FULFILLING THE DETERRENT AND RESTITUTIONARY GOALS OF THE SECURITY DEPOSITS STATUTE AND OTHER DEVELOPMENTS IN INDIANA PROPERTY LAW

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It has been said of human beings that "[w]e cannot escape the appeal of order."[1] In the physical sciences, even though we know that matter tends from order to entropy, we still look for "meaningful or nonrandom arrangement of parts within a structure."[2] The appeal of order likewise impacts the law. Roscoe Pound identified twelve functions accomplished by law, but common to each of them and to all theories of law is "a system of ordering human conduct and adjusting human relations."[3]

Legal order adjusts human relations in at least two respects. First, on a social scale, it resolves disputes in a way that expresses society's conclusions about fairness and justice. Second, on an individual scale, it informs people of the likely ramifications of their conduct, which in turn permits people to interact with others reasonably confident that legitimate expectations will be supported by the courts and improper conduct will be redressed.

Establishing legal order requires appellate courts to create order by establishing fair and just rules in the first instance. Appellate courts must also maintain order by implementing legal principles consistent with prior experience. Finally, appellate courts should not introduce disorder into the legal system by way of inconsistent applications of legal principles. If an inconsistency is introduced, a higher appellate court should be especially vigilant to correct it and to reinstate order.

The appellate court opinions discussed in this Article display the courts' efforts to create and sustain a meaningful arrangement of legal principles within the structure of property law. In the lead case,[4] the court's opinion contributed to a developing split between two irreconcilable analytical approaches to the Indiana Security Deposits statute. This divergence leaves an uncomfortable sense

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1. IAN MARSHALL & DANA ZOHAR, WHO'S AFRAID OF SCHRÖDINGER'S CAT? 13 (1997).
2. *Id.*
3. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF THE LAW 31 (1922).
4. Turley v. Hyten, 751 N.E.2d 249 (Ind. Ct. App. 2001). *See infra* Part I.

of disorder. In another case,[5] the court of appeals was confronted with a case of first impression for Indiana law and established principles that will order and adjust future relations. In other cases,[6] the court advanced the development of property law in an orderly fashion by bringing cases involving novel fact situations into the fold of existing legal principles.

The opinions examined in this Article also exhibit the institutional roles of the Indiana Court of Appeals and the Indiana Supreme Court in establishing and maintaining order. In one case,[7] the supreme court corrected a decision by the court of appeals that would have undone a century or more of precedent and would have introduced substantial disorder into the writing requirement in property law. In another case, involving a mortgagee's duties to other parties at a loan closing,[8] the supreme court denied a petition to transfer and thereby declined an opportunity to increase order. That denial leaves intact a court of appeals decision from 2000 in which two judges on the panel expressly sought a re-examination of current law by the higher court.

This Article consists of three sections, each with its own purpose. The first section analyzes the development of two mutually exclusive interpretations of the Security Deposits statute.[9] These competing interpretations, between which trial courts must choose to resolve disputes between landlords and tenants over retention of security deposits, lead to opposite results. This Article proposes that a landlord should be able to apply security deposit funds to legitimate and appropriately itemized damages even if the landlord's notice letter to the tenant fails to comply with the requirements of the statute with regard to other individualized items.

The second section describes six opinions issued by the Indiana Court of Appeals during the survey period. These opinions were selected because they either created new law, clarified existing legal principles, or demonstrated the application of a legal principle in a noteworthy fashion. This Article will attempt to identify the contributions of these opinions by placing them in a substantive

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5. Howell v. Hawk, 750 N.E.2d 452 (Ind. Ct. App. 2001) (In deciding whether a restrictive covenant prohibiting "mobile homes" in a subdivision precluded a resident from constructing a "modular home," the court stated, "We have not found . . . any Indiana case on point to guide our interpretation of these definitions and regulations . . . ."). *See infra* Part II.A.2.

6. *See infra* Part II.

7. Brown v. Branch, 758 N.E.2d 48 (Ind. 2001). *See infra* Part III.A.

8. Town & Country Homecenter of Crawfordsville, Ind., Inc. v. Woods, 725 N.E.2d 1006 (Ind. Ct. App.) *trans. denied*, 741 N.E.2d 1249 (Ind. 2000). *See infra* Part III.B.

9. IND. CODE §§ 32-7-5-1 to -19 (1998). In the 2002 session, the Indiana General Assembly recodified statutes affecting property law with the goals of reorganizing the statutes and of rephrasing them to improve clarity. Although the majority of the affected statutes are in Title 32, a large number of other titles are also affected. Effective July 1, 2002, many statutes are repealed and are recodified as new code sections. There are no substantive changes to the Security Deposits statute, but Indiana Code sections 32-7-5-1 to -19 will be recodified at Indiana Code sections 32-31-3-1 to -19. Because the former section numbers were in force in the survey period and were used in all of the cases analyzed, the former section numbers will be used throughout the Article.

or historical context.

The third section revisits two cases that were reviewed in the 2001 survey issue on Indiana property law.[10] In *Brown v. Branch*,[11] the Indiana Supreme Court granted a petition to transfer and reversed the decision of the court of appeals. The supreme court's opinion is significant for its determination of the scope of the Statute of Frauds[12] with regard to transfers of interests in real estate. In *Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods*,[13] the supreme court denied a petition to transfer, leaving unresolved the problems identified by the concurring and dissenting opinions and discussed in last year's Article.[14]

I. LANDLORD—TENANT RELATIONS: CONFLICTING APPROACHES TO INDIANA'S SECURITY DEPOSITS STATUTE

In *Turley v. Hyten*[15] the Indiana Court of Appeals was confronted with an appeal from an entry of summary judgment in favor of a tenant that disallowed a landlord's claim for damages because the landlord failed to comply with the notice provisions of Indiana's Security Deposits statute.[16] The court of appeals' judgment to affirm the trial court's decision effected an unfair result that excessively penalized the landlord and unnecessarily enriched the tenant. The tenant who terminated his lease early and who caused extensive damage to the rental property escaped all liability for his actions while the landlord was compelled to return the full amount of the tenant's security deposit and to pay the tenant's attorney's fees.

The court of appeals reached this result by characterizing the provisions of the Security Deposits statute as "explicit and mandatory"[17] and by concluding that the notice requirements of the statute are "strict,"[18] meaning that nothing less than absolute and literal compliance will suffice. The analytical approach of the *Turley* court was so inflexible and so categorical in result that it begged closer examination. That examination disclosed a line of appellate court opinions issued prior to *Turley*. The analyses contained in those cases belie the existence of a single, mandated approach, as presented in *Turley*, and present instead two conflicting views of the correct interpretation of the Security Deposits statute. These views focus on whether the statute requires "strict compliance," producing

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10. *See generally* Lloyd T. Wilson, Jr., *New Bricks for the Wall: Developments in Property Law in Indiana*, 34 IND. L. REV. 955 (2001).

11. 758 N.E.2d 48 (Ind. 2001).

12. IND. CODE § 32-2-1-1 (1998). Effective July 1, 2002, the Statute of Frauds will be recodified at Indiana Code section 32-21-1-1.

13. 741 N.E.2d 1249 (Ind. 2000).

14. *See* Wilson, *supra* note 10, at 981-88.

15. 751 N.E.2d 249 (Ind. Ct. App. 2001).

16. *Id.* at 251.

17. *Id.* at 252 (citing Pinnacle Props. v. Saulka, 693 N.E.2d 101, 104 (Ind. Ct. App. 1998)).

18. *Id.* at 251.

only all-or-nothing results, or whether it permits "substantial compliance," allowing partial recognition and partial denial of a landlord's claims.

It is the thesis of this Article that the *Turley* opinion misinterprets the intended application of the statute and that the substantial compliance approach better implements the deterrent and restitutionary goals and policies of the Security Deposits statute. Deficiencies in the landlord's notice letter were so extensive in the *Turley* case that the court may have reached the same result under either approach. The same may not be true, however, of other cases where the landlords' "failings" are not as extensive as in *Turley* but still do not reach the level of absolute compliance. In such cases, the choice of analytical method would lead to opposite results. The strict compliance approach of *Turley* merits examination and comparison to the substantial compliance approach so that their analytical differences can be illuminated and a single model can be adopted. The Security Deposits statute should be interpreted and applied in a way that promotes its goals while neither imposing undue burdens on, nor dispensing unmerited windfalls to, either landlord or tenant.

In *Turley*, the landlord and the tenant entered into a lease agreement for a house. The lease term was for one year, from May 1 to April 30, at a rent of $450 per month, payable in advance. The tenant paid to the landlord a security deposit equal to one month's rent. Near the end of January, the ninth month of the lease term, the tenant notified the landlord that the tenant intended to terminate the lease prematurely and would vacate the house at the end of the month. When the landlord went to the house on January 31, the tenant was still in possession.

When the landlord returned three days later, the tenant had vacated the house. In so doing, the tenant left the house unheated and a window open. As a result of cold February weather, the pipes in the house burst causing extensive water damage to the carpet and floors. According to the landlord, the house had to be "totally replumbed." The unrestricted flow of water also resulted in a large utility charge billed to the landlord. In addition, the landlord stated that the tenant left trash in the house and was responsible for multiple holes in the walls.

The landlord filed a complaint for damages against the tenant. The tenant answered and filed a counterclaim seeking return of his security deposit and payment of attorney's fees pursuant to the Security Deposits statute. The tenant filed a motion for summary judgment, which the trial court granted. The judgment denied relief to the landlord, ordered the landlord to return the tenant's security deposit, and ordered the landlord to pay the tenant's attorney's fees. The landlord appealed.

The court of appeals identified two issues on appeal. The first issue was whether the landlord provided sufficient notice of the damages and of his intent to apply the security deposit toward them. The second issue was whether a failure to meet statutory notice requirements under the Security Deposits statute barred the landlord from asserting a claim for other damages.

The Security Deposits statute[19] was enacted in 1989. Subsequent appellate

19. IND. CODE § 32-7-5 (1998).

discussion of the statute centers on three recurring disputes: 1) what action by a landlord is sufficient to satisfy the itemization of damages component of the notice requirement, 2) what is the result if a landlord's notice letter is sufficiently itemized for some damage elements but not for others, and 3) what is the scope of the implied acknowledgment that no damages are due that arises from a landlord's failure to comply with the notice requirements. These recurring disputes arise from sections 12, 13, 14, and 15 of the statute.

Section 12 contains four important provisions. First, subsection (a) identifies the expenses and damages toward which a security deposit may be applied. It states that on termination of a rental agreement a landlord must return all of a tenant's security deposit, except for any amount that the landlord applies to "payment of accrued rent," "damages that the landlord has or will reasonably suffer by reason of the tenant's noncompliance with law or the rental agreement," and "unpaid utility or sewer charges that the tenant is obligated to pay under the rental agreement."[20] Second, subsection (a) also sets forth the landlord's itemization and notice requirements. It states that any application of a security deposit to an allowed expense or damage must be "itemized by the landlord in a written notice delivered to the tenant together with the amount due within forty-five (45) days after termination of the rental agreement and delivery of possession."[21]

Third, subsection (b) provides remedies to a tenant where the landlord fails to comply with subsection (a). "If the landlord fails to comply with subsection (a), the tenant may recover all of the security deposit due the tenant and reasonable attorney's fees." Fourth, subsection (c) provides that the statute does not "preclude the landlord or tenant from recovering other damages to which either is entitled."[22]

Section 13(1) supplements section 12(a), by elaborating on the purposes for which a security deposit may be used. For example, section 13 qualifies the "damages" component of section 12(a)(2) by adding the requirement that damages be "actual" and that they not be the result of "ordinary wear and tear expected in the normal course of habitation of a dwelling."[23] Similarly, section 13(2) elaborates on the "accrued rent" component of section 12(a)(1) by including both "rent in arrearage" and "rent due for premature termination of the rental agreement by the tenant."[24]

Section 14 specifies the itemization and notice requirement of section 12(a)(3) by providing:

> In case of damage to the rental unit or other obligation against the security deposit, the landlord shall mail to tenant, within forty-five (45) days after the termination of occupancy, an itemized list of damages

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20. *Id.* § 32-7-5-12(a).
21. *Id*.
22. *Id*. § 32-7-5-12(c).
23. *Id*. § 32-7-5-13(1).
24. *Id*. § 32-7-5-13(2).

> claimed for which the security deposit may be used as provided in section 13 of this chapter, including the estimated cost of repair for each damaged item and the amounts and lease on which the landlord intends to assess the tenant. The list must be accompanied by a check or money order for the difference between the damages claimed and the amount of the security deposit held by the landlord.

