

2000 SURVEY OF INDIANA CONTRACT LAW

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INTRODUCTION

Questions about contracts arise on a regular basis. This Article surveys key developments in cases involving contracts during the survey period. This Article does not attempt to catalog the majority of those cases, nor does it intend to suggest that other cases during the survey period do not provide significant analysis or application of the law. The cases are divided into topic areas, roughly related to the type of contract involved: agency, insurance, settlement, arbitration, employment, and oral agreements.

I. AGENCY—CAPACITY TO CONTRACT

A seemingly well-settled area of law—an agent's ability to bind the principal—was the subject of two opinions from the Indiana Supreme Court during the survey period. These cases provided the court the opportunity to revisit established areas of law and remind us that even well-established rules cannot be blindly applied, but instead must be evaluated against the nuances of the facts.

In the first case, *Oil Supply Co. v. Hires Parts Service, Inc.*,¹ a man named Dolin owed money to both Oil Supply and Hires. In an effort to get paid, Oil Supply agreed to let Dolin arrange sales of automotive supplies and, in essence, work off his debt. Without mentioning his employment relationship with Oil Supply, Dolin offered Hires 720 cases of antifreeze in payment of his debt. Hires accepted Dolin's offer, Dolin submitted the order to Oil Supply, and Oil Supply shipped 720 cases to Hires. When accepting the shipment, Hires' employee signed a document that showed that the shipment came from Oil Supply. Needless to say, Oil Supply expected to be paid and was unwilling to allow its supplies to be used to pay off Dolin's debt to Hires. Oil Supply sued Hires. The trial court awarded Oil Supply the amount of the antifreeze, but allowed Hires to set off Dolin's debt against the judgment. The court of appeals affirmed and transfer was granted.²

The supreme court began its analysis with the premise that “[a]n agent is one

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1. 726 N.E.2d 246 (Ind. 2000).

2. *See id.* at 248.

who acts on behalf of some person, with that person's consent and subject to that person's control."³ When a party to a transaction does not know that the party with whom it is dealing is acting for a principal, the relationship is called an undisclosed agency, and the party for whom the agent acts is the undisclosed principal.⁴ The court affirmed the lower courts' determinations that Oil Supply was an undisclosed principal. However, it disagreed with the analysis applied by the lower courts that allowed Hires to offset Dolin's debt. The supreme court explained that the lower courts applied a well-recognized rule of law, but drew the wrong conclusion from it. The supreme court agreed with the lower courts that:

One who contracts with the agent of an undisclosed principal, supposing that the agent is the real party in interest, and not being chargeable with notice of the existence of the principal, is entitled, if sued by the principal on the contract, to set up any defenses and equities which he could have set up against the agent had the latter been in reality the principal suing on his own behalf.⁵

It disagreed, however, that Hires was not chargeable with notice of the existence of the principal because the shipping documents made no mention of Dolin, but clearly declared that the goods were shipped by Oil Supply. Since Hires had the last opportunity to question the transaction before the loss was suffered, with notice of Oil Supply's involvement, it was not entitled to assert the defense it would have had against Dolin. The court also approved the added benefit of its resolution of this issue: preventing a bad agent from shifting debt.⁶

Justice Boehm, concurring in a separate opinion in which Justice Dickson joined, agreed that the analysis was accurate, but thought a simpler analysis applied. The concurring opinion would have found a fraud perpetrated on both parties and allowed the parties to rescind the contract based on fraud and possibly mutual mistake of fact.⁷

In the second significant opinion on capacity to bind a principal, the supreme court considered the authority of the president of a corporation to bind the corporate entity. In *Menard, Inc. v. Dage-MTI, Inc.*,⁸ Menard offered to purchase part of a parcel of land from Dage, but Dage's board of directors rejected the offer because of certain terms in the offer. Subsequently, the board authorized the president "to offer for sale" the entire parcel. However, the board told the president that he was not authorized to negotiate the terms of the sale or to accept an offer without board approval. Finally, the board told the president that any

3. *Id.* (citing *Dep't of Treasury v. Ice Serv., Inc.*, 41 N.E.2d 201 (Ind. 1942)).

4. *See id.* at 248-49 (citing RESTATEMENT (SECOND) OF AGENCY § 4(3) (1958)).

5. *Id.* at 249 (quoting *Oil Supply Co. v. Hires Parts Serv., Inc.*, 670 N.E.2d 86, 89 (Ind. Ct. App. 1996), *rev'd*, 726 N.E.2d at 246).

6. *See id.* at 248, 250.

7. *See id.* at 251 (Boehm, J., concurring).

8. 726 N.E.2d 1206 (Ind. 2000).

offer with the objectionable terms would be rejected.⁹

Shortly thereafter, Menard tendered a second offer with the same objectionable provisions. However, this proposal was for the purchase of the entire parcel and was \$250,000 more than the minimum purchase price set by the board. During a week of discussions, the president negotiated the terms with Menard and then signed the Menard agreement, representing that “[t]he persons signing this Agreement on behalf of the Seller are duly authorized to do so and their signatures bind the Seller in accordance with the terms of this Agreement.”¹⁰ No one at Dage informed Menard that the president’s authority was limited to solicitation of offers. Upon learning of the signed agreement, the Board attempted to extricate itself from the transaction, but did not give Menard notice of its intent to avoid the agreement until nearly four months later.¹¹

The supreme court, applying the standards for review of findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A),¹² concluded that the evidence supported the trial court’s findings of fact, but it held that the judgment was clearly erroneous because it relied on an incorrect legal standard. The court concluded that the trial court and the court of appeals erroneously relied upon principles of “actual authority” and “apparent authority” when they should have employed principles of “inherent authority.”¹³

Actual authority is created “by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal’s account.”¹⁴ In contrast, apparent authority arises from the principal’s “indirect or direct manifestations to a third party” that give the third party a reasonable belief that the agent was authorized by the principal to take the action.¹⁵ The acts or representations by the agent are not relevant to a determination of apparent authority. The court explained that Indiana has taken an expansive reading of apparent authority and included “inherent agency power” within that concept. Inherent authority differs from apparent authority, however, and ““originates from the customary authority of a person in the particular type of agency relationship so that no representations beyond the fact of the existence of the agency need be shown.””¹⁶ The court, quoting a Seventh Circuit opinion applying a concept articulated by Judge Learned Hand, explained:

9. *See id.* at 1209.

10. *Id.* at 1210.

11. *See id.*

12. When the court reviews findings of fact and conclusions of law entered pursuant to Indiana Trial Rule 52(A), “[t]he findings or judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court’s ability to assess the credibility of witnesses.” *Id.* (citing IND. TRIAL RULE 52(a)).

13. *Id.*

14. *Id.* (quoting *Scott v. Randle*, 697 N.E.2d 60, 66 (Ind. Ct. App. 1998)).

15. *Id.*

16. *Id.* at 1211 (quoting *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987)).

[T]he scope of an agency must be measured “not alone by the words in which it is created, but by the whole setting in which those words are used, including the customary powers of such agents” and thus the contract was enforceable because “the customary implication would seem to have been that [the agent’s] authority was without limitation of the kind here imposed.” The principal benefits from the existence of inherent authority because “the very purpose of delegated authority is to avoid constant recourse by third persons to the principal, which would be a corollary of denying the agent any latitude beyond his exact instructions.”¹⁷

The court relied heavily upon the distinction between an act done by an agent empowered for a specific task and an act done by the corporation through its executive or administrative officers, “which may be termed its inherent agencies.”¹⁸ It is this distinction that controls because the president is the agent through whom a corporation generally acts. The determination of the scope of inherent authority requires more than merely showing an act by such an agent. Rather, the court found that a president acts with inherent authority when three things are shown: (1) the president acts within the usual and ordinary scope of his authority as president; (2) the third party reasonably believes the president was authorized to act; and (3) the third party has no notice that the president’s authority has been limited by the principal.¹⁹

In analyzing the first prong, the court noted a distinction between the Restatement approach and Indiana law as set forth in *Koval v. Simon Telelect, Inc.*,²⁰ which had defined the “usual and ordinary scope” of a president’s authority based upon whether the action was in the “usual and ordinary scope of the business in which [the agent] was employed.”²¹ In contrast, the Restatement (Second) of Agency looks to the agent’s office or station within the corporation to gauge the scope of the agent’s authority.²² The court found the Restatement approach to be more appropriate. This clearly is qualified to the corporate facts at issue here, however, and there arguably may be circumstances in which the *Koval* analysis is more appropriate.

On the second prong of the analysis, the court reasoned that Menard’s actual knowledge that the Board had previously rejected an offer and that the president previously had lacked the power to act for the corporation on this matter did not defeat the president’s inherent authority to act where he was the sole negotiator. Rather, the court looked to “the agent’s indirect or direct manifestations to determine whether Menard could have ‘reasonably believed’ that [the president]

17. *Id.* at 1211-12 (quoting *Cange*, 826 F.2d at 591) (internal citations omitted).

