Article, the Indiana Court of Appeals decided a case of first impression in 1999 closely related to the equity of redemption. In *Cunningham v. Georgetown Homes, Inc.*, 708 N.E.2d 623 (Ind. Ct. App. 1999), the court "addressed the respective rights of the parties to a cooperative living situation . . . [and] what process a cooperative association must follow to dispossess a member of her unit." *Id.* at 626. Adopting a "hybrid approach" that reflected the hybrid nature of a cooperative housing arrangement—partly like a base and partly like fee ownership—the court held that ejectment is the proper remedy for removing a cooperative member who has violated the occupancy agreement, but "other proceedings" are required to protect the member's equity in her unit. *Id.* at 627. The court did not order the cooperative to follow statutory foreclosure procedures but instead authorized the trial court to direct a judicial sale of the departing member's unit. See *id.*

courts issued opinions that significantly changed or defined the law applicable to real estate transactions in this state, including laws that had been in existence for several or even many decades. The affected areas of law include: 1) mechanic's liens procedures; 2) duties of real estate licensees to sellers and buyers; 3) liability of "operators" for environmental contamination clean-up costs resulting from leaking underground storage tanks; and 4) tort and contract claims asserted by tenants against landlords. Parties to real estate transactions will find that the legal "lay of the land" to which they had been accustomed, and on which they had based business decisions, has been altered or defined in possibly unexpected ways. In some areas, the alteration will lend certainty to business relationships, and the parties involved should be comfortable in the new legal landscape. In other areas, the alteration is less successful at establishing certainty or defines the law in ways one party finds undesirable, and the terrain will be less reassuring. In both areas, changes in established transactional procedures and expectations will be required.

#### I. MECHANIC'S LIEN STATUTE

Like all states, Indiana has a mechanic's lien statute.<sup>3</sup> The purpose of the statute is to facilitate payment to contractors, subcontractors, mechanics, lessors of construction equipment, material suppliers, laborers, and "all other persons performing labor or furnishing materials or machinery"<sup>4</sup> for the improvement of real estate by providing to such persons a lien upon the real estate that is improved by their efforts.<sup>5</sup> Although the mechanic's lien statute has occasionally been amended, the provisions in place prior to the 1999 amendments strongly resembled the version enacted in 1909.

However, House Enrolled Act No. 1367,<sup>6</sup> effective on July 1, 1999, altered the long-familiar landscape. The amendments should reinforce the legal framework supporting mechanic's lien use and should reduce the level of uncertainty that in the past adversely affected the risk analysis of parties involved in the improvement of real estate. This conclusion is supported by the fact that, at least with regard to mechanic's liens asserted against real estate used for commercial purposes, the amendments are intended to eliminate uncertainties in the priority of claims asserted against the value of the improved real estate by construction lenders and mechanic's lien holders. One can infer from the speed and ease with which the Act moved through the legislature that the amendments were supported by representatives of both the lending and construction

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3. See IND. CODE §§ 32-8-3-1 to -3-15 (1998 & Supp. 1999).

4. IND. CODE § 32-8-3-1 (Supp. 1999).

5. See generally *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 98 (Ind. Ct. App. 1999) ("The purpose is to promote justice and honesty, and to prevent the inequity of an owner enjoying the fruits of the labor and material furnished by others, without recompense.") (citations omitted), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000).

6. Act of April 23, 1999, Pub. L. No. 53-1999, 1999 Ind. Acts 292 (codified as amended at IND. CODE § 32-8-3-1 (Supp. 1999)).

communities.<sup>7</sup> Such support would be reasonable as the amendments represent an effort to allocate, in a manner acceptable to both groups, the risks of each in relying on a promise of payment for money lent or for labor, materials or equipment supplied to improve real estate used for commercial purposes.

*A. The 1999 Amendments: Balancing the Interests of  
Construction Lenders and Mechanics*

The substantive changes made to mechanic's lien rights and procedures by the 1999 amendments are implemented by creating three classifications of real estate that are defined by the use to which the real estate is put. The scope of the first classification encompasses "[a] Class 2 structure (as defined in IC 22-12-1-5) or an improvement on the same real estate auxiliary to a Class 2 structure (as defined in IC 22-12-1-5)."<sup>8</sup> A Class 2 structure is "[a] building or structure that is intended to contain or contains only one (1) dwelling unit or two (2) dwelling units unless any part of the building or structure is regularly used as a Class 1 structure."<sup>9</sup> In general terms, this classification can be called residential real estate.

The second classification includes:

Property that is: (A) owned, operated, managed, or controlled by a public utility (as defined in IC 8-1-2-1), municipally owned utility (as defined in IC 8-1-2-1), joint agency (as defined in IC 8-1-2.2-2), rural electric membership corporation formed under IC 8-1-13-4, or not-for-profit utility (as defined in IC 8-1-2-125) regulated under IC 8; and (B) intended to be used and useful for the production, transmission, delivery, or furnishing of heat, light, water, or power to the public.<sup>10</sup>

Such real estate can be referred to as utility real estate. All real property that is neither residential nor utility property can be referred to as commercial real estate. Real estate used for residential and utility purposes is excluded from the operation of most of the 1999 amendments, the brunt of which falls on real estate used for commercial purposes.<sup>11</sup>

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7. HB 1367 was authored on January 12, 1999, and was given its first reading on that date. By April 8, 1999, the bill had been given second and third readings, had been voted on in the house, had been referred to the senate where it was given three readings and was amended and voted on. The bill was then returned to the house, where another vote was taken and then signed by the speaker. The entire process took only 86 days and the vote totals were 303 yeas and three nays.

8. IND. CODE § 32-8-3-1(c)(1).

9. *Id.* § 22-12-1-5(a)(1) (1998). Outbuildings for such structures are also included within the definition of a Class 2 structure. *See id.* § -5(a)(2). A Class 1 structure is defined in section 22-12-1-4. *Id.* § 22-12-1-4 (Supp. 1999). The Class 1 and Class 2 designations originate in that part of the Indiana Code dealing with fire safety and building and equipment laws. *See* Fire, Safety, Building, and Equipment Laws: General Administration, IND. CODE § 22-12 (1998).

10. *Id.* § 32-8-3-1(c)(2) (Supp. 1999).

11. For purposes of this Article, real property is characterized as residential, utility, or

Two major substantive rights conferred by the mechanic's lien statute are determined by the new property characterizations. One is that a no-lien provision or stipulation "can only be included" in a construction contract relating to the improvement of residential and utility properties.<sup>12</sup> The necessary corollary of this phrase is that no-lien provisions are not authorized beyond these property classifications and may no longer be included in contracts for the improvement of commercial real estate.<sup>13</sup>

Prior to the effective date of the Act, lenders, as a condition of making a construction loan, often required owners to require the general contractor on the project to execute a no-lien contract, by which the general contractor agreed not to file any liens against the owner's property. This agreement, if properly documented and timely recorded in the office of the recorder in the county in which the real estate is located, was then binding on all subcontractors and their employees and on equipment and material suppliers working on the project through subcontracts with the general contractor.

A no-lien contract has considerable value to a construction lender because it avoids priority battles between the mortgage lien of the lender and the potential statutory liens of mechanics.<sup>14</sup> Under pre-amendment law such battles frequently arose as a result of the "relation back" rule of the mechanic's lien statute.<sup>15</sup> Pursuant to this rule, the effective date of a mechanic's lien was the date on

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commercial. These labels are used for convenience, however, and the reader should not overlook the precise definitions, including cross-references, provided in the Act. For example, a structure that otherwise would be a "Class 2 structure" can lose that designation if any part of it is "regularly used as a Class 1 structure." *Id.* § 22-12-1-5 (1998). Thus, it is necessary to consult the definition of a "Class 1 structure." Additionally, the list of utilities in section 32-8-3-1(C)(2) of the Indiana Code includes only utilities regulated under Title 8 and "intended to be used and useful" for the "production, transmission, delivery, or furnishing of heat, light, water, or power to the public." *Id.* § 32-8-3-1(c)(2) (Supp. 1999).

12. The writing and recording requirements for an enforceable no-lien contract on residential or utility improvement projects have not been changed by the 1999 amendments.

13. The act does not specifically state whether a no-lien provision in a contract for improvement of commercial property is void or merely voidable. Other amendments to the statute, declare actions contrary to the statute to be void. *See* IND. CODE §§ 32-8-3-15, -17, -18. It is reasonable to infer that the legislature's declaration that a no-lien provision "may only be included" in a construction contract relating to residential or utility property would likewise render the inclusion of such a provision in a construction contract relating to commercial property void.

14. For convenience, the term "mechanic" is used in this article to represent all persons within the scope of section 1 of the mechanic's lien statute.

15. Section 5 of the pre-amendment mechanic's lien statute provided that all valid mechanic's liens "shall relate to the time when the mechanic or other person began to perform the labor or furnish the material or machinery." IND. CODE § 32-8-3-5 (1998), *amended by* § 32-8-3-5 (Supp. 1999). The 1999 amendments retain this language but then add the rule that confers on lenders priority over "all liens under this chapter recorded after the date the mortgage was recorded" if the mechanic's work is performed on real estate used for commercial purposes. *Id.* § 32-8-3-5(c) (Supp. 1999).

which the mechanic *first* provided labor, materials, or equipment to the project even though the notice of intention to hold the lien did not have to be recorded until sixty days after the date such labor, materials, or equipment was *last* provided to the project. In other words, a lender contemplating making a construction loan was faced with the prospect that an as-yet unrecorded mechanic's lien could later be perfected and be senior to the lender's mortgage even though that lien was undiscoverable on the public records at the time the construction loan was made.<sup>16</sup>

No-lien contracts eliminate that risk by precluding the filing of any mechanic's liens, thereby leaving priority of the lender's security position unchallengeable by mechanics. The loss, created by the 1999 amendments, of a lender's ability to require construction on commercial real estate to proceed pursuant to a no-lien contract adversely affects that lender's risk in the loan transaction. Were it not for a corresponding change included in the amendments affecting the competing rights of mechanics, the prohibition of no-lien contracts would likely have resulted in construction lenders either seeking other ways to secure their position or increasing the cost of construction credit or both.

That corresponding and counterbalancing change made by the 1999 amendments is the elimination of the "relation back" rule for mechanic's liens filed with regard to commercial projects and the substitution of a rule that establishes priority of liens based on date of recordation.<sup>17</sup> For construction contracts executed after June 30, 1999, relating to the improvement of commercial real estate, the statute now provides, "The mortgage of a lender has priority over all liens under this chapter recorded after the date the mortgage was recorded to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate."<sup>18</sup> In terms of evaluating business risks and making business decisions, this change lends certainty to the legal framework relied upon by lenders.

The elimination of the relation back principle in commercial projects has the direct positive effect of enabling construction lenders to rely on the recording process in making credit and collateral decisions. It also has the additional positive effect of closing one of the gaps in the recording system that impaired its integrity. If no mechanic's liens appear in the records of the county recorder, the lender can now be assured that its construction mortgage on commercial

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16. See, e.g., *Greyhound Financial Corp. v. R.L.C, Inc.*, 637 N.E.2d 1325, 1328 (Ind. Ct. App. 1994) ("We conclude that a properly recorded and perfected mechanic's lien takes priority over a mortgage which is executed before labor or materials are first furnished for the property but reworded after labor or materials are first furnished.").

17. The elimination of the "relation back" principle does not apply to a lien that relates to a construction contract for the development, construction, alteration, or repair of residential or utility property. See IND. CODE § 32-8-3-5(c). Thus, the act does not alter the risk of priority battles with mechanics faced by construction lenders on non-commercial projects prior to the amendment. On construction projects relating to residential and utility real estate, the construction lender retains its right to require that construction proceed only by way of no-lien contract.

18. *Id.* The amendments also contain a new definition of "lender." See *id.* § 32-8-3-5(a).

property will not become subordinate to a later-recorded mechanic's lien that relates back to a date prior to the date of the mortgage. If one or more mechanic's liens appear of record, the lender can either require their payment and release as a condition of making the loan or can negotiate their subordination to the mortgage.

At the same time, mechanics can no longer be prohibited by no-lien provisions from recording their liens and thus will be able to improve their status from that of unsecured creditor, which would be their lot under a no-lien contract, to that of secured creditor. Even if the mechanic's security position is junior to a previously recorded construction lender's mortgage, the mechanic may be able to obtain priority over other competing non-mechanic's lien creditors who are either unsecured or who perfect their security interests after the date the notice of intention to hold mechanic's lien is filed.<sup>19</sup>

Preserving the right to record a mechanic's lien is also important in the event the owner files a petition in bankruptcy. Under a no-lien contract, the mechanic would fall into the class of general unsecured creditors of the debtor's estate. But with the mechanic's lien rights preserved by the elimination of no-lien contracts, mechanics can perfect their liens and achieve secured creditor status even after the bankruptcy petition is filed.<sup>20</sup> Such elevation in creditor status may result in payment from the debtor's estate greater than would have been achieved as an unsecured creditor.

Finally, in what may be seen as additional benefit for mechanics to compensate for the abolition of the relation back rule for contracts involving the improvement of commercial real estate, the amendments extend the time within which a notice of intention to hold mechanic's lien can be filed. Under pre-amendment law, the notice of intention to hold a mechanic's lien had to be filed within sixty days after the date labor was last performed or material or equipment was last provided.<sup>21</sup> That deadline is now extended to ninety days.<sup>22</sup> This change improves the ability of a mechanic to achieve secured creditor status but does not alter the method for determining priority between mechanics and mortgagees based on date of recordation.

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19. The 1999 amendments continue the prior rule that multiple, competing mechanic's liens share in the value of the improved real estate on a pro-rata basis and as to such liens "there shall be no priority." *Id.* § 32-8-3-5(b).

20. Post-petition perfection of a mechanic's lien is not stayed by § 362(a) nor is it subject to invalidation by the trustee under § 544 or § 545 of the Bankruptcy Code as § 362(b) and § 546(b) combine to permit post-petition perfection of a mechanic's lien. *See* 11 U.S.C. §§ 362, 544, 545, 546 (1994 & Supp. IV 1998). *See, e.g., In re Petroleum Piping*, 211 B.R. 290, 301 (Bankr. N.D. Ind. 1997) ("Pursuant to § 362(b)(3), § 546(b) provides an exception to the general rule that the petition stays actions to perfect an interest and allows the post-petition perfection of a lien in limited circumstances.") (citations omitted).

21. *See* IND. CODE § 32-8-3-3(a) (1998), amended by § 32-8-3-3 (Supp. 1999).

22. *See id.* The time within which a notice of intention to hold mechanic's lien must be filed on residential and utility projects remains unchanged at sixty days. *See id.* at § 32-8-3-3(b) (Supp. 1999).

*B. Implementing the New Balance*

The amendments make five other notable changes to the mechanic's lien statute, each of which is necessary to insure implementation of the newly achieved balance of the interests of construction and mechanics lenders and to preclude attempts to undo that balance. Three of these changes operate to prohibit agreements other than no-lien provisions that would prohibit a mechanic from filing a lien. First, section 16(b) declares that a provision in a contract for the improvement of commercial real estate which requires a person who furnishes labor, materials, or machinery to waive a right to a lien against the real estate or to a claim against a payment bond before that person is paid is void.<sup>23</sup> Second, section 16(c) declares void any provision in a construction contract by which one or more persons agree not to file a notice of intention to hold mechanic's lien.<sup>24</sup> Third, section 18 prohibits "if paid/when paid" provisions in construction contracts.<sup>25</sup>

These provisions are intended to prohibit the waiver of mechanic's lien rights by direct contract, as opposed to indirect waiver as is accomplished through agency principles in a no-lien contract. If such provisions were not prohibited, an owner, or his lender, could accomplish through individual contracts with subcontractors a result that he can no longer accomplish through a contract with a general contractor that bound all subcontractors.