Section 15 creates an implied acknowledgment by the landlord that "no damages are due" if "the landlord [fails] to comply with the notice of damages requirement within the forty-five (45) days after the termination of occupancy," in which case "the landlord must remit to the tenant immediately the full security deposit."[25] The key terms that courts must interpret and reconcile are "itemization" from sections 12(a) and 14, "due the tenant" from section 12(b), "other damages" from section 12(c) and "no damages" from section 15.

In *Turley*, the landlord mailed a letter to the tenant on February 25, twenty-two days after the landlord discovered that the tenant had vacated the house. The landlord's letter contained a narrative description of the expenses and damages he had incurred as a result of the tenant's premature breach and damage to the house. The court of appeals acknowledged that the landlord's letter was timely mailed and that it "rather thoroughly identified various damaged items."[26] The court concluded, however, that the landlord's letter failed to comply with the itemization requirement of section 14. The landlord's letter to the tenant stated, "All though [sic] we don't have a complete estimate yet, the damage is already more than $1,400.00."[27] The landlord added, "After a complete assessment is made, we will give you a full itemized statement. It will also include lost rent due to our inability to lease the house again on a timely basis."[28]

The court of appeals determined that landlord's letter was "insufficiently detailed to comply with IC 32-7-5-14" because "it did not provide the estimated cost for each damaged item."[29] The court reasoned that "[w]ithout identification of the cost of each repair, tenant was unable to discern whether the individual charges that comprised the $1,400 were proper or reasonable."[30]

The notice letter from the landlord in *Turley* contained no itemization of any of the claimed damages, and the court's decision could have been decided simply by reference to existing precedents. It is the *Turley* court's emphatic pronouncement of a strict liability-like approach to compliance with the Security Deposits statute that raises concerns. For the benefit of cases to come, the *Turley*

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25. *Id.* § 32-7-5-15.

26. Turley v. Hyten, 751 N.E.2d 249, 252 (Ind. Ct. App. 2001).

27. *Id.* at 251.

28. *Id.*

29. *Id.* at 252.

30. *Id.* The court rejected the landlord's argument that notice was unnecessary because the amount of unpaid rent exceeded the amount of the security deposit. The court stated, "[r]egardless of whether unpaid rent equals or exceeds the security deposit, Landlord must give statutory notice of intent to hold the security deposit." *Id.*

opinion must be recognized as an expression of the less desirable of two competing visions of the statute.

Interpretation of the Security Deposits statute begins with the court of appeals' 1992 decision in *Skiver v. Brighton Meadows*.[31] In *Skiver*, the landlord retained a tenant's security deposit of $350 and applied it to $4,230 of accrued rent that resulted from the tenant's early termination of his lease. The landlord did not send written notice to the tenant because the unpaid rent exceeded the security deposit and the landlord did not intend to pursue the tenant for any other damages done to the rental unit. The court held that notice under section 14 of the Security Deposits statute was required and that the landlord's failure to send "a letter itemizing the accrued rent due to [tenant's] premature termination of the rental agreement" operated as an agreement under section 15 that no damages were due.[32] As a result, the landlord could not collect accrued rent and was ordered to return the security deposit. *Skiver* established that a landlord must provide notice of intended uses for a security deposit even when the use is arguably within the actual notice of a tenant (as would be the case with accrued rent following premature termination) and where the damages "obviously" exceed the amount of the deposit.

Also decided in 1992 was *Duchon v. Ross*.[33] In that case, the court of appeals stated, "This is the first time the sufficiency of a notice submitted pursuant to [the Security Deposits] statutes . . . has been questioned in this state."[34] The court noted that "[t]hese statutes concern the duties of landlords to return security deposits to tenants."[35]

Duchon contains some facts reminiscent of *Turley*. Specifically, as in *Turley*, the tenant in *Duchon* vacated the rental premises in February, disconnected the heat, and left a window open. Additionally, the landlord's letter to the tenants, like the landlord's letter in *Turley*, contained a detailed description of damages but did not itemize the repair costs and instead promised a final accounting "[o]nce the costs associated with the [described] items are determined."[36]

Duchon, like *Skiver*, held that a notice of damages unaccompanied by estimated costs of repair is insufficient as a mater of law.[37] *Duchon* added that "[d]isputes over the costs of repair or the assessment of damages do not relieve the Landlords of the requirement to provide the estimated costs of repair."[38]

Duchon also includes the first discussion of the "other damages" component of section 12(c) and of the relationship of those damages to the implied agreement component of section 15. The court provided some insight into the

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31. 585 N.E.2d 1345 (Ind. Ct. App. 1992).
32. *Id.* at 1347.
33. 599 N.E.2d 621 (Ind. Ct. App. 1992).
34. *Id.* at 623.
35. *Id.*
36. *Id.* at 624.
37. *Id.* at 625.
38. *Id.* at 624-25.

otherwise undefined term, "other damages," by noting that such damages could include "claims for amounts in excess of the security deposit," and "other types of damages not specified in Section 12."[39] Although the court concluded that "the clear intent of Section 15 is that if a landlord fails to provide the requisite notice within the 45-day period[,] there are no 'other damages' to collect,"[40] this statement cannot be taken to support the complete release approach of *Pinnacle Properties*. First, the court provides no analysis to explain the propriety of its interpretation or to explore the implications of its statement. Second, to rely on this quote for that purpose ignores the fact that *Duchon*'s author is Judge Hoffman, who also wrote the dissent in *Pinnacle Properties* criticizing the majority's "all-or-nothing" approach. Unfortunately, the phrase that "there are no 'other damages' to collect" is often quoted without reference to context.

While the specificity of the notice was not challenged in *Miller v. Geels*,[41] the court of appeals did address the "other damages" issue. In *Miller*, the landlord gave a timely and itemized written notice of the damages toward which the tenants' security deposit would be applied, including accrued rent and carpet shampooing. The tenants did not dispute the deduction of all accrued rent from the deposit, but they did object to the deduction for carpet cleaning. The carpet was not stained or spoiled by pet odors, two common types of damage to carpet; it simply displayed "the accumulation of dirt." The tenants argued that the accumulation of dirt constituted "ordinary wear and tear expected in the normal course of habitation of a dwelling" and therefore was not a type of damage to which the security deposit could properly be applied.[42] The landlord argued that the carpet cleaning was a type of "other damage" that could be recovered pursuant to the "restoration provision" contained in the lease. By this provision the tenants agreed that when they vacated the rental premises the "carpet shall be shampooed" and that "[a]ny necessary cleaning to return the house to the same condition as when the Lessee moved in will be deducted from the security deposit."[43]

The court then concluded that dirt which a tenant permits to accumulate in carpet is not "ordinary wear and tear" and qualifies as "other damages."[44] Thus, the damage limitations of the Security Deposits statute did not apply to "other

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39. *Id.* at 625.

40. *Id*.

41. 643 N.E.2d 922 (Ind. Ct. App. 1994). In footnote six, the court identified two notable limitations on the Security Deposits statute. First, for items that are not specified in section 12, "the statute does not require any notice at all of the amount of 'other damages' the landlord may seek." *Id*. at 926 n.6. Second, estimated repair costs are all that are required as "[t]here is no requirement in the statute that the landlord provide actual receipts with the notice." *Id*.

42. *Id*. at 926-27.

43. *Id*. at 926.

44. Noting definitions of "ordinary wear and tear" in other jurisdictions, the court described it as "the gradual deterioration of the condition of an object which results from its appropriate use over time." *Id*. at 927 (citing Publishers Bldg. Co. v. Miller, 172 P.2d 489, 496 (Wash. 1946); Cyclops Corp. v. Home Ins. Co. (W.D. Pa. 1973)).

damages" a landlord might be entitled to recover apart from the deposit. "It was not the legislature's intent to limit the freedom of landlords and tenants to contractually define 'other damages' . . . . Thus, we decline to extend the reach of the statute beyond the security deposit."[45] The court stated that even though "[i]t was the intent of the legislature to provide special protection for security deposits, which often give rise to landlord-tenant disputes[,] [t]he statute clearly and unambiguously preserves the right of the landlord or tenant to recover other damages to which either is entitled."[46] The *Miller* case thus established that there are damages to which the Security Deposits statute applies and other damages that are outside the scope of the statute.

The court also circumscribed the reach of the statute by stating:

> The Security Deposits statute applies only to security deposits. It is a basic rule of construction that statutes in derogation of the common law are to be strictly construed. "We will assume that the legislature is aware of the common law and intends to make no change therein beyond its declaration either by express terms or unmistakable implication."[47]

As discussed below, recognizing that claims not based on the Security Deposits statute remain unaffected by it has important ramifications for both the "other damages" provision of 12(c) and for the "no damages" presumption of section 15.[48]

The court of appeals further interpreted the provisions of the Security Deposits statute in *Rueth v. Quinn*.[49] In that case, the court of appeals addressed issues relating to both timeliness and content of the statute's notice provisions. In *Rueth* the tenants held over beyond the end of the lease term, even though they knew the landlord had sold the house to third parties and was obligated to close on a specific date. When the tenants finally vacated the house, the landlord sent written notice to them identifying the nature and amount of three types of damages that she intended to deduct from the tenants' $1,100 security deposit. These damages were for a per diem rent charge for occupancy during the hold-

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45. *Id*.

46. *Id*.

47. *Id*. (citation omitted).

48. *See infra* notes 84-90 and accompanying text.

49. 659 N.E.2d 684 (Ind. Ct. App. 1996). This case contains a useful discussion of problems that can arise in determining the date on which the forty-five day notice period begins to run. The tenants claimed the landlord failed to send the damage notice to them within forty-five days after the lease terminated as required by sections 13 to 16 of the statute. The court determined that the lease agreement terminated on January 18, 1993, and not on June 10, 1992, which was the date the original lease expired, because January 18 was when the tenants surrendered the house and that was when the landlord accepted their surrender. *Id*. at 689. *See also* Figg v. Bryan Rental, Inc., 646 N.E.2d 69, 74 (Ind. Ct. App. 1995) (holding that a tenant's abandonment of leased premises did not trigger the forty-five day period for the landlord's notice letter). For the notice period to begin, the landlord must take "some decisive, unequivocal act . . . which manifests the lessor's acceptance or the surrender." *Id.* at 73.

over period, a penalty imposed by the purchase agreement that the landlord was compelled to pay to the purchasers of the house because she could not convey possession on the scheduled closing date, and late fees the landlord had to pay to her title company for closing after the scheduled date.

Unfortunately for the landlord, she miscalculated the per diem rent in her notice to tenants by $366.64. Further, she actually paid $400 in hold-over penalties to the buyers when under the terms of the purchase agreement she was only obligated to pay $240. The landlord said she agreed to pay the higher figure to avoid being sued by the purchasers. The trial court decided that, as a result of the calculation error and the voluntary overpayment of fees to the buyers, the landlord's notice failed to comply with the Security Deposits statute. It ordered her to return the full amount of the tenants' deposit and to pay their attorney's fees.

The court of appeals affirmed in part and reversed in part. It reversed the trial court's conclusion that the landlord's overstatement of damages in her notice letter required her to return the entire deposit.[50] The court treated the components of the notice letter as distinct and severable. The landlord had to return the overstated amounts but was entitled to keep both the amounts that she had accurately stated and the correct amounts of the overstated damage items.

The court acknowledged that it was addressing a new question of law. "This court has not addressed the ramifications when the landlord's deductions from the [security] deposit are erroneous."[51] The court concluded that the inclusion of erroneous deductions rendered the notice insufficient to comply with the notice provisions of the statute.[52] Just as importantly, however, the court held that non-compliance, by itself, did not end the matter or require a landlord to return the entire deposit. Instead, the court had to determine what amount of the security deposit the tenants were entitled to recover.

Section 12(b) of the Security Deposits statute states, "If the landlord fails to comply with subsection (a), the tenant may recover all of the security deposit *due the tenant* and reasonable attorney's fees."[53] In *Rueth*, the tenants were "due" only the amount of the miscalculation of per diem rent and the excess hold-over amount paid to the buyers. The tenants were not "due" any further part of their deposit because the charges, at least as recalculated, were legitimate as either accrued rent under 12(a)(1) or as "damages that the landlord has . . . suffer[ed] by reason of the tenant's noncompliance with . . . the rental agreement" under

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50. *Id*. at 690.

51. *Id*. at 689.

52. *Id*. The court reasoned:

> Because a landlord is in a superior position to determine a tenant's damages, we find that when: 1) a landlord erroneously calculates the tenant's damages, 2) the tenant resorts to legal action to collect all or part of his deposit, and 3) the tenant was entitled to a return of all or part of the tenant's deposit, the landlord has not complied with the notice requirement of the statute.

Id.

