RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

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During the survey period,[1] Indiana's courts rendered a number of significant decisions impacting businesses, as well as their owners, officers, directors and shareholders. The Indiana legislature also passed into law a new state Securities Act, providing clarification and uniformity regarding significant rules and regulations. These and other developments of interest to business litigators, and corporate transactional lawyers, as well as business owners and in-house counsel, are discussed herein.

I. SECURITIES LITIGATION AND REGULATION

A. Director's Derivative Liability Under Indiana's Securities Law

In *Lean v. Reed*,[2] the Indiana Supreme Court held that an outside director failed to meet his burden of proving the statutory "reasonable care" defense to personal liability for the corporation's securities registration and disclosure violations under Indiana's Securities Law (ISL).[3] The plaintiffs in *Lean* were the founders and shareholders of Abacus Computer Services, Inc. (Abacus).[4] In "very late March" of 2000, Galaxy Online, Inc. (GOLI), an internet business, entered into an agreement to acquire Abacus.[5] Pursuant to the transaction, which closed on March 31, 2000, Abacus shareholders were issued 600,000 shares of GOLI common stock.[6] The GOLI shares were not registered as "securities" in Indiana.[7]

The plaintiffs sued GOLI, an affiliated company, and 10 individuals who were officers, directors, or controlling persons of GOLI, alleging the "sale of unregistered securities in violation of section 3 of the ISL[8] and material misrepresentations and omissions in violation of section 12(2)."[9] The plaintiffs'

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2007, through September 30, 2008, except where otherwise indicated—as well as significant statutory developments during the survey period.

2. 876 N.E.2d 1104 (Ind. 2007).

3. *Id.* at 1113-14. At the time of the *Lean* decision, the ISL was found at sections 23-2-1-1 to 25 of the Indiana Code.

4. *Id.* at 1105-06.

5. *Id.* at 1106.

6. *Id.*

7. *Id.*

8. *See* IND. CODE § 23-2-1-3 (2007) (providing that "[i]t is unlawful for any person to offer or sell any security in Indiana unless it is registered [or it] is exempted [from registration]").

9. *Lean*, 876 N.E.2d at 1106; *see also* IND. CODE § 23-2-1-12 (2007) (providing that "[i]t

claims against the individual defendants, including Lean, were based on the "derivative liability" provisions found in section 19(d) of the ISL, which provides, in relevant part:

> [A] partner, officer or director of [a person liable under the ISL] [is] also liable jointly and severally with and to the extent as the person, *unless* the person who is liable sustains the burden of proof that *the person did not know and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist*.[10]

The "net effect of [the above-cited provisions of the ISL] is that a director of a selling corporation who cannot sustain the reasonable care defense is liable for both registration and disclosure violations by the corporation."[11]

The plaintiffs moved for summary judgment against Lean, arguing that Lean was liable pursuant to section 19(d).[12] The trial court granted summary judgment in favor of the plaintiffs, rejecting Lean's "reasonable care" defense.[13] The Indiana Court of Appeals affirmed the trial court's ruling,[14] and the Indiana Supreme Court granted transfer.[15] On transfer, Lean argued "that, as a matter of law, it is reasonable care for a director to assume that management and its advisors have taken the appropriate steps to comply with legal requirements."[16] Lean argued "that this is particularly true of a director new to the board at the time the securities transaction is approved."[17] Lean conceded that he voted in favor of the transaction at the March 28, 2000, meeting of GOLI's board of directors, and that he "did not ask any questions that would have allowed him to discover that the stock being sold by GOLI was not registered."[18] Alternatively, on transfer, Lean argued that "summary judgment is never appropriate to resolve a question of 'reasonable care' because it is ultimately a question for the trier of fact."[19]

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is unlawful for any person in connection with the offer, sale or purchase of any security, either directly or indirectly, . . . (2) to make any untrue statements of material fact or to omit to state a material fact necessary in order to make the statement made in light of the circumstances under which they are made, not misleading").

10. IND. CODE § 23-2-1-19(d) (2007) (emphasis added).

11. *Lean*, 876 N.E.2d at 1107.

12. *Id.* at 1106.

13. *Id.*

14. *Id.* at 1107 (citing Lean v. Reed, 854 N.E.2d 79 (Ind. Ct. App. 2006)).

15. *Id.*

16. *Id.* at 1108.

17. *Id.* Lean was elected to the GOLI board of directors on February 18, 2000, i.e., just over a month before the Abacus transaction was approved and closed. *Id.* at 1111. Lean's first board meeting, at which the transaction was approved, was on March 28, 2000—just thirty nine days after Lean was elected a director and three days before the transaction closed. *Id.* at 1111-12.

18. *Id.* at 1112.

19. *Id.* at 1108.

The court in *Lean* encapsulated the issue before it as follows: "[W]hether it is sufficient for an outside director to assume compliance with all applicable laws with no explicit assurance from anyone, no documentation, and in the face of a number of facts that raise obvious points of inquiry."[20] The court explained that "a director can reasonably rely on assertions from counsel and others with expertise as to some legal conclusions."[21] However, the court found that, in this case, "there was no evidence of assurance from counsel, whether made directly by counsel or not, that the law applicable to the Abacus acquisition had been examined and that the transaction conformed to all applicable law."[22] Further, there was no "evidence that lawyers familiar with securities or financing issues had reviewed the transaction."[23] Based on the "undisputed facts," the court in *Lean* concluded, "Lean knew, or in the exercise of reasonable care could have known, that the disputed transaction involved the unlawful issuance of unregistered securities. Accordingly, we hold as a matter of law the defense of reasonable care was not established."[24]

Finally, the court rejected Lean's argument that the issue of "reasonable care" under section 19(d) is always a question of fact, i.e., that resolution of the "reasonable care" defense is inappropriate for summary judgment disposition.[25] The court agreed that "summary judgment is rarely appropriate as to a director's reasonable care."[26] However, the court explained, "in extreme cases conduct may be reasonable or unreasonable as a matter of law just as negligence may be established as a matter of law."[27] The court described its bases for finding "legal" disposition appropriate in this case, as follows:

> If Lean had been told by a respectable authority that his transaction complied with legal requirements, it would create a factual issue as to the reasonableness of his unquestioning acceptance. But the undisputed facts of this case are that Lean assumed this transaction complied with applicable law based on no assurance or documentation from anyone. A director who makes this assumption does not meet the standard required by the ISL that in the exercise of reasonable care he could not have known of the facts constituting the violation.[28]

"Reasonable inquiry, or receipt of reasonable assurance, is one thing," the court explained.[29] "But blind assumption that all is well leaves the investing public in

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20. *Id.* at 1111.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1113-14.
26. *Id.* at 1113.
27. *Id.*
28. *Id.* at 1113-14.
29. *Id.* at 1114.

the same position as if there were no directors of the corporation."[30] The ISL "requires more of a director than a simple assumption that all is well."[31]

B. Indiana's New Uniform Securities Act

Effective July 1, 2008, the Indiana General Assembly passed the new Indiana Uniform Securities Act (the IUSA),[32] which is patterned, in large part, on the Uniform Securities Act of 2002. The new IUSA is now found at Article 19 of Title 23 of the Indiana Code, and is comprised of 6 chapters covering the following subject matter:

Chapter 1: General provisions,[33] including a more detailed and thorough "definitions" section;[34]

Chapter 2: Exemptions from registration and disclosure requirements of the IUSA;[35]

Chapter 3: Registration of securities and notice filing of "federal covered securities;"[36]

Chapter 4: Broker-dealers, agents, investment advisers, investment adviser representatives, and federal covered investment advisers;[37]

Chapter 5: Fraud and liabilities, including provisions dictating both criminal penalties and civil liability;[38] and

Chapter 6: Administration and judicial review.[39]

Although a detailed evaluation of the IUSA, its differences from the prior version of the Act and its impact on practitioners going forward is outside the scope of this Article, a brief summary of just a few of the noteworthy changes follows.

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30. *Id.*

31. *Id.* The Indiana Supreme Court affirmed the trial court's grant of summary judgment against Lean on the "reasonable care" defense. *Id.*

32. IND. CODE §§ 23-19-1-1 to -6-11 (2008). The predecessor version of Indiana's Securities Act, enacted in 1961 and based on the Uniform Securities Act of 1956, was found at Article 2 of Title 23.

33. IND. CODE §§ 23-19-1-1 to -5.

34. *Id.* § 23-19-1-2.

35. *Id.* §§ 23-19-2-1 to -4.

36. *Id.* §§ 23-19-3-1 to -7.