Section 16(b) should not, however, affect the ability of a construction lender to require partial lien waivers from mechanics in connection with progress payments on a construction project. This section prohibits direct lien waivers "before the person is paid for the labor or materials furnished."<sup>26</sup> Partial lien waivers routinely required by construction lenders relate only to completed work for which payment is tendered. When he is paid, a mechanic no longer has a right to assert a lien against the owner's real estate; therefore, requiring a partial waiver at that time will not upset the balance achieved by the amendments. Nor does a partial waiver given through a specified date impair the mechanic's ability to record a lien in the future if he is not paid for subsequent work. If the consideration for the partial lien waiver is paid by a check, the waiver can be conditioned on payment of the funds by the owner's bank.

The other two notable changes are provisions that insure the balance struck by the legislative process in Indiana is not replaced by contractual agreement to submit disputes to another jurisdiction that may have implemented a different balance of the parties' interests. Section 17 now voids any "choice of law" provision in a contract for the improvement of real estate in Indiana that would make the contract "subject to the laws of another state."<sup>27</sup> It also makes void any

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23. *See id.* § 32-8-3-16(b).

24. *See id.* § 32-8-3-16(c).

25. *Id.* § 32-8-3-18(a).

26. *Id.* § 32-8-3-16(b).

27. *Id.* § 32-8-3-17.

“forum selection” provision that would require “any litigation, arbitration, or other dispute resolution process on the contract [to] occur in another state.”<sup>28</sup>

A question that could arise with regard to section 17 is whether a construction contract that includes a forum selection clause requiring arbitration proceedings to be conducted outside Indiana renders the entire agreement to arbitrate void or only voids only the selection of an out-of-state site. The better position is that the agreement to arbitrate should remain enforceable and that only the attempt to require arbitration to occur out of state is void. This result is consistent with the language of the statute, which states that a “provision in a contract,” and not the contract itself, is void if it requires “litigation, arbitration or other dispute resolution” to occur in another state.<sup>29</sup> Enforcement of the agreement to arbitrate at an in-state site, using Indiana’s mechanic’s lien statute as amended, would also be consistent with the general favor afforded to arbitration and mediation agreements.<sup>30</sup>

The provisions of sections 16, 17, and 18 should be read together as means for closing loopholes that could be used to unsettle the balance of interests achieved by the 1999 amendments. Section 16 and 18 preserve the balance achieved by the abolition of the no-lien contract<sup>31</sup> and of the relation back rule for contracts for the improvement of commercial real estate.<sup>32</sup> Section 17 ensures that the underlying legal framework cannot be displaced by a clause that would require the substitution of a different framework that would define rights and adjust interests in a way that is different from the procedure resulting from the Indiana legislative process.<sup>33</sup>

### *C. Summary of the Effect of the 1999 Amendments*

Whether construction lenders or mechanics fare better under the 1999 amendments remains to be seen, but the balancing of competing interests they achieve provides a workable and predictable framework for realizing legitimate business expectations and for analyzing risks that benefits all concerned. Construction lenders are relieved of the uncertainty about the priority of their mortgages because they can rely on the date of recordation in the public records without fear that a subsequently recorded mechanic’s lien will “relate back” to a prior date and assume a senior position.<sup>34</sup> Mechanic’s lien holders preserve the right to file their liens, which right can no longer be displaced by a no-lien or

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28. *Id.*

29. *Id.*

30. *See* Northwestern Mut. Life Ins. Co. v. Stinnett, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998) (“It is well known that Indiana recognizes a strong policy favoring enforcement of arbitration agreements.”) (citing *Chesterfield Management, Inc. v. Cook*, 655 N.E.2d 98, 102 (Ind. Ct. App. 1995)).

31. *See* IND. CODE § 32-8-3-16.

32. *See id.* § 32-8-3-8.

33. *See id.* § 32-8-3-17.

34. *See supra* text accompanying notes 17-18.



direct contract provision.<sup>35</sup> This right can be important in priority battles between mechanics and third party creditors, including a trustee in bankruptcy or debtor in possession. As an added benefit, the reliability of the recording system for real property is enhanced as a gap in the system has been filled, at least for projects to improve commercial real estate.<sup>36</sup> Unfortunately, the continued viability of the “relation back” rule for non-commercial real estate will continue to insert uncertainty into residential and utility property improvement projects. Accordingly, lenders for such projects will have to continue to use traditional means, such as the no-lien contract, to protect the priority of their mortgages.

*D. Appellate Opinions Issued During 1999 Affecting Mechanic’s Liens*

Because the 1999 amendments to the mechanic’s lien statute affect only contracts executed after July 1, 1999, construction contracts executed prior to that date will continue to be governed by the prior law. Additionally, the rules relating to mechanic’s liens asserted against real estate used for residential and utility purposes were largely unchanged by the 1999 amendments. Thus, existing case law will continue to control in those areas. Finally, even with regard to commercial real estate, cases decided under the pre-amendment law will continue to be useful in cases for many issues, such as content and validity requirements of the notice of intention to hold a lien and revival and tacking of liens. For all of these reasons, appellate opinions issued in 1999 relating to mechanic’s liens merit examination. Three mechanic’s lien related opinions issued by the Indiana Court of Appeals in 1999 are *Mullis v. Brennan*,<sup>37</sup> *Abbey Villas Development Corp. v. Site Contractors, Inc.*,<sup>38</sup> and *Dinsmore v. Lake Electric Co.*<sup>39</sup>

In *Mullis*,<sup>40</sup> the Brennans, as homeowners, entered into a written contract with a contractor, Richard Mullis, for the construction of an addition to their house. Even though Mullis apparently had previously created a corporation known as Mullis Building Corporation, he signed the contract as “Contractor” in his individual capacity.<sup>41</sup> He also directed the Brennans to make progress payments to him as an individual, and he deposited such payments into his personal account and not into a separate account maintained by the corporation.<sup>42</sup>

Problems with the quality of construction of the addition arose almost immediately. After several months of observing poor workmanship, the Brennans demanded that Mullis correct the problems, and they refused to pay any

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35. See IND. CODE § 32-8-3-16 to -18.

36. See *id.*

37. 716 N.E.2d 58 (Ind. Ct. App. 1999).

38. 716 N.E.2d 91 (Ind. Ct. App. 1999), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000).

39. 719 N.E.2d 1282 (Ind. Ct. App. 1999).

40. *Mullis*, 716 N.E.2d at 58.

41. *Id.* at 63.

42. See *id.* at 61.

further draws until the corrections were completed.<sup>43</sup> Mullis refused to perform any further work until he was paid. He ceased work and never completed the addition.

After Mullis walked off the project, a mechanic's lien was filed against the Brennans' real estate in the name of his corporation.<sup>44</sup> Mullis subsequently filed a complaint for breach of the construction contract and to foreclose on the mechanic's lien. The Brennans filed various counterclaims relating to Mullis' defective work. Following a two-day bench trial, the court entered judgment against Mullis on his complaint and in favor of the Brennans on their counterclaims.<sup>45</sup> The court of appeals affirmed the decision of the trial court and held that Mullis' lien was invalid.<sup>46</sup>

*Mullis* contributes to the body of common law relating to mechanic's liens as it continues the practice of requiring strict compliance with the requirements of the mechanic's lien statute for purposes of determining the validity of the lien,<sup>47</sup> which stands in sharp contrast to the more forgiving, substantial compliance standard applied to enforcement of the lien.<sup>48</sup> Although one could conclude from the facts of the case that Mullis did not fully understand the difference between actions taken as an individual and actions taken as a representative of his corporation,<sup>49</sup> strict compliance with the statute was nevertheless required.<sup>50</sup> The court observed that the mechanic's lien statute dictates that the sworn statement of intention to hold the lien "must specifically set forth: . . . (2) the name and address of the claimant. . . ."<sup>51</sup> The court further observed that "[b]ecause the mechanic's lien statute is in derogation of the common law, the provision of the statute 'relating to the creation, existence or persons entitled to the lien have historically been strictly construed.'"<sup>52</sup> Accordingly, the appellate court concluded that "the designation of the wrong claimant must render the lien invalid."<sup>53</sup>

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43. *See id.*

44. *See id.* at 62.

45. *See id.*

46. *See id.* at 63.

47. *See, e.g., Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 98 (Ind. Ct. App. 1999), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000); *Riddle v. Newton Crane Serv., Inc.*, 661 N.E.2d 6, 9 (Ind. Ct. App. 1996) (holding that Indiana's mechanic lien provisions should be narrowly construed) (citation omitted).

48. *See, e.g., Abbey Villas*, 716 N.E.2d at 98 ("[Once claimants prove they are within Indiana's mechanic lien statute,] the remedial provisions of the legislation should be liberally construed." (citing *Beneficial Finance Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41, 45 (Ind. Ct. App. 1980))).

49. *See Mullis*, 716 N.E.2d at 63 n.2.

50. *See id.* at 63.

51. *Id.* (citing IND. CODE § 32-8-3-3(a) (1998)).

52. *Id.* (quoting *Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1302 (Ind. Ct. App. 1997)).

53. *Id.* The *Mullis* case also discusses an implied duty of a contractor to perform his work

In *Dinsmore*,<sup>54</sup> the court of appeals, in determining the timeliness of a lien filing, considered the types of property that may be the subject of a valid mechanic's lien.<sup>55</sup> In this case, a contractor, Lake, provided electrical services to Northern Indiana Resources (NIR) to place an unused asphalt facility into operating order so that NIR could conduct its business of screening, bagging, and drying various products. NIR did not own the real estate from which its business was going to be operated, but occupied the real estate pursuant to a lease with the owner, Dinsmore Farms.<sup>56</sup>

Lake provided electrical services to NIR from November 8, 1993 through March 16, 1994, for which Lake received only partial payment. Subsequently, Lake provided services in April 1995 when it built a control system, repaired a burner control, and fixed the "outside bagger system."<sup>57</sup> Finally, Lake provided repair services on the "outside bagger" from May 20 through May 22, 1995, after which no further work was performed. Lake filed its notice of intention to hold mechanic's lien on July 21, 1995, and included all work performed from November 8, 1993, through May 22, 1995.<sup>58</sup> The trial court, following a bench trial, entered a judgment in favor of Lake on its claim to foreclose the mechanic's lien.<sup>59</sup>

The court of appeals reversed the judgment of the trial court.<sup>60</sup> Although the appellate court did not expressly refer to "strict construction" of the requirements for the creation of a valid mechanic's lien statute, it did focus its analysis on whether the "bagger" qualified under section 1 of the statute as property that could be subjected to a mechanic's lien.<sup>61</sup> The appellate court noted that for Lake's lien to be valid, the bagger must come within the definition of "fixture" or of "other structures" contained in that section.<sup>62</sup>

Based upon the portability of the bagger, its ability to be removed from the real estate without damage to any buildings or land, and NIR's intent to remove the bagger at the end of the lease term, the appellate court concluded that the bagger was either an item of personal property or a trade fixture, neither of which can be the subject of a mechanic's lien.<sup>63</sup> Having determined that the bagger was

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"skillfully, carefully, diligently, and in a workmanlike manner," which duty is implied in "every contract for work or services," *Id.* at 64 (citations omitted), and discusses evaluating contractor liability under Indiana's Home Improvement Contracts Act, according to a "strict standard." *Id.* at 64-65 (citing IND. CODE § 24-5-11-1 to -14 (1998)).

54. See *Dinsmore v. Lake Elec. Co.*, 719 N.E.2d 1282 (Ind. Ct. App. 1999).

55. See *id.* at 1286.

56. See *id.* at 1284-85.

57. *Id.* at 1285.

58. See *id.*

59. See *id.*

60. See *id.* at 1289.

61. *Id.* at 1286-88.

62. *Id.* at 1286 (quoting IND. CODE § 32-8-3-1 (1998)).

63. See *id.* at 1288. The appellate court also concluded that the bagger did not qualify as an "other structure." Relying principally on four cases from the 1890's and upon the "words

not property capable of being subjected to a mechanic's lien, the court held that the lien filed by Lake on July 21, 1995, failed in its entirety because no qualifying work had performed within the previous sixty days.<sup>64</sup>

*Abbey Villas*<sup>65</sup> examined two issues: 1) attempts by contractors to extend or revive mechanic's lien rights by providing additional work on a project after the work called for by the original contract had been completed, and 2) the effect of an overstatement of the amount owed on the validity of a mechanic's lien. In *Abbey Villas*, an engineer and an excavating contractor filed complaints to foreclose on mechanic's liens that each had filed against real estate owned by a developer of a residential subdivision. The trial court concluded that both liens were valid, and the developer appealed.<sup>66</sup> The court of appeals upheld the validity of the contractor's lien but disallowed the engineer's lien.<sup>67</sup>

The developer and the engineer had entered into a contract pursuant to which the engineer was to provide specified services for a flat fee of \$15,000. The engineer subsequently provided additional services that it considered to be outside the original contract and billed the developer separately for them.<sup>68</sup> When the developer informed the engineer that he would not be paid for the additional services, the engineer ceased work on the project in January 1997. In March 1997, the developer's attorney contacted the engineer to inquire about the status of the project and to obtain additional services from him.<sup>69</sup> In response to this call, the engineer "dug out the plans" and began an investigation.<sup>70</sup> When it became clear that the developer still did not intend to pay any fees above the original contract amount, the engineer ended his review of the project and billed the developer for four hours of work.<sup>71</sup>

The engineer filed his mechanic's lien on May 9, 1997, and claimed as due all fees incurred for additional services performed on the project prior to January of that year. The trial court determined that the engineer's lien had been timely filed based on the billing for services rendered in March.<sup>72</sup> On appeal two of the three judges on the panel voted to reverse the judgment in favor of the engineer

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associated with 'other structures' in I.C. 32-8-3-1," the appellate court concluded that an important feature of an "other structure" is that it "is attached to or is a part of the land." *Id.* at 1287-88. Because the bagger was portable, it failed to meet this requirement. *See id.*

64. *See id.* Given its decision that the mechanic's lien was not timely filed, the appellate court did not address arguments raised by Dinsmore concerning whether work performed on the bagger was incidental and thus could not revive Lake's lien rights or whether Dinsmore, as owner of the real estate, consented to work performed at the request of NIR as lessee. *See id.*

65. *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91 (Ind. Ct. App. 1999), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000).

66. *See id.* at 95, 97.

67. *See id.* at 99, 101.

68. *See id.* at 94.

69. *See id.*

70. *Id.*

71. *See id.*

72. *See id.* at 95.

and to remanded the case to the trial court with instructions to enter new findings and to modify its judgment to reflect the majority's opinion that the engineer's mechanic's lien was not timely filed.<sup>73</sup>

The court of appeals began its analysis of both the engineer's and the excavating contractor's claims by invoking a 1913 Indiana Supreme Court case for a statement of the purpose of the mechanic's lien statute.