18. *Id.* at 1212.

19. *See id.* at 1212-13.

20. 693 N.E.2d 1299 (Ind. 1998).

21. *Menard*, 726 N.E.2d at 1213 (quoting *Koval*, 693 N.E.2d at 1304).

22. *See id.* (citing RESTATEMENT (SECOND) OF AGENCY § 161 (1958)).

was authorized.”²³ The court explained that this test is in “contradistinction to the test for apparent authority, which looks to the principal’s indirect or direct manifestations” to determine the reasonableness of the third party’s belief.²⁴

The third prong requires consideration of whether the third party has notice that the agent was not authorized to act for the principal and is a “narrow inquiry focusing on the specific transaction.”²⁵ The court noted that Menard had notice previously that the president needed the board’s approval for sale of the land, and “this knowledge would have vitiated the apparent authority of a lower-tiered employee or a prototypical general or special agent”²⁶ because such agents have only apparent authority, not the inherent authority of the president. When the agent has inherent authority derived from his status, the third party is not “required to scrutinize too carefully at a knowledge or awareness that the officer’s authority has possibly been limited.”²⁷ Applying this three-prong analysis, the court held that Dage was bound by its inherent agent’s actions.²⁸

This test of the inherent agent’s actions, while seemingly reasonable on the facts of this case, should serve as a caution to corporations and their attorneys. In applying the standards of this case, when an officer of a corporation acts, his action may bind the corporation even when he acted without authority and when the third party had notice that the officer’s actions required ratification by the principal. Under this analysis, an officer can create authority for himself simply by representing he has authority. A court’s inquiry into the transaction will be very fact-sensitive, and the reviewing court will accord those findings of fact great deference if entered pursuant to Trial Rule 52(A).

In *Menard*, the trial court had before it evidence of the other actions of the president, his role on the board, his negotiations with Menard, and the president’s written acknowledgment that he was authorized to act. Against this evidence, the trial court also had evidence that the Board had previously rejected Menard’s offer and that the president had told Menard that the Board’s rejection was due to the terms.²⁹

The outcome in this case is consistent with the court’s policy of allocating losses to the party most at fault so that the principal who put the agent in a position of trust should bear the loss, but this three-prong test certainly creates some uncertainty in Indiana law.³⁰ As this test is framed, facts could arise under which the third party could have *actual* knowledge that the agent was not authorized to act based upon direct experience with the corporation, but the court could find the agent’s actions to the contrary lead the third party to reasonably

23. *Id.* at 1214.

24. *Id.* at 1214 n.8.

25. *Id.* at 1213 n.6.

26. *Id.* at 1215.

27. *Id.* at 1216 n.10.

28. *See id.* at 1216.

29. *See id.* at 1209-10.

30. *See id.* at 1217 (Shepard, C.J., dissenting) (“I think today’s decision will leave most corporate lawyers wondering what the law actually is.”).

believe that the agent was authorized to act.

II. INSURANCE CONTRACTS

During the survey period, Indiana courts considered a number of issues within the insurance context, including an issue of first impression—notice of cancellation of an endorsement.

A. Notice Requirements

In *Westfield Cos. v. Rován, Inc.*,³¹ Robinson, the son of Rován's president, was involved in an automobile accident while driving a vehicle leased from Rován. Over a period of several years, Robinson leased vehicles through Rován and insured them through Westfield. As each new vehicle was leased, Westfield was informed and asked to substitute the vehicle on the policy. At some point during the period of the policy arrangement, the vehicle was substituted, but the "Lessor Endorsement" was dropped from the policy. Days before the accident at issue in this case, Robinson entered a new lease agreement and Westfield was informed of the change. The issue on appeal was the coverage provided by the lessor endorsement included in the policy at the request of Rován for the benefit of Robinson. Rován argued that the endorsement would have covered Robinson had it not been deleted by Westfield and that Westfield was not entitled to judgment because it failed to provide notice of the cancellation of the policy under the policy's terms.³²

In order to resolve the dispute, the court interpreted the policy. It noted that in considering the interpretation of an insurance contract, ambiguities are construed in favor of the insured because the insurance company "drafts the policy and foists its terms upon the customer. The insurance companies write the policies; we buy their forms or we do not buy insurance."³³ After reviewing the language in the policy, the court concluded that the endorsement covered "any 'leased auto'" and that, had Westfield not deleted the endorsement, it would have covered the vehicle as a replacement for the vehicle described in the policy schedule.³⁴

The court then considered the question of the cancellation. Westfield argued that it was not required to provide notice because it did not cancel the policy, but merely modified it at Rován's request. Further, Westfield argued that it satisfied the notice requirement by sending the agency an Amended Common Policy Declaration, which stated that the endorsement was deleted and changed the policy. The court of appeals disagreed with Westfield's argument. First, it found that the deletion of the endorsement effectively canceled coverage available to Robinson because "cancellation occurs whenever a policy provision is amended

31. 722 N.E.2d 851 (Ind. Ct. App. 2000).

32. *See id.* at 854-55.

33. *Id.* at 856 (citing *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. Ct. App. 1998)).

34. *Id.* at 857.

or deleted so as to discontinue coverage previously available.”³⁵ Next, the court found that Rován’s request to substitute the vehicle did not necessitate deleting the endorsement because the endorsement was not vehicle specific. Accordingly the deletion was unilateral and, in fact, canceled coverage. Finally, it concluded that the cancellation required notice. The Amended Common Policy Declaration was not sufficient to provide the required notice.³⁶

The question of what kind and how much notice is sufficient to effectively cancel an insurance policy was a question of first impression. The court determined that Westfield was contractually required to provide notice of any cancellation of coverage.³⁷ Although the court noted that, in the absence of a specific statutory or contractual description of the notice required, any form of notice of cancellation is sufficient, “such notice must positively and unequivocally inform the insured of the insurer’s intention that the policy cease to be binding.”³⁸ The court agreed with the Supreme Court of Appeals of West Virginia, which held:

A notice of cancellation of insurance must be clear, definite and certain. While it is not necessary that the notice be in any particular form, it must contain such a clear expression of intent to cancel the policy that the intent to cancel would be apparent to the ordinary person. All ambiguities in the notice will be resolved in favor of the insured.³⁹

The relevant portion of the notice sent by Westfield showed only that it had “DELETED FORM CA2001 07/97.”⁴⁰ The court found this language “decidedly cryptic and completely uninformative. All it expresses is that one out of some forty-two forms contained in the Policy had been deleted. It does not suggest the importance or practical consequences of this deletion by positively and unequivocally” notifying Rován that the lessor endorsement no longer applied.⁴¹ Because the policy was over one hundred pages long, with roughly forty-two separately numbered forms, and a person would be required to review the entire document to determine which form had been deleted, the court rejected Westfield’s argument that a reasonable person could determine that cancellation had occurred.⁴²

Under other circumstances, insureds also have notice obligations. In *Gallant Insurance Co. v. Allstate Insurance Co.*,⁴³ Gallant claimed it was not liable under

35. *Id.* at 858 (citing *Plumlee v. Monroe Guar. Ins. Co.*, 655 N.E.2d 350, 355 (Ind. Ct. App. 1995)).

36. *See id.* at 857-59.

37. *See id.* at 858.

38. *Id.*

39. *Id.* (quoting *Connecticut v. Motorist Mut. Ins. Co.*, 439 S.E.2d 418, 421-22 (W. Va. 1993)).

40. *Id.* at 859.

41. *Id.*

42. *See id.*

43. 723 N.E.2d 452 (Ind. Ct. App. 2000).

the insurance policy because it received no notice of a lawsuit against its insured. Two days after an automobile accident, Gallant's insured informed Gallant of the accident. Allstate's insured filed suit, and Gallant provided counsel to its insured. The parties reached a settlement, and Gallant paid Allstate's insured in exchange for a release. Allstate paid its insured on a property damage claim, then filed suit on its subrogation claim against Gallant's insured in a different county. Gallant's insured was served at her residence, but Allstate did not send a copy of the complaint to Gallant or to counsel who had represented the insured. The insured neither answered nor sent the complaint to her counsel or Gallant. While the parties were negotiating the property damage claim, Allstate sought default judgment against Gallant's insured and mailed a copy of the subrogation claim to Gallant. Once default was entered, Allstate moved for proceedings supplemental and listed Gallant as a garnishee defendant.⁴⁴ The policy required that

[i]f claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him

The company will not be obligated to pay . . . unless the company received actual notice of a lawsuit before a judgment had been entered in said suit.⁴⁵

The trial court found that Gallant had notice of the claim. Actual notice, however, means "notice sufficient to permit the insurer to locate the suit and defend it."⁴⁶ "Knowledge of a pending claim or that a lawsuit might be filed is not equivalent to the actual notice that a suit has been filed [as] required under the policy."⁴⁷ Further, the court held that Gallant's participation in settlement negotiations regarding the property damage issues did not constitute a waiver of notice.⁴⁸

The court also noted that Allstate was not an "innocent victim" because it knew of Gallant's duty to defend the insured yet failed to notify either the insured's counsel or Gallant of the subrogation lawsuit. Quoting *Smith v. Johnston*,⁴⁹ the court noted that "[t]he administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment."⁵⁰ Finding that the insured was not entitled to coverage because she failed to provide the required notice and that Allstate's rights were derivative of the insured's, the court reversed the garnishment order and found Gallant not liable to indemnify its insured.⁵¹

44. *See id.* at 454.