37. *Id.* §§ 23-19-4-1 to -12.

38. *Id.* §§ 23-19-5-1 to -10.

39. *Id.* §§ 23-19-6-1 to -11.

1. "Investment Contract" Includes Interest in a Limited Liability Company.—The "definitions" section of the IUSA is more detailed than that of the predecessor Act. Significantly, the IUSA's definition of a "security," which, like the predecessor version of the Act, includes an "investment contract," now includes five sub-sections describing specific categories of investment vehicles that are "include[d]" or not "include[d]" within the definition.[40] One of those sub-sections provides that the definition of a "security" specifically "includes as an 'investment contract', among other contracts, *an interest in a . . . limited liability company*."[41] The IUSA does not expressly clarify whether *all* "interests" in limited liability companies will meet the definition of a "security."[42] Prior to enactment of the IUSA, whether or not an interest in an LLC was a "security" depended on whether the interest met the definition of an "investment contract," as defined by applicable case law.[43] Arguably, the specification in the IUSA that the definition of a security "includes *as* an 'investment contract'"[44] an interest in an LLC indicates that the test for an "investment contract" must still be satisfied. In other words, an LLC interest may have been included within the definitional section to clarify that an LLC interest can, if the applicable test for an "investment contract" is satisfied, constitute a "security" under the IUSA.[45]

2. Private Placement Exemption Replaced with "Self-Executing" Limited Offering Exemption.—The detailed private placement exemption contained in the predecessor Act[46] has been replaced in the IUSA with a simplified "self-executing" exemption for limited offerings.[47] The new exemption does not require the filing of an offering statement or other written materials (as did the predecessor private placement exemption, depending on the size of the offering and characteristics of the offerees)—i.e., it is "self-executing"—as long as the conditions dictated therein are satisfied.[48] Generally, the new limited offering exemption applies to transactions meeting the following criteria: (1) the issue is

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40. *See id.* § 23-19-1-2(28)(A)-(E).

41. *Id.* § 23-19-1-1(28)(E) (emphasis added).

42. *See id.*

43. *See, e.g.*, SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (defining "investment contract" as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party").

44. *See* IND. CODE § 23-19-1-2(28)(E) (2008).

45. The test for an "investment contract," as described by *Howey* and its progeny, appears to have been codified in section 2(28)(D) of the IUSA, which provides the following:

> [The definition of a "security"] includes as an "investment contract" an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors . . . .

Id. § 23-19-1-2(28)(D).

46. IND. CODE § 23-2-1-2(b)(10) (2007).

47. IND. CODE § 23-19-2-2(14) (2008).

48. *Id.*

made to "not more than twenty-five purchasers . . . other than ['institutional investors']"; (2) a "general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;" (3) no "commission or other remuneration" is paid "or given, directly or indirectly," to an unregistered broker or agent; and (4) "the issuer reasonably believes that all the purchasers . . . are purchasing for investment."[49]

3. Registration of "Finders."—Under the new IUSA, so-called "finders"—i.e., "agents" representing issuers with respect to an *offer or sale* of the issuer's securities—must be registered under the IUSA if they are "compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities."[50] Individuals representing issuers "in connection with the *purchase* of the issuer's own securities"[51] are exempt from registration.[52]

4. Registration of "Investment Advisers."—The "investment adviser" exemption now provides that investment advisers with "no more than five (5) clients that are resident in [Indiana]" are exempt from registration *only if* the investment adviser has no "place of business in this state."[53]

5. Fraud and Liabilities, Including "Control Person" and Director Liability.—The fraud and liability provisions of the IUSA remain substantially unchanged from the predecessor Act's analogous provisions. It continues to be "unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly[,]"[54] to do any of the following:

> (1) to employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.[55]

The "knowing" violation of Article 5, with specified exceptions, constitutes a Class C felony.[56] Civil liability is imposed on a "person" who sells a security in violation of Article 5, unless "the person selling the security sustains the burden of proof that either the person did not know, and in the exercise of reasonable care could not have known, of the violation or the purchaser knowingly participated in the violation."[57]

Joint and several liability continues to be imposed on (1) a person that

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49. *Id.*
50. *Id.* § 23-19-4-2(a), (b)(3).
51. *Id.* § 23-19-4-2(b)(7) (emphasis added).
52. *Id.*
53. *Id.* § 23-19-4-3(b)(2).
54. *Id.* § 23-19-5-1.
55. *Id.* § 23-19-5-1 to -1(3).
56. *Id.* § 23-19-5-8(a).
57. *Id.* § 23-19-5-9(a).

"directly or indirectly controls a person liable under [the civil liability provisions of the IUSA]"[58] and (2) an individual "who is a managing partner, executive officer, or director of a person liable under [the civil liability provisions],"[59] unless the "controlling person" or the "individual" partner, officer or director sustains the burden of proof that he or she "did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist."[60] Other than minor changes, the "joint and several" liability provisions, including the statement of the "reasonable care" defense thereto, remain unchanged from the prior statute. As such, the analysis of the "reasonable care" defense outlined by the Indiana Supreme Court in *Lean v. Reed*,[61] discussed above, remains good law.[62]

II. CORPORATE AND SHAREHOLDER LIABILITY

A. Piercing the Corporate Veil—"Alter Ego" Doctrine

In *Massey v. Conseco Services, LLC*,[63] the court ruled that a subsidiary corporation that loaned money to a director of a parent corporation (in order to purchase stock of the parent corporation) was not an "alter ego" of the parent corporation, for purposes of the director's defenses against the parent.[64] From 1996 to 2000, Conseco, Inc. (Conseco) had a program "known as the D&O Loan Program" (the Program). Pursuant to the Program, Conseco made arrangements with several banks to loan money to its directors and officers for the purchase of Conseco stock.[65] "Conseco guaranteed the loans."[66] Conseco's subsidiary, Conseco Services, LLC (Conseco Services), also loaned money to the directors and officers "to cover the interest owed on the loans from the banks."[67]

The plaintiff participated in the Program from 1996 to 2000, borrowing approximately $15 million to purchase Conseco stock.[68] The plaintiff also signed a promissory note in favor of Conseco Services, to cover interest on his bank loan in the amount of more than $4 million.[69] In April 2000, Conseco "acknowledged that it had overstated its income on its quarterly financial statements in 1999 by $376.6 million.[70] "The value of Conseco shares dropped as the maturity date on

58. *Id.* § 23-19-5-9(d)(1).
59. *Id.* § 23-19-5-9(d)(2).
60. *Id.* § 23-19-5-9(d)(2).
61. 876 N.E.2d 1104 (Ind. 2007).
62. *Compare* IND. CODE § 23-2-1-19(d) (2007), *with* IND. CODE § 23-19-5-9(d)(2) (2008).
63. 879 N.E.2d 605 (Ind. Ct. App. 2008).
64. *Id.* at 609-10.
65. *Id.* at 607.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

[the plaintiff's] Note with Conseco Services approached."[71]

In December 2002, the plaintiff's stock lost all its value when Conseco filed for bankruptcy.[72] Conseco Services sued the plaintiff on the note he executed to cover interest on the bank loans, and the plaintiff asserted several affirmative defenses and counterclaims, primarily based on the conduct of Conseco.[73] In other words, the plaintiff asserted defenses and counterclaims seeking "to hold Conseco Services liable by alleging Conseco Services is the alter ego of Conseco."[74]

The court in *Massey* explained the "alter ego" theory as follows:

> "The legal fiction of a corporation may be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation. Indiana courts refuse to recognize corporations as separate entities where the facts establish that several corporations are acting as the same entity."[75]

The court continued, explaining that "[t]he party seeking to pierce the corporate veil bears the burden of proving the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice."[76]

In affirming the trial court's summary judgment ruling, as a matter of law, the court in *Massey* explained that the "alter ego" doctrine "may be invoked to prevent fraud or unfairness to third parties."[77] The court concluded that the plaintiff "was an outside director, but he was not a third party. He was a director of Conseco and understood the corporate organization of Conseco and Conseco Services."[78] The court also concluded that the plaintiff failed to designate any evidence that the corporations "abused the corporate form or that such abuse would result in a fraud or injustice to him."[79] The court held that the plaintiff "could not treat Conseco Services as the alter ego of Conseco."[80]

In *French-Tex Cleaners, Inc. v. Cafaro Co.*,[81] the court held that a corporation that shared office space with a landlord was not liable for the landlord's alleged breach of contract (or conversion) under "alter ego" or

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71. *Id.* at 608.

72. *Id.*

73. *Id.* at 608-09.

74. *Id.* at 609.