The mechanics' lien laws of America, in general, reveal the underlying motive of justice and equity in dedicating, primarily, buildings and the land on which they are erected to the payment of the labor and materials incorporated, and which have given to them an increased value. The purpose is to promote justice and honesty, and to prevent the inequity of an owner enjoying the fruits of the labor and material furnished by others, without recompense.<sup>74</sup>

The court also stated that the "core function of mechanic's lien statutes is to provide a method for contractors, subcontractors, laborers, and materialmen who have increased the value of a property owner's land but who have not been paid to obtain remuneration."<sup>75</sup> Finally, the court restated the different levels of scrutiny applied in determining the validity of a lien versus giving effect to the remedial purposes of a lien that has been determined to be valid.<sup>76</sup> Noting that mechanic's liens are in derogation of the common law, the court stated that the statute's provisions "must be strictly construed" and that "[l]ien claimants have the burden to prove that their claim is within the scope of the statute."<sup>77</sup> However, once a mechanic's lien has been determined to be valid, the "remedial provisions of the legislation should be liberally construed in order to accomplish the purposes of the statute."<sup>78</sup>

With these policies and rules as a foundation, the court analyzed the work the engineer had performed for the developer. The engineer quit work on the developer's project in January 1997 because of the fee dispute.<sup>79</sup> The engineer filed his mechanic's lien on May 9, 1997. Thus the only way his lien could be valid as having been filed within sixty days of the date of last work performed is if the engineer's work in investigating the project file upon request of the developer's attorney could be considered to be a part of the parties' original contract and not merely incidental to it or done pursuant to a new agreement.<sup>80</sup> The court noted that "[a] mechanic's lien may appropriately be based upon work

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73. *See id.* at 99.

74. *Id.* at 98 (quoting *Moore-Mansfield Constr. Co., Inc. v. Indianapolis N.C. & T. Ry. Co.*, 101 N.E. 296, 302 (Ind. 1913)).

75. *Id.* (citations omitted).

76. *See id.*

77. *Id.* (citations omitted).

78. *Id.* (citing *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

79. *See id.*

80. *See id.*

which was actually called for under the contract or continuing employment relationship performed with the intention of completing the job,”<sup>81</sup> but “[t]he right to such a lien cannot be revived through the performance of some act incidental to the work which is not done with the intention of completing the job.”<sup>82</sup> The court concluded that the engineer had previously fulfilled his obligations under the original contract and that the file examination done in March was not performed in connection with completing the original contract and was merely incidental to it.<sup>83</sup> Accordingly, the court found, as a matter of law, that the engineer’s mechanic’s lien had been filed outside the statutory sixty-day period.<sup>84</sup>

The contractor’s mechanic’s lien claim raised different issues, specifically: 1) whether the contractor’s failure to perform as agreed precluded him from asserting a lien,<sup>85</sup> and 2) whether an overstatement of the amount owed invalidated that lien.<sup>86</sup> The contract between the developer and the contractor required the contractor to complete work on the project by specified dates. The contractor failed to meet these deadlines, and the developer paid the contractor only \$70,000 out of the \$200,000 worth of invoices that had been submitted for payment. The developer subsequently ordered the contractor off the job, by which time the contractor had completed seventy percent of its work.<sup>87</sup> The contractor filed a mechanic’s lien against the developer’s real estate in the amount of \$166,510.09. It was later discovered that this lien was overstated by more than \$38,000.<sup>88</sup>

The first issue the trial court had to consider with regard to the contractor’s claim was whether the contractor’s failure to complete work in a timely manner constituted a breach of the construction contract that would bar recovery on his lien.<sup>89</sup> The trial court found that the developer was the first party to breach the contract by failing to pay the contractor’s invoices, and therefore the developer was liable for the reasonable value of the services rendered by the contractor.<sup>90</sup>

The court then examined the effect of the contractor’s overstatement of the amount owed on the validity of the lien.<sup>91</sup> The developer argued that the overstatement rendered the lien void. His argument was based on a construction of the mechanic’s lien statute which maintains that a failure to complete the notice of intention accurately is fatal to the lien right, a construction that was

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81. *Id.* (citing *Miller Monuments, Inc. v. Asbestos Insulating & Roofing Co.*, 185 N.E.2d 533, 535 (Ind. App. 1962)).

82. *Id.* (citing *Gooch v. Hiatt*, 337 N.E.2d 585, 588 (Ind. App. 1975)).

83. *See id.* at 99.

84. *See id.*

85. *See id.* at 101-02.

86. *See id.* at 100-01.

87. *See id.* at 102.

88. *See id.*

89. *See id.* at 97.

90. *See id.*

91. *See id.* at 101.

applied to the element of the identity of the lien holder in *Mullis*.<sup>92</sup> Instead, the court used a more lenient standard that permitted an inquiry into the cause of the overstatement.<sup>93</sup> The court held that an overstatement of the amount of a mechanic's lien that is done intentionally or through culpable negligence will invalidate the whole lien but an overstatement that results from mistake will not render the lien void in the absence of fraud or prejudice to the land owner.<sup>94</sup> Because the facts indicated that the contractor's overstatement was the result of inadvertent clerical error and had been reported to the developer, the court held that such overstatement did not affect the validity of the lien.<sup>95</sup>

*Mullis*, *Abbey Villas*, and *Dinsmore* demonstrate some of the many mechanic's lien issues that are not affected by the 1999 amendments to the mechanic's lien statute. Opinions deciding such issues continue to be viable.

## II. REAL ESTATE AGENCY RELATIONSHIPS STATUTE

In another significant act, the Indiana Legislature amended that part of Title 25 governing real estate agency relationships.<sup>96</sup> In so doing the legislature altered at least thirty years of custom and practice in the real estate sales industry<sup>97</sup> by redefining the relationships among parties to a sale or lease of real estate by eliminating subagency. In so doing, the legislature also dramatically altered the duties owed by real estate licensees to sellers and buyers<sup>98</sup> by actually reversing the duties owed in many instances. Unfortunately, the restructured agency relationships only partially render a licensee's duties more certain. Plentiful opportunities for claims against licensees remain under the amended statute, and in some instances new opportunities may be created by overbroad or imprecisely defined terms added by the amendments themselves.

### A. Pre-Amendment Practice

Prior to the 1999 amendments, a seller of real estate typically retained a real estate licensee to act as his agent to find a suitable buyer. The licensee and the seller would memorialize their relationship in a listing agreement, which would include a definition of the circumstances under which the licensee's commission would be earned.<sup>99</sup> This licensee, referred to as the "listing agent,"

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92. See *Mullis v. Brennan*, 716 N.E.2d 58, 63 (Ind. Ct. App. 1999).

93. See *Abbey Villas*, 716 N.E.2d at 101.

94. See *id.*

95. See *id.*

96. See IND. CODE § 25-34.1-10-0.5 to -34.1-10-17 (1998).

97. The concept of the unilateral offer of subagency has been traced to the early 1970s. See Sandra Nelson, Note, *The Illinois Real Estate "Designated Agency Amendment": A Minefield for Brokers*, 27 J. MARSHALL L. REV. 953, 961-62 (1994).

98. The amended sections dealing with real estate licensees include lessors and lessees as well as sellers and buyers. For convenience only the terms seller and buyer will be used, but they should be understood to include lessors and lessees as well.

99. See IND. CODE § 32-2-2-1 (1998). This statute operates as a statute of frauds for real

would then place information about the real estate with a multiple listing service, thereby bringing the real estate to the attention of all other member licensees in the hope that one of them might locate a buyer.

At the other end of a typical transaction, a potential buyer would contact a licensee and state that he was interested in locating and purchasing a parcel of real estate. If this licensee was not the listing agent for any real estate meeting the buyer's needs, he would consult the multiple listing service for properties listed by other licensees. If a suitable parcel was located and purchased, the licensee would participate in the closing as the "selling agent."

Such a procedure, although efficient in bringing about sales of real estate, raised important legal questions concerning the licensees' rights and obligations to each other and to the seller and buyer. One such problem related to the payment of commissions to the selling agent. Listing agreements between the seller and the listing agent provided for the payment of a commission, usually stated as a percentage of the selling price, upon the occurrence of certain stated events. Thus, the listing agent's right to collect the commission was protected by contract. The selling agent, however, enjoyed no such privity of contract with the seller and had no direct basis to enforce payment of a commission. It was also extremely unlikely that the selling agent had any contractual agreement with the buyer to pay a commission akin to a "finder's fee" as buyers considered the commission to be the seller's obligation and likely to be already factored into the purchase price. However, in the absence of the potential for earning a commission, there was no incentive for a licensee to find buyers for any properties other than the ones on which he was the listing agent.

This conundrum was solved by the concept of subagency. As a condition of placing a property with a multiple listing service, where its chances of sale are greatly increased, every licensee agreed to make every other licensee his subagent. This mandatory offer of subagency was unilateral and was presumed to be accepted by the second licensee upon showing the real estate to a potential buyer. Through this procedure, the seller's contractual obligation to pay a commission to the listing agent passed through to the selling agent.

Subagency also carried with it, however, serious issues concerning the fiduciary duties owed by the licensees to the parties under the common law of agency, and there was widespread misunderstanding of those duties by buyers. When a potential buyer approached a licensee, that buyer sought assistance in buying a parcel of real estate. The buyer relied on the licensee to search the multiple listing service for appropriate properties, to accompany him to inspect available properties, and if an appropriate property was located to assist him in completing offers to purchase and counteroffers. A close working relationship often developed, and most buyers viewed the licensee as his agent, as acting with his best interests at heart, and as owing duties to him.<sup>100</sup> Unfortunately, the

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estate sales commissions by providing that no agreement for the payment of money for the finding of a purchaser of real estate is valid unless that agreement is set forth in a writing. *See id.*

100. According to a Federal Trade Commission survey conducted in 1983, 72% of all residential real estate buyers thought that they were represented by the selling agent. Even when



buyers' view was wrong. According to the principle of subagency, the selling agent was a subagent of the listing agent and both owed fiduciary duties to the seller. The buyer was represented by no one.

The common law of agency imposes a number of duties on an agent in favor of his principal.<sup>101</sup> Perhaps chief among these is the duty of loyalty, which encompasses both a duty to avoid conflicts of interest and a duty to maintain confidentiality for any information acquired from the principal during the term of the agency. Under the principle of subagency both the listing agent and the selling agent owed these duties to the seller. Neither of them owed any of the common law duties to the buyer. Thus, for example, under subagency it would be improper for the selling agent to negotiate for terms of sale advantageous to the buyer at the expense of the seller, even though the buyer may be "relying" on the selling agent's expertise. Similarly, although it would be improper for a selling agent to divulge to the buyer information obtained from the seller, there would be no agency law violation if the selling agent told the listing agent information obtained from the buyer.

This situation called out for a remedy for at least two reasons. First, consumer groups objected to the lack of representation for buyers and to the misunderstanding under which most buyers approached real estate transactions. Second, licensees desired a clarification of their relationships and duties, with the goal that such clarification would result in a limitation of potential legal liability that could arise from misunderstood agency relationships. It is these twin goals that the 1999 amendments attempt to achieve.

#### *B. The 1999 Amendments to the Real Estate Agency Relationships Statute*

Perhaps the feature of Senate Enrolled Act No. 358<sup>102</sup> (which became effective on July 1, 1999) that one first notices is the number of amended or new

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only one licensee was involved in the transaction, 31% of buyers thought that licensee represented them and not the seller. Additionally, 82% of sellers thought the selling agent represented the buyer. See Roy T. Black, *Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship*, 22 REAL ESTATE L.J. 201, 201-02 (1994) (citation omitted).

101. These duties include: the duty to obey instructions, the duty to act with care and skill, the duty to notify the principal of material information relevant to the principal's goal, and the duty to account for anything of value received by the agent on the principal's behalf during the term of the agency. See, e.g., *Prudential Ins. Co. of Am. v. Crouch*, 606 F. Supp. 464, 471 (S.D. Ind. 1985) ("[E]very agent owes a fiduciary duty to his principal to act with good faith and loyalty in furtherance of the principal's interests."), *aff'd*, 796 F.2d 477 (7th Cir. 1986) (mem.); *Potts v. Review Bd. of Ind. Employment Sec. Div.*, 475 N.E.2d 708, 711 (Ind. Ct. App. 1985) ("[A]n agent is subject to a duty to act solely for the benefit of the principal. An agent may not place himself in a position wherein his own interests are potentially antagonistic to those of his principal.") (citations omitted).

102. Act of May 3, 1999, Pub. L. 130-1999, 1999 Ind. Act 696 (codified as amended at IND. CODE § 25-34.1-10-1 (Supp. 1999)).

sections of the Act devoted to defining terms. New definitions are provided for “agency relationship,”<sup>103</sup> “broker,”<sup>104</sup> “client,”<sup>105</sup> “customer,”<sup>106</sup> “in-house agency relationship,”<sup>107</sup> “licensee,”<sup>108</sup> “limited agent,”<sup>109</sup> “managing broker,”<sup>110</sup> “principal broker,”<sup>111</sup> and “subagent.”<sup>112</sup> Such extensive redefinition was required because the amendments alter the familiar landscape of real estate agency law by eliminating the former organizing principle of subagency and by substituting newly defined relationships and duties between licensees and sellers and buyers.

This feat is accomplished by amendments to sections 17 and 9.5 of the Act. Section 17 states that “[a] licensee may not make an offer of subagency through a multiple listing service or other information source, or agree to appoint, cooperate with, compensate, or otherwise associate with a subagent in a real estate transaction.”<sup>113</sup> In place of subagency, section 9.5 provides that “[a] licensee has an agency relationship with, and is representing, the individual with whom the licensee is working . . . .”<sup>114</sup> Thus, agency relationships are now defined by working relationship, and the statutory goal of having the law of real estate agency relationship match the legitimate expectations of the parties, especially buyers, should be accomplished.

At the same time the amendments preserve the ability of the licensee assisting the buyer to receive compensation in the absence of subagency by providing that “[t]he elimination of subagency by this section is not intended to limit the rights of a licensee to cooperate with, compensate, or otherwise associate with another licensee who is not acting on behalf of a client.”<sup>115</sup> As part of the listing agreement, the licensee working with the seller will obtain permission to compensate the buyer’s licensee. That licensee can thus be paid without the creation of any of the duties that accompanied subagency.

Evaluating the success of the 1999 amendments in achieving the second goal

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103. IND. CODE § 25-34.1-10-0.5 (Supp. 1999).

104. *Id.* § 25-34.1-10-1.

105. *Id.* § 25-34.1-10-5.

106. *Id.* § 25-34.1-10-6.

107. *Id.* § 25-34.1-10-6.5.

108. *Id.* § 25-34.1-10.6.8. “A ‘licensee’ means an individual or entity issued a salesperson’s or broker’s real estate license by the Indiana real estate commission.” *Id.*

109. *Id.* § 25-34.1-10-7.

110. *Id.* § 25-34.1-10-7.5.

111. *Id.* § 25-34.1-10-7.8.

112. *Id.* § 25-34.1-10-9.

113. *Id.* § 25-34.1-10-17. The only instance in which “subagency” remains possible is where one broker is engaged to act for another broker in performing brokerage services for a single client. *See id.* § 25-34.1-10-9. Under these limited circumstances, there is no concern about a buyer misconstruing the loyalties of the subagent.