45. *Id.* at 455.

46. *Id.*

47. *Id.* at 456.

48. *See id.*

49. 711 N.E.2d 1259 (Ind. 1999).

50. *Gallant*, 723 N.E.2d at 456.

51. *See id.* at 456-57.

While not at issue on this appeal, the result of this determination is to hold the insured responsible for her failure to notify her insurance company of a lawsuit when she had already notified them, and they had defended her, in related matters. It is possible that, on the facts in this case, the insured reasonably believed that her counsel and Gallant also received copies of the materials and that further notice by her was unnecessary. In *Smith v. Johnston*, the court set aside a default despite the defendant doctor's failure to answer because plaintiff's counsel, aware that the doctor was represented by an attorney in a related matter, failed to serve the attorney with at least a courtesy copy of the complaint.⁵² If the insured in this case stood to suffer personally from the failure to indemnify, one wonders if an argument similar to the one made in *Smith* might be available to the insured to protect her from her own negligence.

Similarly, in *Askren Hub States Pest Control Services, Inc. v. Zurich Insurance Co.*,⁵³ an insured exterminator sought coverage under its commercial general liability (CGL) policy after the insurer denied coverage. In this case, the exterminator negligently advised a customer that there was no evidence of termite damage, but after the buyer purchased the home, termites were discovered. The exterminator conducted another inspection and discovered the error, but did not advise its insurance carrier. The court found the facts demonstrated "property damage" that resulted from an "occurrence" as defined in the policy. It disagreed with the exterminator's claim that it had provided reasonable notice to the CGL insurer.⁵⁴

Several forms made up the CGL policy, and more than one notice provision was attached to the separate forms. The pest control form required prompt notice of an occurrence that might result in a claim, with such notice explaining how, when, and where the occurrence took place. It separately required prompt written notice of a claim or action against the insured and required that copies of all legal papers connected with any claim be forwarded to the insurer.⁵⁵

The court noted that notice provisions are "material, and of the essence of the contract"⁵⁶ and that "the duty to notify an insurance company is a condition precedent to the insurer's liability."⁵⁷ Further, the failure to comply with notice provisions resulting in unreasonable delay "triggers a presumption of prejudice to the insurer's ability to prepare an adequate defense."⁵⁸ The court then concluded that the exterminator's failure to give notice of the occurrence for six months was unreasonable, but determined that failure to give reasonable notice would not bar recovery unless the insurer suffered prejudice because of the delay. Because of the presumption of prejudice to the insurer, the insured has the

52. See *Smith*, 711 N.E.2d at 1261-63.

53. 721 N.E.2d 270 (Ind. Ct. App. 1999).

54. See *id.* at 278-79.

55. See *id.*

56. *Id.* at 277 (quoting *London Guarantee & Accident Co. v. Siwy*, 66 N.E. 481, 482 (Ind. App. 1903)).

57. *Id.* (citing *Shelter Mut. Ins. Co. v. Barron*, 615 N.E.2d 503, 507 (Ind. Ct. App. 1993)).

58. *Id.* at 278 (citing *Miller v. Dilts*, 463 N.E.2d 257, 265 (Ind. 1984)).

burden of setting forth evidence that shows prejudice did not actually occur. Once such evidence is set forth, the question of prejudice goes to a trier of fact and both parties may submit evidence.⁵⁹

The court ultimately found the insurer was prejudiced because language in the policy only covered certain types of damage which arose after the date of the occurrence. The exterminator, without notifying the insurer, made repairs that prevented the insurer from later determining which damage was pre-existing and which occurred after, and as a result of, the exterminator's actions. Accordingly, the insurer was not obligated to cover the occurrence.⁶⁰

In *Paint Shuttle, Inc. v. Continental Casualty Co.*,⁶¹ the court addressed the difference between "claims made" and "occurrence" insurance policies, noting that this distinction has not previously been addressed in Indiana but that other jurisdictions have found it important. Here, the appellate court considered whether a law firm's notice to its professional liability insurance company of a malpractice suit was effective under the provisions of the firm's "claims made" legal liability insurance policy.⁶²

Continental Casualty Company (Continental) issued a professional liability policy (malpractice policy) to the law firm of Bosch & Banasiak (firm) for the term of November 29, 1993 through November 29, 1994. During this period, Jacqueline and Peter Miller retained the firm to assist them in the licensing of their business, Paint Shuttle. On March 23, 1994, Paint Shuttle filed suit against the firm for negligence in the rendering of, or in the failure to render, professional legal services relating to such licensing. Although the firm alleges that it orally notified the insurance broker of the suit within the policy period, the firm did not provide written notice of such suit until almost two years after the policy had lapsed. On October 7, 1996, the firm filed a declaratory action against Continental and Paint Shuttle for relief under the malpractice policy. Continental filed an answer, counterclaim and third party complaint for declaratory relief under the malpractice policy. Thereafter, Continental filed a motion for summary judgment on the complaint, third party complaint, and counterclaim, which the trial court granted. This appeal followed the trial court's granting of Continental's motion to correct error.⁶³

The court began its opinion by analyzing whether the notice provision of the malpractice policy was clear and unambiguous. The pertinent part of the provision required the insured to provide written notice of the wrongful act, the injury or damage which had or could result from the wrongful act and the "circumstances by which [the insured] first became aware of such wrongful act."⁶⁴ If such notice was provided, the policy stated that any subsequent claim made against the insured arising out of such wrongful act would be deemed to

59. *See id.* at 278-79.

60. *See id.* at 280.

61. 733 N.E.2d 513 (Ind. Ct. App. 2000).

62. *See id.* at 520-22.

63. *See id.* at 517-18.

64. *Id.* at 519.

have been made during the policy term or extended reporting period. In determining that the provision was unambiguous, the court stated that the firm's duty to provide written notice to Continental of a claim during the policy period was a condition precedent to Continental's providing coverage under the policy.⁶⁵

As in *Askren Hub*, the court of appeals held that the notice requirement is "material, and of the essence of the contract."⁶⁶ Furthermore, the duty to notify an insurance company of potential liability is a condition precedent to the company's liability to its insured. When the facts are not in dispute, what constitutes proper notice is a question of law.⁶⁷ The court then stated that

[n]otice is a term of art within the insurance context and sufficient notice by an insured to an insurer involves more than just promptly notifying an insurance company of a claim. Specifically, we believe that notice also encompasses an insurer's right to promptly investigate a claim or to control the defense of a lawsuit with which it might be subjected to liability as an insurer of an insurance policy.⁶⁸

In addition to promoting the insurer's right to a timely investigation, the court held that the notice provision and the "cooperation provision" have the same purpose and effect.⁶⁹ The cooperation clause requires that the insured assist the insurance company with its preparation for settlement or trial. Similarly, notice provisions require the insured to assist the insurance company by enabling it to make a timely and adequate investigation during its preparation for trial or settlement. "Therefore, when an insured impedes or prohibits an insurer from investigating or defending a claim, the insured can be found to be in noncompliance with the notice provision of an insurance policy."⁷⁰

"[F]or notice to be proper under an insurance policy it must be: (1) timely as proscribed by the language of the insurance policy; and (2) 'true' in the sense that the insured allows the insurer to exercise its rights of investigation and defense of a claim under the policy."⁷¹ In *Paint Shuttle*, the court found that although the firm provided verbal notice in a timely fashion, the policy required written notice. Thus, the verbal notice was insufficient and deprived Continental of its right to investigate.⁷²

Conventional liability insurance policies are "occurrence" policies, which link coverage to the date of the tort, not the suit.⁷³ "Claims made" policies link coverage to the date of the claim rather than the tort.⁷⁴ Thus, "[t]he notice

65. *See id.* at 519-20.

66. *Id.* at 520.

67. *See id.*

68. *Id.* at 520-21.

69. *Id.* at 521 (citing *Ind. Ins. Co. v. Williams*, 448 N.E.2d 1233, 1237 (Ind. Ct. App. 1983)).

70. *Id.*

71. *Id.*

72. *See id.*

73. *See id.* at 522.