53. IND. CODE § 32-7-5-12(b) (1998) (emphasis added).

12(a)(2). Under the *Rueth* analysis, the itemization requirements of the landlord's written notice are correctable, subject to the "penalty" that noncompliance may require the landlord to pay the tenant's attorney's fees.[54]

The Security Deposits statute was next addressed in *Greasel v. Troy*.[55] *Greasel* provides guidance on both the itemization component of the notice letter and on the nature of "other damages." In that case, the tenant sued his landlord for return of his security deposit. The landlord filed a counterclaim for damages to carpet from pet odor. The tenant argued that he was entitled to return of his deposit because the landlord's notice letter failed to comply with section 14 of the statute. As a result of this non-compliance, the tenant argued that the landlord was barred from seeking "other damages."

The landlord's notice letter identified the damage to the carpet and the cost to repair it. The landlord's letter also listed other items of damage, but she included no costs of repair for them because she did not intend to assess those damages against the tenant. At trial, the tenant argued that failure to include repair costs for all items in the notice letter invalidated it in full. The court distinguished *Duchon*, which held that a landlord's notice letter failed to comply with the statute where the letter identified damages but provided no estimates of repair for any of them, on the ground that the landlord in *Greasel* did provide the cost of repair for the items she intended to assess against the tenant. The omission of repair costs for damaged items that may have been identified, but for which no recovery was sought, was inconsequential.[56] This holding stands in stark contrast to the decision in *Turley*.

Having determined that the landlord's notice complied with the statute and thereby preserved her right to seek "other damages," the court of appeals' opinion addressed that term. The court wrote, "[W]here the landlord provides notice in satisfaction of the statute, she may then seek to recover any 'other damages' *beyond the security deposit* to which she is entitled under the lease agreement."[57] The parties' lease provided that the tenant was required to repair at his expense "any damage caused by . . . pets of Tenant."[58] Accordingly, the landlord was entitled to seek recovery beyond the amount of the security deposit as "other damages" authorized by the lease agreement.

From *Skiver* and *Duchon* in 1992 through *Greasel* at the very end of 1997, several principles about the Security Deposits statute appear established. First, a landlord fails to comply with the statute when he fails to send any notice

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54. *Rueth*, 659 N.E.2d at 689-90. Another problem for the interpretation of the Security Deposits statute relates to a court's discretion, or lack of it, in awarding attorney's fees to a tenant where the landlord's notice letter contains both adequately and inadequately stated damages. In *Pinnacle Properties*, the court of appeals said that an award of attorney's fees to the tenant is mandatory. Pinnacle Props. v. Saulka, 693 N.E.2d 101, 105 (Ind. Ct. App. 1998). In *Rueth*, the court said that an award of attorney's fees is discretionary. *Rueth*, 659 N.E.2d at 690.

55. 690 N.E.2d 298 (Ind. Ct. App. 1997).

56. *Id.* at 302.

57. *Id.* (emphasis added) (citing Miller v. Geels, 643 N.E.2d 922, 926 (Ind. Ct. App. 1994)).

58. *Id*.

whatsoever to the tenant concerning use of the security deposit, even if the use is for unpaid accrued rent.[59] Second, a landlord fails to comply with the statute if he provides notice that identifies the nature of damages he intends to charge against the security deposit but fails to provide individual costs of repair for any of those items.[60] Third, where the notice letter is individually itemized as to both nature of damage and cost of repair, the damages limitations imposed by the statute do not limit a landlord's ability to seek recovery for "other damages" in excess of the deposit where permitted under the lease; only estimates of cost of repair are required, not actual receipts; and neither the nature nor cost of repair for "other damages" must be stated in the notice letter.[61] Fourth, where the notice letter is individually itemized as to both nature of damage and cost of repair, the inclusion of erroneously calculated or excessively stated damages does not invalidate the entire notice; the tenant is entitled to a return of only the amount of the deposit "due;" the landlord is entitled to retain the correctly calculated amounts of all legitimate charges.[62] Finally, where the notice letter is individually itemized as to both nature of damages and cost of repair for the damages the landlord seeks to charge against the security deposit, the inclusion of other items of damage without individual repair costs does not invalidate the notice or preclude the landlord from recovering "other damages" permitted under the lease; even with errors, the purposes of the notice provision, which are "to inform the tenant that the landlord is keeping the security deposit and for what reason" and to "provide[] the tenant an opportunity to challenge the costs for which the deposit is being used" are met.[63]

A difference in judicial approach clearly emerges with the court of appeals' decision in *Pinnacle Properties v. Saulka*.[64] This divergence is perpetuated by the court's decisions in *Schoknecht v. Hasemeier*[65] decided in 2000 and in *Turley* in 2001. The approaches used by these courts cannot be reconciled. One approach must be chosen, and that approach should be the one used in *Schoknecht* and expressly or impliedly endorsed in the pre-*Pinnacle Properties* opinions.

In *Pinnacle Properties*, the tenants sued their landlord to recover an earnest money deposit that the landlord had retained for damages to the rental property. The tenants asserted that the landlord's notice letter did not comply with the Security Deposits statute. The landlord filed a counterclaim seeking damages in

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59. Skiver v. Brighton Meadows, 585 N.E.2d 1345 (Ind. Ct. App. 1992).

60. Duchon v. Ross, 599 N.E.2d 621 (Ind. Ct. App. 1992).

61. Miller v. Geels, 643 N.E.2d 922 (Ind. Ct. App. 1994).

62. Rueth v. Quinn, 659 N.E.2d 684 (Ind. Ct. App. 1996).

63. *Greasel*, 690 N.E.2d at 302 (citing Meyers v. Langley, 638 N.E.2d 875, 878-79 (Ind. Ct. App. 1994)). In *Meyers*, the court found that the purposes of the notice provision had been served where the landlord sent the tenant a letter that itemized as damages "material for two doors, material to fix the bathroom, material for a 'kit room,' labor costs, and court costs and set forth specific dollar amounts for each" and "$600.00 for two months rent." *Meyers*, 638 N.E.2d at 878-79.

64. 693 N.E.2d 101 (Ind. Ct. App. 1998).

65. 735 N.E.2d 299 (Ind. Ct. App. 2000). *See also* Wilson, *supra* note 10, at 976-78.

excess of the amount of the security deposit.

After the tenants vacated the property, the landlord sent a written "Vacate Report" identifying six types of damages and providing individual repair costs for each. The report contained commonplace items such as cleaning, carpet replacement, and painting; it also contained a $670 charge identified only as "other damages." The court found this damage entry insufficient to satisfy the itemization requirement of section 14 of the statute. That conclusion would have been unremarkable as the court had held since *Duchon* that costs of repair which are "lumped together" rather than individually itemized do not satisfy the statute. The analysis in the majority opinion, however, exhibits a marked difference from the approach used in prior opinions, especially *Rueth* and *Greasel*. The court identified the legitimate ends served by the notice requirement of the statute as follows:

> The notice provision does not impose a difficult burden on the landlord. The purpose of the provision is to inform the tenant that the landlord is keeping the security and for what reason, as well as to allow that tenant an opportunity to challenge the costs for which the deposit is being used.[66]

For the court in *Pinnacle Properties*, "if the landlord fails to provide the tenant with an itemized list of damages including the estimated cost of repair for *each damaged item*, the purpose for the notice provision has not been served."[67]

The court then took an unexpected and unnecessary step and used the inadequacy of *one* damages item to invalidate *all* damages items, even those that were appropriate in nature and accompanied by cost of repair. Announcing a strict construction approach, the court stated, "A strict reading of Indiana Code §§ 32-7-5-13 and –14 does not allow for substantial or partial compliance by the landlord with the itemization of damages notice requirement."[68] The court concluded that the failure to comply with the notice provision, which arose from the inadequacy of one entry in the Vacate Report, constituted agreement by the landlord that "no damages" of any kind were due by virtue of section 15.[69]

The *Pinnacle Properties* court does not explain why it was compelled to reach a decision contrary to the similar cases of *Rueth* and *Greasel*. The majority opinion did not refer to those cases, let alone distinguish them. The two cases the majority did cite, *Miller* and *Duchon*, do not require the decision the majority reached. In *Miller*, the tenant did not dispute either the timeliness or sufficiency of the detail in landlord's notice, and in *Duchon* the landlord's letter acknowledged that none of the repair costs had yet been determined. Further, other than reciting that the Security Deposits statute "is in derogation of the common law [and] must be strictly construed,"[70] the majority opinion did not

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66. *Pinnacle Props.*, 693 N.E.2d at 104.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (citing Miller v. Geels, 643 N.E.2d 922, 927 (Ind. Ct. App. 1994)).

explain why the policies of the statute could not be achieved by severing the offending damage entry and enforcing the other legitimate and properly documented entries. For those appropriate entries the tenants would have been provided with notice and an opportunity to challenge. For the inappropriate entry, the landlord would have suffered the obligation to pay the tenants' attorney's fees as provided in *Rueth.*

The overreach of the majority's decision was noted by Judge Hoffman, who dissented "insofar as the majority finds that [landlord's] partially inadequate notice entitles the tenants to return of their entire security deposit."[71] Judge Hoffman supported his dissent on both statutory interpretation and policy grounds. Whereas the majority opinion concluded that the presumptive agreement of "no damages" in section 15 arises "unless the [landlord's] notice is in compliance *in toto*,"[72] Judge Hoffman argued that section 15 "is inapposite when only a portion of the notice fails"[73] and that the statute "contemplate[s] return of the full security deposit when the entire notice fails, e.g. untimely notice, no itemization, or no estimated costs."[74]

Judge Hoffman also provided a telling description of the effect of the majority's decision. "Certainly the statutes discourage overreaching and unscrupulous retention of security deposits. They do not, however, compel landlords to unrefutably itemize damages in a legal roll of the dice where they may lose all by a misstep."[75] Neither the terms of the Security Deposits statute nor existing precedent requires that the statutes be an "all or nothing proposition."[76]

The *Pinnacle Properties* opinion was cited once in the court of appeals' 2000 decision in *Schoknecht v. Hasemeier*,[77] but its all-or-nothing approach was not followed, or even directly acknowledged. In *Schoknecht*, the tenant defaulted on her lease by failing to make rental payments when due. The landlord obtained a judgment for possession, with a hearing on damages to follow. After obtaining possession, the landlord discovered damages to the property. The landlord timely sent written notice to the tenant, in which she itemized the damages and provided a cost of repair for each.

The tenant later filed suit for return of her security deposit, which suit was consolidated with landlord's suit for damages in excess of the amount of that

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71. *Id*. at 106 (Hoffman, J., dissenting).

72. *Id.*

73. *Id*.

74. *Id*. The majority opinion also fails to address the court's decision in *Figg*, where the landlord's erroneous inclusion of an extra month's unpaid rent in his notice letter did not render that notice insufficient. Figg v. Bryan Rental, Inc., 646 N.E.2d 69, 70 (Ind. Ct. App. 1995). But for two footnotes in which the court explained the damage component of the summary judgment entered in favor of the landlord, the error in the notice letter would have received no attention at all. *Id.* at 69 nn.1-2.

75. *Pinnacle Props.*, 693 N.E.2d at 107.

76. *Id*. at 106.

77. 735 N.E.2d 299 (Ind. Ct. App. 2000).

deposit. The tenant argued that the landlord failed to comply with the Security Deposits statute because the landlord's notice letter contained some damage items that she was not entitled to deduct from the security deposit and because she failed to substantiate the estimated cost of repair. The landlord responded that the letter included good faith estimates of repair costs, that she was not required to substantiate her itemized list of damages, and that her notice letter was valid even though she did not list damages chargeable to the security deposit separately from damage items that were not chargeable to it. Once again the itemization requirement of section 14 and the presumptive acknowledgment of "no damages" from section 15 had to be examined.

The court observed that section 14 of the statute contains "strict notice requirements" and that failure to comply with these requirements constitutes an agreement that no damages are due.[78] Quoting *Miller*, the court further observed, however, that "'the Security Deposit statute applies only to security deposits' and that the statute 'clearly and unambiguously preserves the right of the landlord . . . to recover other damages to which [he or she] is entitled.'"[79] Because the statute permits a landlord to pursue claims that are not deductible from the security deposit in addition to those claims that are deductible, it is not an "erroneous calculation" by the landlord to include both types of claims in one letter. "[W]hile the Security Deposits statute requires Landlord to itemize the damages for which the security deposit may be used, it does not prohibit her from also itemizing other damages claimed under the lease."[80] The court of appeals thus reversed the decision of the trial court and remanded with instructions to calculate the amount of damages landlord was entitled to receive and what amount should be reimbursed to the tenants.[81]

The *Schoknecht* opinion does not construe the inclusion of non-conforming damages or damages outside the scope of the statute as prohibited "partial compliance," as the majority opinion did in *Pinnacle Properties*. Although not expressly identified, Judge Hoffman's recognition of the possibility of partial compliance and the need to compute the amount of deposit "due" is consistent with the *Schoknecht* court's instructions on remand.