114. *Id.* § 25-34.1-10-9.5. This presumption can be altered by agreement and does not apply where the licensee “is merely assisting the individual as a customer.” *Id.*

115. *Id.* § 25-34.1-10-17.

of redefining agency duties with the goal of limiting opportunities for licensee liability is more problematic. The effectiveness of the restructured relationships in eliminating the agency duty problems that formerly accompanied subagency is best examined in the context of three common transactional patterns: 1) sales involving licensees affiliated with different brokerage houses; 2) sales involving two licensees affiliated with a single brokerage house; and 3) sales involving only one licensee within a single brokerage house.

*1. Duties Owed by a Licensee in Multiple Brokerage House Transactions.*— Having based the roles of principal and agent on the basis of working relationship, the amendments then define the nature and scope of the duties owed by a licensee to a client. These duties can be characterized as acts that a licensee must do, acts that he must not do, and acts that he is permitted to do.

The duties and obligations that must be observed by a licensee who represents a seller are set forth in section 10(a), which duties are: “(1) To fulfill the terms of the agency relationship made with the seller or landlord; (2) To disclose the nature of the agency relationship with the seller . . . and redefine and redisclose if the relationship changes; [and] (3) To promote the interests of the seller. . . .”<sup>116</sup> It is in the last category where the specific duties are identified. “Promoting the interests of the seller” includes : 1) seeking a price and sales contract terms satisfactory to the seller;<sup>117</sup> 2) presenting all offers to purchase to the seller immediately upon receipt;<sup>118</sup> 3) disclosing to the seller “adverse material facts or risks actually known by the licensee concerning the real estate transaction”;<sup>119</sup> 4) advising the seller “to obtain expert advice concerning material matters that are beyond the licensee’s expertise”;<sup>120</sup> 5) timely accounting for all money and property received from the seller;<sup>121</sup> 6) exercising reasonable care and skill;<sup>122</sup> and 7) complying with “the requirements of this chapter and all applicable federal, state, and local laws, rules, and regulations, including fair housing and civil rights statutes, rules, and regulations.”<sup>123</sup>

The actions a licensee must not take are identified in section 10(b). A licensee representing a seller is prohibited from disclosing to a potential buyer: 1) that the seller will accept less than the asking price or make other contract concessions;<sup>124</sup> 2) the seller’s motivation to sell the real estate;<sup>125</sup> and 3) any “material or confidential” information about the seller.<sup>126</sup>

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116. *Id.* § 25-34.1-10-10(a).

117. *Id.* § 25-34.1-10-10(a)(3)(A).

118. *See id.* § 25-34.1-10-10(a)(3)(B).

119. *Id.* § 25-34.1-10-10(a)(3)(C).

120. *Id.* § 25-34.1-10-10(a)(3)(D).

121. *See id.* § 25-34.1-10-10(a)(3)(E).

122. *See id.* § 25-34.1-10-10(a)(3)(F).

123. *Id.* § 25-34.1-10-10(a)(3)(G).

124. *See id.* § 25-34.1-10-10(b)(1).

125. *See id.* § 25-34.1-10-10(B)(2).

126. *Id.* § 25-34.1-10-10(b)(3). Material or confidential information can be revealed by a licensee if disclosure is required by law or where failure to disclose would constitute fraud or

Section 10(c) further defines the duties of a licensee representing a seller by stating that he owes “no duties or obligations” to a prospective buyer except to treat the buyer honestly and not to knowingly give false information,<sup>127</sup> and to disclose to a prospective buyer “adverse material facts or risks actually know by the licensee concerning the physical condition of the property and facts required by statute or regulation to be disclosed and that could not be discovered by a reasonable and timely inspection of the property by the buyer . . . .”<sup>128</sup> This latter duty is limited by the undiscoverability requirement and by subsequent language that exempts the seller’s licensee from any duty to conduct an inspection for the buyer or to verify the accuracy of any written or oral statements made by the seller.<sup>129</sup> The amendments also provide that “[a] cause of action does not arise against a licensee for disclosing information in compliance with this section.”<sup>130</sup>

Finally, the acts that the seller’s licensee is permitted to do are identified in section 10(e). A seller’s licensee may “show alternative properties not owned by the seller . . . to a prospective buyer . . . and may list competing properties for sale . . . without breaching any duty or obligations to the seller . . . .”<sup>131</sup> He may also provide to a buyer “services in the ordinary course of a real estate transaction and any similar services that do not violate the terms of the agency relationship . . . .”<sup>132</sup>

Substantially identical provisions concerning the acts that a licensee working with a buyer is required to take, is prohibited from taking and is permitted to take are contained in section 11.<sup>133</sup> The only differences between the duties identified in the two sections are those necessary to track the differences between activities of a seller and a buyer. For example, section 10(d) speaks to a licensee’s duty to verify statements made by the seller,<sup>134</sup> while section 11(d) speaks to a licensee’s duty to make disclosures about the buyer’s financial ability to perform the terms of an offer.<sup>135</sup>

If the goal of the amendments was to identify a licensee’s duties to his client and thereby limit the licensee’s exposure to claims arising from misunderstandings about relationships, specifying the substantive nature of those duties is only part of the chore. The scope of those duties must also be identified by specifying the events that trigger the creation of a licensee’s agency duties and their termination. The amendments achieve this goal in section 14 of the amended statute.

The 1999 amendments contain no formal requirements, including the

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dishonest dealing. *See id.* § 10(b)(3).

127. *Id.* § 25-34.1-10-10(c).

128. *Id.* § 25-34.1-10-10(d).

129. *See id.*

130. *Id.*

131. *Id.* § 25-34.1-10-10(e)(1).

132. *Id.* § 25-34.1-10-10(e)(2).

133. *See id.* § 25-34.1-10-11.

134. *See id.* § 25-34.1-10-10(d).

135. *See id.* § 25-34.1-10-11(d).

necessity of a writing,<sup>136</sup> for the creation of an agency relationship. Instead, section 14 provides that “[t]he duties and obligations set forth in this chapter begin at the time the licensee enters into an agency relationship with a party to a real estate transaction . . . .”<sup>137</sup> An agency relationship is created when a licensee works with a client,<sup>138</sup> and it is with the beginning of the working relationship that the licensee’s agency duties begin.

Section 14 provides that the licensee’s agency duties continue “until the agency terminates.”<sup>139</sup> If the agency goal is not fulfilled, “the agency relationship ends at the earlier of: (1) a date of expiration agreed upon by the parties; or (2) a termination of the relationship by the parties.”<sup>140</sup> Unless otherwise agreed, “a licensee representing a seller, landlord, buyer, or tenant owes no further duties or obligations after termination, expiration, or completion of the agency relationship . . . .”<sup>141</sup> Despite this sweeping denial of the existence of continuing duties following termination of the agency relationship, the Act follows common law rules in providing that certain duties do survive termination of the agency relationship. These are the duties to “account[ ] for all money and property received during the agency relationship”<sup>142</sup> and to “keep[ ] confidential all information received during the course of the agency relationship that was made confidential by request or instructions from the client,”<sup>143</sup> except where such disclosure is required by law, is made with the consent of the client or became public from a source other than the licensee.<sup>144</sup>

2. *Licensee Duties in In-House Agency Relationships.*—Sales of real estate involving licensees from separate brokerage houses are common, but also significant are sales involving two licensees both employed by the same brokerage house. Under the former subagency rules, once a licensee executed a listing agreement with a seller, that licensee, the company for which he worked

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136. But see Indiana Code section 32-2-2-1 (1998) concerning the requirement of a writing as a prerequisite for enforcing an agreement to pay a commission for locating a buyer of real estate. As a practical matter, this writing requirement will in almost all cases result in the memorialization of the start of the agency between a seller the licensee working with him.

137. *Id.* § 25-34.1-10-14(a).

138. *See id.* § 25-34.1-10-9.5.

139. *Id.* § 25-34.1-10-14 (a).

140. *Id.* § 25-34.1-10-14(b). This sub-section implies, but does not state, that an agency relationship is also terminated by the accomplishment of the goal of the agency relationship. By the use of the words “by the parties” in subsection (b)(2), instead of by “either of the parties,” the Act appears not to acknowledge the rule that either party to an agency relationship has the power—but maybe not the legal right—to terminate the agency at any time. Pursuant to the terms of the listing agreement containing an exclusive right to sell clause, a seller may be able to terminate the agreement but still will be obligated to pay a commission if the property is subsequently sold to a buyer who became aware of it through the services of any realtor during the term of the agency.

141. *Id.* § 25-34.1-10-14(c).

142. *Id.* § 25-34.1-10-14(c)(1).

143. *Id.* § 25-34.1-10-14(c)(2).

144. *See id.* § 25-34.1-10-14(c)(2)(A)-(C).

and all other licensees working for that company became agents of the seller. Such a result created no special difficulties for the firm or its licensees since agency duties owed by all licensees ran exclusively to the seller, but such automatic and all-inclusive imputation of agency cannot work under a statute that imposes duties based on working relationships with sellers and buyers. In markets dominated by a few brokerage houses with dozens or scores of licensees, it is unavoidable that a licensee will end up working with a buyer who is interested in purchasing real estate owned by a seller who is working with a licensee in the same firm.

The Act addresses this problem by defining such a situation as an “in-house agency relationship”<sup>145</sup> and by providing that:

An individual licensee affiliated with a principal broker represents only the client with which the licensee is working in an in-house agency relationship. A client represented by an individual licensee affiliated with a principal broker is represented only by that licensee to the exclusion of all other licensees. A principal or managing broker does not represent any party in such transactions unless the principal or managing broker has an agency relationship to personally represent a client.<sup>146</sup>

This rule restricting licensee representation to a specific client is necessary because, unlike sales involving multiple brokerage houses, sales involving in-house agency relationships must preclude the imputation of an agency relationship and agency duties from one licensee to the company any thence to other licensees in it. This goal is achieved among licensees by declaring that agency relationships exist between a licensee and a client “to the exclusion” of all other licensees in the firm. It is achieved for the principal or managing broker of the firm by conferring a type of neutrality under which that broker represents no one other than his specific client. Firewalls are thus established between licensees, and agency duties stop at those walls.

The firewalls established by the amendments also serve to preclude the imputation of knowledge among the brokers and licensees. Section 12.5(e) provides that “[i]n all in-house agency relationships, a principal broker, managing broker, and an individual licensee possess only actual knowledge and information.”<sup>147</sup> Without this provision, in-house agency relationships would raise insurmountable issues relating to the competing duties to maintain confidentiality and duties to disclose information imputed to a licensee.

To insure that the theoretical separation of licensees is maintained in practice and that one licensee does not defeat the statutory scheme by imparting actual

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145. An “in-house agency relationship” is defined as “an agency relationship involving two (2) or more clients who are represented by different licensees within the same real estate firm.” *Id.* § 25-34.1-10-6.5.

146. *Id.* § 25-34.1-10-12.5(a). The terms “principal broker” and “managing broker” are defined at sections 25-34.1-10-7.8 and -7.5, respectively.

147. *Id.* § 25-34.1-10-12(e).

knowledge to another licensee within the firm, section 12.5(d) provides that “[a] principal broker, managing broker, and any affiliated licensee shall take reasonable and necessary care to protect any material or confidential information disclosed by a client to the client’s in-house agent.”<sup>148</sup> The amendments further provide that “[a] licensee representing a client in an in-house agency relationship owes the client duties and obligations set forth in this chapter and shall not disclose material or confidential information obtained from the client to other licensees . . . .”<sup>149</sup> In recognition of the neutrality bestowed on brokers, a licensee is permitted to disclose material or confidential information obtained from a client “for the purpose of seeking advice or assistance for the client’s benefit.”<sup>150</sup> Maintaining the integrity of the firewalls can prove to be difficult as there are numerous ways in which information can pass across it.

With the elimination of imputed agency and of imputed knowledge and with the construction of firewalls within a brokerage firm to maintain the separation, the determination of licensee duties based upon working relationship is preserved even in in-house agency relationships. Still more is required when there is only one licensee involved in the transaction, and he is working with both the buyer and the seller.

*3. Agency Duties in Limited Agency Transactions.*—Presumptions against imputation of agency relationships and knowledge and the construction of firewalls may be effective in in-house agency relationships where two licensees are involved, but they are inapplicable in a transaction involving only one licensee working with and for both the seller and buyer. A licensee involved in such a transaction is defined as a limited agent. A limited agent is a licensee “who, with the written and informed consent of all parties to a real estate transaction, is engaged by both the seller and the buyer.”<sup>151</sup>

The written and informed consent requirement is presumed to be met if, at the time of entering into an agency relationship with the licensee, each party signs a document that contains the information prescribed by section 12(a).<sup>152</sup> With regard to agency duties owed by the licensee to the seller and buyer in a limited agency transaction, the most important disclosure is the one that informs the parties that “in serving as a limited agent, the licensee represents parties whose interests are different or even adverse.”<sup>153</sup>

The prohibitions placed against disclosure of information by a licensee in a limited agency relationship are severe and include essentially all of the prohibitions of sections 10 and 11 plus add the additional prohibition that the licensee shall not disclose any other term “that would create a contractual

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148. *Id.* § 25-34.1-10-12.5(d).

149. *Id.* § 25-34.1-10-12.5(c).

150. *Id.*

151. *Id.* § 24-4.6-2.1-1.5 (Supp. 1999). This definition is also used in sections 25-34.1-10-12(a) and -12.5(b). *See id.* § 25-34.1-10-12.

152. *See id.* § 25-34.1-10-12(a)(1)-(6).

153. *Id.* § 25-34.1-10-12(a)(2).

advantage for one (1) party over another party.”<sup>154</sup> The safe harbors available for a licensee in a limited agency relationship are narrow. Unless he has obtained the informed and written consent of his client, a licensee is only permitted to “disclose and provide to both the seller and buyer property information, including listed and sold properties available through a multiple listing service or other information source.”<sup>155</sup> In the absence of this safe harbor, providing such information could be seen as giving an advantage to a buyer, for example, by providing him with sales information including the sale prices for comparable properties, which the buyer could then use to negotiate a purchase price lower than that sought by the seller. Finally, section 12(c) insulates the licensee from causes of action for “disclosing or failing to disclose information in compliance with this section . . . .”<sup>156</sup> Given the limited actions a licensee in a limited agency relationship can take for either seller or buyer, the usefulness of such representation to the parties is highly questionable. Nevertheless, the amendments affecting such representation address concerns about buyer misunderstanding of agency relationships by requiring informed and written consent and address licensee concerns about liability by clearly defining the licensee’s relationships and duties.

*C. Broker and Licensee Liability Issues Remaining  
After the 1999 Amendments*

No matter how well designed the agency relationship statute may be, liability can obviously result if the broker fails to implement the new procedures and firewalls or if a licensee fails to conduct himself in the required manner. Memoranda left in open view and overheard telephone conversations are but two examples of ways in which the firewalls can be breached. Even assuming an embrace of the statutory requirements by a licensee, undefined, inadequately defined, and overinclusive terms in the amendments themselves may provide a basis for litigation concerning a licensee’s actions. At least eight terms or clauses appear suitable for use by creative litigants.

One issue created by the definitions supplied in the statute centers on the difference between a “client” and a “customer.” A client is defined as a person who has entered into an agency relationship with a licensee.<sup>157</sup> The definition of an agency relationship, however, is wonderfully circular as that term means a relationship in which a licensee represents a client.<sup>158</sup> The circularity continues as a customer is defined as a person who is provided services in the ordinary course of business by a licensee but who is not a client.<sup>159</sup>

To make matters even more difficult, the amendments provide no definition

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154. *Id.* § 25-34.1-10-12(a)(3)(E).