75. *Id.* (quoting Oliver v. Pinnacle Homes, Inc., 769 N.E.2d 1188, 1191 (Ind. Ct. App. 2002)) (internal quotations omitted).

76. *Id.* (internal quotations omitted).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 893 N.E.2d 1156 (Ind. Ct. App. 2008).

piercing the corporate veil theories.[82] The landlord and tenant in *French-Tex* became involved in a dispute regarding real estate taxes.[83] The dispute led to the tenant, a dry cleaning business, filing a class action complaint, alleging that the landlord and the second corporation, Cafaro, overcharged the tenant (and other commercial tenants of various shopping centers) for their shares of property taxes.[84] The tenant alleged breach of contract, conversion, unjust enrichment, and fraud.[85] Although Cafaro was not a party to the subject lease, the tenant alleged that the two defendants shared office space, telephone and computer systems, and some officers. Further, the tenant alleged that the landlord's invoices were actually prepared by Cafaro's employees, and other issues that allegedly gave rise to liability.[86] The trial court granted summary judgment in favor of Cafaro, and the tenant appealed.[87]

The court recognized that although Cafaro was not a party to the lease, "liability could be imputed . . . if Cafaro was acting as [the landlord's] alter ego."[88] The court explained that it was the tenant's burden to establish that the landlord "was so ignored, controlled, or manipulated that it was merely the instrumentality of Cafaro and that the misuse of the corporate form would constitute a fraud or promote injustice."[89] The court enumerated the categories of evidence required to satisfy the tenant's burden of proof on the tenant's "alter ego" theory:

> (1) [The landlord's] undercapitalization; (2) absence of corporate records; (3) fraudulent representation by the corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.[90]

The court of appeals concluded that "[l]ike the trial court, we find no genuine issue of material fact regarding Cafaro's liability for breach of contract under the [lease between the landlord and tenant]."[91] The court summarized the respective parties' arguments and "facts" relied upon in support, but did not analyze the facts or specify which of them was persuasive or dispositive on the issue.[92]

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82. *Id.* at 1169.
83. *Id.* at 1159-60.
84. *Id.* at 1160.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 1168.
89. *Id.* at 1168-69.
90. *Id.* at 1169.
91. *Id.*
92. *Id.*

B. Corporate Liability for Criminal Act of Employee

In *Prime Mortgage USA, Inc. v. Nichols*,[93] the court held that a corporation could be held liable for its employee-shareholder's forgery of a share authorization form, allegedly causing damage to the other shareholder.[94] Specifically, the plaintiff and defendant shareholders—Nichols and Law, respectively—were, at one time, the sole shareholders of the corporation.[95] The business relationship between the shareholders deteriorated, and Nichols decided she wanted to sell her stock.[96] The parties were unable to negotiate a buyout; so, Nichols filed a complaint seeking appointment of a receiver and dissolution, arguing that she and Law each owned half of the company's shares.[97] Law responded, claiming that he had previously issued company stock to his daughter and another company employee, pursuant to a share authorization document allegedly signed by Nichols.[98] Nichols later learned that Law had forged her signature on the share authorization document and sought, among other things, to hold both Law and the corporation liable for the forgery under Indiana's crime victims statute.[99]

Pursuant to section 35-41-2-3 of the Indiana Code

> [A] corporation may be held liable for an employee's criminal acts as long as the employee was acting within the scope of employment. The company may be held liable, if the employee's purpose, was to an appreciable extent, to further his employer's business, even if the act was predominantly motivated by an intention to benefit the employee himself. Even if a particular act was not authorized by the corporation, if there is a sufficient association between the authorized acts and the unauthorized acts, the unauthorized acts may fall within the scope of employment.[100]

The court in *Nichols* stated that "[a]n elaborate discussion on this point is not necessary to explain [its] conclusion that Law was acting within the scope of his employment when he forged Nichols' name."[101] According to the court, although Law forged the share authorization document with the intent to benefit himself to the detriment of Nichols, the act also furthered the corporation's business.[102] As such, the court concluded that the corporation could be held liable under

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93. 885 N.E.2d 628 (Ind. Ct. App. 2008).
94. *Id.* at 655.
95. *Id.* at 637.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 637-38; *see also* IND. CODE § 34-24-3-1 (2008).
100. *Id.* at 654-55 (internal quotations omitted).
101. *Id.* at 655
102. *Id.*

Indiana's crime victims statute.[103]

C. Doctrine of Contribution Applied to Shareholders of Failed Business

In *Balvich v. Spicer*,[104] the Indiana Court of Appeals discussed the doctrine of "contribution" in the context of shareholders of a failed Hardee's franchise business.[105] The Balviches and the Spicers owned varying interests in the corporate entities that owned the franchises.[106] The corporations had obtained more than $700,000 in loans from Bank One and AT&T Financial Corporation.[107] When the franchises began to fail, the corporations defaulted on the loans and the lenders foreclosed.[108] The shareholders had personally guarantied the loans and, ultimately, judgments were entered against them.[109] The Spicers paid significantly more than the Balviches to release their obligations under the judgments.[110] The corporations also owed past due amounts for state sales tax and employee withholding taxes.[111] The Spicers paid approximately $75,000 to satisfy the corporations' tax obligations.[112]

The Spicers filed an action against the Balviches for contribution regarding the amounts paid in connection with the Bank One, AT&T and state tax payments.[113] The trial court entered judgment in favor of the Spicers and the Balviches appealed.[114]

After finding that the Spicer's claims were not barred by the applicable statute of limitations, the court in *Spicer* turned to the contribution claim, explaining that "the doctrine of contribution rests on the principle that where parties stand in equal right, equality of burden becomes equity."[115] Further, the court explained: "[T]he right of contribution is based upon natural Justice, and it applies to any relation, including that of joint contractors, where equity between the parties is equality of burden, and one of them discharges more than his share of the common obligation."[116] The court also noted that section 26-1-3.1-116 of the Indiana Code provides, in relevant part, that "a party having joint and several liability who pays the instrument is entitled to receive from *any party*

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103. *Id.*

104. 894 N.E.2d 235 (Ind. Ct. App. 2008).

105. *Id.* at 237. The Hardee's franchises were located throughout Indiana and were owned by several separate corporations of which the parties in *Spicer* were shareholders. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 238.

113. *Id.*

114. *Id.* at 238, 242.

115. *Id.* at 245 (internal quotations omitted).

116. *Id.* (internal quotations omitted).

having the same joint and several liability contribution in accordance with applicable law."[117]

The court in *Spicer* found that the evidence supported the trial court's ruling in favor of contribution from the Balviches, because they were jointly and severally liable under their personal guaranties.[118] The court also rejected the Balviches' statutory argument that contribution could not be pursued because the judgments had not been paid "in full" or "in their entirety."[119] Finally, the court ruled that the trial court had jurisdiction to award contribution regarding the state tax liability.[120] The court explained that the "propriety of imposition of a tax"—which arguably would have been within the exclusive jurisdiction of the Indiana Tax Court—was not at issue.[121] Rather, the issue was whether contribution for the amount paid by the Spicers was proper.[122]

III. "AUTHORITY" OF EXECUTIVE DIRECTOR AND "REMOVED" DIRECTOR TO FILE ACTION AGAINST BOARD MEMBERS

In *Martindale Brightwood CDC v. Gore*,[123] the court held that a non-profit corporation's executive director lacked standing to file suit against board members, but that a "removed" director was authorized by statute to allege that his removal was invalid and improper.[124] The executive director and the recently "removed" director filed suit against the corporation's board members, alleging breach of contract, intentional interference with contract, misfeasance, breach of fiduciary duty, and breach of the standard of care of directors.[125] The board members moved to dismiss, for failure to name the real party in interest, arguing that neither the executive director nor the former director was authorized by statute to file suit.[126] The trial court granted the motion to dismiss.[127]

Section 23-17-4-4(b) of the Indiana Code provides, "A corporation's power to act may be challenged in a proceeding against the corporation for a declaratory judgment or to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General *or a director*."[128] A "director" is defined in the statute as "an individual designated in articles of incorporation or bylaws, elected by the incorporators *or otherwise elected or*

117. *Id.* (quoting IND. CODE § 26-1-3.1-116).
118. *Id.*
119. *Id.* at 247 (discussing IND. CODE § 34-22-1-6 (2006)).
120. *Id.* at 247-48.
121. *Id.* at 248.
122. *Id.* at 248-49.
123. 878 N.E.2d 1280 (Ind. Ct. App. 2008).
124. *Id.* at 1284, 1285.
125. *Id.* at 1281.
126. *Id.* at 1281-82.
127. *Id.* at 1282.
128. *Id.* at 1283 (quoting IND. CODE § 23-17-4-4(b) (2007)).