We now come full-circle to *Turley*. Because the landlord's notice letter in that case contained only a lump-sum damage repair cost and failed to provide itemized costs for any of the damages, that notice was insufficient under *Duchon*

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78. *Id*. at 302.

79. *Id*. at 303 (alteration in original and citations omitted).

80. *Id*. The court also held that pursuant to the notice requirements of the Security Deposits statute the landlord does not have to substantiate the damages in the letter but rather needs to supply only an "estimated cost for each damaged item." *Id*. The analysis of *Schoknecht* in last year's survey on Indiana property law concluded that to fulfill the statutory notice requirements "notice must be specific enough to set forth an itemized list of damages and an estimated cost of repair for each, but the substantive rights of the parties under the lease, the factual support . . . for claims asserted, and the substantiation of damage amounts are left for further proceedings." Wilson, *supra* note 10, at 978.

81. *Schoknecht*, 735 N.E.2d at 303.

and all other cases that have interpreted the Security Deposits statute. The notice contained no legitimate and itemized damage items capable of being severed and preserved.

However, there is reason to infer from the court's treatment of the landlord's claim for "other damages" that it would not have allowed itemized claims to survive even if the facts had been different. The landlord in *Turley* argued that even if he had failed to comply with the notice requirements of the statute and was obligated to return the full amount of the security deposit, he would still be entitled under section 12(c) to recover "other damages" pursuant to a waste claim. The court rejected landlord's argument, saying that if a landlord fails to comply with the notice requirements of the statute, "there are no 'other damages' to collect."[82] Stating that "[e]xisting caselaw concludes any debate on the issue," the court quoted *Miller* for the proposition that "[a] landlord can attempt to pursue a claim for 'other damages' only if it returns the tenant's security deposit within 45 days or provides statutory notice."[83]

There are two problems with this assertion: first, it is not supported by the case law; second, it converts section 15 from an implied acknowledgment that no damages are due and chargeable to the security deposit into a general release that precludes all claims of any type, as opposed to precluding only claims that arise under section 12. Such an interpretation unnecessarily and inappropriately expands the reach of subsection 15 far beyond the proper scope of the Security Deposits statute.

The court in *Miller* observed that the "Security Deposits statute applies only to security deposits."[84] The meaning of "other damages" thus depends on context. If damages are attributable to the lease and are sought to be charged against the security deposit, they must be itemized and must include individual costs of repair. Damage items in a notice letter that meet these requirements are "proper" damages under the statute. Items that are not individually identified violate the statute and are not recoverable from the security deposit. In this context of deduction from a security deposit that a landlord has retained, a presumptive agreement that "no damages" are due and deductible is appropriate.

The meaning of "no damages" should not, however, be extended to preclude recovery of damages that are not sought to be charged against a security deposit. Such damages are "other damages" because they are external to the regulation of security deposits. They may be external because deduction is not the remedy sought or because liability is based on a theory other than the lease. To hold otherwise extends the scope of the statute beyond the target of security deposit funds, and thus contradicts *Miller*, and turns the "no damages" clause of section 15 into a general release of all claims a landlord might have against the tenant independent of the regulation of deposits, which even according to *Turley* is the reason the statute was enacted.[85]

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82. Turley v. Hyten, 751 N.E.2d 249, 253 (Ind. Ct. App. 2001).

83. *Id.*

84. Miller v. Geels, 643 N.E.2d 922, 927 (Ind. Ct. App. 1994).

85. *Turley*, 751 N.E.2d at 251.

The court in *Turley* concluded that the landlord's failure to comply with the Security Deposits statute precluded him from asserting a common law claim for waste.[86] Based on this reasoning, one would have to conclude that all other common law claims are similarly "released" by the "no damages" clause. There is no connection between the Security Deposits statute and damage claims that do not target the deposit, some of which may be based on causes of action apart from the lease, that would justify a comprehensive release. Such a release also violates the narrow construction given to statutes in derogation of the common law by barring claims without the "express terms or unmistakable implication" required by *Miller*.[87]

An interpretation of section 15 that converts it into a general release is also unsupported by the language of the statute itself. First, section 9 defines "security deposit" to mean "a deposit paid by a tenant to the landlord . . . to *secure performance* of any obligation of the tenant *under the rental agreement*."[88] There is no indication anywhere in the statute that its effect was to extend beyond the deposit and the tenant's obligations under the lease agreement. The illogic of reading section 15 as a general release can also be seen by comparing the security function of rental deposits to other areas of the law involving secured debts, such as real estate mortgages and security interests in personal property. In neither of these areas does a creditor's loss of secured status, as by failure to record a mortgage or file a financing statement, release the debtor from an obligation to pay.[89] Instead, loss of secured status simply requires the creditor to pursue an in personam action against the debtor instead of an in rem action against the security. The same result is appropriate for a landlord who fails to comply with the notice provisions of the Security Deposits statute. If the landlord's notice is inadequate, he forfeits the ability to pursue the collateral and must take his chances on an unsecured claim against the tenant, which claim may be uncollectable apart from the deposit or subject to a senior claim or judgment. Finally, conferring on section 15 the power to operate as a general release would render the ability to recover "other damages" moot and would make section 12 internally inconsistent.

"Other damages" that are founded on a legal basis apart from the lease agreement should not be barred because of a landlord's failure to comply with a statute that only regulates one lease provision. The landlord in *Turley* was willing to return the full amount of the tenant's security deposit for failing to provide proper notice, but he believed he should then have been able to pursue

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86. *Id.* at 253.

87. *Miller*, 643 N.E.2d at 927.

88. IND. CODE § 32-7-5-9 (1998) (emphasis added).

89. In fact, the Colorado Supreme Court declared unconstitutional that part of the Colorado security deposits statute which prohibited a landlord from "bring[ing] suit against the tenant for damages to the premises" where that landlord had failed to provide a written statement listing the reasons for retaining the tenant's deposit. Turner v. Lyon, 539 P.2d 1241, 1242 (Colo. 1975). The court in that case held that the statute violated the Equal Protection Clause of the Fourteenth Amendment by treating a secured creditor different than an unsecured creditor. *Id.* at 1243.

other claims unrelated to retention of the tenant's security deposit. He should have been allowed to do so.

Courts that are called upon in the future to consider claims arising under the Security Deposits statute should be aware of the conflicting interpretations of the notice provisions of section 14 and should reject the absolute compliance analysis of *Pinnacle Properties* in favor of the substantial compliance articulated by Judge Hoffman in his dissent in *Pinnacle Properties* and as utilized in *Rueth*, *Greasel*, and *Schoknecht*. Courts should also be aware of the limitations on the scope of the statute and should not interpret the "no damages" provision of section 15 as a general release. Instead, that section should be interpreted to act as a presumptive agreement by the landlord only that there are no damages chargeable to the security deposit other than for those items itemized in the notice letter and accompanied by correct or correctable repair costs.

Implementing the Security Deposits statute in this manner will serve the relevant policies of dissuading landlords from overstating or fabricating damages in a scheme to unfairly retain a tenant's deposit and of holding tenants responsible for damage they cause. Tenants will be protected because landlords must provide notice that specifically identifies the damages to be charged against the deposit and the amount of repair cost. Armed with this notice, tenants will be able to decide whether to challenge the landlord's intended use. Landlords will be dissuaded from improperly inflating damage claims or inventing them outright by the duty to pay the challenging tenant's attorney's fees if the notice does not comply with the statute. From the other perspective, landlords will not see their legitimate and documented damage claims defeated in full by reason of an error in one item, as well as losing the ability to pursue claims unrelated to retention of a security deposit. Finally, tenants will not be presented with a windfall by escaping liability for actual damages that are properly itemized in the notice letter, plus receiving a general release, a return of the entire amount of the security deposit, and payment of their attorney's fees simply because the notice letter also contains one or more unsupported or wrongly calculated items. The *Pinnacle Properties—Turley* approach to the Security Deposits statute cannot accomplish all of these goals.

II. New Holdings from the Indiana Court of Appeals: Some Clarification, Some Extension, Some Reminders

The second section of this Article will address six cases decided by the Indiana Court of Appeals in 2001 in the areas of restrictive covenants in neighborhood association documents, statutorily created exceptions to recording requirements, real covenants, and implied warranties of habitability for single-family residences. These opinions were chosen because they clarify some aspect of an existing legal principle or extend a principle into new areas.

A. Restrictive Covenants: Clarity Versus Ambiguity; Reciprocal Restrictions Versus Free Alienability of Land

One of the many methods available to restrict the future use of land is a restrictive covenant. Through restrictive covenants landowners can agree to

impose reciprocal benefits and burdens on their parcels that will bind not only themselves but will also run with the land and bind subsequent owners. In *Crawley v. Oak Bend Estates Homeowners Ass'n*[90] and *Howell v. Hawk*,[91] the court of appeals demonstrated the importance of language to the policy that will be deemed paramount. When covenants are clearly stated, the enforcement of private agreement accepted by the lot owners dominates. When covenants are ambiguous, preference for the free alienability of land will prevail.

1. Crawley v. Oak Bend Estates Homeowners Ass'n.—In *Crawley*, the Oak Bend Homeowners Association and two residents of the Oak Bend subdivision sued two other subdivision residents, the Crawleys, seeking preliminary and permanent injunctions to prevent the Crawleys from parking a recreational vehicle at their home in violation of the neighborhood restrictive covenants. Section 17 of the Oak Bend covenants provided:

> No trucks larger than pickup trucks, disabled vehicles, unused vehicles, campers, trailers, recreational vehicles, boats, motorcycles, or similar vehicles shall be parked on any road, street, private driveway, or lot in this subdivision unless it is screened in such a way that it is not visible to the occupants of the other lots in the subdivision.[92]

The Crawleys kept their thirty-seven-foot long and eleven-foot tall motor home parked in the driveway at their house. The Crawleys did not deny that they kept the motor home parked in their driveway or that it was not screened. Instead, they offered explanations for why their conduct was reasonable and why the restrictive covenant should not be enforced against them. The Crawleys stated that they kept the motor home stored off-site in the winter months and only parked it at their residence "temporarily" in the months of April to October. Such temporary parking was reasonable, the Crawleys asserted, because it made the motor home convenient for packing for use on weekends and vacations. They also considered the length of time that they stored the motor home at their residence to be reasonable because they would take it to an off-site storage facility if the motor home went unused for fifteen days. Neither the trial court nor the court of appeals was impressed with the Crawleys' "reasonable use" defense.

The court of appeals defined a restrictive covenant as "an agreement duly made to do, or not to do, a particular act" that is "created in conveyances or other instruments."[93] In addition, the court identified restrictive covenants as a form of express contract.[94] Because restrictive covenants were viewed as merely another species of contract, the *Crawley* court applied traditional contract interpretation tools to section 17. These tools included determining the parties' intent from the specific language used in the covenant and from the situation of

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90. 753 N.E.2d 740 (Ind. Ct. App. 2001).

91. 750 N.E.2d 452 (Ind. Ct. App. 2001).

92. *Crawley*, 753 N.E.2d at 742.

93. *Id.* at 744.

94. *Id.*

the parties when the covenant was made, reading specific words and phrases in conjunction with other provisions of the contract, determining the parties' intentions from the entirety of the contract, and construing the covenant provisions "so as to harmonize the agreement."[95]

Using these tools, the court of appeals saw no merit in the Crawleys' argument that the terms of the covenant were ambiguous or in their attempt to portray their conduct as reasonable and therefore not in violation of the covenants. The Crawleys were enjoined from parking their motor home on their property in the subdivision.[96]

The message of *Crawley* is clear. Restrictive covenants are valid, and unless ambiguous, they are strictly enforceable by another covenantee. That an expensive motor home would not normally be considered a nuisance or even an eyesore does not lessen the necessity of compliance. The same is true even though violation of the covenant is not continuous or is limited in duration.

The strict enforcement given to unambiguous restrictive covenants is noteworthy because it imposes a duty of inspection on buyers of real estate. Buyers cannot assume that once they become owners they will be permitted to engage in activities that contradict the terms of restrictive covenants on the ground that those activities are "reasonable." Because reciprocal benefits and burdens are designed to preserve the property values of all covenantees, the presence of even one objector will be sufficient to enjoin the prohibited activity. Further, although notice was not an issue in *Crawley*, buyers must be aware that they will not be able to assert lack of knowledge as a defense to an obligation imposed by a restrictive covenant. Provided that a declaration of the neighborhood covenants has been recorded in the office of the county recorder, the covenants will run with the land and will bind subsequent purchasers by virtue of constructive notice.