74. *See id.*

provision of a 'claims made' policy is not simply the part of the insured's duty to cooperate, it defines the limits of the insurer's obligation."⁷⁵ In *Paint Shuttle*, the firm held a "claims made" policy. Accordingly, in order for coverage to be in place, the wrongful act must have occurred during the policy period, a claim must have been made and written notice of the claim have been provided to Continental in order for coverage to be in place.⁷⁶ The court determined that because "consideration is an essential element of every contract," that also requires a "bargained for exchange," extending the notice period in a "claims made" policy would create an "unbargained for expansion of coverage."⁷⁷

The message of *Rovan* and *Gallant* appears to be that whether you are an insurance company or an insured, you must assure that notice is timely and clear. In order to cancel any portion of a policy, the insurance company must provide clear and definite language, readily accessible to a reasonable person. Simple reference to the canceled or deleted portions may not be sufficient if there is any ambiguity in the eyes of a reasonable person as to what effect a deletion or cancellation might have. In the context of duty to defend, at least as described in the language of the policy, the insured must provide clear and definite notice for any claim, even claims related to actions that the insurance company has already defended. *Askren Hub* puts into perspective the risks of the insured who fails to give notice as required, by raising a rebuttable presumption of prejudice to protect the insurer from responsibility for the insured's actions taken between his/her awareness of an occurrence and his notice to his insurer. Also, in *Paint Shuttle*, when the insured fails to give timely notice to the insurer of potential liabilities, the insurer is deprived of the valuable opportunity to investigate claims and prepare its defense.

B. Limitations Periods

In *United Technologies Automotive Systems, Inc. v. Affiliated FM Insurance Co.*,⁷⁸ a manufacturing company brought an action against a property insurer seeking coverage of damages resulting from environmental contamination. The insurance policy required that a suit or action on the policy be commenced "within twelve (12) months next after the happening of the loss, unless a longer period of time is provided by applicable statute."⁷⁹ The manufacturer argued that the contractual limitations period did not bar its claim for coverage because Indiana's general statute of limitations for contract actions based upon written contracts entered before September 1, 1982, is twenty (20) years after the action accrues. In this case, the policy provided coverage for losses within the policy period of December 1, 1971 to December 1, 1974. Accordingly, even if a twenty year statute of limitations was followed, the claim would have been untimely

75. *Id.*

76. *See id.* at 522-23.

77. *Id.* at 523.

78. 725 N.E.2d 871 (Ind. Ct. App. 2000).

79. *Id.* at 873-74.

because it was not filed until May 21, 1998, more than twenty years after the latest possible cutoff. If a twelve-month limitation from the date the injury occurred was used, the injury would have had to occur no earlier than May 21, 1997. In either case, the limitation period in the contract had long expired before suit was filed.⁸⁰

Although not essential to the holding, the court noted that Indiana does not toll a contractual period of limitations until discovery, but rather holds that the period of limitations begins to run when the loss occurs, regardless of whether the insured knew about it. Giving the manufacturer the benefit of the doubt, the court noted that it had to have “discovered” the loss no later than 1995 when it settled claims brought against it under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁸¹

In light of the substantial work that undoubtedly was undertaken as part of the CERCLA defense, it is unclear why the manufacturer would wait three more years to seek insurance indemnification. The inspections and cleanup took place over several years, from at least 1989 to 1995, before litigation was commenced.⁸² Further, the facts recited in the case demonstrate that the real property where the contamination occurred was transferred as part of corporate change and acquisition, but the facts do not explain what, if any, subsequent coverage was available, when the contamination occurred, or why no claim was filed earlier. In light of the probably substantial costs related to the cleanup of the contamination, it is not unreasonable that litigants would seek recovery from whatever party failed to timely file this claim. Although the court was able to resolve this case by finding the claim was untimely under any version of the limitations period, a decision that explained which limitations period applied would have provided guidance to other similarly situated insureds, as well as guiding this manufacturer in determining whether any of its officers, attorneys, or fiduciaries failed in their duties by proceeding at such late date against this insurer.

In *Summers v. Auto-Owners Insurance Co.*,⁸³ an insured sued his property insurer seeking coverage for a theft loss. After a theft on July 3, 1996, the insured promptly notified the insurer, who sent a theft questionnaire and inventory forms to the insured. A month passed, and the insurer sent a follow-up letter as well as duplicate forms. On September 4, 1996, the insured returned the forms. Two months later, the insurer sent a letter requesting examination of the insured under oath and rejecting the forms as submitted. The insured obtained counsel. The examination under oath occurred, and the insured’s attorney challenged a requirement that the insured authorize a release of tax records. On September 3, 1997, the insured’s attorney sent correspondence to the insurer regarding discrepancies in the examination. Two weeks later, the insurer notified the insured that his opportunity to comply with terms and conditions of the policy

80. *See id.* at 874-75.

81. *See id.*

82. *See id.* at 873.

83. 719 N.E.2d 412 (Ind. Ct. App. 1999).

expired on the one-year anniversary of the loss and, as a result, he was barred from further pursuit of the matter.⁸⁴

Summary judgment was granted in favor of the insurer based upon the contractual limitations period, and the insured appealed. The court noted that, while not favored, contractual limitations shortening the time to commence suit are valid so long as a reasonable time is afforded. The purpose of the provision is to avoid unreasonable delay in enforcing the claim; that is, it protects insurers from those who do not voice a claim until beyond the one-year period. Such limitations provisions may be waived, expressly or impliedly, and waiver may result if the insurer's acts create a reasonable belief on the part of the insured that strict compliance with the policy provision will not be required. If the insurer fosters such a belief, it may not later raise the limitation as a defense.⁸⁵

On the facts, the court concluded that the insurer did not expressly waive the limitation. Moreover, the court concluded that the insured failed to comply with the requirements of the policy during the one-year period. The policy required the insured to be in full compliance in order to bring suit. Finally, the court concluded that the insurer was not waiving any of the requirements, but rather was trying to enforce them during the year. On this third conclusion, the court explained that the law does not require the insurer to inform the insured of his responsibilities under the contract or to assert its intention to rely upon a limitation provision as a defense. If the insurer proceeds to negotiate settlement, however, the law will imply a waiver of the contractual limitation. In this case, the insurer did not reach the point of settlement negotiations. The court concluded that the insured failed to demonstrate that the summary judgment was erroneous and affirmed the trial court's judgment.⁸⁶

C. Terms Defining Coverage

The Indiana Supreme Court, finding language in an insurance policy to be ambiguous on its face, construed a builder's risk policy in favor of the insured in *Bosecker v. Westfield Insurance Co.*⁸⁷ The Boseckers sold an apartment building, but reacquired it a year later when the purchaser was unable to make payments under the conditional sales contract. They immediately contacted Westfield, their regular insurance company, about coverage and, after some disclosures and discussion with Westfield, the property was added as an endorsement to an existing builder's risk policy. Approximately ten hours after the property was added to the policy, at 2:00 in the morning, the building was destroyed in a fire. Westfield denied coverage based upon a clause defining "Property Not Covered," apparently on the assumption that "improvements, alterations, repairs, or additions were being made."⁸⁸ On summary judgment,

84. *See id.* at 414.

85. *See id.* at 414-15.

86. *See id.* at 416-17.

87. 724 N.E.2d 241 (Ind. 2000).

88. *Id.* at 243.

Westfield argued that the property was not “Covered Property” because the Boseckers had not begun repairs.⁸⁹

The two provisions at issue, “Covered Property” and “Property Not Covered,” suggest on the policy’s face that the same property can be both covered and not covered if it is under repair. Westfield argued that “Property Not Covered” is defined to be buildings other than new construction. Under this definition, only the improvements and additions are covered, not the pre-existing building. In contrast, the “Covered Property” provision includes “buildings or structures including foundations while in the course of construction, installation, reconstruction, or repair.”⁹⁰ Considering this seeming inconsistency, the court found the contract ambiguous and determined that it must be construed to afford coverage.⁹¹ To require either two separate policies to cover the time between obtaining the building and beginning construction or requiring construction concurrent with obtaining the property in order to trigger coverage would be “unnecessarily cumbersome and artificial.”⁹² Explaining the reasoning behind construing ambiguities against the insurer, the court quoted a 1905 opinion, *Glens Falls Insurance Co. v. Michael*,⁹³ addressing the unequal bargaining power of the parties:

Insurance policies are prepared in advance by insurance and legal experts, having in view primarily the safeguarding of the interests of the insurer against every possible contingency. The insurer not only fully knows the contents of the writing, but also adequately comprehends its legal effect. The insured has no voice in fixing or framing the terms of the [policy], but must accept it as prepared and tendered, usually without any knowledge of its contents, and often without ability to comprehend the legal significance of its provisions.⁹⁴

The court concluded that if Westfield had intended to differentiate between coverage of unoccupied buildings being held for repairs and buildings in which repairs commence immediately, it should have set those terms out clearly. Absent that, the risk was upon the insurer as drafter of the ambiguous terms.⁹⁵

III. SETTLEMENT AGREEMENTS

A. Confidentiality of Negotiations

There was a great deal of judicial discussion of the enforceability of settlement agreements during the survey period. Most significantly, the Indiana

89. *See id.* at 242-43.