155. *Id.* § 25-34.1-10-12(b).

156. *Id.* § 25-34.1-10-12(c).

157. *See id.* § 25-34.1-10-5.

158. *See id.* § 25-34.1-10-9.5.

159. *See id.* § 25-34.1-10-6.



at all for “services in the ordinary course of business.” A list of illustrative acts, including “preparing offers to purchase or lease and communicating the offers to the seller or landlord, arranging for lenders, attorneys, inspectors, insurance agents, [and] surveyors”<sup>160</sup> was deleted by the 1999 amendments. How are courts to construe this deletion? Does it indicate that these are not the types of activities the legislature intended to be within the scope of the term “ordinary course of business”? If those are not the intended acts, what did the legislature intend them to be?

Differentiating between a client and a customer is important because the licensee’s duties are determined by the relationship. A licensee owes the statutory duties to a client but not to a customer. With such an important issue at stake, the legislature should have provided better guidance.

A second and related issue tied to the definition of client is “with whom the licensee is working.”<sup>161</sup> How is a licensee, or a court, to know when the “working” relationship, and the agency duties, begin? The statute merely provides that, in the absence of a written agreement to the contrary or mere assistance to a “customer,” an agency relationship arises automatically when there is a “working” relationship. A written document is required by the Indiana Code for a promise to pay a real estate commission to be enforceable;<sup>162</sup> therefore, the working relationship between the seller and a licensee can be traced to the execution of the listing agreement. There is, however, no similar requirement for licensees who work with buyers, and no document memorializing the representation is currently in wide-spread practice. Even if use of a buyer representation form becomes widespread, some buyers may be reluctant to sign it upon first meeting a licensee. How then will a licensee know when a qualifying working relationship has begun and corresponding duties have arisen? Section 14(a) provides no assistance as it states only that “[t]he duties and obligations set forth in this chapter begin at the time the licensee enters into an agency relationship,”<sup>163</sup> but provides no definition for “entering.”<sup>164</sup> The answer forthcoming from licensees representing buyers is likely to be that there is no precise way to determine the time when contacts with a prospective buyer blossom into a “working relationship” and that the best they can do is operate on faith. Anecdotal stories can already be heard describing instances in which a licensee considered a working relationship to exist but the buyer actually closed on the sale of a property with another licensee, perhaps a friend, who had not previously been involved in showing that property. If one of the goals of the 1999 amendments was to define clearly the agency relationships, more clarity is needed in defining their commencement.

Third, the statute requires a licensee representing a seller to disclose to the

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160. *Id.* § 34.1-10-10(e)(z) (1998), amended by § 25-34.1-10-10(e) (Supp. 1999).

161. *Id.* 25-34.1-10-9.5 (Supp. 1999).

162. *See id.* § 32-2-2-1 (1998).

163. *Id.* § 25-34-1-10-14(a) (Supp. 1999).

164. Section 14 does a better job defining the events that will serve to terminate an agency relationship. *See id.* § 25-34.1-10-14(b); text of *supra* note 140.

seller “adverse material facts or risks” actually known to the licensee concerning the “real estate transaction.”<sup>165</sup> Differences of opinion can develop between a seller and a licensee with regard to adversity and materiality, neither of which are further defined. Additionally, what is the difference between a fact and a risk requiring disclosure? This question is made more difficult for licensees as the facts or risks that must be disclosed relate to the “real estate transaction” as opposed to the condition of the real estate itself.

Fourth, the statute requires the seller’s licensee to advise the seller to obtain expert advice concerning matters that are “beyond the licensee’s expertise.”<sup>166</sup> Many matters relating to construction methods and building code compliance, for example, may be beyond the expertise of a licensee. Other matters may even be outside his knowledge and thus will go unrecognized. How is a licensee to know that he should recommend that a seller obtain expert advice about matters beyond the licensee’s ken? A prophylactic warning by the licensee, “There may be matters relating to this property and to this transaction that are beyond my expertise, so retain an expert” is unhelpful and absurd. The absence of any reasonableness qualifier on the extent of the licensee’s expertise, however, makes it difficult for a licensee to know when to give the required advice.

Fifth is the requirement that all licensees, whether representing sellers or buyers, must “comply[] with the requirements of this chapter *and all applicable federal, state, and local laws, rules, and regulations, including fair housing and civil rights statutes, rules, and regulations.*”<sup>167</sup> Such a blanket importation of an unknown number of laws, rules, and regulations from federal, state, and local authorities requires licensees to possess an impossible amount of legal knowledge. Additionally, if a licensee takes an actions that violates an applicable law, did the legislature intend to make that same act also a violation of Title 25?

Sixth, the rules governing maintenance of confidentiality in sections 10 and 11 refer to “material” *or* “confidential” information.<sup>168</sup> Does this mean that a disclosure of material information will provide a cause of action against the licensee even if that information was not confidential? The statute gives no guidance in evaluating “materiality.” The amendments provide that material or confidential information can be disclosed by a licensee if failure to disclose would result in “dishonest dealing.”<sup>169</sup> How is a court to determine the scope of this term?<sup>170</sup> Undefined terms will require determination on a case-by-case basis, which hardly provides the certainty licensees sought in defining the scope of their liability.

Seventh, in a limited agency transaction, the licensee is prohibited from

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165. *Id.* § 25-34.1-10-10(a)(3)(C).

166. *Id.* §§ 25-34.1-10-10(a)(3)(D), -11(a)(3)(G).

167. *Id.* § 25-34.1-10-10(a)(3)(G) (emphasis added).

168. *Id.* §§ 25-34.1-10-10(b)(3), -10-11(b)(3).

169. *Id.* §§ 25-34.1-10-10(b)(3), -10-11(b)(3).

170. “Honesty” is also required in dealings between the seller’s licensee and the buyer in section 10(b)(3) and between the buyer’s licensee and the seller in section 11(c). *Id.* §§ 25-34.1-10-10(b)(3), -10-11(c).

disclosing any term that would “create a contractual advantage” for one party over the other.<sup>171</sup> It can be argued with some force that practically any information provided to one party can confer some advantage on the other party. Lack of guidance on this issue should make licensees in such transactions even more cautious about disclosing any information to either buyer or seller than they must already be by virtue of their representation of parties whose interests are already “different or even adverse.”

Eighth, the amendments seek to contain the theories on which clients might assert claims against licensees by providing that the statute’s provisions displace common law agency principles.<sup>172</sup> Specifically, the statute states that “[t]he duties and obligations of a licensee set forth in this chapter supersede any fiduciary duties of a licensee to a party based on common law principles of agency to the extent that those common law fiduciary duties are inconsistent with the duties and obligations set forth in this chapter.”<sup>173</sup> The statute leaves open room for a court to impose liability on common law principles of agency that are not inconsistent with the statute but instead support, supplement, or explain it. Exactly which common law principles might remain applicable will not be known until the courts tell us which are consistent and which are not. Also, the statute attempts to exclude only theories based on common law agency principles.<sup>174</sup> There is no attempt to exclude common law tort principles. Even in the days of subagency, licensees representing sellers had been held liable to buyers under negligence principles.<sup>175</sup> Sections 10(a)(3)(G) and 11(a)(3)(F) specifically provide for licensee liability for failing to “exercise reasonable care and skill,” which is a tort-based standard.<sup>176</sup>

#### *D. Conclusions About Real Estate Agency Relationships Statute Amendments*

The 1999 amendments are an improvement over the interim agency disclosure requirements enacted in 1994. Disclosure of available agency relationships did little to cure buyer confusion about the absence of agency duties owed to him and equally little to clarify the nature and scope of duties expected of licensees. The 1999 amendments provide for buyer representation based on working relationship and abolish the principle of subagency. The amendments are less successful at clearly defining a licensee’s duties. Although they are an improvement over pre-amendment rules, the statute leaves a number of issues open for future litigation. Resolution of such open issues will have to come from judicial decisions arising from individual cases or from further legislative refinement of the statute.

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171. *Id.* § 25-34.1-10-12(a)(3)(E).

172. *See id.* § 25-34.1-10-15.

173. *Id.*

174. *See id.*

175. *See Tri-Professional Realty, Inc. v. Hillenberg*, 669 N.E.2d 1064 (Ind. Ct. App. 1996).

176. IND. CODE §§ 25-34.1-10-10(a)(3)(G), -10-11(a)(3)(F).

III. ENVIRONMENTAL LAW INTERSECTS WITH PROPERTY LAW:  
THE *SHELL OIL CO. v. MEYER* DECISION AND SUBSEQUENT  
LEGISLATIVE RESPONSE

Environmental laws have an undeniable impact on real estate. Laws that impose financial responsibility for hazardous waste clean-up costs on a joint, several and strict liability basis, for example, can render a parcel of property undesirable for a buyer, unsellable for a seller, and worthless as collateral for a lender. Finding an appropriate balance of the interest of protecting the environment and the health of individuals with the interest of promoting the productive use of land and the economy has been an on-going task for legislatures and courts over the past several decades.<sup>177</sup> The Indiana Supreme Court spoke on the relationship of environmental law to property law in the context of Indiana's Underground Storage Tank Act<sup>178</sup> in the case of *Shell Oil Co. v. Meyer*.<sup>179</sup>

The supreme court described the *Meyer* case as dealing with "the liability of refiners under Indiana's Underground Storage Tank Act . . . for costs of corrective actions for leaks in tanks at retail gasoline stations owned by independent retailers."<sup>180</sup> The court further identified the "principal issue" as being "under what circumstances [is] a major oil company . . . an 'operator' of underground storage tanks located at an independent station that bears its brand."<sup>181</sup> The case received notoriety as briefs were filed by at least twenty four amicus curiae, including the Attorney General of Indiana, attorneys general from twelve other states, the Acting Attorney General of Guam, the Indiana Department of Environmental Management, the City of Indianapolis, the Indiana Association of Cities and Towns, and several public interest groups and trade associations.<sup>182</sup> When issued, the supreme court's opinion made the Indiana Supreme Court the highest state court in the nation to speak on the issue.

A. *Facts of the Case*

Plaintiffs in the case were six families who owned or lived in houses in West Point, Indiana. The town of West Point does not have a municipal water system, and each of the families relied on groundwater from wells for their drinking

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177. Indiana's "brownfields" statute can be seen as one example of the balancing of these sometimes apparently competing policy interests. See *id.* § 6-1.1-42-1 to -42-3 (1998 & Supp. 1999). "Brownfield" is defined as an industrial or a commercial parcel of real estate that is abandoned or may not be operated at its appropriate use on which redevelopment is prohibitive because of hazardous substances contaminating the land. See IND. CODE § 13-11-2-19.3 (1998).

178. *Id.* §§ 13-23-1 to 13-23-15 (1998 & Supp. 1999).

179. 705 N.E.2d 962 (Ind. 1998).

180. *Id.* at 965-66.

181. *Id.* at 966.

182. The full list of amicus curiae can be found at *Meyer*, 705 N.E.2d at 965. Some of these same parties participated as amicus curiae in the companion case of *Shell Oil Co. v. Lovold Co.*, 705 N.E.2d 981 (Ind. 1998).

water supply.<sup>183</sup> In early 1989, plaintiff Kimberly Meyer noticed that her tap water had a petroleum smell. She notified the Tippecanoe County Health Department, which in turn contacted the Indiana Department of Environmental Management.<sup>184</sup> In June 1989, laboratory tests of the Meyers' water detected the presence of several contaminants, including benzene, which is a component of gasoline and a known carcinogen. It was later determined that the source of the groundwater contamination was a nearby retail gasoline station.<sup>185</sup> The history of the operation of that station proved critical to the supreme court's decision.

The record reveals that Fred Smith purchased the station in 1946, at which time he changed it from a Standard branded station to a Shell branded station. At the time of the purchase, Smith's principal occupation was as a "commissioned driver" for Shell, which meant that he delivered gasoline from Shell's bulk plant in Lafayette to farmers in the area and to his station in West Point.<sup>186</sup> Shell owned the gasoline that Smith delivered and retained title until paid by the purchaser.

In 1963, Murphy Enterprises ("Murphy") purchased the bulk plant from Shell and became a Shell "jobber."<sup>187</sup> At that time, Smith became a commissioned driver for Murphy. Murphy purchased gasoline from Shell, stored it at Murphy's bulk plant, and from there Smith delivered the gasoline to purchasers. The effect of Murphy's purchase and operation of the bulk plant was to insert an independent distributor into the chain of distribution of gasoline from the refiner to the retail outlet.<sup>188</sup> In 1971, Murphy changed its gasoline supplier from Shell to Unocal, a relationship that lasted until 1980 when Murphy sold the bulk plant.

Although Smith owned the station at West Point, he never managed it. Instead, he leased the station to a series of short-term lessees who operated gasoline stations and automotive service businesses.<sup>189</sup> Smith died in 1979, and his widow sold the station in 1981. The property was not used for gasoline sales after 1981, and the underground storage tanks were removed by the new owner in 1989.<sup>190</sup>

### *B. Procedural History*

The Meyers and the other neighbors (the "Landowners") filed a complaint against Shell Oil Co. ("Shell") and Unocal Oil Co. ("Unocal") in the Tippecanoe Superior Court on May 4, 1993.<sup>191</sup> The Landowners asserted five common law

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183. See *Meyer*, 705 N.E.2d at 966.

184. See *id.*

185. See *id.*

186. *Id.*

187. *Id.*

188. See *id.*

189. See *id.* at 966-67.

190. See *id.*

191. The Landowners also named Smith's widow and the purchaser of the station as defendants but dismissed them before trial. See *id.* at 967-68.

claims and a claim under the USTA for damages arising from groundwater contamination caused by the leaking underground storage tanks at the station. The common law claims were tried to a jury, but the remaining claim based on the USTA was reserved for a bench decision.<sup>192</sup>

The jury returned a verdict in favor of Shell and Unocal on all of the common law claims, and judgment was entered on them in October 1994. The parties subsequently filed cross-motions for summary judgment on the USTA claim, both of which were denied. The parties then stipulated that they had no further evidence to present and submitted the claim for a decision on the record that had been developed in the jury trial.<sup>193</sup> The trial judge issued a Memorandum Opinion and Order on May 16, 1995, finding Shell and Unocal to be "operators" under the USTA and therefore liable for the costs associated with correcting the groundwater contamination and for the Landowners' other damages.<sup>194</sup> Following a bench trial to determine the cost of correcting the contamination, the trial court issued a Judgment on September 9, 1995, awarding the Landowners \$2,743,660.21 for corrective costs, \$1,459,721.25 for attorney fees and \$179,350.70 for litigation expenses.<sup>195</sup>

Shell and Unocal appealed. The court of appeals affirmed the trial court's finding of liability under the USTA and the award of costs for the corrective action, with the exception of medical monitoring costs.<sup>196</sup> The appellate court also reversed and remanded with instructions to allocate attorney's fees and costs between the unsuccessful common law claims and the successful USTA claim and with instructions for computing interest of those fees.<sup>197</sup> Shell and Unocal then sought transfer to the Indiana Supreme Court, and the Landowners filed a cross-appeal seeking a new trial on their common law claims on the basis of an erroneous jury instruction.