Standardized real estate purchase agreements provide a limited time for a buyer to inspect the covenants where membership in a homeowner's association is mandatory, as it usually is. The purchase agreement form for improved property prepared by the Indiana Association of Realtors states, "If the Buyer does not make a written response to the [homeowner's association] documents within _____ days after receipt, the documents shall be deemed acceptable."[97] Once deemed acceptable in the offer to purchase, the buyer has lost the ability to object to the covenants' provisions. The buyer's due diligence must therefore include a careful review of homeowner's association documents.

2. Howell v. Hawk.—Where *Crawley* promotes a policy favoring enforcement of clearly stated restrictive covenants, *Howell* demonstrates an approach to restrictive covenants that are ambiguous. The *Howell* court determined that if a term in a restrictive covenant is ambiguous the policy favoring free alienability of land compels use of the least restrictive meaning of

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95. *Id.* at 745.

96. *Id.* at 746.

97. Indiana Ass'n of Realtors, Inc., Purchase Agreement (Improved Property), Form # 02 (2001), para. 17.

the covenant.[98]

The *Howell* court, much like the *Crawley* court, began its analysis by identifying restrictive covenants as a form of contract. "We have held that restrictive covenants are, in essence, a form of express contract between a grantor and a grantee in which the latter agrees to refrain from using his property in a particular manner."[99] The court also noted that restrictive covenants are created "to maintain or enhance the value of land by controlling the nature and use of lands subject to a covenant's provisions."[100]

Also similar to the *Crawley* court, the court in *Howell* applied traditional tools of contract interpretation. "Because covenants are a form of express contract, we apply the same rules of construction. . . ."[101] Unlike the *Crawley* court, which was presented with unambiguous covenants, the *Howell* court considered the effect of ambiguity on the enforceability of restrictive covenant terms. "[W]here the intent of the parties cannot be determined within the four corners of the document, a factual determination is necessary to give effect to the parties' reasonable expectations."[102] The ambiguity in that case was whether the prohibition against "mobile homes" in Oak Bend precluded Hawk from constructing a "manufactured home" in the subdivision.

For the *Howell* court the presence of ambiguity called into play a proposition of law that was not mentioned in *Crawley* and that limits the enforceability of restrictive covenants. The court stated, "As a general proposition, restrictive covenants are disfavored in the law, strictly construed by the courts, and all doubts should be resolved in favor of the free use of property and against restrictions."[103] This statement foreshadows the result of the appeal.

For the trial court, the outcome of the case depended on "whether the term 'mobile home' as used in the plain language of the restriction [drafted in] 1972 is broad enough to encompass the house placed on Ms. Hawk's lot in 1999."[104] To answer this question, the trial judge engaged in an admirably broad examination of factors that would determine whether a manufactured home could be categorized as a mobile home. These factors included: 1) tax assessment procedures used by the county assessor, 2) understanding of realtors from custom and usage, 3) presence of steel chassis, 4) type of foundation, 5) applicable

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98. *Howell*, 750 N.E.2d at 456 (citing Campbell v. Spade, 617 N.E.2d 580, 584 (Ind. Ct. App. 1993)).

99. *Id*. (citing Columbia Club, Inc. v. Am. Fletcher Realty Corp., 720 N.E.2d 411, 418 (Ind. Ct. App. 1999)).

100. *Id*. (citing *Campbell*, 617 N.E.2d at 584).

101. *Id*.

102. *Id*. (citing *Campbell*, 617 N.E.2d at 584). In *Campbell*, the court found the trial court's grant of summary judgment in favor of a lot owner in a suit filed by the neighborhood association to be inappropriate. A factual dispute existed regarding the parties' intent of whether the construction and use of a gravel roadway on the lot without a residence violated the restrictive covenant that limited use of lots to "residential purposes only." *Campbell*, 617 N.E.2d at 583-84.

103. *Howell*, 750 N.E.2d at 456 (citing *Campbell*, 617 N.E.2d at 584).

104. *Id*. at 455.

building codes (state and local versus HUD requirements), 6) construction off-site and delivery in segments or as a whole, 7) nature of seller's business, 8) transportability on attached wheels, 9) number of square feet of living space, 10) similarity in appearance to other homes in the subdivision, and 11) Indiana Administrative Code definitions.[105] After analyzing these factors and applying the presumptions against restrictions and in favor of free use of land, the trial court concluded that Hawk's manufactured home did not violate the covenant against mobile homes. It therefore denied the residents' request for an injunction.

On appeal, Howell and the other residents argued that the trial court had erred in finding the term "mobile home" to be ambiguous and in finding that Hawk's manufactured home was not encompassed by that term. Addressing the residents' reliance on various statutory definitions of "mobile home," the court of appeals emphasized the paramount contract interpretation principle of "giv[ing] effect to the actual intent of the parties, as determined from the language used, the motives of the parties and the purposes they sought to accomplish."[106] The court added that the language of a covenant should be read in its ordinary or popular sense rather than a legal or technical sense and that the parties' construction of an ambiguous term is the best evidence of its meaning.[107] Finally, the court echoed the trial court's emphasis of free use of land over restrictions on use. "Covenants will be most strongly construed against the covenantor, at least where the terms used therein are equivocal."[108] The court of appeals affirmed the trial court's decision that Hawk's manufactured house was not barred by the covenant prohibiting mobile homes.[109]

To determine the parties' intent in their use of the word "mobile home" in the restrictive covenants, the court of appeals utilized a functional analysis that focused on the appearance and size of Hawk's house and on the purpose behind the covenant. The court identified the fundamental intent of the parties in prohibiting mobile homes in the subdivision as maintaining the covenantees' property values.[110] Guided by this goal, the court of appeals noted that Hawk's house exceeded the square footage requirements of the covenants and that it looked like the other houses in the neighborhood.[111] Because "a person could not tell [Hawk's house] from the others,"[112] it did not threaten the neighbors' property values and thus did not violate the intent of the covenant.[113] The court of appeals' use of a functional approach accommodated the covenantee's desire to preserve land values and preserved the free use of land against ambiguous

105. *Id*. at 453-55.
106. *Id*. at 457.
107. *Id*.
108. *Id*.
109. *Id.* at 460.
110. *Id*. at 456.
111. *Id*. at 459.
112. *Id*.
113. *Id*. at 459-60.

restrictions.

Perhaps the most important contribution of the *Howell* opinion is its focus on the parties' intent for a restrictive covenant as expressed at a particular time. The court stated that "[i]ntent should be determined *as of the time the covenant was made* . . . ."[114] This temporal component of the analysis fixes the parties' intent at a point in the past and does not permit the restrictive covenant to be interpreted to include conditions or products that arise subsequently, unless those conditions or products are unambiguously encompassed by the original covenant terms.

In 1972, when the restrictive covenants at issue in the *Howell* case were drafted, the court concluded that a mobile home was the only type of housing that was not "stick-built." Further, a mobile home was understood to be a "house trailer" that possessed identifiable features, including relatively small size (single-wide construction), ability to be towed on the highway using its own tongue and wheels, and absence of a permanent foundation.[115] Housing of this type was seen as a threat to property values for owners of stick-built homes.

However, between 1972 and 1999, when the College-Hill subdivision residents sought the injunction against Hawk, housing options had expanded to include double-wide mobile homes, manufactured homes, and modular homes in addition to stick-built homes. The distinction between home types was further blurred as components of stick-built homes may now be constructed off-site and delivered to the owner's lot for assembly. This evolution in housing options, the court of appeals said, has resulted in "now-overlapping concepts" in housing types.[116]

Issues can, and likely will, arise when products evolve but the intent of the convenantees' language cannot. For the court of appeals, the appropriate response to changed conditions is to change the language of the covenant. "Had the [residents] wished to clarify the covenant so as to restrict any structure other than a so-called 'stick-built' home, they had the means and the terminology at their disposal to do so."[117]

The court of appeals' emphasis on amending the language of restrictive covenants to keep pace with the times may not be the panacea it is portrayed to be. Such an amendment may be impossible if the restrictive covenants require a supermajority vote of homeowners to amend the covenants. A supermajority would not have been a problem in the *Howell* case as ninety-one residents of College-Hill joined in the complaint and in the appeal, but it is easy to conceive of situations where a sufficient number of lot owners will refuse to amend the covenants to exclude the newly-evolved product. The non-agreeing lot owners may be motivated by a desire to use their land in the way the other owners would like to prohibit or they may simply wish to maximize the marketability of their land by keeping it free of additional restrictions. The difficulty in amending

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114. *Id*. at 457 (emphasis added).

115. *Id*. at 458-59.

116. *Id*. at 459-60.

117. *Id*. at 460.

covenants would of course be amplified if unanimity is required.

The most effective approach for preserving the enforceability of restrictive covenants and for anticipating future developments is to utilize both negative restrictions and affirmative intent statements. To address existing conditions, the restrictive covenants should identify the prohibited structures, practices, and conditions as specifically as possible. To address future developments, the restrictive covenants should clearly identify the goal of the restriction. An affirmative goal statement of preserving property values by permitting the construction of residences using construction methods and building materials similar to existing homes in a subdivision states the residents' intent in a way that may lessen the risk of ambiguity due to the evolution of "overlapping concepts" of housing types.

B. Exclusion of Statutorily Created Interests in Real Estate from the Public Document Recording System: Mattingly v. Warrick County Drainage Board[118]

Prospective purchasers of real estate are naturally interested in confirming the state of title to the land they plan to purchase. Some certification of the state of title is contained in the words of grant contained in the deed and in the vendor's affidavit that generally accompanies a deed, but no reasonable, let alone careful, buyer would rely solely on the seller's affirmations. That buyer would seek further confirmation.

Further confirmation will often consist of a search of the documents placed in the public recording system. The most obvious place to conduct such a search is in the recorder's office in the county where the land is located. In that office, the prospective buyer will find deed record books, mortgage record books, and miscellaneous record books[119] that contain copies of documents affecting title to real estate.[120] These books are, however, not the only books in the recorder's office that must be examined. There will also be books that index federal and state tax liens.

Nor is the recorder's office the only office in the county courthouse that the prospective buyer must search. He must also check the county clerk's office to determine if any judgments have been entered against the seller as those judgments constitute a lien against all of the seller's real estate in that county.[121] Similarly, the prospective buyer must check the *lis pendens* record book to determine whether there are any pending complaints against the seller that would

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118. 743 N.E.2d 1245 (Ind. Ct. App. 2001).

119. These "books" may be in electronic form in many counties, but the intent and organization of the documents in them is the same whether the medium is print or electronic.

120. Although the possibility of having one's interest in land defeated, as by a bona fide purchaser, or subordinated, as by a recorded lien, is powerful incentive to record a document setting forth one's interest in land, recording is not required. As a result, the availability of public recording does not mean that every relevant document has been recorded.

121. IND. CODE § 34-55-9-2 (1998).

affect the real estate. Additionally, the county treasurer's records must be examined to determine if unpaid real estate taxes have resulted in a lien against the property.

Nor is the county the only governmental subdivision whose records must be examined. The federal court clerk's records must be searched for pending actions, and the federal bankruptcy clerk's records must be searched to determine whether the seller has filed a bankruptcy petition (or had one filed against him) that would include the real estate as part of a bankruptcy estate. Additionally, if the real estate is located in a town or city, the buyer must check the records of various municipal offices for a variety of charges that could constitute liens, such as utility assessments.

This list of offices whose records must be consulted is not exhaustive;[122] it includes only those records that are most commonly encountered in a real estate transfer. Because there is no centralized record system for real estate, a person interested in confirming the state of title for a parcel of land is made to work for his answer. Even though the public document recording system provides a generally workable framework for verifying the state of title of real estate, the system does contain "holes." These holes exist when an interest in real estate cannot be discovered, no matter how diligent the search of the public records. The relation-back provisions of mechanic's liens is an obvious example.[123] A future advances clause contained in a mortgage raises a similar problem.[124] Knowing that these holes exist, persons who wish to acquire an interest in real estate can take steps to protect themselves against the uncertainties about the state of title.[125]

Occasionally, a case comes along that highlights a further shortcoming in the public document recording system as a means of title verification. Such a case in 2001 was *Mattingly v. Warrick County Drainage Board*. The problem in that case arose from the fact that statutorily created interests in real estate are excluded from the recording system. Constructive notice arises merely from the enactment of the statute or regulation.