appointed, to act as a member of a board of directors."[129]

Regarding the executive director, the court in *Martindale* rejected the executive director's argument that, pursuant to the corporation's by-laws, she was a "non-voting member" of the board.[130] Specifically, the court explained that the by-laws merely provide that the executive director will attend meetings of the board of directors, but they "in no way [designate] the Executive Director as a person to act as a member of [the board of directors]."[131] Further, pursuant to the executive director's employment agreement with the corporation, the executive director was required to "report to" the board, "advise" the board, and "see that all orders and resolutions of the [board were] carried into effect."[132] The court concluded that the executive director "clearly was an employee of [the corporation] and not a director as she argue[d]."[133]

Regarding the "removed" director, the director alleged in the complaint that his removal from the board was "improper" and "invalid," in that it was not done in compliance with the corporation's by-laws.[134] The court directed that in ruling on a motion to dismiss, "it must accept as true the facts alleged in the complaint."[135] As such, the court accepted as true the fact that the director-plaintiff's removal was "improper and therefore void."[136] If his removal was void, the court explained, "he would have standing to bring a proceeding pursuant to Indiana Code section 23-17-4-4(b)."[137] Therefore, the court reversed the trial court's dismissal of the director's complaint on standing grounds.[138]

IV. INSPECTION OF CORPORATE BOOKS AND RECORDS

In *Bacompt Systems, Inc. v. Peck*,[139] the court of appeals concluded that a hearing on a petition to inspect corporate records "constituted a trial within the meaning of [Indiana] Trial Rule 43(A)."[140] As such, the court held, it was improper for the trial court to base its findings and conclusions regarding whether a "proper purpose" for the inspection existed on an affidavit.[141] Rather,

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129. *Id*. (quoting IND. CODE § 23-17-2-9 (2007)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* The court in *Martindale* also noted that the corporation's articles of incorporation provide that directors "shall be elected." *Id.* at 1284. The executive director was appointed—not elected—further refuting her argument that she was a "director" within the meaning of the corporation's articles. *Id.*

134. *Id.* at 1284.

135. *Id.* at 1285 (citing Trail v. Boys & Girls Clubs, 845 N.E.2d 130, 134 (Ind. 2006)).

136. *Id.*

137. *Id.*

138. *Id.*

139. 879 N.E.2d 1 (Ind. Ct. App. 2008).

140. *Id.* at 5.

141. *Id.*

live testimony was required, in open court.[142]

Section 23-1-52-2 of the Indiana Code provides, in relevant part: "A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, [various categories of] records of the corporation . . . if . . . the shareholder's demand is made in good faith and for a proper purpose."[143]

One of the parties seeking records in *Bacompt* filed an affidavit in support of the petition, stating "that she needed access to [the requested] corporate records in order to value her stock in her pending divorce proceeding."[144] The trial court concluded that a "proper purpose" had been demonstrated and granted the petition.[145]

On appeal, the corporation argued, among other things, that the trial court's reliance on the petitioner's affidavit violated Indiana Trial Rule 43(A), which provides that "[i]n all trials the testimony of witnesses shall be taken in open court."[146] The court of appeals agreed, describing the nature of a hearing on a petition to inspect corporate records as follows: "[T]he hearing . . . was for the purpose of determining issues of fact concerning, in this case, the [petitioners'] purpose and entitlement to inspect [the corporation's] corporate records, which was the very basis of their petition. The hearing therefore constituted a trial within the meaning of Trial Rule 43(A)."[147]

Therefore, the court ruled, "testimony was required to be taken in open court in order to preserve [the corporation's] rights to cross-examination and the ability of the fact-finder to observe demeanor and determine credibility."[148] The court proceeded to analyze the trial court's finding of a "proper purpose" and concluded that the trial court improperly relied on the affidavit.[149] In reversing the trial court's ruling, the court of appeals explained "we are reluctant to endorse the trial court's findings of fact and conclusions thereon as somehow demonstrative of a proper purpose when there was no testimony or properly-admitted evidence establishing it."[150]

V. JOINT VENTURES

In *Lauth Indiana Resort & Casino, LLC v. Lost River Development, LLC*,[151] the Indiana Court of Appeals held, as a matter of first impression, as follows:

[I]f a joint venture is formed for the purpose of submitting a proposal or

142. *Id.*
143. *Id.* at 3 (quoting IND. CODE § 23-1-52-2(a), (c) (2007)).
144. *Id.*
145. *Id.*
146. *Id.* at 4 (quoting IND. TRIAL R. 43(A)).
147. *Id.* at 5 (citations omitted).
148. *Id.*
149. *Id.*
150. *Id.* at 6.
151. 889 N.E.2d 915 (Ind. Ct. App. 2008).

> similar bid, and the joint venture agreement is silent as to when or under what circumstances the joint venture will end, then the joint venture ends, as a matter of law, when the proposal or bid is rejected.[152]

In March 2004, the Indiana Gaming Commission (IGC) issued a request for proposals (RFP), soliciting proposals from those wishing to develop a casino project in Orange County.[153] Three groups submitted proposals: Trump Indiana, Orange County Development, and Lost River Development.[154] After Lost River submitted its original proposal, it was contacted by Lauth Indiana Resort & Casino, LLC (Lauth), which expressed a desire to become involved with the Lost River proposal.[155] The Lost River members and Lauth entered into a "Letter Agreement," providing for the parties' ownership interests in Lost River. The parties agreed that the Letter Agreement created a "joint venture."[156] "However, the Letter Agreement was silent as to when, or under what circumstances, the joint venture would end."[157] Lost River submitted an amended proposal to the IGC.[158] Ultimately, however, the IGC selected the Trump Indiana proposal.[159]

The parties were hopeful that Trump Indiana would be unable to meet the financing or other conditions imposed by the IGC.[160] Meanwhile, Lauth began contacting other gaming companies regarding the possibility of teaming up if the IGC rescinded its award to Trump Indiana.[161] As expected, Trump Indiana was unable to meet the IGC's conditions and the IGC issued a second RFP.[162] Lauth submitted a proposal with another company, Cook Group, under the name of Blue Sky Casino, LLC (Blue Sky), in competition with Lost River.[163] The IGC awarded the development to Blue Sky.[164]

Lost River filed suit against Lauth and others, alleging breach of the Letter Agreement, in addition to breach of fiduciary duty claims.[165] Lauth moved for summary judgment, arguing that the Letter Agreement formed a joint venture, which terminated when the IGC chose Trump Indiana's proposal.[166] The trial court denied Lauth's summary judgment motion, and Lauth appealed.[167]

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152. *Id.* at 922-23.
153. *Id.* at 916.
154. *Id.*
155. *Id.* at 917.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 917-18.
163. *Id.* at 918.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 919.

As an initial matter, the court in *Lauth* ruled, as a matter of first impression in Indiana, that "a joint venture without a termination date remains in force until its purpose is accomplished or that purpose becomes impracticable."[168] The court proceeded to evaluate the "purpose" of the Lost River joint venture, starting with the definition of joint venture: "[A] joint venture is an association of two or more parties formed to carry out a single business enterprise for profit. A joint venture is similar to a partnership except that *a joint venture contemplates only a single transaction*."[169] The court then looked to the express language of the "Letter Agreement," concluding that "the joint venture contemplated only one proposal and [it] is silent with regard to what would happen if the Lost River proposal was not chosen by the IGC."[170] The court ruled that "once the IGC rejected the Lost River proposal, the joint venture terminated, and the parties were then free to pursue other opportunities, either with each other or with other parties."[171] As such, the court found, "Lauth did not breach the joint venture agreement or violate any duty owed to the other parties to the joint venture."[172] The court emphasized that its "holding applies only in cases where, as here, the joint venture agreement is silent as to when the joint venture terminates."[173]

VI. BUSINESS TORTS AND STATUTORY "CRIMES"

A. Tortious Interference with Contract

In *Allison v. Union Hospital, Inc.*,[174] the court evaluated the "justification" element for a tortious interference with a contractual relationship claim.[175] The plaintiffs in *Allison*—Certified Registered Nurse Anesthetists—worked for a hospital providing obstetric anesthesia services.[176] The plaintiffs and hospital were engaged in contract renegotiations while the hospital was attempting to negotiate an agreement with a professional corporation to replace the plaintiffs in providing obstetric anesthesia services for the hospital.[177] The original

168. *Id.* at 920.