### *C. Issues Relating to the USTA*

The supreme court identified seven issues for decision,<sup>198</sup> but the most important ones for property law purposes relate to the standing of the Landowners to file suit against Shell and Unocal under the USTA, the definition of "operator" under the USTA adopted by the court, and the nature of damages that may be awarded to a person who successfully asserts a claim under the USTA. The court's decision on each of these issues gives dimension to the balance between environmental protection and property use.

1. *Standing.*—The USTA "generally provides for the regulation of underground storage tanks ('UST's') and the prevention and remediation of

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192. *See id.* at 968.

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

pollution from tanks. It contains specific provisions designed to correct contamination from leaking underground storage tanks (LUST's)."<sup>199</sup> Section 8(b) of the USTA provides that "[a] person who . . . (2) undertakes corrective action resulting from a release from an underground storage tank . . . is entitled to receive a contribution from a person who owned or operated the underground storage tank at the time the release occurred. . . ."<sup>200</sup> Shell and Unocal argued that a "contribution" could only appropriately be sought from one having legal liability, and because the Landowners had no such liability they had no standing to bring suit under the USTA.<sup>201</sup>

The court rejected that argument by pointing to the plain language of the USTA, which authorizes private actions by "persons."<sup>202</sup> The court concluded that a 1991 amendment to the USTA that repealed the requirement of state-initiated actions "significantly expanded the group of individuals who are entitled to invoke a right to 'a contribution' under the [USTA]."<sup>203</sup> The court also supported its conclusion by comparing the USTA with language used in previously existing state environmental laws and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").<sup>204</sup> Under CERCLA, only "responsible parties" can recover contributions in corrective action suits,<sup>205</sup> and Indiana's environmental laws also contain definitions for "responsible parties"<sup>206</sup> that the legislature could have used if had intended to limit the scope of parties who could recover under the USTA in a manner similar to the limitation in CERCLA.<sup>207</sup> Use of the term "persons" instead of "responsible parties" indicated to the court that the legislature intended the USTA to confer standing on persons such as the Landowners.<sup>208</sup> Provided that the other requirements of the USTA can be met, the Indiana Supreme Court's decision recognizes the greatest possible degree of standing, and thereby greatest availability of private actions to promote environmental interests.

2. *Identity of "Operators" Under the USTA.*—An issue not so easily resolved is the identity of "operators" under the USTA. Section 8(b) of the USTA imposes liability for corrective action resulting from a release from an underground storage tank on a person who "owned or operated" the UST at the time of the leak.<sup>209</sup> There was no evidence in the record that either Shell or Unocal ever owned the West Point station, so they would only be liable to the

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199. *Id.* at 967.

200. IND. CODE § 13-23-13-8(b) (1998).

201. *See Meyer*, 705 N.E.2d at 970.

202. *Id.*

203. *Id.*

204. *Id.* at 971 (citing CERCLA, 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997)).

205. 42 U.S.C. § 9613(f)(1) (1994).

206. *Meyer*, 705 N.E.2d at 971.

207. *See id.*

208. *See id.*

209. IND. CODE § 13-23-13-8 (1998).

plaintiffs, if at all, if they were operators of that station.<sup>210</sup>

The term “operator” has a two-pronged definition as “[o]perator for purposes of IC 13-23 . . . means a person: (1) in control; or (2) having responsibility for; the daily operation of an underground storage tank.”<sup>211</sup> The trial court and the court of appeals based Shell’s and Unocal’s liability on the “responsibility for” prong, and the trial court concluded that “[t]he phrase ‘having responsibility for’ means those parties that retained *authority* to control the UST’s and that *should* be responsible as a matter of public policy.”<sup>212</sup> The court stated that it granted transfer to determine the scope of the definition of “operator” under the USTA.<sup>213</sup>

The Landowners argued that Shell and Unocal had “responsibility for the daily control” of the USTs at the West Point station because they retained the ability to control the station through jobber contracts with the bulk plant owner and through threats of debranding.<sup>214</sup> The Landowners further argued that Shell and Unocal should be held to be operators because they designed and profited from a distribution system with locally placed USTs and because they were in the best position to clean up contamination by virtue of their “greater access to technology and vastly greater financial resources.”<sup>215</sup> Shell and Unocal countered by arguing that “control” should mean actual control, not practical leverage over the station owner or manager or the ability “to cajole, influence or demand results from station’s managers.”<sup>216</sup>

To resolve these competing views, the court began by looking for “clues” in the language of the USTA.<sup>217</sup> It found two. First, it noted that the term “operator” included the phrase “daily operation of the underground storage tank.”<sup>218</sup> To the court, “‘daily’ implied at least some continuous level of activity as opposed to installation, repair or removal of a storage tank or performance of some other irregular or infrequent action with respect to it.”<sup>219</sup> Given the technology of the time, the only qualifying “daily” activities were filling the UST, dispensing gasoline from it and measuring its contents.<sup>220</sup> The second “clue” deduced by the court was that the “control” or “responsibility” must relate “to the ‘operation’ of the underground storage tank itself and not to other aspects of the station’s operation or management.”<sup>221</sup>

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210. See *Meyer*, 705 N.E.2d at 971.

211. IND. CODE § 13-11-2-148(d) (Supp. 1999).

212. *Meyer*, 705 N.E.2d at 971 (citation omitted).

213. See *id.* at 972. The court also said that transfer enabled it to resolve a conflict in the court of appeals between this case and *Shell Oil Co. v. Lovold Co.*, 687 N.E.2d 383 (Ind. Ct. App. 1997), *rev’d*, 705 N.E.2d 981 (1998).

214. See *Meyer*, 705 N.E.2d at 971.

215. *Id.*

216. *Id.* at 973.

217. *Id.* at 972.

218. *Id.*

219. *Id.*

220. *Id.* at 972-73.

221. *Id.* at 973.



To determine whether actual control is necessary to satisfy the “in control of” prong of the USTA definition of “operator” or whether ability to control is sufficient, the court analyzed: 1) the federal legislative history of CERCLA and the Resource Recovery and Conservation Act (RCRA)<sup>222</sup> and administrative definitions under those acts; 2) the lender liability provisions under federal<sup>223</sup> and state<sup>224</sup> statutes; 3) the federal leaded fuel ban statute;<sup>225</sup> 4) IDEM’s interpretation of the USTA as evidenced by prior enforcement actions;<sup>226</sup> and 5) public policy.<sup>227</sup> Although some of these factors proved inconclusive, the court found it significant that the “operator” definition in the USTA is identical to the definition in RCRA, which unlike CERCLA does not impose liability on parties who supply the contaminant.<sup>228</sup> Shell and Unocal thus cannot be liable under the USTA merely because they supplied the gasoline from their refinery.<sup>229</sup> The court also found it significant that the legislature had statutory models available to it where liability was imposed on refiners for the actions of their branded stations even if those stations were independent.<sup>230</sup> The legislature’s failure to provide for refiner liability under the USTA despite the existence of these models led the court to conclude that actual control is required.<sup>231</sup> Specifically, the court said:

[A]s we read the current Indiana UST Act, the legislature has not seen fit to constitute every refiner with a brand an operator of the independent station flying its flag. Neither the language of the statute nor its limited legislative history suggests that the Oil Companies who supplied the gasoline to the distribution system, without more, are operators under the Act. And practical leverage over the station owner does not suffice whether through threat by a refiner of debranding, a threat by a bank to call a loan, or any other action by a person that may be able to influence or even dictate how the station’s operations are conducted, but has no actual or contractual relationship to the daily operation of the tank.<sup>232</sup>

Having decided that actual control over the daily operations of a UST is necessary for a party to be an “operator,” under the USTA, the court proceeded to determine if Shell or Unocal exercised such control over the West Point station.<sup>233</sup> The court reasoned that the identity of persons who had

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222. 42 U.S.C. §§ 6901 to 6992k (1994 & Supp. III 1997).

223. *See id.* § 6991b(h)(9) (Supp. III 1997).

224. *See* IND. CODE § 13-11-2-148(c) (Supp. 1999).

225. *See* 42 U.S.C. § 7545(n) (1994).

226. *See Meyer*, 705 N.E.2d at 976-77.

227. *Id.* at 977.

228. *See id.* at 974-75.

229. *See id.* at 974.

230. *See id.* at 976.

231. *See id.* at 977.

232. *Id.*

233. *See id.*

“responsibility for the daily operation” of the tanks, and therefore had liability as an “operator,” turned on: “(1) what constituted the daily operation of the tanks, (2) who did these things, (3) in what capacity that person was acting and (4) who is responsible for that person’s actions in that capacity.”<sup>234</sup>

As previously noted, the “daily operations” of a UST at the time of the leak at the West Point station consisted of filling the tank, measuring the level of gasoline in it, and dispensing gasoline from it. The person who performed daily operations at the West Point station was Smith.<sup>235</sup> Smith conducted these activities as an independent contractor and not an employee of Shell or Unocal. If liability were to be found for Shell or Unocal, it would depend on the court’s resolution of the fourth question.

Answering that question required the court to review established principles of derivative or vicarious liability.<sup>236</sup> Although noting that “[a]s a general matter, under the common law a principal is not liable for damages resulting from an independent contractor’s wrongful acts or omissions,”<sup>237</sup> the court added that “[u]nder accepted tort doctrines, however, an independent contractor may create liability for a principal under some circumstances.”<sup>238</sup> The court held that these common law rules are applicable in the context of operating a UST “to the same extent that common law liability exists for the contractor’s actions.”<sup>239</sup> Included among those circumstances recognized by Indiana law is one in which a contract requires the performance of intrinsically dangerous work or constitutes a nuisance.<sup>240</sup>

The court found that “[f]illing a tank that is known to have the potential to leak and, if it does, to contaminate others’ water supplies has elements that are strongly reminiscent of” the doctrines imposing liability on a principal for intrinsically dangerous work required by his contract with the independent contractor.<sup>241</sup> Accordingly, the court determined that Shell had the “requisite contact with the ‘daily operations of the underground storage tank’ at West Point to support liability under the [USTA].”<sup>242</sup>

Shell’s liability, however, was not unlimited. The USTA imposes liability on persons who are owners and operators “at the time the release occurred.”<sup>243</sup> This limitation meant that Shell was derivatively liable for Smith’s “responsibility for the daily operation” of the UST at West Point only for the period from 1946 to 1963 when Smith worked as an independent contractor for

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234. *Id.*

235. *Id.* at 967.

236. *See id.* at 977-78.

237. *Id.* at 978.

238. *Id.*

239. *Id.*

240. *See id.*

241. *Id.*

242. *Id.* at 979.

243. IND. CODE § 13-23-13-8(b) (1998).

Shell.<sup>244</sup> After 1963, Smith worked for Murphy, so Smith's actions could no longer bind Shell after that year. Because Smith never worked as a commissioned driver for Unocal, there was no time period that he could bind that company.<sup>245</sup>

Accordingly, the supreme court reversed that part of the trial court's decision that imposed any liability on Unocal and that imposed liability on Shell for the period 1963 to 1971.<sup>246</sup> The court also "summarily affirm[ed] the decision of the court of appeals with respect to the following issues: future corrective action costs, medical monitoring costs, attorney fees, and the trademark jury instruction."<sup>247</sup>

#### *D. The Legislature's Response*

The supreme court's decision in *Meyer* was not welcome news in the petroleum industry, and work on a legislative response began swiftly. That response was House Enrolled Act 1578, which became effective on July 1, 1999, barely six months after the *Meyer* decision. The Act amended the USTA definition of "operator" by excluding a person who is not an owner or lessee of a facility where a UST is located, who does not participate in the management of the facility and "is engaged only in: (i) filling; (ii) gauging; or (iii) filling and gauging; the product level in the course of delivering fuel to an underground storage tank."<sup>248</sup>

By this amendment, the legislature struck out two of the three activities identified by the supreme court as supporting the "daily operation" of a UST. Only the act of dispensing gasoline, which would be done only by an owner or lessee of a gasoline station and not by a refiner or a jobber distributing that gasoline to an independently owned station, remains unexcepted. As a result, the immunity from private actions under the USTA recognized in the *Shell Oil Co.* case for refiners dealing with independent stations now extends to jobbers in the next level of distribution.

#### *E. Continued Viability of the Shell Oil Co. v. Meyer Decision*

Does the supreme court's decision have any continuing value after the 1999 legislative amendments to the USTA? Even though the court's holding on the "principal issue" it identified in the case has been superceded by legislative action, the opinion remains an important statement of several principles that were included in the court's opinion and were not affected by the legislatures response.

First, the USTA recognizes a private right of action of individuals to seek contributions toward the costs of remediating contamination and to seek related damages. Second, the Act contemplates payment of costs by owners and

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244. *Meyer*, 705 N.E.2d at 980-81.

245. *See id.* at 979-80.

246. *See id.* 705 N.E.2d at 981.

247. *Id.*

248. IND. CODE § 13-11-2-148(e)(2)(C) (Supp. 1999).

operators before or after cleanup. Third, more than one person can be an operator of the same UST for liability purposes, so absence of actual ability to control the daily operation of a UST does not exclude the presence of having responsibility for such operation. Fourth, it is not necessary that a person perform every act constituting daily operation to be liable; performance of one included act can be sufficient. Fifth, liability under the USTA is strict and is retroactive to the time the release occurred.

In addition to the substantive rules announced in the *Meyer* decision, the court's approach to the issues presented by the case is also instructive. At least twice in the opinion, the court displays sympathy toward arguments made by the Landowners that would expand liability of oil refiners. In its discussion of IDEM's stated administrative policy of enforcing the USTA against refiners, the court states that "[m]uch as we might agree with the policy considerations underlying IDEM's current position"<sup>249</sup> it had to reject the agency's argument as contrary to its actions in practice. Also, the court noted that "[t]he Landowners and amici offer compelling public policy arguments in favor of imposing liability on those who both profited from the sale of the contaminant and were in the best practical position to assure its containment."<sup>250</sup>

At the same time, the court displays an appropriate respect for the separation of powers of the legislative and judicial branches. The court interpreted the USTA to discover the legislature's intent and resisted any attempts made to persuade it to make policy not supported by that intent. In the words of the court, "[W]e are not free to adopt on our own a policy the legislature has rejected."<sup>251</sup>

Although the liability of jobbers in distributing petroleum to independent retail stations is settled by the 1999 amendments to the USTA, the substantive principles applicable to persons who qualify as an operator and the judicial approach identified above will likely find a place in the analysis of other issues that will arise in the future under the USTA and other environmental laws.

#### IV. LANDLORD-TENANT RELATIONS: IDENTIFYING THE ROLES OF TORT LAW AND CONTRACT LAW

The fourth area of property law that received notable attention in 1999 is landlord-tenant relations in the context of residential leases. Cases in this area often involve claims by tenants against landlords for damages resulting from personal injuries incurred at the leased premises. Tenants and their advocates urge the expansion of common law causes of action to broaden the scope of landlords' liability, and landlords and their advocates argue for holding fast to established common law principles to restrict the scope of their liability. One of the ways that tenants have sought to expand landlord liability is to seek recognition of implied warranty claims in addition to established tort claims. Three appellate court opinions that were issued during the survey period,

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249. *Meyer*, 705 N.E.2d at 976-77.

250. *Id.* at 977.