Mattingly purchased 3.10 acres of land in Warrick County, on which he planned to construct eight buildings containing 457 mini-storage units. After closing of the purchase and during the building permit process, Mattingly learned that a "regulated drain" abutted one border of his land and that his proposed construction encroached on the seventy-five foot right-of-way associated with the

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122. One text identifies seventy-six types of records located in sixteen different public offices that contain information relevant to the state of title to land. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 216 (5th ed. 1998) (citing QUINTIN JOHNSTONE & DAN HOPSON JR., LAWYERS AND THEIR WORK 274-75 (1967)).

123. IND. CODE §§ 32-8-3-1 to -3-15 (1998 & Supp. 1999). *See* Lloyd T. Wilson, Jr., *Reconstructing Property Law in Indiana: Altering Familiar Landscapes*, 33 IND. L. REV. 1405, 1406-10 (2000). Effective July 1, 2002, the mechanic's lien statutes will be recodified at Indiana Code sections 32-28-3-1 to -18.

124. *See* Wilson v. Ripley County Bank, 426 N.E.2d 263, 266, 269 (Ind. Ct. App. 1984).

125. *See* Wilson, *supra* note 123, at 1411-13.

drain. Mattingly asked the Warrick County Drainage Board to decrease the size of the right-of-way to twenty-five feet, but the board would only agree to a reduction to fifty feet. The effect of a fifty-foot right-of-way was to reduce the number of mini-storage units Mattingly could construct by thirty percent, from 457 to 318.

Mattingly sued the drainage board, alleging an unconstitutional taking of his property. The board and Mattingly filed cross-motions for summary judgment. In his motion, Mattingly argued that his land was not encumbered by the right-of-way for the drain because he did not have actual knowledge of its existence and could not be deemed to have constructive knowledge because there was no public record to put him on notice that a regulated drain existed on his land. The trial court denied Mattingly's motion and granted the motion for summary judgment filed by the board. The court of appeals affirmed the trial court's decision.[126]

Indiana Code section 36-9-27-2[127] defines a regulated drain as "an open drain, a tiled drain, or a combination of the two." Once a county declares a drain to be "regulated," the county becomes responsible for repairing and maintaining it.[128] The court of appeals identified a regulated drain as an interest in land in the nature of a license that includes both a right-of-entry and a right-of-way.[129]

Even if the drain was statutorily created, Mattingly argued that it could not adversely affect his title because the statutes that authorize and define regulated drains do not inform him that a drain exists on *his* land. Mattingly further argued that no publicly recorded documents existed by which he could have discovered the drain's existence. The court did not agree.

In addition to interests in land that can be created by private action or agreement or through judicial proceedings, the court of appeals noted that interests in land can also be created by statute. For those interests, the public document recording system is inapposite. Instead, the statute that creates the interest in land will designate a custodian of the records, and it is only in the records of the custodian that documents affecting real estate will be found. "[T]he easement associated with the regulated drain is a creature of statute and . . . was created by public action rather than by private agreement. Ind. Code § 36-9-27-29 designates the county surveyor as the 'technical authority' [for] . . . all regulated drains . . . in the county."[130] By virtue of his status as technical authority, the court of appeals determined that "the county surveyor is the custodian of the records pertaining to regulated drains . . . ."[131] Further, the county surveyor is required only to possess the records; "[t]he statute does not require the county surveyor to record regulated drains with the county

126. *Mattingly*, 743 N.E.2d at 1251.

127. IND. CODE § 36-9-27-2 (1998).

128. *Mattingly*, 743 N.E.2d at 1247 n.2 (citing Johnson v. Kosciusko County Drainage Bd., 594 N.E.2d 798, 800 (Ind. Ct. App. 1992)).

129. *Id*. at 1249 (citing *Johnson*, 594 N.E.2d at 804).

130. *Id*. at 1250.

131. *Id*.

recorder."[132]

The Warrick County Surveyor did maintain a list of the drains in the county and had maps showing their location. Such lists did not, however, show the location of regulated drains and they were not indexed by name of property owner. Instead the drains were locatable only by applying known geographic information to the maps. The court of appeals nonetheless concluded that the list and the maps were "public records" that "provide[d] constructive notice of the regulated drain" to Mattingly and the public in general.[133] Because constructive notice had been given, the board could enforce its right-of-way. Further the board's assertion of its pre-existing interest in land, as evidenced by its refusal to reduce the size of the right-of-way to Mattingly's liking, could not constitute a "taking" that required compensation.[134]

The court of appeal's decision in *Mattingly* serves as a sobering reminder of the limitations of the public recording system as a means of confirming the state of title to real estate. *Mattingly* is not unique, however, in this regard. In 1998 the court of appeals decided *WorldCom Network Services, Inc. v. Thompson*.[135] In that case, owners of land were deemed to have constructive knowledge of a county highway right-of-way even though there was no record of it in the county recorder's office. In upholding the enforceability of the right-of-way, the court of appeals determined that the owners had constructive notice of the existence of the right-of-way because of a 1913 entry in the county Board of Commissioner's order book.[136] The presence of that order book in the office of the county auditor was a "public record binding on the [owners]."[137]

As *Mattingly* and *WorldCom* demonstrate, the scope of inquiry necessary to "confirm" the state of title to real estate is broad. In addition to the multiple public offices where privately or judicially created interests in land are deposited, one must also take into account statutorily created interests that do not depend on the public document recording system to impart constructive notice.

C. The Scope and Duration of Real Covenants

Restrictive covenants used by neighborhood associations, as in *Crawley* and *Howell*, are a means by which a group of landowners can use contractual agreement to impose reciprocal benefits and burdens that affect and run with the land. When a grantor wishes to impose some restriction or affirmative duty on a grantee affecting a single parcel of land upon transfer, that restriction or duty is imposed by way of a real covenant contained in a deed. The court of appeals considered the scope and duration of such a real covenant in *Keene v. Elkhart*

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132. *Id*.
133. *Id*. at 1250-51.
134. *Id*. at 1251.
135. 698 N.E.2d. 1233 (Ind. Ct. App. 1998).
136. *Id*. at 1241.
137. *Id*. at 1238.

County Park & Recreation Board.[138]

The relevant facts of that case begin in 1924 when the owners, the Darrs, conveyed by deed a 100-foot strip of land on their farm to the Interstate Public Service Company (IPSCO). This strip of land ran the length of the Darrs' farm and bisected it. IPSCO intended to use the strip for a hydraulic canal in conjunction with a hydroelectric generating facility it operated on the Elkhart River. The canal would prevent the Darrs from accessing the rear part of their farm.

To address the bisection of the farm, IPSCO agreed, as part of the consideration for the sale of the strip, to "construct and forever maintain a proper bridge over the canal . . . , which bridge shall be one constructed and maintained as to provide safe and secure crossing over said canal for all farming operations upon [the] land. . . ."[139] IPSCO's obligation was memorialized as a real covenant in the deed from the Darrs to IPSCO. The deed further provided that "[t]he conditions herein set forth to be done and performed by said grantee shall be a burden upon and run with the title of the land hereby conveyed."[140]

IPSCO deeded the strip of land to Northern Indiana Public Service Company (NIPSCO) in 1932, and in 1970 NIPSCO deeded the land to the Elkhart County Park and Recreation Board (Board). Although the number of intermediary owners of the farm is not identified, the Keenes eventually acquired the Darrs parcels. The bridge was apparently maintained in a manner satisfactory to all parties until 1996. In that year the Keenes filed suit against the Board, alleging that it had failed to perform its obligations under the real covenant because it had failed to make necessary "repairs and alterations." As a result, the Keenes alleged that the bridge was "no longer suitable for [their] farming needs."[141]

The Keenes filed a motion for summary judgment, claiming that the real covenant in the deed obligated the Board to maintain the bridge "such that [it] could support reasonable modern farming operations."[142] The Board filed a cross-motion for summary judgment, arguing that its maintenance and repair duties were to be measured by the original 1924 specifications for the bridge. The trial court agreed with the Board.

The parties did not dispute that the Board, as successor in interest from IPSCO, was bound by the real covenant IPSCO had accepted, nor did they dispute that the Keenes were entitled to enforce the covenant as successors in interest to the Darrs. The parties did disagree, however, about the proper scope of the duty the covenant imposed. Were the maintenance and repair obligations assumed in 1924 to be viewed as static or evolving?

After reviewing basic principles applicable to real covenants, the court of appeals engaged in deed interpretation, "[t]he object [of which] is to identify and implement the intent of the parties to the transaction as expressed in the plain

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138. 740 N.E.2d 893 (Ind. Ct. App. 2000).

139. *Id*. at 895.

140. *Id*.

141. *Id*. at 895-96.

142. *Id*. at 896.

language of the deed."[143] Applying "ordinary and popular" meanings to the words in the covenant, as opposed to "technical or legal"[144] meanings, the court resolved the issue in three steps. First, it said that the obligation to construct and repair was tied to the characterization of the bridge as a "proper bridge." What made the bridge "proper" was suitability for some purpose, which the parties had identified in the real covenant as "[to] provide safe and secure crossing over [the] canal for all farming operations upon [the] land."[145]

Second, the court determined the duration of the obligation. It concluded that the use of the term "forever" in the deed "indicate[d] that this obligation would run in perpetuity."[146]

The final component of the court's analysis was to determine the scope of the necessary duties to maintain a bridge that would be "proper" because it provided "safe and secure crossing . . . for all farming operations upon [the] land." The court focussed on the word "all." From the inclusion of this word, the court concluded that the original parties to the real covenant did not intend to limit IPSCO's obligations (and thereby the obligations of IPSCO's successors) "to farming operations of a particular kind or extent."[147] When the court joined the unlimited extent of the repair and maintenance obligation with the unlimited time frame, it had the basis for rejecting the Board's contention that its obligations were fixed at 1924 standards. "[W]hen the phrase 'all farming operations' is read in conjunction with the perpetual nature of the obligations imposed by the covenant, it is clear that the parties did not intend that IPSCO's obligations would be fixed to the type or extent of farming operations in existence at any particular time."[148]

Instead, the court permitted the covenant obligation to be an evolving one. "We accordingly conclude that the Board's maintenance obligation under the covenant includes the perpetual duty to ensure that the bridge over the canal remains *sufficient to accommodate the farming operations performed on the Keenes's land.*"[149]

The court recognized that a perpetual maintenance obligation would exceed the useful life of the bridge and someday would require a new bridge to be built. The court also acknowledged that its ruling might seem inequitable as the Board did not receive any advantage from the 100 foot-wide strip of land, like IPSCO might have received, to offset the burden of repairing or replacing the bridge. Nevertheless, the court concluded that the Board was bound as successor in interest to the land burdened by a real covenant. The rule that "one who takes real property subject to covenants running with land set forth in a deed is bound

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143. *Id*. at 897 (citing Windell v. Miller, 687 N.E.2d 585, 589 (Ind. Ct. App. 1997)).

144. *Id*.

145. *Id*.

146. *Id*. at 898.

147. *Id*.

148. *Id*.

149. *Id*. (emphasis added).

by those covenants as if he were a party to the original transaction"[150] left no room for consideration of apparent burdens on successors in interest who may share little in common with the original grantee.

The *Keene* opinion does identify one open question that is likely to resurface: Even if it can be said that the parties intended to impose and to accept a changeable duty, how are the permissible extent and frequency of changes to be evaluated when the covenant is silent on those aspects. In other words, how far can the evolution of a duty progress? The Board argued that a perpetual and evolving maintenance burden rendered the covenant too uncertain to be enforceable. Specifically, the Board asserted that:

> [I]f [the Board] is required to maintain the bridge so that it will be suitable for use in connection with whatever farming operations are being conducted on the Keenes's property at any given time, [it] will be forced to improve or rebuild the bridge at the whim of the Keenes. . . .[151]

The court did not consider this objection sufficient to void the covenant. The court acknowledged that the covenant did not provide for "a fixed schedule of maintenance or decide in advance the exact specifications of future improvements,"[152] but, based on the parties' operation under the covenant from 1924 until the present dispute, the court said it was confident that the covenant was "sufficiently defined to guide their obligations in the future."[153]

The court's confidence in parties' ability to agree on undefined terms may be overly optimistic, both for the Keenes and the Board and for parties to other real covenants. In the absence of specifications, how is a court to determine whether an owner's demand for maintenance, repair, or reconstruction is excessive? If a court imposes a reasonableness standard, doesn't the court become involved in writing terms for the parties that they did not write for themselves? Further, wouldn't a reasonableness standard perhaps penalize the Keenes if they used larger equipment than their neighbors, and which permitted them to farm more efficiently, even if the result is greater and more frequent repairs to the bridge? Plus, shouldn't the covenant obligation pertain to the particular owner's use of this particular piece of land, as it was all farming operations on this land that was protected by the covenant? But on the other hand, aren't the Keenes being given the power to impose significant costs on the Board if they do indeed use unusually large and heavy equipment? If courts are going to be reluctant to invalidate restrictive covenants on vagueness grounds, covenantees may be dismayed at the ways courts fill gaps that the parties left behind.