169. *Id.* (citations omitted); *see also* Walker v. Martin, 887 N.E.2d 125, 138 (Ind. Ct. App. 2008). The court in *Walker* explained that for a joint venture to exist, "the parties must be bound by an express or implied contract providing for (1) a community of interests, and (2) joint or mutual control, that is, an equal right to direct and govern the undertaking, that binds the parties to such an agreement." *Id.* "A joint venture agreement must also provide for the sharing of profits." *Id.*

170. *Lauth*, 889 N.E.2d at 920. The court in *Lauth* recognized that its holding established a "bright-line rule[,]" but believed that approach to be "particularly appropriate for dealing with joint ventures, which by their very nature contemplate only a single transaction." *Id.* at 922.

171. *Id.* at 921.

172. *Id.*

173. *Id.* at 922.

174. 883 N.E.2d 113 (Ind. Ct. App. 2008).

175. *Id.* at 118-22.

176. *Id.* at 115.

177. *Id.* at 116-17.

agreement with the plaintiffs contained a provision for termination without cause.[178] Before the agreement with the professional corporation was finalized, however, the hospital reached an agreement with the plaintiffs.[179] The new agreement did not contain a termination without cause provision.[180]

The hospital informed the professional corporation that the agreement with plaintiffs could, in fact, be terminated without cause subject to ninety days notice.[181] After terms were agreed upon with the professional corporation, the hospital provided notice of termination to the plaintiffs.[182] When plaintiffs demanded a copy of their contract, the hospital produced an altered version with a new termination without cause provision.[183] The hospital and professional corporation finalized their agreement, and plaintiffs sued both of them—alleging breach of contract, tortious interference with a contractual relationship, and other causes of action.[184]

To establish a claim of tortious interference with a contractual relationship, a plaintiff must prove the following five elements: "(1) the existence of a valid and enforceable contract; (2) the defendant's knowledge of the existence of the contract; (3) the defendant's intentional inducement of the breach of contract; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful inducement of the breach."[185] To determine whether a defendant's conduct is "justified," the Indiana Supreme Court has suggested that courts look to the factors enumerated in the Restatement (Second) of Torts, which are as follows:

(a) the nature of the defendant's conduct;
(b) the defendant's motive;
(c) the interests of the plaintiff with which the defendant's conduct interferes;
(d) the interests sought to be advanced by the defendant;
(e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;
(f) the proximity or remoteness of the defendant's conduct to the interference; and
(g) the relations between the parties.[186]

The court in *Allison* explained that "the weight to be given to each consideration may differ from case to case depending on the factual circumstances, but *the*

178. *Id.* at 115.
179. *Id.* at 116.
180. *Id.*
181. *Id.* at 117.
182. *Id.* at 116-17.
183. *Id.* at 116.
184. *Id.* at 117.
185. *Id.* at 118 (citing Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1235 (Ind. 1994)).
186. *Id.* (quoting *Winkler*, 638 N.E.2d at 1235).

overriding question is whether the defendants' conduct has been fair and reasonable under the circumstances."[187]

Regarding the hospital,[188] the court found that there was "*at the least* . . . a question of material fact as to whether [the hospital's] actions with respect to the contents of the [agreement with plaintiffs] was justified."[189] The court found it significant that the hospital discovered that the contract did not contain a termination without cause provision; the hospital failed to discuss that omission with the plaintiffs; it terminated the contract pursuant to a nonexistent provision; and then it inserted the provision into an altered version, which it delivered to the plaintiffs following termination.[190] The court proceeded to analyze the remaining Restatement factors, concluding that the inquiry regarding "whether [the hospital's] conduct has been fair and reasonable under the circumstances . . . [is] so highly fact sensitive that . . . it is best answered by a factfinder."[191]

Regarding the professional corporation, the court found that its conduct was justified.[192] The court explained that the professional corporation's conduct was "limited to agreeing to be a replacement provider of [obstetric] anesthesia services."[193] Further, the hospital told the professional corporation that the plaintiffs' contract was terminable at will.[194] After evaluating the remaining factors enumerated by the Restatement, the court concluded that "[u]nder these circumstances, [the professional corporation's] actions were justified."[195]

B. Trade Secrets

In *Bridgestone Americas Holding, Inc. v. Mayberry*,[196] the Indiana Supreme Court held, as a matter of first impression, that the federal courts' long-standing three-part balancing test was "the proper analysis for whether 'good cause' has been shown and whether a protective order should be issued for a trade secret during discovery."[197] Before analyzing and, ultimately, adopting the three-part balancing test for analysis of the protective order issue, the court provided a concise "history" of trade secret protection in Indiana, including the following description:

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187. *Id.*

188. The court explained that "[a]lthough it is true that a party to a contract is not subject to liability for tortious interference with its own contract if it acts alone, it may be subject to liability for conspiring with another party to tortiously interefere with the contract." *Id.* (quoting *Winkler*, 638 N.E.2d at 1234 n.7).

189. *Id.* at 120 (emphasis in original).

190. *Id.* at 119-20.

191. *Id.* at 121.

192. *Id.*

193. *Id.* at 122.

194. *Id.*

195. *Id.*

196. 878 N.E.2d 189 (Ind. 2007).

197. *Id*. at 194.

> Trade secrets are unique creatures of the law, not property in the ordinary sense, but historically receiving protection as such. Unlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, the value quickly diminishes. For this reason, owners or inventors go to great lengths to protect their trade secrets from dissemination.
>
> . . . .
>
> This Court has long recognized the importance of protecting trade secrets from inappropriate disclosure. Most trade secret litigation in Indiana has involved allegations of overt misappropriation. Of course, trade secrets may be valuable during the course of litigation not involving misappropriation claims, and there are moments when justice requires disclosure. Still, courts must proceed with care when supervising the discovery of trade secrets, lest the judiciary be used to achieve misappropriation or mere leverage.[198]

The court proceeded to adopt the three-part balancing test followed by federal courts,[199] and concluded that the parties seeking disclosure failed to meet their burden for showing necessity.[200]

C. Indiana's Corrupt Business Influence Act

1. "Direction" or "Control" of Racketeering Activities Not Required.—In *Keesling v. Beegle*,[201] the Indiana Supreme Court concluded that Indiana's Corrupt Business Influence Act—i.e., Indiana's version of the federal Racketeer Influenced and Corrupt Organizations Act—"imposes RICO liability both on persons at *and below* a racketeering enterprise's managerial or supervisory level."[202] The plaintiffs in *Keesling* purchased pay telephones and "entered into

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198. *Id.* at 192-93 (citations omitted).

199. *Id.* at 193-94. The court described the three-part test as follows:

> First, the party opposing discovery must show that the information sought is a "trade secret or other confidential research, development, or commercial information" and that disclosure would be harmful. . . . Then the burden shifts to the party seeking discovery to show that the information is relevant and necessary to bring the matter to trial. If both parties satisfy their burden, the court must weigh the potential harm of disclosure against the need for the information in reaching a decision.

Id. at 193 (quoting FED. R. CIV. PRO. 26(c)(7)) (other citations omitted)).

200. *Id.* at 197. A more thorough discussion of the application of the three-part balancing test as applied to the facts in *Mayberry* is included in this year's Indiana civil procedure survey. *See* Daniel K. Burke, *Recent Developments in Indiana Civil Procedure*, 42 IND. L. REV. 879, 882-83 (2009).

201. 880 N.E.2d 1202 (Ind. 2008).

202. *Id.* at 1203 (emphasis added).

service agreements to install, service and maintain the telephones."[203] The plaintiffs were passive investors in the program.[204] The promoters of the program "violated federal securities laws by not registering the pay telephone investment program with the Securities and Exchange Commission."[205]

The defendants in *Keesling* included not only the "promoters," but also the recruited sales representatives and the individuals and entities that had entered agreements with the promoters, "to recruit sales representatives and receive commissions on the sales made by his recruits."[206] The plaintiffs sued the defendants for their respective roles in the pay telephone program, alleging violations of Indiana's Securities Act, Indiana's RICO Act, fraud, conversion and theft.[207]

The plaintiffs contended that these "recruiters" and "recruits" violated the Indiana RICO Act by "conduct[ing] or otherwise participat[ing] in the activities of [an] enterprise through a pattern of racketeering activity."[208] The trial court rejected the contention and granted summary judgment in favor of the defendants, based on the 2000 Indiana Court of Appeals' decision in *Yoder Grain, Inc. v. Antalis*,[209] in which the court of appeals held that "the plaintiff must allege that the defendant 'participated in the operation or management of the enterprise itself,' and that the defendant played 'some part in directing the enterprise's affairs.'"[210] According to the court in *Yoder Grain*, "mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management of the enterprise."[211] The trial court found that the plaintiffs failed to present evidence that the defendants "directed" the activities of the enterprise and, as such, granted summary judgment in the defendants' favor.[212]

On transfer, the Indiana Supreme Court abrogated the *Yoder Grain* decision and reversed the trial court's summary judgment ruling, holding that a defendant need not "direct" or "control" the racketeering activities in order to face liability under Indiana's RICO Act.[213] The Indiana Supreme court explained that "'the Legislature intended for the Indiana Act to reach persons below the managerial or supervisory level as well as those who exert control or direction over the affairs of [a racketeering] enterprise, i.e., to reach a racketeering enterprises 'foot

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1204.