251. *Id.*

including a supreme court opinion authored by Chief Justice Shepard, make significant contributions toward clarifying the roles of tort principles and contract principles in defining the rights and duties of tenants and landlords in Indiana. These cases are: *Vertucci v. HNP Management Co.*,<sup>252</sup> *Lake County Trust Co. v. Wine*,<sup>253</sup> both from the court of appeals, and *Johnson v. Scandia Associates, Inc.*<sup>254</sup> issued by a divided supreme court.

*A. Contractual Limitation of Landlord Liability for  
Personal Injury Claims by Tenants*

*Vertucci* involved a tort claim asserted by a tenant against her landlord for injuries she sustained when she was sexually assaulted by a non-resident at the swimming pool of the apartment complex where she resided.<sup>255</sup> The evidence revealed that, prior to commencing occupancy, the plaintiff's father inquired about security at the apartments because his minor children, including the plaintiff, would be left alone during the day while he and his wife worked. An employee of the landlord told the father that identification cards were issued to tenants and that tenants were to carry the cards, especially when using common areas, because the cards would be checked to determine that users of common areas were tenants of the apartments. According to the father, no one ever checked the identification cards.<sup>256</sup>

The landlord filed a motion for summary judgment on the tenant's complaint. The landlord argued that it had no duty under the common law to protect tenants from an unforeseeable criminal attack by a third party, that it never assumed such a duty, and that the lease contract contained a disclaimer of liability for the tenant's injuries. The tenant contended that the landlord had assumed a duty to protect its tenants by issuing the identification cards and that the disclaimer language in the lease did not apply to the sexual assault of the plaintiff. The trial court agreed with the landlord and granted its motion for summary judgment.<sup>257</sup>

The court of appeals reversed and remanded.<sup>258</sup> The court began its analysis by determining the effect of the exculpatory clause in the *Vertucci*'s lease. That clause provided:

Tenant agrees that Landlord . . . shall not be liable for any damage or injury to Tenant . . . for injury to person or property arising from theft, vandalism, fire, or casualty occurring in the premises or building. LANDLORD IS NOT RESPONSIBLE FOR, AND DOES NOT GUARANTEE, THE SAFETY OF TENANT, TENANT'S GUESTS, FAMILY, EMPLOYEES, AGENTS, OR INVITEES. TENANT

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252. 701 N.E.2d 604 (Ind. Ct. App. 1998).

253. 704 N.E.2d 1035 (Ind. Ct. App. 1998).

254. 717 N.E.2d 24 (Ind. 1999).

255. See *Vertucci*, 701 N.E.2d at 605.

256. See *id.*

257. See *id.* at 606.

258. See *id.* at 608.

AGREES TO LOOK SOLELY TO THE PUBLIC POLICE  
AUTHORITIES FOR SECURITY AND PROTECTION. ANY  
SECURITY THAT MAY BE PROVIDED IS SOLELY FOR THE  
PROTECTION OF LANDLORD'S PROPERTY. . . .<sup>259</sup>

The court approached the lease like any other form of contract. Applying the contract interpretation principle that terms in a contract are to be strictly construed against the drafter of the document, the court concluded that a sexual assault did not fit within the definition of a "casualty" and, therefore, the exculpatory clause did not preclude the landlord from assuming a duty to protect the plaintiff.<sup>260</sup>

Finding no contractual bar to liability, the court then determined whether the landlord owed a duty to the plaintiff to protect her from sexual assault by a non-resident. The starting point for the court was the traditional common law rule that "a landlord does not have a duty to protect a tenant from loss or injury due to the criminal actions of a third party."<sup>261</sup> The court noted an exception to the general rule, however, by which a duty to protect tenants can be imposed on a landlord: "[A] duty may be imposed upon one, who, by affirmative conduct or agreement assumes to act, even gratuitously, for another."<sup>262</sup> As a result, "liability to protect a tenant from criminal activity may be imposed on a landlord who voluntarily undertakes to provide security measures, but does so negligently."<sup>263</sup>

To determine whether the issuance of identification cards constituted a voluntary undertaking to provide security measures, the court focused on two previous cases, *Nalls v. Blank*,<sup>264</sup> and *Bradtmiller v. Hughes Properties, Inc.*<sup>265</sup> In *Nalls*, a tenant claimed that her landlord was liable for injuries resulting from an assault by a third party who had gained access to the floor of the building where the plaintiff's apartment was located. The appellate court reversed the trial court's grant of summary judgment in favor of the landlord. The court concluded that by providing self-closing and self-locking doors both at the point of entry into plaintiff's building and at the point of entry onto her particular floor "the trier of fact could reasonably infer that [the landlord] had undertaken to provide security to [the tenant] against criminal attack by a third party."<sup>266</sup>

In *Bradtmiller*, the landlord was found not liable for injuries sustained by a tenant when he was assaulted by a third party as part of an altercation relating to the tenant's reserved parking space.<sup>267</sup> The tenant had reported the unauthorized

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259. *Id.* at 606 (citation omitted).

260. *Id.* (citing *Center Management Corp. v. Bowman*, 526 N.E.2d 228, 236 (Ind. Ct. App. 1988)).

261. *Id.* at 607.

262. *Id.* (citation omitted).

263. *Id.* (citation omitted).

264. 571 N.E.2d 1321 (Ind. Ct. App. 1991).

265. 693 N.E.2d 85 (Ind. Ct. App. 1998).

266. *Vertucci*, 717 N.E.2d at 607 (quoting *Nalls*, 571 N.E.2d at 1323).

267. *Bradtmiller*, 693 N.E.2d at 87.

use of his space to the landlord on several occasions, and one of the landlord's employees said she would "see what she could do." The appellate court affirmed the trial court's entry of summary judgment in favor of the landlord, holding that "notwithstanding notice to the landlord of violations of the parking policy, criminal activity was not a reasonably foreseeable risk of failing to enforce the parking policy and therefore, there was no duty on the part of the landlord to protect the tenant from the injury he sustained."<sup>268</sup>

The court in *Vertucci* found that case to be more like *Nalls*, where the self-closing and self-locking doors were installed for a safety purpose, than *Bradtmiller*, where the assigned parking space policy was created for a convenience purpose.<sup>269</sup> Accordingly, the court concluded that the trier of fact could infer from the issuance of identification cards that the landlord "had undertaken to provide security to the Vertuccis against criminal activity by non-residents by keeping non-residents from the premises."<sup>270</sup>

The *Vertucci* case contains two important principles for determining rights of tenants and responsibilities of landlords in tort claims for personal injuries caused by criminal acts of third parties. First, a safety versus convenience test is applied to determine whether a landlord has assumed a duty to protect its tenants. The precise nature and extent of acts that will support imposition on landlords of an assumed duty to protect tenants is left for future cases to decide.<sup>271</sup> When, for example, does an apartment feature cease to be an amenity and become a security item? Second, traditional contract interpretation principles, including construing ambiguities in a lease against the landlord-drafter, are applied to residential leases as in any other contract. As will be shown below, although application of traditional contract principles in the context of exculpatory clauses in tort cases may benefit tenants, an analytical approach that treats residential leases in the same manner as all other contracts largely benefits landlords.

#### *B. Contract and Tort Analysis of Tenants' Challenges to Eviction Proceedings*

In *Lake County Trust Co.*, a mobile home park landlord sued to evict tenants for failure to pay rent. Each of the tenants had executed written leases with the landlord, which contracts provided that all tenancies were month-to-month. When the landlord raised lot rents seven percent (\$15.00 per month) many of the tenants protested. After being served with notices to quit, some tenants were

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268. *Id.*

269. *See Vertucci*, 717 N.E.2d at 608.

270. *Id.*

271. Even if a duty to protect is assumed by a landlord, the tenant must still prove breach of that duty, causation and damages. Also, the court does not discuss, except in footnote 1, whether a duty can be imposed on a landlord by way of the three-part analysis that includes foreseeability of harm arising from criminal actions as illustrated in *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

permitted to cure their default by paying the increased rent plus late fees.<sup>272</sup> Other tenants refused to pay, and the landlord commenced eviction proceedings. The tenants filed counterclaims against the landlord alleging that the landlord's actions constituted: 1) a breach of a contractual duty of good faith and fair dealing; 2) an abuse of process; 3) a violation of civil rights under 42 U.S.C. § 1983; and 4) a breach of "equity." The trial court also certified the case as a class action. The landlord filed a motion for summary judgment on all of the tenants' counterclaims and a motion to decertify the class, both of which the trial court denied.<sup>273</sup>

The appellate court disposed of the tenants' abuse of process, civil rights and equity claims with little difficulty. The court held that the landlord was not liable for abuse of process because eviction for failure to pay rent "is a proper purpose contemplated by Ind. Code § 16-41-27-30,"<sup>274</sup> and that "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions."<sup>275</sup> The court also held that the tenants failed to allege any "state action" as required by § 1983 and that "an ejectment in retaliation for the exercise of First Amendment rights is, without more, 'purely private' action."<sup>276</sup> Finally, the court held that the tenants could not proceed on their "equity" claim because they had not specified any particular theory they wished to pursue, and the stated counterclaims were "without merit."<sup>277</sup> The court also concluded that the tenants' "equity" claim was barred because the tenants themselves had unclean hands as they intentionally refused to comply with the terms of the lease.<sup>278</sup>

The substantive claim that generated the most discussion and that will be most influential in adjusting rights and obligations of tenants and landlords in the future is the contract analysis of the tenants' good faith and fair dealing claim. The tenants' argument was based on section thirteen of the lease, which stated that "the posted rules and regulations . . . attached to this lease are part of this lease at the time of execution."<sup>279</sup> The preamble to the lease contained a policy statement that the mobile home park "is conceived as a community of neighbors living in harmony . . . not by rigid rules and regulations. . . . When these standards are fair, reasonable and logical . . . when they are applied with on an impartial basis . . . each resident can be assured a maximum of freedom, privacy, safety and comfort. . . ."<sup>280</sup> The tenants contended that this preamble statement imposed on the landlord a duty of good faith and fair dealing which was

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272. See *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1038 (Ind. Ct. App. 1998).

273. See *id.* at 1038.

274. *Id.* at 1040.

275. *Id.* at 1040-41 (quoting *Reichhart v. City of New Haven*, 674 N.E.2d 27, 30 (Ind. Ct. App. 1996)).

276. *Id.* at 1041.

277. *Id.* at 1042.

278. *Id.*

279. *Id.* at 1039 (citation omitted).

280. *Id.* (citations omitted).



expressly incorporated into the lease by section thirteen.

The appellate court disagreed and reversed the trial court's denial of the landlord's motion to dismiss the tenants' contract claim along with their other three claims.<sup>281</sup> The court's approach to the issue may be as significant to the ongoing battles between tenants and landlords as the decision itself. The court began its analysis with a statement that reverberates in the supreme court's opinion in *Johnson v. Scandia Associates, Inc.* and in cases beyond the survey period:<sup>282</sup> "Rules of construction for contracts apply to leases."<sup>283</sup> While this statement might be considered a truism by landlords, it foreshadows the refusal of the supreme court to impose an implied warranty of habitability on landlords as part of every residential lease.

The court in its contract analysis noted that the duty of good faith and fair dealing "is applied in contract law only under limited circumstances such as those involving insurance contracts."<sup>284</sup> The court acknowledged, however, that even outside insurance contracts a duty of good faith and fair dealing "may apply to a contract where the terms of the contract are ambiguous or where the terms

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281. See *id.* at 1040.

282. See *Zawistoski v. Gene B. Glick Co., Inc.*, 727 N.E.2d 790 (Ind. Ct. App. 2000). In *Zawistoski*, a tenant sued her landlord for personal injuries she received when she tripped on a raised portion of a sidewalk at the apartment complex. The landlord had advertised the apartment complex as designed for individuals over age 62 and accessible for individuals with limited mobility. The tenant asserted claims sounding in negligence, breach of contract and breach of express warranty. The landlord moved for summary judgment on the breach of contract and breach of warranty claims, which motion was granted. See *id.* at 792. On appeal the tenant asserted that a warranty was created by paragraph 10(a)(2) of the lease contract, which contained the landlord's agreement to "maintain the common areas and facilities in a safe condition." *Id.* The court rejected the tenant's arguments and held that: 1) the statements in paragraph 10(a)(2) were merely a restatement of the landlord's common law duty to its lessees; 2) a finding of a warranty as argued by the tenant would conflict with other language in the lease by which the landlord expressed its intent not to be an insurer of its lessees' safety; and 3) a finding of a warranty would render meaningless other provisions of the lease. See *id.* at 794. The court also rejected the tenant's argument that a "higher standard" of conduct should be imposed on the landlord because the lease was directed at "elderly renters" and her argument that the lease represented a "contract of adhesion" entered into by parties with "vastly different bargaining power." *Id.* "While it may be true that the parties were in somewhat unequal bargaining position, this is true in many contractual relationships. Further, in this case, *Zawistoski* certainly had the option of leasing an apartment elsewhere if she did not like the terms of the lease with Glick. Moreover, we reject *Zawistoski*'s attempt to portray people over the age of sixty-two as feeble, infirm, and requiring assistance with entering into a basic contract." *Id.* Using as its guide the principles that "[a] lease is to be construed in the same manner as any other contract," *id.* at 792, and that "the intention of the parties to a contract is to be determined from the four corners of the document," *id.*, the court failed to find any express warranty by the landlord and refused "to read into the contract terms to which the parties did not agree." *Id.*

283. *Lake County Trust Co.*, 704 N.E.2d at 1039.

284. *Id.*

expressly apply such a duty”<sup>285</sup> and that a contract may incorporate another unsigned writing, like the preamble, “when the contract expressly incorporates the terms of the writing.”<sup>286</sup> The court concluded that although the language of the lease incorporated the terms of the rules and regulations, each document “retain[ed] [its] original meaning,” which means that the reference to “fairness” in the preamble was restricted to that document and did not become a term of the lease contract.<sup>287</sup>

As an alternative to the attempt to incorporate an express duty of good faith and fair dealing into the lease by way of the preamble, the tenants also urged the court to imply the existence of such a duty into leases “in general.” The court stated that “contract law does not require such an duty”<sup>288</sup> and quoted a 1990 Indiana Supreme Court case for the proposition that

[i]t is not the province of courts to require a party acting pursuant to such a contract to be “reasonable,” “fair,” or show “good faith” cooperation. Such an assessment would go beyond the bounds of judicial duty and responsibility. It would be impossible for parties to rely on the written expression of their duties and responsibilities.<sup>289</sup>

The court also rejected any notion that tenants are entitled to special considerations outside of traditional contract law principles or that landlords have undue influence in the execution of leases because they are sophisticated while tenants are unsophisticated. The court wrote, “Under Indiana Law, a person is presumed to understand and assent to the terms of contracts they sign.”<sup>290</sup> The court closed its analysis of the tenants’ disparate bargaining power argument by stating:

Aside from the fact that Williamsburg is a ‘corporate landlord,’ the [tenants] cannot point to any undue influence or unequal bargaining power exercised by Williamsburg in the execution of their respective leases; furthermore, as a matter of law, we are unwilling to extend a duty of good faith and fair dealing to corporate landlords. Like all tenants, the residents were free to execute a lease with a different landlord if the terms of the lease were unacceptable. By asking this court to apply a duty of good faith to an unambiguous lease, the [tenants are] effectively requesting this court to rewrite the terms of an agreement where the intent of the parties is clear. Such an exercise of our discretion is without the boundaries of our authority and in clear contravention of

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285. *Id.*

286. *Id.*

287. *Id.* 1040.