90. *Id.* at 243.

91. *See id.* at 244.

92. *Id.* at 245.

93. 74 N.E. 964, 969 (Ind. 1905).

94. *Bosecker*, 724 N.E.2d at 244.

95. *See id.* at 245.

Supreme Court addressed the admissibility of evidence of an alleged oral settlement agreement reached in a mediation held under the Indiana Alternative Dispute Resolution Rules in *Vernon v. Acton*.⁹⁶ In *Vernon*, the parties engaged in pre-suit mediation regarding injuries suffered in an automobile accident. After the mediation, Acton tendered a check and a release form for settlement, but the Vernons returned the check and the unsigned release and filed suit. Acton counterclaimed for breach of the oral settlement agreement and attorney fees. The trial court heard evidence proffered by Acton that the agreement had been reached, including testimony by the mediator, but refused the Vernons' evidence that an offer had been made, but not accepted. The Vernons appealed, claiming the trial court erroneously admitted evidence in contravention of the parties' confidentiality agreement, and Acton asserted that evidence of the final resolution was admissible, but evidence of the events leading up to it were not.⁹⁷

As a pre-suit mediation, the A.D.R. Rules generally would not apply,⁹⁸ but the agreement to mediate and the rules for the mediation expressly incorporated the A.D.R. Rules.⁹⁹ The A.D.R. Rule then applicable was Rule 2.12, which provided:

Mediation shall be regarded as settlement negotiations. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in the course of mediation is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay. Mediation meetings shall be closed to all persons other than the parties of record, their legal representatives, and other invited persons. Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the

96. 732 N.E.2d 805 (Ind. 2000).

97. *See id.* at 806.

98. The A.D.R. Rules apply only to "all civil and domestic relations litigation filed" in Indiana trial courts. *See* IND. ALTERNATIVE DISPUTE RESOLUTION RULE 1.4. Note, however, that the supreme court has approved Pre-Suit Mediation Guidelines developed by the Indiana State Bar Association which encourages parties to enter private agreements to assure the confidentiality of pre-suit mediations similar to the protections of the A.D.R. Rules.

99. *See Vernon*, 732 N.E.2d at 807.

mediators.¹⁰⁰

This Rule was amended, effective March 1, 1997, however, to state that “Mediation shall be regarded as settlement negotiations as governed by Ind. Evidence Rule 408,” which language had been included directly in the old rule.¹⁰¹ Although the Rule declared that “[e]vidence of conduct or statements made in the course of mediation is . . . not admissible,” it did not exclude “any evidence otherwise discoverable merely because it is presented in the course of the mediation process . . . [and] does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay.”¹⁰²

The court explained that, generally, settlement agreements need not be in writing to be enforceable, but the mediation rules require the agreement to be reduced to writing and signed.¹⁰³ After reviewing the notes to the proposed Uniform Mediation Act under consideration by the National Conference of Commissioners on Uniform State Laws, the court concluded that the enforcement of oral settlement agreements is not a sufficient ground to satisfy the “offered for another purpose” exception to confidentiality under Indiana Evidence Rule 408.¹⁰⁴ Moreover, in weighing the objectives of mediation, the court concluded that “[t]hese objectives are fostered by disfavoring oral agreements, about which the parties are more likely to have misunderstandings and disagreements,” and mediation is more likely to remain a viable avenue for resolving disputes if a written agreement is required.¹⁰⁵ Accordingly, the court reversed the entry of judgment on the oral settlement agreement.¹⁰⁶

B. Property Settlement

The court of appeals addressed the issue of third party beneficiaries to a life insurance policy in the context of a property settlement associated with a divorce proceeding in *Miller v. Partridge*.¹⁰⁷ In this case, the father and mother divorced when their daughter was fifteen years old. One term of the property settlement agreement required the father to maintain, at all times, a life insurance policy “in an amount equal to or greater than Fifty Thousand Dollars (\$50,000)” and to

100. See *id.* at 808 (quoting A.D.R. RULE 2.12) (emphasis deleted).

101. *Id.* at 809.

102. *Id.* (quoting A.D.R. RULE 2.12).

103. See *id.* In reaching this conclusion, the court noted a court of appeals decision, *Silkey v. Investors Diversified Service Inc.*, 690 N.E.2d 329 (Ind. Ct. App. 1997), in which the parties acknowledged that an agreement was reached, but disagreed as to whether it was enforceable. The supreme court concluded that, to the extent *Silkey* suggests that oral settlement agreements are not subject to the confidentiality rules, it is disapproved. See *Vernon*, 732 N.E.2d at 810 n.8.

104. *Vernon*, 732 N.E.2d at 810.

105. *Id.*

106. See *id.* at 806.

107. 734 N.E.2d 1061 (Ind. Ct. App. 2000).

name the daughter as beneficiary.¹⁰⁸ At the time of the property settlement and divorce, the father had three policies in force, with a total benefit equaling \$50,000, that named the mother as beneficiary. The father later changed the beneficiary on his policies, but instead of naming his daughter as the property settlement required, he named his girlfriend. The policies then remained unchanged until his death, at which time the benefits had increased in value to \$62,000. The girlfriend appealed the trial court's summary judgment and order granting the daughter the proceeds of the father's life insurance policy, and the daughter appealed the trial court's grant of the girlfriend's motion to correct error which reduced the daughter's award from \$62,500 to \$50,000.¹⁰⁹

Initially, the court analyzed whether the daughter was a third party beneficiary to the insurance policy. Since property settlement agreements are binding contracts, "[p]arties are free to divide their property in any way they choose and their agreement in that regard is interpreted as any other contract."¹¹⁰ Accordingly, the general rules of contract interpretation governed this property settlement agreement.

Generally, only a party to the contract or one in privity with a party to a contract has rights under that contract. However, one not a party to the contract may directly enforce the contract as a third party beneficiary if: (1) the parties intend to benefit a third party; (2) the contract imposes a duty on one of the parties in favor of the third party; and (3) the performance of the terms of the contract renders a direct benefit to the third party.¹¹¹

The court found that the property settlement agreement in this case showed ample evidence that the daughter was a third party beneficiary, despite the fact that she had not been named beneficiary of the insurance policies. Accordingly, the court determined that judicially altering the beneficiary from the girlfriend to the daughter was an appropriate remedy.¹¹²

The girlfriend argued that whatever rights the daughter had, these rights terminated when she reached the age of majority. She based this argument on cases that held that trial courts are prohibited from distributing marital property to children and are only able to create such an obligation as a form of child support. The court identified the critical distinction between an obligation arising from a property settlement agreement, as in this case, and a court order. "When the court orders, as a part of a divorce decree, that a parent is to designate a child as beneficiary of a life insurance policy, the court is making an order of child support by protecting the support in the event of the supporting parent's death."¹¹³ However, parties are able to include provisions in property settlement

108. *Id.* at 1063.

109. *See id.* at 1063-64.

110. *Id.* at 1064 (quoting *Kiltz v. Kiltz*, 708 N.E.2d 600, 602 (Ind. Ct. App. 1999)).

111. *Id.* (quoting *Kiltz*, 708 N.E.2d at 602) (internal citations omitted).

112. *See id.*

113. *Id.* at 1065 (citing *Capehart v. Capehart*, 705 N.E.2d 533 (Ind. Ct. App. 1999)).

agreements, such as an insurance obligation benefitting children, which achieve what the court cannot. Accordingly, the court found no reason to treat the obligation of the father to name the daughter as beneficiary to his insurance policies differently than other marital property. Furthermore, the court found that because the provision for the daughter was a contractual obligation and not child support, the daughter's age was only relevant if the contract made it so.¹¹⁴

The case's final issue concerned whether the daughter was entitled to recover the full amount of the insurance proceeds or whether her award should be reduced to the \$50,000 as indicated in the settlement agreement. The daughter argued she was entitled to the full amount because the settlement agreement anticipated either an increase in the value of the proceeds or, if needed, the purchase of additional life insurance. The trial court awarded the daughter \$50,000 after finding that the specific use of the disjunctive conjunction, "in an amount *equal or greater* than \$50,000 dollars," meant that \$50,000 was the minimum.¹¹⁵ The appellate court found that this strict interpretation was not an abuse of discretion.¹¹⁶

Finally, the court offered drafting advice when attempting to create a parental obligation to buy life insurance for the benefit of a child. As these provisions are commonly intended to protect child support in the event the support-paying parent dies, it is important for the parties to understand the need to clearly identify the intent of such provisions. The court reminded drafters that courts will not speculate about intent and will not look outside the four corners of the document. In this case, it was clear and unambiguous that the parties intended for the daughter's benefit to extend beyond emancipation by inclusion of the term "at all times."¹¹⁷

In *Niccum v. Niccum*,¹¹⁸ the court considered the terms of a settlement agreement dissolving a marriage. The agreement provided that the funds would be divided equally, which it interpreted as "having the same privileges, status, or rights; deserving or worthy: equal before the law."¹¹⁹ The property to be divided included a benefit plan and a savings and investment program. Disagreeing with the trial court, the court concluded that, absent express language to the contrary, "the settlement agreement implicitly contemplated both parties sharing all of the rewards and risks associated with the investment plan."¹²⁰ The court held that the valuation date established in the settlement agreement controlled the base amount to which growth is added or loss subtracted and barred the spouse from benefitting from contributions made by the other spouse after the valuation date.¹²¹

114. *See id.*

115. *Id.* at 1065-66 (emphasis in original).