Real covenants are a species of private law, where the parties have the ability to determine the content and scope of their rights and obligations. *Keene* emphasizes the care the original grantor and grantee must use when establishing

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150. *Id*. at 899 (citing Midland R. Co. v. Fisher, 24 N.E. 756, 756-58 (Ind. 1890)).

151. *Id*.

152. *Id*.

153. *Id*.

their private law rights and duties and the care subsequent guarantees must exercise before accepting title to real estate. Absent such care a subsequent grantee can incur unanticipated, and potentially undesirable, duties through real covenants.

D. The Elements and Scope of the Implied Warranty of Habitability in Sales of Residential Housing

Indiana law protects homebuyers from losses arising from latent defects in the property and improvements by implying a warranty of habitability. Through this warranty the vendor "warrants that the home will be free from defects that substantially impair the use and enjoyment of the home."[154] Two cases decided by the court of appeals address this warranty. *Smith v. Miller Builders, Inc.* provides an important clarification of the elements of proof a homeowner must establish to succeed on a claim for breach of implied warranty. *Carroll's Mobile Homes, Inc. v. Hedegard*[155] helps define the scope of the implied warranty by analyzing the classes of persons subject to the duties of the warranty. *Smith* and *Carroll's Mobile Homes* are thus important for defining the extent of protection provided to homebuyers who sustain losses arising from conditions unknown to them prior to closing.

1. Clarifying the Role of Reliance: Smith v. Miller Builders, Inc.—In *Smith*, homeowners, the Smiths, sued the developer of their subdivision, Miller, for negligent design and construction of drainage facilities and for breach of the implied warranty of habitability.[156] The primary issue considered on appeal was whether the trial court correctly concluded that the Smiths, who purchased the house from the original purchaser and not from the developer, could not recover from Miller because they did not rely on Miller's skill or expertise.[157] Is reliance a necessary element of an implied warranty of habitability claim asserted by a remote purchaser?

Miller was a real estate developer who developed a subdivision in St. Joseph County. In the subdivision approval process, Miller identified storm water drainage problems at the property, especially with regard to lots platted in the southwest corner of the subdivision. To address these problems, the County made approval of Miller's subdivision application subject to certain lot elevation requirements and to the construction of an urban drain engineered to accommodate a specified volume of water.

The St. Joseph County Area Plan Commission approved Miller's subdivision application, including its drainage system, in 1986. In 1988, Miller sold lot 71, which is located in the southwest corner of the subdivision, to Mrs. Crachy. Mrs. Crachy and her husband then built a house on the lot. Sometime thereafter, the basement of the Crachys' house flooded following a heavy rain. The drainage

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154. Smith v. Miller Builders, Inc., 741 N.E.2d 731, 740 (Ind. Ct. App. 2000).

155. 744 N.E.2d 1049 (Ind. Ct. App. 2001).

156. *Smith*, 741 N.E.2d at 734.

157. *Id.* at 740-41.

basin area at the rear of the lot also filled with water.

The Smiths purchased the Crachys' house in 1991. Prior to the sale, the Crachys told the Smiths about the earlier flooding. In 1993, the basement of the Smiths' house flooded after a heavy rain. An engineering study revealed that the retention basins in the subdivision were built to accommodate approximately twenty percent fewer cubic feet of water than called for in Miller's approved design, that none of the drywells planned for the drainage plain had been constructed, and that the Smiths' lot was located in a natural drainage course.

The Smiths' sued the developer, who planned and developed the subdivision, including the drainage plan, but who did not construct the house in which they lived. The court of appeals framed the issue stating, "The question addressed . . . was [w]hether a professional developer who improves land for the express purpose of residential homebuilding with knowledge but without disclosure of a latent defect in the real estate that renders the land unsuitable for the purpose of residential homebuilding breaches an implied warranty of habitability."[158]

The trial court based its analysis on a factually similar case the court of appeals had decided in 1989, *Jordan v. Talaga*.[159] In *Jordan*, homeowners sued subdivision developers, who improved the land but did not build the house, alleging breach of implied warranty of habitability when their home and lot were damaged from periodic flooding. The court of appeals in *Jordan* held that the theory of implied warranty of habitability is applicable to professional developers and that the developers in that case breached the duty.

Because there was no authority in Indiana on the issue raised in *Jordan* that court looked to a Colorado case, *Rusch v. Lincoln-Devore Testing Laboratory, Inc.*[160] The *Jordan* court quoted the *Rusch* opinion for the principle that:

> [I]f land is improved and sold for a particular purpose, if vendor has reason to know that the purchaser is relying upon the skill or expertise of the vendor in improving the parcel for that particular purpose, and the purchaser does in fact so rely, there is an implied warranty that the parcel is suitable for the intended purpose.[161]

The trial court in the Smiths' case characterized the *Jordan* court as "essentially adopt[ing]" the *Rusch* rule, including the element of reliance by the homeowner. Because a remote homebuyer could not have relied on a developer with whom that homebuyer had not dealt, the trial court entered judgment in favor of Miller.

In examining the Smiths' claims on appeal, the court of appeals re-examined the use that the *Jordan* court had actually made of the *Rusch* decision. The court of appeals concluded that the trial court had misconstrued the *Jordan* court's use of *Rusch*, stating that the court in *Jordan* "did not adopt" the holding of the

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158. *Id*. at 742 (alteration in original).

159. 532 N.E.2d 1174 (Ind. Ct. App. 1989).

160. 698 P.2d 832 (Colo. Ct. App. 1984).

161. *Jordan*, 532 N.E.2d at 1185.

Colorado court.[162] Instead, the court of appeals said that the *Jordan* court had found the *Rusch* decision "worthy of note" because it "illustrate[d] that other jurisdictions had reached the same conclusion under similar facts; namely that subdivision developers were liable to the homeowners for breach of the implied warranty of habitability."[163]

The question actually resolved by *Jordan*, according to the *Smith* court, was that for purposes of the implied warranty of habitability the term "vendor" could include a developer of real estate intended for residential use even if the developer did not build (and thus was not the "vendor" of) the residence that was damaged by a defect in the design or engineering of the land on which the residence sits. To explain the imposition of the warranty of habitability on the developer, the *Smith* court relied on the following factors and policy concerns established in *Jordan*: that developers are professionals in the real estate development business, that they may sell land without disclosing known defects, and that they do more than sell raw land as they construct infrastructure such as roads and sewers specifically for home construction.[164] Including developers within the definition of vendor was also guided by the policy concern that "homeowners would be left without a remedy for latent defects in real estate that unscrupulous developers failed to disclose."[165]

Having clarified what had been decided in *Jordan*, and what had not been decided, the *Smith* court turned to the issue it said had not been addressed in that case—whether under Indiana law reliance by a homeowner is a required element of a claim for breach of implied warranty. To answer this question the *Smith* court noted the trend inherent in the development of the implied warranty of habitability in residential construction.

The implied warranty of habitability in home purchases originated in Indiana in 1972 in *Theis v. Heuer*.[166] In that case, the Indiana Supreme Court held that the doctrine of *caveat emptor* would no longer be applied to claims of a homeowner involving the purchase of a new residence from the builder-vendor.[167]

The next significant development occurred in 1976 when the Indiana Supreme Court decided *Barnes v. Mac Brown & Co.*[168] The court there held that the warranty of habitability protects second and subsequent homeowners from latent defects that are not discoverable on the purchaser's reasonable pre-purchase inspections and which manifest themselves after the purchase.[169]

The court of appeals in *Smith* observed that nothing in *Barnes* required the second or subsequent homeowner to prove that he had relied on the builder's

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162. *Smith*, 741 N.E.2d at 742.

163. *Id.*

164. *Id.* (citing *Jordan*, 532 N.E.2d at 1185).

165. *Id.* (citing *Jordan*, 532 N.E.2d at 1186).

166. 280 N.E.2d 300 (Ind. 1972).

167. *Id.* at 306.

168. 342 N.E.2d 619 (Ind. 1976).

169. *Id.* at 620-21.

skill or expertise.[170] The court of appeals also stated that "such reliance would be unlikely and hard to prove given the lack of privity between the parties."[171] Thus, imposition of a reliance element would frustrate the policy objective noted in *Jordan* of providing a remedy for homeowners damaged by a developer's failure to disclose the existence of a known latent defect and would be counter to the consumer protection interests furthered by *Theis* and *Barnes*.

The court of appeals' decision in *Smith* continues the trend of expanding consumer protection in home purchases and of imposing liability on developers who fail to disclose their knowledge of latent defects. *Smith* does so by making clear that a "vendor" includes persons in addition to those who construct and sell houses; the term also includes those persons who construct infrastructure and sell lots to others, who in turn build houses. Thus, the court expanded the focus of the warranty of habitability from the residence building itself to all components of the development process that are necessary prerequisites for that residence. Imposition of reliance as an element of a claim for breach of implied warranty of habitability would have permitted some site developers who covered up latent engineering defects to escape liability. In the absence of a reliance element, such developers can be held responsible for the effects of their failure to disclose. By clarifying the meaning of its prior holding in *Jordan*, the court of appeals increased the sense of order in the law of implied warranties of habitability. The consumer protection goals inherent in the implied warranty are freed of an unnecessary barrier.

2. The "Builder" Component of "Vendor": Carroll's Mobile Homes, Inc. v. Hedegard.—The scope of consumer protection afforded by the implied warranty of habitability was also considered in *Carroll's Mobile Homes, Inc. v. Hedegard*, but in that case the defendant-vendor's lack of participation in creating the latent defect precluded liability. In *Carroll's Mobile Homes*, the buyer of a mobile home sued the vendor of that home alleging structural damages resulting from the vendor's failure to set up the home according to the manufacturer's specifications. The buyer also alleged that the vendor failed to properly construct the foundation on which the home's footers and piers rested.

The buyer purchased the mobile home in 1987 but did not file suit until twelve years later. Because the statute of limitations barred the buyer's negligence and breach of contract claims, the buyer based her complaint on a confusing mix of allegations sounding in fraud and in breach of implied warranty of habitability. The trial court ultimately ruled in favor of the buyer on the warranty claim, finding that the vendor "owed Plaintiff a warranty of habitability that the mobile home, as installed, would be free from defects which would substantially impair the use and enjoyment of such mobile home."[172] The court of appeals reversed.[173]

The court of appeals initially noted that "[t]he implied warranty of

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170. *Smith*, 741 N.E.2d at 743.

171. *Id.*

172. *Carroll's Mobile Homes*, 744 N.E.2d at 1051.

173. *Id.* at 1051-52.

habitability applies only to home builders-vendors" and that it "does not apply to a mere vendor."[174] The court cited *Choung v. Iemma*[175] for several established principles of warranty of habitability law, including principles that define the scope of the warranty's protection by identifying what classes of persons are presumed to have extended the warranty. "[A]n implied warranty of habitability in the sale of a new house [is] extended from a 'builder-vendor'. . . ."[176] Further, a "'builder-vendor' is a person in the business of building and selling homes for profit."[177] The court of appeals concluded that Carroll's Mobile Homes may have been a vendor but it was not a "builder-vendor" subject to duties pursuant to an implied warranty of habitability.[178]

The principle by which *Smith* and *Carroll's Mobile Homes* can be reconciled is that habitability for breach of the implied warranty requires a causal connection between the vendor and the defect. With the removal of contractual privity and actual reliance as elements of a homebuyer's warranty claim, remote vendors responsible for "building" the defect can be held liable, while immediate vendors who did not contribute to the defect will not be liable simply by virtue of their status as a vendor.

III. SECOND CHANCES AT ORDERING: TWO RULINGS ON PETITIONS TO TRANSFER

Cases discussed in one volume of this law review can resurface in a subsequent volume as a result of the supreme court's decision to grant or to deny a petition to transfer. A grant of transfer and subsequent opinion will usually merit analysis; a denial of transfer may merit discussion if that denial leaves standing an opinion that injects uncertainty or disorder into the law. In the survey period of this volume, the supreme court provided an example of each.

A. The Scope of the Statute of Frauds in Property Law: Brown v. Branch[179]

The 2001 survey issue Article on Indiana property law contains an analysis of the court of appeals' decision in the *Brown* case.[180] That analysis criticized both the result the court of appeals reached and the method it used to reach that result. Fortunately, the Indiana Supreme Court reversed the court of appeals' decision. In so doing, the court avoided injecting substantial uncertainty into an area of law that appeared to have been long-settled and reestablished order to the adjustment of allegedly competing claims to land.