288. *Id.*

289. *Id.* (quoting *First Federal Sav. Bank of Ind. v. Key Markets, Inc.*, 559 N.E.2d 600, 604 (Ind. 1990)).

290. *Id.*

contract law as outlined by our supreme court.<sup>291</sup>

This contract law “as outlined by our supreme court” in the context of landlord-tenant disputes was largely reaffirmed approximately nine months later in the *Johnson* case.

*C. The Circumscribed Role of Contract Law in Claims for Breach of Warranties of Habitability in Residential Leases*

*Johnson v. Scandia Associates, Inc.*<sup>292</sup> involves a tenant’s attempt to recover damages from her landlord for personal injuries she received from an electrical shock that occurred as she simultaneously touched two appliances in the kitchen of her apartment. The tenant’s complaint asserted claims based on negligence and on an implied warranty of habitability that she contended was incorporated into the lease contract. The landlord filed motions to have both claims dismissed for failure to state a claim. The trial court dismissed the warranty claim but refused to dismiss the negligence claim.<sup>293</sup> Following a defense verdict on the negligence claim, the tenant appealed the dismissal of her breach of warranty claim. The supreme court, in a split decision,<sup>294</sup> affirmed the trial court’s ruling dismissing the tenant’s breach of warranty claim.<sup>295</sup> The court recognized “for the first time that such a warranty may be implied in some leases”<sup>296</sup> but concluded that Johnson had not alleged facts to support the imposition of an implied warranty of habitability into her particular lease.<sup>297</sup>

The supreme court’s analysis consists of two parts: determining the conditions under which a warranty of habitability will be implied in a residential lease, and the nature of the damages that can be awarded to a tenant who proves a breach of such a warranty. Johnson did not allege that the landlord had made any express warranties about the apartment; instead, she based her complaint on a warranty of habitability that she contended was implied into her written lease.<sup>298</sup> The tenant further acknowledged that Indiana law does not recognize warranty claims as a basis for a personal injury action, but she argued that

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291. *Id.*

292. 717 N.E.2d 24 (Ind. 1999).

293. *See id.* at 26.

294. Chief Justice Shepard wrote the opinion of the court and was joined by Justices Sullivan and Selby. Justice Boehm concurred in the result but issued an opinion agreeing with dissenting Justice Dickson that the law “implies a warranty of habitability.” *Id.* at 32 (Boehm, J., concurring in part and dissenting in part). Justice Dickson filed a dissenting opinion. *Id.* (Dickson, J., dissenting).

295. *See id.*

296. *Id.* at 26.

297. *See id.* at 32. The court of appeals had affirmed the trial court’s decision in part and reversed in part. Its decision, now vacated, is reported at 641 N.E.2d 51. The supreme court’s summary of the court of appeal’s decision is found at footnote 1. *See Johnson*, 717 N.E.2d at 26 n.1.

298. *See id.* at 26.

recovery for such injuries was proper as “a logical extension of the law.”<sup>299</sup>

To discern the proper analytical approach to be applied to the tenant’s claim, the supreme court reviewed the historical development of the warranty of habitability in Indiana common law, a development that the court described as part of a general expansion of “residential tenants’ bundle of rights.”<sup>300</sup> In the context of the warranty of habitability in the sale of residential housing, the court noted that implicit in its prior holdings was “the notion that the warranty was implied-in-fact in the original parties’ sales contract.”<sup>301</sup> Those prior holdings included *Theis v. Heuer*<sup>302</sup> and *Barnes v. Mac Brown & Co., Inc.*,<sup>303</sup> in which the warranty of habitability was first recognized in the sale of a newly constructed house to the original purchaser and was then extended to benefit subsequent purchasers, at least with regard to latent defects.

The supreme court then reviewed a 1980 case, *Great Atlantic & Pacific Tea Co. v. Wilson*,<sup>304</sup> which held that the implied warranty of habitability does not attach merely on transfer of possession. In that case, a tenant was held not liable to her landlord for injuries caused by a dangerous condition that existed in the premises when the tenant tendered possession back to the landlord.<sup>305</sup> The supreme court identified a unifying principle in these three cases by stating, “In the very least, [these cases] implied that law of contract was the source of the warranty of habitability.”<sup>306</sup>

A fourth relevant precedent was the court of appeals’ decision in *Breezewood Management Co. v. Maltbie*,<sup>307</sup> where, based on the facts of that case, an implied warranty of habitability was found to exist, and to have been breached, in the context of a residential lease.<sup>308</sup> The supreme court found it significant that the damages awarded to the tenant in *Breezewood* for breach of the implied warranty were “damages based on the law of contract” and did not include any personal injury damages.<sup>309</sup> *Breezewood* was further evidence for the supreme court that “[p]lainly, a warranty of habitability, whether in the sale or lease of residential dwellings, has developed in the common law of Indiana, and its roots are in the law of contract.”<sup>310</sup>

Having deduced the roots of the warranty, the court then defined its substance, the manner by which it becomes implied into a lease, and the remedies available if a breach is established. The court identified the substance of the

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299. *Id.*

300. *Id.* at 27.

301. *Id.*

302. 280 N.E.2d 300 (Ind. 1972).

303. 342 N.E.2d 619 (Ind. 1976).

304. 408 N.E.2d 144 (Ind. Ct. App. 1980).

305. *See Johnson*, 717 N.E.2d at 28 (citing *Great Atl. & Pac. Tea Co.*, 408 N.E.2d at 144).

306. *Id.* (citations omitted).

307. 411 N.E.2d 670 (Ind. Ct. App. 1980).

308. *See id.* at 671, 675.

309. *Johnson*, 717 N.E.2d at 28.

310. *Id.*

warranty as a landlord's "affirmative declaration of the apartment's fitness for habitation, that is, as a dwelling place."<sup>311</sup> The court expanded on this statement by adding, "Habitability is not the same as no risk of harm. . . .An apartment can thus provide adequate shelter and amenities, as promised, and still be a place which presents some risk."<sup>312</sup>

The distribution of these risks between tenant and landlord influenced the court's decision concerning the availability of a breach of warranty claim for a tenant. Under tort principles, risks are distributed on the basis of socially dictated duties not to expose others to unreasonable risk of harm. Tort "liability is involuntary, and it is balanced between the parties according to each's comparative fault."<sup>313</sup> By contrast, risks are distributed under contract law on the basis of agreement and consent. Liability under contract principles is strict; parties promise either to perform their obligations under the contract or to compensate the other party for damages resulting from the breach.<sup>314</sup> As a result, "[c]ontracts are private, voluntary allocations by which two or more parties distribute specific entitlements and obligations."<sup>315</sup> According to the supreme court, a warranty of habitability, therefore, requires a voluntary and affirmative promise by the landlord in exchange for some return promise from the tenant. The scope of the promises determines the scope of the warranty. A different approach would require, according to the court, a promise that a tenant would be free from injury and would result in strict liability for landlords.

Freely bargained-for express warranties of habitability voluntarily assumed by a landlord are likely to be rare, so the more common situation addressed by the court in *Johnson* is under what conditions will an implied warranty be imposed upon a landlord. Because the court characterized the "[i]mposition of an unbargained-for obligation on a contract . . . [as] derogat[ing] the common law,"<sup>316</sup> it concluded that "the law must state with fair specificity the warranty being imposed and the class of transactions covered by it."<sup>317</sup>

One possible source of the terms of such an imposed warranty is building or housing code provisions, which can contain prescribed standards for housing conditions. The court refused to impose such codes automatically into all residential leases absent "explicit statutory or regulatory language imposing on landlords the obligation to warrant a codified standard or habitability in property rented as a residence."<sup>318</sup>

Absence of a warranty automatically imposed by law into all leases does not, however, exclude the possibility that a warranty of habitability can be implied in-fact into individual leases. Such warranty implied in-fact can arise "from the

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311. *Id.*

312. *Id.* at 29.

313. *Id.*

314. *See id.* at 29 & n.7.

315. *See id.* at 29.

316. *Id.* at 30.

317. *Id.*

318. *Id.*

course of dealing between the parties and may be evidenced by the acts done in the course of performance or by ordinary practices in the trade.”<sup>319</sup> The court identified course of dealing as the “best way of viewing *Breezewood*.”<sup>320</sup> The court in *Breezewood* had held that “a landlord could be held liable to his tenant on a breach of implied warranty, at least where there was a housing code and city inspectors had cited the landlord with multiple violations.”<sup>321</sup> For the supreme court the source of the implied in-fact warranty in *Breezewood* was the landlord’s actions and not the existence of the building code itself. Speaking of the tenant in *Breezewood*, the supreme court stated that, “[a]t most, the tenant’s expectation that conditions [in her apartment] would be made to comply with the housing code arose from the landlord’s post-inspection promise to repair.”<sup>322</sup> Because the tenant in *Johnson* did not identify any local law as the warranty she sought to have implied into her contract and did not identify any facts to support implication of the warranty into the lease as a result of the landlord’s conduct, the supreme court affirmed dismissal of her breach of warranty claim.<sup>323</sup>

The supreme court found the roots of a warranty of habitability claim in contract law, and so it also found there limitations on the remedies available for breach of that warranty. The court stated, “Consequential damages may be awarded on a breach of contract claim when the non-breaching party’s loss flows naturally and probably from the breach and was contemplated by the parties when the contract was made.”<sup>324</sup> This rule “generally limits consequential damages to reasonably foreseeable economic losses.”<sup>325</sup> Accordingly, a plaintiff can recover for personal injuries on a contract claim “only when the particular injury was within the parties’ contemplation during contract formation.”<sup>326</sup> Such a showing may be made by reference to an express contract term in the lease or by reference to evidence permitting it to be implied into the lease.<sup>327</sup> In either event, the warranty must be “derive[d] from the agreement between the tenant and the landlord.”<sup>328</sup> *Johnson* could not meet this requirement, so the supreme court concluded that her claim was also subject to dismissal on that basis.<sup>329</sup>

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319. *Id.* at 30-31.

320. *Id.* at 31.

321. *Id.* at 28 (citation omitted).

322. *Id.* at 31.

323. *See id.* at 32.

324. *Id.* at 31.

325. *Id.* (citing *Strong v. Commercial Carpet Co.*, 322 N.E.2d 387, 391-92 (Ind. Ct. App. 1975)).

326. *Id.* (citing *Strong*, 322 N.E.2d at 391-92).

327. *See id.*

328. *Id.* at 32.

329. *See id.*

*D. The Status of Breach of Warranty Claims After  
Johnson v. Scandia Associates, Inc.*

The *Johnson* decision was welcome news for landlords and a disappointment for tenants. The supreme court adhered to traditional common law contract principles and treated residential leases in the same manner as any other type of contract. The court also viewed residential leases against a “freedom of contract” model in which landlord and tenant have equal bargaining power and a ready supply of alternative housing sources for tenants if mutually acceptable lease terms cannot be achieved. Finally, the court views such leases against an economic model in which a residential lease represents a negotiated package of benefits and obligations resulting in a balance of the landlord’s interests and the tenant’s interests. Such models were also at work in *Lake County Trust Co. v. Wine*, and their validation by the supreme court will certainly result in their use in subsequent cases, as can be seen in *Zawistosky v. Gene B. Glick Co., Inc.*

With such models as the foundation for the supreme court’s opinion, it is not surprising that the court refused to hold that an implied warranty of habitability is implied by law into every residential lease. One can certainly question the constraint the court felt to follow traditional common law principles and not to “impose” an unbargained-for warranty term into a residential lease. The court acknowledged its role in establishing a warranty of habitability in the sale of residences, both to original and to remote buyers.<sup>330</sup> The court would also have been aware of existing law in which insurance contracts are subjected to a different type of analysis than other types of contracts<sup>331</sup> and of warranties implied by law into sales contracts under the Uniform Commercial Code.<sup>332</sup>

One can also question the validity of the analytical models chosen by the court to judge residential leases. Do the majority of tenants of residential apartments bargain for the inclusion or exclusion of terms, including habitability, in a lease? Do they have an equal understanding of lease terms and a supply of alternatives in the marketplace if lease negotiations break down?

The *Johnson* opinion is not totally one-sided, however, as the court does “recognize for the first time” that a warranty of habitability “can be implied” in residential leases.<sup>333</sup> Even though express inclusion in a residential lease is not a likely occurrence, the court leaves open at least two ways in which a warranty of habitability can be implied. The first is actions taken by the lessor. Such actions can take a variety of forms, and landlords will continue to face claims by tenants asserting that some action by the landlord supports the existence of a warranty.

The second is housing or building codes. Even though the court refused to define a warranty of habitability by the building code applicable to *Johnson*’s

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330. See *Johnson*, 717 N.E.2d at 27-28.

331. See *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1039 (Ind. Ct. App. 1998).

332. See IND. CODE § 26-1-2-314, -315 (1998); *Zawistosky v. Gene B. Glick Co., Inc.*, 727 N.E.2d 790, 794 (Ind. Ct. App. 2000).

333. *Johnson*, 717 N.E.2d at 26.

apartment, the use of such codes for that purpose was not completely forestalled. The court wrote that habitability is "not necessarily" prescribed by a housing or building code, but it also wrote that "[h]abitability is an objective factual determination which may be codified."<sup>334</sup> The court also stated that "*absent explicit statutory or regulatory language*" it could not "impos[e] on landlords the obligation to warrant a codified standard of habitability in property rented as a residence. . . ."<sup>335</sup> The necessary corollary of this statement is that legislative and administrative bodies are free to create such explicit language that will impose an implied warranty of habitability into residential leases if that result is desired by the electorate. Such warranties are already statutorily imposed on a state-wide basis for the new construction<sup>336</sup> and remodeling<sup>337</sup> of single family residences.

The court appears to sanction local ordinances and regulations to define the standard for warranty of habitability for that locale as it speaks of "[a] community's adoption of a building or housing code."<sup>338</sup> The court does not appear troubled by the prospect of a patchwork of local codes and resulting warranties as it acknowledges that such codes "vary enormously in their prescriptions."<sup>339</sup> Thus, the next battleground concerning the warranty of habitability may well be in the city- and county council chambers around the state. If such explicit codes imposing a codified standard of habitability are enacted, the role of the courts will shift from common law contracts analysis to interpreting the codes to carry out the intent of the legislative body in mandating a standard of habitability in residential leases.

#### CONCLUSION

Property law has been described as an area that "usually develops in an evolutionary fashion" and where the rate of change is "measured in terms of decades and centuries rather than in months and years."<sup>340</sup> That characterization is not appropriate for property law in Indiana in the past year. In this one single year, at least four major developments occurred: 1) the law of mechanic's liens was changed to abolish the relation back principle and no-lien contracts with regard to the improvement of commercial real estate; 2) the principle of subagency was abolished, and the duties real estate licensees owe to their clients is now based on working relationship; 3) the supreme court and the legislature

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334. *Id.* at 30.

335. *Id.* (emphasis added).

336. *See* IND. CODE § 32-15-7 (1998).

337. *See id.* § 24-5-11.5.

338. *Id.*

339. *Id.*

340. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT 455 (West Group 5th ed. 1998).



defined the term “operator” for purposes of the Underground Storage Tank statute; and 4) the court of appeals and the supreme court spoke on the roles of tort and contract principles in disputes between landlords and tenants. The law of the 2000 survey period and beyond will likely involve cases growing out of the altered legal landscape resulting from these developments.