116. *See id.* at 1066.

117. *See id.* at 1065.

118. 734 N.E.2d 657 (Ind. Ct. App. 2000).

119. *Id.* at 640.

120. *Id.*

121. *See id.*

C. Fraud in Inducing Settlement

In *Indiana Insurance Co. v. Margotte*,¹²² the court of appeals considered the effect of attorney fraud in the context of settlement agreements. The Margottes were represented by their attorney, Bradley J. Catt, in negotiations for settlement of their claims of injuries suffered in an automobile accident. Catt gave the Margottes a settlement agreement to sign, and they signed it without reading it and without knowledge that it was a settlement agreement. After the Margottes signed the agreement, Catt returned it to Indiana Insurance, and Indiana Insurance issued a check jointly payable to Catt and the Margottes in the amount of \$400,000. Catt received the check, signed his name, forged the Margottes' signatures, deposited it into his attorney trust account, and embezzled the funds for his personal use. The Margottes received none of the money and subsequently sued Indiana Insurance alleging breach of the settlement agreement.¹²³

The court of appeals initially found the settlement agreement voidable for fraud in the execution because Catt misrepresented its contents to the Margottes in order to induce their signature. The court acknowledged that the parties did not dispute that the Margottes did not know the content of the document, but noted that when a party is negligent in reading the contents of a contract, the contract is voidable, not void.¹²⁴ When a contract is voidable for fraud, the injured party may either seek to avoid the contract or stand on the contract and seek damages. Because the Margottes sought the benefits of the contract, the court concluded it was a binding contract.¹²⁵

The court next found that Indiana Insurance had performed as required under the agreement. It had sent a check jointly payable to Catt and the Margottes to the address specified in the agreement in the amount required, and there were sufficient funds to cover the check. Once the check was paid, it extinguished Indiana's debt to the Margottes. Further, Indiana law provides that acceptance of a check by an attorney on behalf of his client amounts to payment of the obligation. Thus, the Margottes were precluded from recovery in large part by their decision to stand by the contract and seek damages.¹²⁶

IV. AGREEMENTS TO ARBITRATE

Indiana courts may not order parties into arbitration unless the parties have agreed by private contract to arbitrate their disputes.¹²⁷ In *Mid-America Surgery*

122. 718 N.E.2d 1226 (Ind. Ct. App. 1999).

123. *See id.* at 1227-28.

124. *See id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. c (1981)).

125. *See id.*

126. *See id.* at 1229-30.

127. *See Int'l Creative Mgmt., Inc. v. DAR Entm't Co.*, 670 N.E.2d 1305, 1311 (Ind. Ct. App. 1996).

Center, L.L.C. v. Schooler,¹²⁸ the Schoolers resigned from the corporation, which was an event of dissociation under the limited liability corporation agreement, and which the Schoolers believed required Mid-America to purchase their interest within ninety days. When Mid-America failed to purchase the interest, the Schoolers filed suit and Mid-America moved to compel arbitration under the agreement. The Schoolers resisted arbitration and argued that the arbitration clause was unenforceable due to Mid-America's prior breach.¹²⁹

A court considering a motion to compel or stay arbitration must first determine whether the parties have agreed to arbitrate the particular dispute and, if it concludes they have, the court is required by statute to compel arbitration. Here, the court noted that the parties' agreement specifically provided that any claim, including a claim of breach of the agreement, "shall be submitted to arbitration."¹³⁰ Further, the court noted that

the very purpose of arbitration provisions would be defeated and their effectiveness severely limited if a party were held to have abandoned his arbitration rights merely because his actions might be construed to constitute a breach of the contract prior to the time he seeks a clarification of those rights through arbitration.¹³¹

Despite this, arbitration may be waived by express acts or implied by the acts, omissions or conduct of the parties. Although the facts in this case demonstrated some delay from the time that the Schoolers informed Mid-America that they would resign to the time Mid-America ultimately sought arbitration, the court concluded the delay alone was insufficient to establish waiver and that the trial court erred in denying Mid-America's application for arbitration.¹³²

V. STATUTE OF FRAUDS AND ORAL AGREEMENTS

Is an oral agreement to form an entity to purchase real estate a valid and enforceable contract? As with many questions in the law, it appears the answer is: "It depends." In *Epperly v. Johnson*,¹³³ two men entered into an oral agreement to form a partnership to purchase a golf course in Florida. Johnson learned of the golf course for sale, but lacked the money to invest. He contacted Epperly about forming a partnership to purchase the golf course. The two agreed that the partnership would be formed, with Epperly lending Johnson the money for Johnson's share of the down payment. After reaching this agreement, however, Epperly found other partners and purchased the property without Johnson. Johnson sued, alleging breach of contract, fraud and constructive fraud,

128. 719 N.E.2d 1267 (Ind. Ct. App. 1999).

129. *See id.* at 1269-70.

130. *Id.* at 1270.

131. *Id.*

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

133. 734 N.E.2d 1066 (Ind. Ct. App. 2000).

and a jury awarded him \$1 million in compensatory damages and \$2 million in punitive damages. Epperly appealed, and the court of appeals affirmed in part and reversed in part.¹³⁴

Epperly argued that there could be no binding contract because Johnson's claim was essentially a claim to be made a limited partner and such an interest cannot be created without a writing. The court determined that, while Epperly went on to form a limited partnership to which Epperly's argument might apply, the contract he had breached was the oral agreement to form a partnership in the future. In resolving the claim of breach of contract, the court of appeals applied the rule set forth in *Wolvos v. Meyer*,¹³⁵ which recognized that, in general, an agreement to agree is not enforceable, but parties may make an enforceable contract that binds them to prepare and execute a final agreement.¹³⁶

In order to determine whether an oral agreement is an enforceable contract or a mere agreement to agree, the court considers two questions. "First, did the parties intend to be bound by the agreement or did they intend to be bound only after executing a subsequent written document?"¹³⁷ If they intended only to be bound after the written document was executed, no enforceable contract exists until the subsequent document is executed. "Second, did the agreement lack such essential terms as to render it unenforceable?"¹³⁸ The agreement must provide "reasonable certainty in the terms and conditions of the promises made, including by whom and to whom."¹³⁹ In this case, Johnson had a letter from Johnson's attorney which memorialized the attorney's understanding of the agreement between Johnson and Epperly, including that each would hold a one-third interest and would contribute \$200,000, with Epperly loaning Johnson the money. The oral agreement was subsequently modified to give each a one-fourth share and reduce the contribution to \$150,000. Under the court's standard of review, it could not say there was a "total failure of evidence permitting the jury to find the oral agreement amounted to a binding contract to subsequently execute a partnership agreement."¹⁴⁰

Epperly next argued that, even if a contract existed, Johnson failed to perform because he never presented a promissory note. However, the court found that the agreement as memorialized in the letter, stated an interest rate and due date for the promissory note, but it did not state when the note would be executed and tendered. Accordingly, because the parties left open the time for the performance, they are presumed to have intended a reasonable time, which is determined by the circumstances. The court declined to hold that, absent a date in the agreement, the failure to present the promissory note necessarily

134. *See id.* at 1069-70.

135. 668 N.E.2d 671 (Ind. 1996).

136. *See Epperly*, 734 N.E.2d at 1070-71.

137. *Id.* at 1071.