207. *Id.*

208. *Id.* at 1205-06 (quoting IND. CODE § 35-45-6-2(3) (2008)).

209. 722 N.E.2d 840 (Ind. Ct. App. 2000).

210. *Keesling*, 880 N.E.2d at 1205 (quoting *Yoder Grain*, 722 N.E.2d at 846).

211. *Yoder Grain*, 722 N.E.2d at 846 (quoting Goren v. New Vision Int'l, Inc., 156 F.3d 721, 727 (7th Cir. 1998)).

212. *Keesling*, 880 N.E.2d at 1205.

213. *Id.*

soldiers' as well as its 'generals.'"[214] In reaching its holding, the court in *Keesling* analyzed the language of the federal RICO statute compared to that of the Indiana Act, finding that the Indiana Act was phrased more "broadly," and it surveyed the laws of other states.[215] The court stated that "[b]ecause we hold that the level of participation necessary to implicate the Indiana Act need not rise to the level of direction, such a showing was unnecessary and summary judgment was not justified on that basis."[216]

2. Indiana's RICO Act Not Preempted by IUTSA.—In *AGS Capital Corp. v. Product Action International, LLC*,[217] the court held, as a matter of first impression in Indiana, that the Indiana Uniform Trade Secrets Act (IUTSA) does not preempt Indiana's RICO Act.[218] *AGS* involved claims by Product Action against its former employees, a competing company, and that company's "parent" company (under "alter ego" theory),[219] alleging, among other things, misappropriation of trade secrets, violation of Indiana's RICO Act. The defendants argued that the IUTSA preempts Product Action under Indiana's RICO Act.[220]

In concluding that the IUTSA does not preempt the civil remedy provisions of Indiana's RICO Act, the court in *AGS* explained as follows:

> Because the RICO statute was designed to address the more sinister forms of corruption and criminal activity, the preemption provision of IUTSA should not prohibit RICO from fulfilling its purpose where the form of corruption involves the systematic acquisition of economically valuable information through the artifice of competitors' employees in order to gain an unlawful economic advantage in the marketplace. RICO is structured to reach and punish these diabolical operations that are a greater threat to society than random theft.[221]

The court continued, "In consideration of the purpose and goals of the entire RICO framework, we conclude that the civil remedy portion providing for a private action is a derivative of the criminal law. Thus, this type of action is not preempted by IUTSA."[222] The court was hopeful that its "conclusion will result

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214. *Id.* at 1206 (internal quotations omitted).

215. *Id*. at 1205-08.

216. *Id*. at 1208.

217. 884 N.E.2d 294 (Ind. Ct. App. 2008).

218. *Id.* at 308.

219. *See id.* at 311-12 (concluding that the parent and subsidiary companies were "alter egos," premised in large part on the parent's use of a "sister" company to pose as a potential customer of Product Action in order to obtain a price quotation and then provide that information to the subsidiary competitor).

220. *Id.* at 306. The IUTSA provides that it "displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law." *Id.* (quoting IND. CODE § 24-2-3-1(c) (2007)).

221. *Id.* at 308.

222. *Id.*

in a greater disincentive for the commission of the strategic, repetitious theft of trade secrets."[223]

D. Fraud on a Financial Institution

In *American Heritage Banco, Inc. v. McNaughton*,[224] the court held that a plaintiff alleging "fraud on a financial institution" need not prove the elements of common law fraud.[225] Fraud on a financial institution is defined as follows:

> A person who knowingly executes, or attempts to execute, a scheme or artifice . . . to obtain any of the money, funds, credits, assets, securities, or other property owned by or under the custody or control of a state or federally chartered or federally insured financial institution by means of false or fraudulent pretenses, representations, or promises commits a Class C felony.[226]

The defendants in *American Heritage* argued that the plaintiff must prove "the elements of common law fraud [including, specifically, "reliance"] in order to prove a violation of this statute."[227] The court disagreed, explaining that "[i]n Indiana no common-law crimes exist, and the legislature fixes the elements necessary for any statutory crime."[228] According to the court, "[c]riminal statutes cannot be enlarged by construction, implication, or intendment beyond the fair meaning of the language used."[229]

VII. NON-COMPETITION COVENANTS

A. Public Policy and Geographic Scope

In *Central Indiana Podiatry, P.C. v. Krueger*,[230] a podiatrist had been employed with the plaintiff pursuant to a series of written employment agreements, which were "renewed" every year or two.[231] Each agreement

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223. *Id.*

224. 879 N.E.2d 1110 (Ind. Ct. App. 2008).

225. *Id.* at 1117-18.

226. *Id.* at 1117 (quoting IND. CODE § 35-43-5-8(a)(2) (2008)).

227. *Id.* at 1117 n.4.

228. *Id.* at 1117 (quoting Knotts v. State, 187 N.E.2d 571, 573 (Ind. 1963)).

229. *Id.* The court in *American Heritage* also addressed the plaintiff's common law fraud claim, addressing the rule that fraud cannot be premised on "representations of future conduct, on broken premises, or on representations of existing intent that are not executed." *Id.* at 1115. The plaintiff in *American Heritage* based its common law fraud claim, in part, on the defendant's loan application, which included a statement regarding the "purpose" of the loan. The plaintiff alleged that the stated purpose was not the "true" purpose. The court affirmed the trial court's dismissal of the claim, explaining that the "stated purpose of the loan is not a statement of past or existing fact." *Id.* at 1116.

230. 882 N.E.2d 723 (Ind. 2008).

231. *Id.* at 725.

contained non-solicitation and non-competition provisions, with terms of two years from the date of termination and geographic scopes "defined as fourteen listed central Indiana counties, as well as any other county where [plaintiff] maintained an office during the term of the Contract or in any county adjacent to any of the foregoing counties."[232] Significantly, the podiatrist had not practiced in Hamilton County within 2 years of his termination.[233]

In 2005, the podiatrist was accused of attempting to kiss an office employee at the office.[234] The plaintiff terminated him on July 25, 2005.[235] In September 2005, the podiatrist entered an employment agreement with a competing company in Hamilton County, which was one of the counties specifically listed in the employment agreement with the plaintiff.[236] Further, the podiatrist sent a letter to the plaintiff's patients, informing them of his new employment.[237] The plaintiff sued for injunctive relief and damages, the trial court found the geographic restriction unenforceable, and denied the injunction.[238] The court of appeals reversed,[239] and the Indiana Supreme Court granted transfer.[240]

As an initial matter, the court in *Krueger* described the "public policy" concerns implicated by non-competition agreements involving physicians, as follows:

> Noncompetition agreements are justified because they protect the investment and goodwill of the employer. In many businesses, the enforceability of a noncompetition agreement affects only the interests of the employee and employer. A noncompetition agreement by a physician involves other considerations as well. Unlike customers of many businesses, patients typically come to the physician's office and have direct contact with the physician. If an agreement forces a physician to relocate outside the geographic area of the physician's practice, the patients' legitimate interest in selecting the physician of their choice is impaired. Moreover, the confidence of a patient in the physician is typically an important factor in the relationship that relocation would displace.[241]

Nevertheless, after reviewing case law and legislation from other states, as well as an ethics opinion from the American Medical Association, the Indiana Supreme Court held that non-competition agreements involving physicians were

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232. *Id.* at 725-26 (internal quotations omitted).

233. *Id.* at 730.

234. *Id.* at 725.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* (citing Cent. Ind. Podiatry, P.C. v. Krueger, 859 N.E.2d 686, 689 (Ind. Ct. App. 2007)).