The critical fact in *Brown* is an oral promise by Brown, the owner of a house, to Branch, his girlfriend in a stormy on-again, off-again relationship. Following

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174. *Id*. at 1051.
175. 708 N.E.2d 7 (Ind. Ct. App. 1999).
176. *Carroll's Mobile Homes*, 744 N.E.2d at 1051 (quoting *Choung*, 708 N.E.2d at 12).
177. *Id*.
178. *Id*. at 1051-52.
179. 758 N.E.2d 48 (Ind. 2001).
180. Wilson, *supra* note 10, at 994-99.

one of the couple's multiple breakups, Branch moved to Missouri. Shortly after that move, "Brown telephoned [Branch] and said that if she moved back to Indiana, Branch would 'always have the . . . house' and that she '[would not] be stuck on the street. [She] [would] have a roof over [her] head.'"[181] Branch returned; the couple fought and broke up again; Brown reneged on his oral promise; Branch sued. To support her claim, Branch argued that the Statute of Frauds[182] did not apply to the case because Brown's promise was to "give" her the house and thus did not involve the "sale" of real estate as provided in the statute. Alternatively, Branch argued that Brown's promise was taken out of the Statute of Frauds by promissory estoppel principles. The trial court awarded the house to Branch. The court of appeals affirmed, accepting both of Branch's arguments.

The principal criticism of *Brown* made in last year's survey issue focused on the court of appeals' use of an unduly restrictive definition of the word "sale" contained in the Statute of Frauds.[183] According to the court of appeals, the Statute of Frauds applies only to "[a] contract between two parties, called, respectively, the 'seller' . . . and the 'buyer,' . . . by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property."[184] The court of appeals' approach, it was observed, ignored a rich history of appellate decisions which applied the Statute of Frauds to transactions that did not involve consideration, did not involve transfers of title, or did not involve a change in possession.[185] Further, the court of appeals' opinion failed to analyze the evidentiary function of the Statute of Frauds, which requires a writing to substantiate the existence of a promise involving real property and failed to provide any guidance to prevent the promissory estoppel exception from swallowing the rule.[186]

The supreme court corrected both of these errors and restored order to Statute of Frauds analysis. First the court clarified the meaning of the word "sale" in the statute. Second, it also provided guidance for the analysis of those situations where promissory estoppel may appropriately be used to take an oral promise affecting real estate out of the Statute of Frauds.

The supreme court acknowledged that the Statute of Frauds does not define the word "sale" in the phrase "any contract for the sale of lands" contained in Indiana Code section 32-2-1-1.[187] The court pointed out, however, that "the law is settled that . . . 'any contract which *seeks to convey an interest in land* is

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181. *Brown*, 758 N.E.2d at 50.

182. IND. CODE § 32-2-1-1 (1998).

183. Wilson, *supra* note 10, at 994-99.

184. *Id.* at 995 (alteration in original) (quoting Brown v. Branch, 733 N.E.2d 17, 22 (Ind. Ct. App. 2000), *vacated by* 758 N.E.2d 48 (Ind. 2001)).

185. *Id*. at 996.

186. *Id.* at 997.

187. *Brown*, 758 N.E.2d at 50-51. *See also* IND. CODE § 32-2-1-1 (1998).

required to be in writing.'"[188] This principle, previously "not often articulat[ed] . . . as such"[189] was clearly articulated by the supreme court in *Brown*. The Statute of Frauds applies to promises to convey an interest in real estate, "[a]nd this is so whether there is actually a 'sale' as the term is commonly used."[190]

In addition to bringing the *Brown* decision in line with long-established precedent, the supreme court's decision spares the judiciary from the specter of resolving claims affecting a wide variety of interests in real estate based solely on "the word of one person . . . against the word of another."[191] This specter resulted from the court of appeals' decision as "[t]he definition [of "sale"] chosen by [that] court [would] certainly permit more actions to proceed on the basis of oral allegations alone than was previously thought possible, and the evidentiary and fraud prevention functions of the statute of frauds [would] be frustrated."[192]

The supreme court confirmed the importance of the evidentiary function of the Statute of Frauds, stating:

> Requiring a writing for transactions concerning the conveyance of real estate, regardless of whether a sale has occurred within the dictionary definition of the term, is consistent with the underlying purposes of the Statute of Frauds, namely: to preclude fraudulent claims that would likely arise when the word of one person is pitted against the word of another, and to remove the temptation of perjury by preventing the rights of litigants from resting wholly on the precarious foundation of memory.[193]

Thus in the first instance, the Statute of Frauds provides an "unambiguous" and "bright line rule"[194] concerning the necessity of a writing.[195] Nevertheless, oral promises to convey an interest in real estate can be enforceable if the facts of the case are appropriate for the application of the doctrine of promissory estoppel. Because the court of appeals held that Brown's promise was not subject to the Statute of Frauds, it did not address the propriety of using promissory estoppel.[196] However, because the supreme court held that the Statute of Frauds did apply, it was compelled to consider the effect of promissory estoppel.

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188. *Brown*, 758 N.E.2d at 51 (quoting Guckenberger v. Shank, 37 N.E.2d 708, 713 (Ind. App. 1941)).

189. *Id*.

190. *Id*. (citing Hensley v. Hilton, 131 N.E. 38, 40 (Ind. 1921); Fuelling v. Fuesse, 87 N.E. 700, 701 (Ind. App. 1909); McCoy v. McCoy, 69 N.E. 193, 195 (Ind. App. 1903)).

191. *Id*.

192. Wilson, *supra* note 10, at 997.

193. *Brown*, 758 N.E.2d at 51 (citing Summerlot v. Summerlot, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980); Ohio Valley Plastics, Inc. v. Nat. City Bank, 687 N.E.2d 260, 263 (Ind. Ct. App. 1997)).

194. *Id*.

195. *Id*.

196. *Brown*, 733 N.E.2d at 22, *vacated by* 758 N.E.2d 48 (Ind. 2001).

The supreme court's analysis emphasized that "while it is true that the doctrine of promissory estoppel may remove an oral agreement from the operation of the Statute of Frauds, it is also true that the party asserting the doctrine carries a heavy burden establishing its applicability."[197] Specifically in *Brown*, Branch had the burden of establishing that injustice could be avoided only by enforcing Brown's promise.[198]

To establish injustice, the party seeking to enforce promissory estoppel "must show [ ] that the other party's refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was intended to confer, but the infliction of an unjust and unconscionable injury and loss."[199] The supreme court utilized the "degree of consideration given in reliance on an oral promise"[200] as the measure of the unjustness and unconscionability. It identified the consideration for Brown's promise as quitting her "modest" job, dropping out of college at the end of a semester, and moving back to Indiana. These items of consideration were insufficient to establish unjust and unconscionable injury and loss because they were either seen as inconveniences or merely the denial of the benefits of the otherwise unenforceable oral promise.[201] The doctrine of promissory estoppel did not, therefore, remove Brown's oral promise from the writing requirement of the Statute of Frauds.

The doctrine of promissory estoppel is attractive because it provides a safety valve for those situations where the promisor "us[es] the statute of frauds as a shield to insulate himself from responsibility for unwritten promises."[202] However, if applied too liberally, the doctrine will be the exception that consumes the rule. The Statute of Frauds promotes order; the doctrine of promissory estoppel introduces a degree of uncertainty in the name of fairness and justice in extraordinary circumstances. The supreme court struck a balance between the rule and the exception and provided a tool for identifying the existence of "extraordinary circumstances" through its analysis of the "degree of consideration" given by the promisee in reliance on the oral promise.[203] By correcting the approach taken by the court of appeals, the supreme court institutionally restored order to the law of the Statute of Frauds.

B. The Scope of a Mortgagee's Duty to Protect the Interests of Third Parties: Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods[204]

A second case analyzed in last year's survey on Indiana property law, *Town & Country Homecenter of Crawfordsville, Indiana, Inc. v. Woods* is referenced

197. *Brown*, 758 N.E.2d at 52.
198. *Id*. at 53.
199. *Id*. at 52 (alteration in original).
200. *Id*. at 53.
201. *Id*.
202. Wilson, *supra* note 10, at 998.
203. *Brown*, 758 N.E.2d at 53.
204. 725 N.E.2d 1006 (Ind. Ct. App. 2000), *trans. denied*, 741 N.E.2d 1249 (Ind. 2000).

here because of inaction taken by the supreme court. In *Brown* the court granted transfer, corrected an erroneous legal conclusion, and provided guidance for the application of the doctrine of promissory estoppel to oral promises within the Statute of Frauds.[205] In contrast, in *Town & Country Homecenter*, the supreme court denied a material vendor's petition for transfer, leaving intact the court of appeals' fragmented opinion, despite the express request of panel members for the supreme court to review unsatisfactory precedent.[206]

In one sense the refusal of the supreme court to consider the *Town & Country Homecenter* case could be seen as leaving an established order in place. The problem with such a view is that it does not take into account the extraordinary dissatisfaction with the existing rule separately expressed by two of the three members of the court of appeals panel that decided the case. As noted in last year's Article, the court of appeals' opinion in *Town & Country Homecenter* is interesting because:

> [I]t contains a majority opinion, a concurring opinion that decries the result the author feels compelled to follow by virtue of Indiana Supreme Court precedent, and a dissenting opinion that decries the result [reached in the majority opinion] and finds a way to interpret existing precedent to allow a decision contrary to the one reached by the majority.[207]

Judge Sullivan's plea that "the supreme court . . . reopen the matter" to "avert the inequities apparent in the present state of the law" went unheeded.[208]

By not providing clear guidance and explanation of the scope of a mortgagee's duty to protect the interests of third parties at loan closings conducted by that mortgagee, the supreme court permitted the dissatisfaction with the rule, and the multiple potential approaches to it, to remain. Order is not achieved; unnecessary disorder is injected into the law as trial courts will struggle to decide whether they must follow the majority opinion or whether they can craft a way around it to avoid unfair results.

The analysis conducted in the 2001 edition of this volume[209] will not be repeated here; it remains unchanged by the supreme court's denial of transfer. The two competing views of real estate closings include one that considers each party to be independent and free of duties, absent contractual or agency bases, to others, and one that sees duties arising between the parties based on tort principles. At present, the self-protection model of real estate closings, which holds each party responsible for protecting his own interests alone absent a fiduciary, agency, or contractual relationship, remains the rule. However, the sense of outrage expressed by two judges at the potential for unfairness that can result from this model should lead to the recognition of duties based on a model

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205. *See supra* Part III.A.

206. Town & Country Homecenter of Crawfordsville, Ind., Inc. v. Woods, 741 N.E.2d 1249 (Ind. 2000).

207. Wilson, *supra* note 10, at 981.

208. *Town & Country Homecenter*, 725 N.E.2d at 1013-14.

209. *See* Wilson, *supra* note 10, at 981-88.

that looks to the foreseeability of harm.

CONCLUSION

Property interests come in a wide variety of forms. They can be the "full bundle of sticks" represented by fee simple absolute ownership or they can be any of the individual sticks that represent the many lesser estates in land. Property interests involve people in a variety of relationships, such as lessor/lessee, vendor/vendee, creditor/debtor, and reciprocal covenantees, each of which confers benefits or duties based on status. Property interests are also supported by a variety of related systems, including the public document recording system. Given the pervasiveness of the types of property interests and the fundamental role of property, it should not be surprising that each year provides interesting developments in the law of property in Indiana.

Some of the developments in the period surveyed by this Article are likely to lead to further developments. Two conflicting views of the scope of the Security Deposits statute became crystallized, and continued attention should be focused on these views until a clear interpretation of the statute emerges that will appropriately balance the legitimate interests of both landlords and tenants. The extent of duties owed by a mortgagee to other parties to a loan closing should also attract further judicial attention as, at least for two notable voices, the existing rules do not adequately address the reality of relationships that can arise in practice.

In other areas of property law, the preceding year saw some useful clarifications, including clarification of the role of reliance in a claim for breach of implied warranty of habitability in home construction. Cases decided by the court of appeals also clarified legal principles by providing contrasting pairs of cases. One pair of cases provided an example of an enforceable restrictive covenant and one that was deemed unenforceable. Another pair of cases provided an example of a defendant who qualified as a vendor for the implied warranty of habitability, even though the vendor did not construct or sell the plaintiffs' home, and one who was not a vendor for purposes of that warranty even though it was the retail seller of the plaintiff's home. Perhaps the most notable clarification was the supreme court's express statement that the scope of the Statute of Frauds applies to transfers of interests in real estate and not just to sales.

The process of refining issues and balancing interests in real property is an on-going process. The cases analyzed and reviewed in this Article provide the foundation for future refinements.