138. *Id.*

139. *Id.*

140. *Id.*

constituted a failure to perform.¹⁴¹

*Wallem v. CLS Industries, Inc.*¹⁴² dealt with another prong of the Statute of Frauds which provides that

[n]o action shall be brought . . . upon any agreement that is not to be performed within one (1) year from the making thereof . . . Unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith.¹⁴³

In *Wallem*, the parties entered into an oral employment agreement by which Wallem was paid weekly. As a result of a conflict, Wallem agreed to resign from CLS and was offered a resignation bonus. The agreement, entered into September 1, 1994, provided that Wallem would receive weekly payments for one year, starting October 21, 1994. Wallem claimed that CLS breached the oral agreement because it did not make bonus payments under the oral agreement. Further, he claimed that CLS had breached a settlement agreement.¹⁴⁴

CLS argued that the Statute of Frauds controlled the settlement agreement because the agreement could not be completed in one year. Wallem, relying upon *Silkey v. Investors Diversified Services*,¹⁴⁵ argued that the Statute of Frauds did not preclude recovery because the agreement could be performed within one year. In *Silkey*, the agreement required payment on or before a specific date. Although the date itself was beyond the one year period, on the face of the agreement it was capable of being performed within one year.¹⁴⁶ In contrast, if CLS performed the agreement as specified in its own terms, it would make weekly payments and could not fully perform before the one-year term ended. The court first concluded that there was no agreement reached on the bonus and affirmed summary judgment on the breach of contract claim. The express terms in the CLS agreement made it clear that it was not intended or capable upon its own terms of performance within one year. When, as in this case, the contract is not capable of full performance within one year, the agreement is subject to the Statute of Frauds and is unenforceable.¹⁴⁷

In another Statute of Frauds case, the court of appeals considered a dispute over property. In *Perkins v. Owens*,¹⁴⁸ three parties purchased land from Stottlemeyer. Two adjoining properties, conveyed to Owens and Leedy, did not include a thirty-foot strip of land ("disputed property") which Stottlemeyer retained to provide access to other land. However, the third purchaser, Perkins, received a contract and deed which included the disputed property. Nearly

141. *See id.* at 1072.

142. 725 N.E.2d 880 (Ind. Ct. App. 2000).

143. IND. CODE § 32-2-1-1 (1998).

144. *See Wallem*, 725 N.E.2d at 882.

145. 690 N.E.2d 329 (Ind. Ct. App. 1997).

146. *See Wallem*, 725 N.E.2d at 887.

147. *See id.*

148. 721 N.E.2d 289 (Ind. Ct. App. 1999).

twenty years later, Owens and Leedy sued, claiming ownership of the disputed property by adverse possession. Later, they amended the complaint to allege that Perkins' deed was void and that Owens and Leedy received title by an oral agreement with Stottlemeyer. The trial court found that the oral agreements for the sale of land were taken out of the Statute of Frauds by Owens's and Leedy's partial performance.¹⁴⁹

Under the Statute of Frauds, oral contracts for the sale of real property are voidable, not void, and may be excepted from the Statute of Frauds by partial performance. However, partial payment by itself does not amount to partial performance. Circumstances generally sufficient to invoke the doctrine of partial performance include some combination of several factors: payment of all or part of the purchase price, possession, and lasting and valuable improvements on the land. The court noted that Indiana holds fast to the rationale behind the Statute of Frauds and "strictly adhere[s] to requiring proof of a combination of [the factors]."¹⁵⁰ Moreover, courts require that proof be "clear and definite."¹⁵¹ Here, the court found the evidence was not sufficient to prove partial performance.¹⁵²

The facts showed that Owens and Leedy each made some improvements in the land, but did not show that the improvements were of a permanent nature. Rather, they were mostly landscaping and temporary structures, such as a utility barn. The court held that improvements bear little weight unless they are of the kind that would not have been made without the oral contract. The court explained that improvements must be referable to the contract such that the improvements would have been improvident in the absence of the contract. Further, the evidence suggested that both Owens and Leedy treated the property in nearly the same manner before the conveyance as after. Having concluded that Owens and Leedy had not shown the oral contracts to be enforceable, the court found that they had no personal stake in the outcome and could not show that they had been or might be injured. Thus, the court held that Owens and Leedy lacked standing to challenge Perkins' deed, and, accordingly, the trial court lacked jurisdiction to hear their claim.¹⁵³

VI. EXCLUSIVE LISTING AGREEMENTS

In *Rogier v. American Testing & Engineering Corp.*,¹⁵⁴ the appellate court interpreted an exclusive listing agreement to determine whether it in fact was an exclusive right-to-sell or an exclusive agent agreement. Rogier was a marketing consultant who specialized in mergers and acquisitions of architectural, engineering and environmental firms. American Testing and Engineering Corporation ("ATEC"), an environmental engineering firm, entered into an

149. *See id.* at 291.

150. *Id.* at 292 (quoting *Summerlot v. Summerlot*, 408 N.E.2d 820, 829 (Ind. Ct. App. 1980)).

151. *Id.*

152. *See id.*

153. *See id.* at 293-94.

154. 734 N.E.2d 606 (Ind. Ct. App. 2000).

exclusive listing agreement (“Agreement”) with Rogier whereby ATEC appointed Rogier as its exclusive agent to search for a buyer for ATEC’s business. The Agreement expressly appointed Rogier as ATEC’s exclusive agent and required that all prospective buyers were to send copies of “all correspondence and purchase offers” to both parties.¹⁵⁵ Rogier provided ATEC with a template search agreement, which Rogier would execute with potential buyers. Pursuant to the template agreement, the buyer would pay Rogier’s commission on the date of closing.¹⁵⁶

After entering into the agreement with Rogier, ATEC waited nearly six years before taking steps to sell its business. At that time Rogier entered into a search agreement with Baker, a large engineering firm that provided for a different payment schedule than the template provided to ATEC. Specifically, instead of Baker paying Rogier’s commission at the closing, the search agreement required Baker to pay Rogier incremental commissions prior to the sale, immediately upon the completion of Rogier’s sales presentation, and upon closing. The initial fee payment was nonrefundable even if the closing never occurred.¹⁵⁷

Over three years passed before Rogier and ATEC communicated again. However, the record showed that Rogier continued to work under the Agreement, although ATEC was unaware he was doing so. On or about January 21, 1994, Rogier provided ATEC with written notification that Baker was interested in purchasing their firm. Rogier requested that ATEC sign a purchase offer letter, which would authorize Rogier to present ATEC as an acquisition candidate to Baker. After three requests, ATEC finally forwarded such a purchase offer letter on May 5, 1994. The letter stated that ATEC “acknowledged that Baker would be paying Rogier’s commission and . . . that this term be included in Baker’s purchase offer.”¹⁵⁸

In June and July 1994, Rogier communicated with ATEC to attempt to receive ATEC’s financial statements and other related corporate documents requested by Baker. Due to ATEC’s refusal to provide the necessary financial statements, Rogier was unable to make the sales presentation to Baker. In July 1994, Baker notified Rogier that it was no longer interested in acquiring ATEC.¹⁵⁹

In mid-1994, ATEC began making contacts with another buyer without informing Rogier. In 1996, ATEC sold its own business without informing Rogier and without the use of another broker. Rogier learned of the sale and filed suit, alleging breach of the parties’ Agreement by refusing to provide the necessary financial information to Baker (which resulted in Rogier’s loss of a multi-million dollar sales presentation fee) and by failing to disclose the sale of its business to another buyer.¹⁶⁰

155. *Id.* at 611.

156. *See id.*

157. *See id.* at 612.

158. *Id.*

159. *See id.*

160. *See id.* at 613.

ATEC moved for summary judgment alleging Rogier had no damages and that the Agreement had terminated, was abandoned, or had been waived by Rogier as a matter of law. The trial court entered summary judgment in favor of ATEC, and Rogier appealed. The appellate court affirmed in part, reversed in part and remanded.¹⁶¹

1. *Foreseeable Damages.*—The first issue analyzed by the court was whether the damages sustained by Rogier as a result of the loss of commissions pursuant to the Baker search agreement were foreseeable by ATEC. The test for measuring damages in a breach of contract suit is “foreseeability at the time of entry into the contract, not facts existing or known to the parties at the time of the breach.”¹⁶² Damages not contemplated by the parties at the time the contract is entered into are not recoverable.¹⁶³

The court found “that ATEC breached its duty to provide Rogier with the financial documents necessary to make a sales presentation to Baker.”¹⁶⁴ Furthermore, in the purchase offer letter, ATEC authorized Rogier to present ATEC as an acquisition candidate to Baker, and reaffirmed that it would provide Rogier with the materials including the financial statements so that the buyer could make a realistic offer. Despite these factors, the court concluded that any damages arising because of that breach were unforeseeable due to the fact that ATEC had no reason to know that Rogier entered into a customized search agreement that entitled Rogier to a commission irrespective of whether a sale took place. As such, the damages alleged by Rogier resulted from the lost opportunity to make a sales presentation and were not foreseeable by ATEC and therefore unrecoverable.¹⁶⁵

2. *Exclusive Right.*—The next issue analyzed by this court was ATEC’s argument that the exclusive listing agreement was merely an exclusive agency agreement, not an exclusive right to sell. An exclusive right to sell would have entitled Rogier to a commission even if he were not the “procuring cause” of the sale of ATEC business.¹⁶⁶ The court concluded that this agreement was an exclusive right to sell.