240. *Id.*

241. *Id.* at 727.

not unenforceable as a matter of public policy.[242] The court upheld its 1983 ruling in *Raymundo v. Hammond Clinic Ass'n*,[243] in which it rejected a claim that such covenants were unenforceable on public policy grounds and "adopted a reasonableness standard for physician noncompetition agreements."[244] The court concluded that "[a]ny decision to ban physician noncompetition agreements altogether should be left to the legislature."[245]

After finding that the plaintiff had demonstrated that the non-competition agreement "served the legitimate interest of preserving patient relationships developed with [plaintiff's] resources and to that extent served a legitimate interest of [the plaintiff],"[246] the court proceeded to evaluate the reasonableness of the geographic restriction.[247] The court explained that "[w]hether a geographic scope is reasonable depends on the interest of the employer that the restriction serves."[248] According to the court, "[a]n employer has invested in creating its physician's patient relationships only where the physician has practiced."[249] Further, "noncompetition agreements justified by the employer's development of patient relationships must be limited to the area in which the physician has had patient contact."[250]

Because the podiatrist had not used the plaintiff's resources to establish patient relationships throughout all of the counties either identified by name or description in the agreement, the court in *Krueger* found that the geographic scope was "clearly overbroad."[251] However, the court applied the "blue pencil" doctrine in an effort to determine whether enforceable aspects of the non-compete were being violated.[252] The court started with the fact that the plaintiff defined its geographic scope in terms of counties, rather than the radius from the locations of the "workplace," and then considered that the duration of the non-compete was two years.[253] The court explained "when the [two year] period

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242. *Id.* at 728.

243. 449 N.E.2d 276 (Ind. 1983).

244. *Krueger*, 882 N.E.2d at 728 (citing *Raymundo*, 449 N.E.2d at 280-81).

245. *Id.*

246. *Id.* at 729.

247. *Id.* The parties had agreed that the two-year duration of the agreement was reasonable. *Id.*

248. *Id.* at 730.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 730-31. The court described the "blue pencil" doctrine as follows:

> If a noncompetition agreement is overbroad and it is feasible to strike the unreasonable portions and leave only reasonable portions, the court may apply the blue pencil doctrine to permit enforcement of the reasonable portions. The blue pencil doctrine permits excising language but not rewriting the agreement.

Id. (internal citations omitted).

253. *Id.* at 730-31.

begins to run varies with when [the podiatrist] left that location."[254] The court found that the plaintiff established only that the podiatrist worked in "three counties—Marion, Tippecanoe and Howard—within the 2-years preceding his termination."[255] Because those counties were specifically identified in the non-compete, the geographic scope was "sustainable as to them."[256]

However, the court concluded that the "geographic scope [was] unreasonable to the extent it reache[d] contiguous counties."[257] The court explained that parts of the contiguous counties were too far from the locations at which the podiatrist actually worked.[258] In other words, the selection of entire counties as the basis for the geographic restriction rendered the restriction unreasonable, because no evidence was offered to suggest that a "significant contingent of patients" traveled from more remote parts of even the adjacent counties.[259] The court, therefore, held that the "contiguous county restriction [was] unreasonable[,]"[260] but that the restriction was enforceable as to Marion, Tippecanoe, and Howard counties.[261]

B. "Protectible Interest" in Customer Relationships

In *Gleeson v. Preferred Sourcing, LLC*,[262] the court of appeals evaluated whether a plaintiff-employer had a "protectible interest" in its "customer relationships."[263] In *Gleeson*, the plaintiff employed the defendant as the "sales manager" at its Fort Wayne location.[264] The defendant and Preferred entered into a non-competition and confidentiality agreement.[265] The defendant was "instrumental in growing [plaintiff's] Fort Wayne location from a new, start-up facility . . . to one of its more profitable facilities."[266] According to the plaintiff, "customer relationships are 'key' to [its] success."[267] The defendant-employee resigned in January 2005.[268] In February 2005, the defendant began working for

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254. *Id.* at 731.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* The court in *Krueger* affirmed the trial court's order denying plaintiff's request for a preliminary injunction, except as to the three Indiana counties for which the non-compete was found enforceable. *Id.* at 734.

262. 883 N.E.2d 164 (Ind. Ct. App. 2008).

263. *Id.* at 172-74.

264. *Id.* at 169.

265. *Id.*

266. *Id.* at 170.

267. *Id.*

268. *Id.*

a competitor, soliciting sales and contacting customers of the plaintiff.[269] The plaintiff-employer filed its complaint, seeking damages and a permanent injunction, followed by a motion for preliminary injunction.[270] The trial court granted the preliminary injunction and the defendant appealed.[271]

In connection with a dispute regarding the enforceability of a non-competition agreement, the court must "first examine whether the employer has asserted a legitimate interest that may be protected by a covenant."[272] Indiana courts "recognize[] a protectable interest in the good will generated between a customer and a business."[273] The court in *Gleeson* explained that "[g]ood will includes secret or confidential information such as the names and addresses of customers and the advantage acquired through representative contact."[274] The court explained the rationale for finding a "protectible interest" in customer relationships, as follows:

> In industries where personal contact between the employee and the customer is especially important due to the similarity in the product offered by the competitors, the advantage acquired through the employee's representative contact with the customer is part of the employer's good will, regardless of whether the employee had access to confidential information.[275]

The court in *Gleeson* continued, as follows:

> If an employee is hired in order to generate such good will, she may be enjoined from subsequently contacting those customers or using that good will to her advantage. Indeed, Indiana courts have held that a salesperson may be restrained from contacting former customers within her previous sales area. There is a personal nature to the relationship between a salesperson and customer, and many times the customer's only contact with the company is through the salesperson.[276]

In *Gleeson*, the court concluded that the plaintiff's "customer relationships and good will [could] be protected by a covenant not to compete[,]"[277] because "customer relationships are important in [the] business, which is a 'people business,' and . . . [the defendant] 'was one of [plaintiff's] most successful sales associates in creating those relationships with [plaintiff's] customers.'"[278]

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269. *Id.*
270. *Id.*
271. *Id.* at 170-71.
272. *Id.* at 172 (citing Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 728 (Ind. 2008)).
273. *Id.* at 173 (quoting Norlund v. Faust, 675 N.E.2d 1142, 1154 (Ind. Ct. App. 1997)).
274. *Id.*
275. *Id.* (citing MacGill v. Reid, 850 N.E.2d 926, 930 (Ind. Ct. App. 2006)).
276. *Id.* (citations omitted).
277. *Id.* at 174.
278. *Id.* at 173-74.

VIII. CONTRACT INTERPRETATION

A. "Contemporaneous Document" Rule

In *Murat v. South Bend Lodge No. 235*,[279] the court held that the "contemporaneous document" rule did not apply to the construction of two allegedly contemporaneously executed deeds—one of which contained a specific width to an easement and the other of which did not.[280] In *Murat*, the dominant estate brought an action for injunctive relief to prevent the servient estate owner and billboard company from placing a billboard within an easement area.[281] The subject property had been conveyed subject to a retained easement of unspecified width. The same day as the original conveyance, the retained easement holders conveyed the easement to their daughter and son-in-law, specifying a twenty-three-foot width to the conveyed easement.[282] Later, the property owner attempted to place a billboard on a portion of the property.[283] The easement holders sought an injunction preventing placement of the billboard. The trial court denied the injunction, concluding that placement of the billboard along the side of the property would "afford necessary or reasonable ingress and egress."[284] The court declined to read the two deeds together to impose a twenty-three-foot width to the original retained easement.[285]

In affirming the trial court's ruling, the court of appeals described the "contemporaneous document" rule as follows: "'[I]n the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction will be construed together in determining the contract. The application of this rule depends on the facts of each particular case."[286]

The court in *Murat* explained that "the doctrine should be applied cautiously when the documents involve different parties."[287] The court held that the two deeds should not be read together to impose a deed of specific width on the property owner.[288] The original deed conveying the property did not specify a width to the retained easement and the current easement holders pointed to no evidence indicating that the property owner "understood the transaction to involve an easement of a specific width."[289] The court of appeals, therefore, affirmed the trial court's ruling denying the requested injunction.[290]

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279. 893 N.E.2d 753 (Ind. Ct. App. 2008).
280. *Id.* at 757-58.
281. *Id*. at 755.
282. *Id.* at 754.
283. *Id.* at 755.
284. *See id.* at 756.
285. *Id.* at 757-58.
286. *Id.* (internal quotations omitted).
287. *Id.* at 757.
288. *Id.*
289. *Id.*
290. *Id.* at 757-58.