It has long been the rule in Indiana that a broker earns its commission when it . . . procures a buyer ready, willing, and able to purchase the property. Notwithstanding the doctrine of procuring cause, Indiana courts will enforce specific provisions in a listing contract which allow a broker to earn a commission under other circumstances.¹⁶⁷

Specifically, a broker may be granted the right to a commission regardless of whether the sale was effected by the broker, the owner, or any other third person.

161. *See id.*

162. *Id.* at 614.

163. *See id.*

164. *Id.* at 614.

165. *See id.*

166. *Id.* at 615.

167. *Id.* (citation omitted).

To determine whether the listing contract created an exclusive agency or an exclusive right to sell, the court referred to a treatise:

An “exclusive agency” agreement, prohibiting the owner from selling property through another broker during the listing period, but permitting the owner to sell property through his own efforts, is distinguishable from an “exclusive right to sell” agreement, prohibiting the owner from selling personally or through another broker without incurring liability for commission to the original broker.¹⁶⁸

The particular language of the agreement is important to distinguish between exclusive agency and exclusive right to sell agreements. In this case, the parties agreed that Rogier would be “the exclusive agent with an exclusive listing and all prospective buyers shall send copies of all correspondence and purchase offers to [ATEC] and to [Rogier].”¹⁶⁹ Because the court determined that this provision was clear and unambiguous, it found that Rogier was to be involved in all negotiations with all prospective buyers, regardless of how they were procured. Accordingly, the court found that this exclusive listing agreement prohibited ATEC from selling its own business and Rogier was entitled to his commission on such sale.¹⁷⁰

3. *Enforceability*.—The third issue considered by the court was whether the exclusive listing agreement was unenforceable as a matter of law. ATEC argued that it was “(1) ‘uncertain as to duration and consideration,’ and (2) illusory and lacked mutuality of obligation because it imposed no responsibility on Rogier to perform.”¹⁷¹ Generally, when a contract is silent about duration, the broker is given a reasonable period of time to accomplish the object of the agency. Contracts without specific endpoints or which specifically indicate they last perpetually, are enforceable and terminable at will by either party. The agreement in question was not terminated by either party and, accordingly, was not unenforceable for lack of a termination date.¹⁷²

Notwithstanding, ATEC argued that Rogier did not perform within a reasonable time. Generally, what constitutes a reasonable time for performance is determined by the trier of fact; however, Indiana courts have held that when the facts are not in dispute, the determination of “reasonable” is a question of law.¹⁷³ In this case, the parties had a course of dealing that included elongated “holding patterns,” during which there was no communication, and evidence supported the conclusion that such periods were common in deals involving multi-million dollar businesses such as ATEC. Furthermore, ATEC did not actively solicit buyers for its company for six years after the execution of the agreement. Accordingly, the court refused to hold as a matter of law that the ten

168. *Id.*

169. *Id.* at 616.

170. *See id.*

171. *Id.*

172. *See id.* at 616-17.

173. *See id.* at 617 n.4.

year period here was unreasonable, and the court consequently found that there was a genuine issue of material fact regarding whether Rogier failed to perform his obligations within a reasonable time.¹⁷⁴

The court found that it was improper for courts to inquire into the adequacy of consideration, and when the substance of the contract has no determined value, the court will not disturb the determination of the parties as to the sufficiency of the bargain. Furthermore,

[w]hen the broker, in good faith and in compliance with its implied promise to make an effort to sell the property, expends time, energy, and money to find a purchaser or successfully completes the undertaking, there is sufficient consideration for the promise to pay a commission, and the agreement becomes a bilateral and binding contract.¹⁷⁵

The court held that the exclusive listing agreement was supported by consideration and did not fail for uncertainty.¹⁷⁶

Additionally, the agreement was not unenforceable for a lack of mutuality because both parties were bound. When one party performs, relying upon the other party's promise, the contract is not unenforceable for lack of mutuality. In this contract, Rogier had obligations to find a buyer, and he had performed to fulfill those obligations. Accordingly, the court found that this contract was not unenforceable as a matter of law for lack of mutuality.¹⁷⁷

4. *Lapse*.—The court next turned to ATEC's argument that the contract had lapsed. Brokers may only be compensated pursuant to written contract, and such contracts may be revoked through lapse of time. As with the determination of whether Rogier's obligations were performed within a reasonable time, whether the contract was revoked through lapse of time is a question for the trier of fact. Because the parties' course of dealing could lead to more than one inference, the court refused to hold as a matter of law that the contract was unenforceable due to a lapse of time.¹⁷⁸

5. *Abandonment*.—Similarly, the court remanded the case on the question of whether the contract had been abandoned. "The abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted."¹⁷⁹ Abandonment may be implied from the circumstances and the actions of the parties. A contract will be deemed abandoned when a party's conduct is inconsistent with the existence of a contract and the other party acquiesces to such conduct. The mere passage of time between when the broker has ceased to perform and when the owner makes a sale does not conclusively

174. *See id.* at 617.

175. *Id.* at 618.

176. *See id.*

177. *See id.*

178. *See id.*

179. *Id.* at 619 (quoting *Baker v. Estate of Seat*, 611 N.E.2d 149, 152 (Ind. Ct. App. 1993)).

establish that the contract was abandoned. What constitutes abandonment is a question of law, but whether there has been abandonment is a question of fact. In this case, the parties' course of dealing included prolonged "holding patterns" in which there was no sales activity or communication between the parties. Thus, the court held that there was a genuine issue of fact as to whether Rogier abandoned the contract.¹⁸⁰

6. *Waiver*.—Silence and inactivity alone cannot constitute waiver unless there is a duty to speak or act. ATEC argued that Rogier waived his rights under the agreement by failing to communicate with ATEC for long periods of time. The court concluded that, like the determinations of what is reasonable time and abandonment, whether Rogier waived his contractual rights by his prolonged periods of silence is a genuine issue of fact.¹⁸¹

7. *Prevention of Performance*.—A breaching party may not be relieved of his duty to perform under the contract. Further, the common law of contracts excuses a party's performance where the other party prevents that performance. Moreover, "a party may not rely on the failure of a condition precedent to excuse performance" when such failure is a result of that party's actions or inaction.¹⁸² In the case of an exclusive right to sell, there is an implied promise by the owner not to obstruct the broker's performance. Despite the Agreement in this case applying to "all buyers," ATEC did not notify Rogier of the potential buyer, which made his performance virtually impossible.¹⁸³

Ultimately, the court held that whether there was a breach of contract was a question of fact and, accordingly, reversed the summary judgment with respect to ATEC's claims of unforeseeability, lapse, abandonment, and waiver precluding judgment as a matter of law.¹⁸⁴

VII. REMEDIES

In *Nielson Buick Jeep Eagle Subaru v. Hall*,¹⁸⁵ the court considered the scope of remedies available from a small claims court. The buyer of a used car soon discovered she had a problem. The day after her purchase, she returned the car, and the dealer replaced the starter, performed front and rear brake services, and changed the oil and filter at no cost to the buyer. Over the next five months, she returned the car for service several times under the twelve-month limited vehicle service contract. Finally, the dealer refused to perform under the service contract, and the buyer left the vehicle at the dealership. The buyer brought suit, and the small claims court rescinded the contract, awarded the buyer monetary damages and court costs, and awarded the dealership possession of the car. The

180. *See id.* at 619-20.

181. *See id.* at 620.

182. *Id.* at 621.

183. *See id.*

184. *See id.*

185. 726 N.E.2d 358 (Ind. Ct. App. 2000).

dealer appealed.¹⁸⁶

The small claims statute defines the court's jurisdiction based upon the dollar value of the recovery sought.¹⁸⁷ Nothing in the statute authorizes the court to grant the equitable remedy of rescission. Thus, the court of appeals held that the small claims court exceeded its jurisdiction when it granted rescission.¹⁸⁸

CONCLUSION

Contracts law in Indiana, while generally stable and predictable, has continued to evolve over the past year. As evidenced by the cases in this survey, there has been no dramatic swing of the pendulum, but rather a steady progression towards defining the parameters of effectuating the parties' intent. Indiana courts refuse to rewrite agreements, but instead afford the parties the freedom to do amongst themselves what courts cannot. While the consistency in Indiana contracts law may afford the practitioner some comfort and expertise, the prudent drafter should be wary of complacency and should take note of the subtle evolution so as to more effectively counsel and protect his clients' interests.

186. *See id.* at 359-61.

187. *See id.* (citing IND. CODE ANN. § 33-5-2-4 (Supp. 2000)).

188. *See id.* at 360-61.