B. Handwriting Controls Over Print or Typewriting

In *Patel v. United Inns, Inc.*,[291] the court of appeals applied the rule that "[w]hen construing a contract where there is apparent conflict, handwriting prevails over typewriting."[292] The court explained the rationale for this rule as follows: "Handwritten terms are favored over typewritten terms because there is a presumption that the handwritten terms were more actively negotiated between the parties, and, therefore, that those terms best reflect the parties' intent."[293] The court in *Patel* relied on this rule in charging a party to a purchase agreement with an escrow obligation of $530,000, which had been hand-written onto the contract, as opposed to an escrow obligation of 10% of the purchase price.[294] The court recognized that $530,000 was closer to 25% of the purchase price, but found dispositive that the $530,000, amount was hand-written into the contract.[295] The court held that the party obligated to pay the escrow amount had breached the contract, because he failed to pay the full $530,000 escrow amount.[296]

IX. Contract Performance and Breach

A. Standing to Allege Breach

1. Third-Party Standing to Argue "First Material Breach."—In *Harold McComb & Son, Inc. v. JPMorgan Chase Bank*,[297] the court held that a mechanic's lien holder lacked standing to sue on a mortgagee-bank's alleged first material breach of a contract between the bank and the mortgagor-borrower.[298] The mechanic's lien holder and bank had filed separate foreclosure actions, which were consolidated.[299] The trial court ordered foreclosure of the bank's mortgages and ordered the sale of the subject property.[300] On appeal, the mechanic's lien holder argued that the trial court erred in foreclosing on the bank's mortgages, because the bank was in first material breach of the loan agreement between the bank and the mortgagor-borrower.[301]

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291. 887 N.E.2d 139 (Ind. Ct. App. 2008).

292. *Id.* at 148 (citing Scott v. Anderson Newspapers, Inc., 477 N.E.2d 553, 562 (Ind. Ct. App. 1985)).

293. *Id.* at 149 n.3.

294. *Id.* at 148.

295. *Id.*

296. *Id.* at 148-49.

297. 892 N.E.2d 1255 (Ind. Ct. App. 2008).

298. *Id.* at 1258.

299. *Id.* at 1256-57.

300. *Id.* at 1257.

301. *Id.* at 1258; *see also* Wilson v. Lincoln Fed. Sav. Bank, 790 N.E.2d 1042, 1048 (Ind. Ct. App. 2003) (stating that "where a party is in material breach of a contract, he may not maintain an action against the other party or seek to enforce the contract against the other party if that party later breaches the contract").

The court in *JPMorgan* rejected the lien holder's argument, concluding that the lien holder had "no legal standing to complain."[302] Quoting the United States Supreme Court's decision in *Williams v. Eggleston*,[303] the court in *JPMorgan* explained that "[t]he parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken."[304] The court in *JPMorgan* continued, explaining that "only the parties to a contract, those in privity with the parties, and intended third-party beneficiaries under the contract may seek to enforce the contract."[305] Concluding that the mechanic's lien holder was none of those, the court affirmed the trial court's ruling that the lien holder lacked standing to assert the bank's alleged breach in opposition to its foreclosure action.[306]

2. Members of LLC Lacked Standing to Sue for Damage to LLC.—In *Vectren Energy Marketing & Service v. Executive Risk Specialty Insurance Co.*,[307] the court held that members of a limited liability company lacked standing to sue their (and the LLC's) liability insurance carrier for breach of contract and declaratory relief in connection with the insurer's alleged failure to pay a judgment entered against the LLC and its employees.[308] The court reviewed the subject policy and concluded that the members were individual insureds covered by the policy.[309] However, the court noted that neither of the members were named defendants in the underlying lawsuit, neither member attempted to intervene in the lawsuit, no judgment was entered against the members, and neither member incurred any defense costs in connection with the lawsuit.[310]

The court in *Vectren* explained that "[t]o establish standing, the plaintiff must demonstrate a personal stake in the outcome of the lawsuit and must show that he or she has sustained or was in immediate danger of sustaining, some direct injury as a result of the conduct at issue."[311] The court acknowledged that the members were covered by the policy and that, as such, the insurer owed them "contractual duties . . . that are separate and distinct from those duties owed to [the LLC]."[312] However, the court found that the contractual duties at issue in the case were owed only to the LLC. It stated that "[i]t may be that as the two members of [the LLC], the [members] will lose money as an indirect consequence of the judgment, defense expenses, and [the insurer's] refusal to pay. That reality, however, does not mean that they have suffered a "Loss" under

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302. *JPMorgan*, 892 N.E.2d at 1258.
303. 170 U.S. 304 (1898).
304. *JPMorgan*, 892 N.E.2d at 1258.
305. *Id.*
306. *Id.*
307. 875 N.E.2d 774 (Ind. Ct. App. 2007).
308. *Id.* at 778-79.
309. *Id.* at 775.
310. *Id.* at 776.
311. *Id.* at 777 (citing Shourek v. Stirling, 621 N.E.2d 1107, 1109 (Ind. 1993)).
312. *Id.*

the Policy."[313] The court concluded that the members were "not entitled to attempt to right a wrong allegedly done to a separate and distinct entity."[314]

B. Third-Party Beneficiaries

In *City of East Chicago v. East Chicago Second Century, Inc.*,[315] the court discussed third-party beneficiary theory and ruled that two non-profit foundations and a for-profit corporation were intended third-party beneficiaries of two "letter agreements" between the City of East Chicago and a marina partnership, relating to a license to operate a riverboat casino that provided for the payment of a percentage of gross receipts to the foundations and the corporation.[316] Specifically, the award of a license to the marina partnership was conditioned on the partnership's agreement to fund local economic development through payment of 3.75% of its gross receipts to the foundations and the corporation.[317] The license was transferred to Harrah's, then later, to "Resorts East Chicago."[318] The letter agreements were not addressed in the documents transferring the license from Harrah's to Resorts.[319]

Subsequently, the East Chicago Common Counsel passed an ordinance purporting to redirect the amounts being paid under the letter agreements to the City of East Chicago.[320] The corporation filed suit against Resorts, seeking a declaration that it was a third-party beneficiary entitled to enforce the terms of the letter agreements.[321] Resorts filed a third-party complaint against the foundations and the City of East Chicago.[322]

The court in *East Chicago* started with a description of third-party beneficiary law in general:

> One who is not a party to a contract may enforce the contract by demonstrating it is a third-party beneficiary. A third-party beneficiary contract exists when (1) the parties intend to benefit a third party; (2) the contract imposes a duty on one of the parties in favor of the third party; and (3) the performance of the terms of the contract renders a direct benefit to the third party intended by the parties to the contract.[323]

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313. *Id.* at 778.

314. *Id.* The court in *Vectren* reasoned that if the LLC members had standing in this case, every past, present or future member, officer, director, or employee of an LLC could have a separate justiciable claim against an insurer anytime the LLC or any other insured was denied coverage. *Id.*

315. 878 N.E.2d 358 (Ind. Ct. App. 2007), *trans. granted and rev'd in part and aff'd in part*, 908 N.E.2d 611 (Ind. 2009).

316. *Id.* at 375.

317. *Id.* at 366.

318. *Id.* at 367.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 374 (internal citations omitted).

The court noted that

> [a]mong these three factors, the intent of the contracting parties to benefit the third party is the controlling factor. Such intention may be demonstrated by naming the third party, or by other evidence. The necessary intent is not a desire or purpose to confer a particular benefit upon the third party nor a desire to advance his interest or promote his welfare, but an intent that the promising party or parties shall assume a direct obligation to him.[324]

The City of East Chicago argued that the foundations and the corporations were "merely conduits for the citizens of East Chicago, the true intended beneficiaries."[325] In other words, the City argued that the letters did not evidence an intent to benefit the foundations and the corporation.[326]

The court in *East Chicago* disagreed, stating that the "relevant intent" for purposes of third-party beneficiary analysis is "an intent that the promising party or parties shall *assume a direct obligation* to the third party, and not a desire or purpose to *confer a particular benefit* on the third party."[327] Based on this statement, the court in *City of East Chicago* "declined" to hold that the foundations or the corporation were "conduits."[328] The court concluded that the foundations and the corporations were third-party beneficiaries of the letter agreements.[329]

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324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* (citing Nat'l Bd. of Exam'rs for Osteopathic Physicians & Surgeons, Inc. v. American Osteopathic Physicians & Surgeons Ass'n, 645 N.E.2d 608, 618 (Ind. Ct. App. 1994)).

328. *Id.* at 375.

329. *Id.* The court in *City of East Chicago* also rejected the City's argument that third-party beneficiaries should not be recognized in a "public contract," because, according to the City, non-parties should not be allowed to "control a government contract in opposition to the will of the government." *Id.* (distinguishing Jenne v. Church & Tower, Inc., 814 So. 2d 522 (Fla. Dist. Ct. App. 2002)).