

RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

MICHAEL A. DORELLI*
JUSTIN T. WALTON**

During the survey period,¹ Indiana courts rendered a number of significant decisions impacting businesses, as well as their owners, officers, directors and shareholders. These developments of interest to business litigators and corporate transactional lawyers, as well as business owners and in-house counsel, are discussed herein.

I. INDIANA BUSINESS LAW SURVEY COMMISSION STUDY ON REVISED UNIFORM LIMITED LIABILITY ACT AND UNIFORM LIMITED PARTNERSHIP ACT

The Indiana legislature recently directed the Indiana Business Law Survey Commission (the “Commission”)² to conduct a study regarding the “desirability of enacting”: (1) the Uniform Limited Partnership Act; and (2) the Revised Uniform Limited Liability Company Act.³ In response to this mandate, the Commission submitted the results of its study on October 20, 2011.⁴

Regarding the Uniform Limited Partnership Act, the Commission recommended as follows: “It would be desirable to update Indiana’s limited partnership act . . . to better reflect the modern world of LLCs and LLPs, using 2001 ULPA as a starting point; however, a number of important variations would need to be made.”⁵ The Commission recommended an “update [of] Indiana’s LLC Act and [Indiana’s] LLP provisions and then export resulting policy

* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1998, *magna cum laude*, Indiana University Robert H. McKinney School of Law. The views expressed herein are solely those of the authors.

** Associate, Hoover Hull LLP, Indianapolis, Indiana. B.A., 2004, Ohio Northern University; J.D., 2010, *cum laude*, Indiana University Robert H. McKinney School of Law.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period: October 1, 2010, through September 30, 2011.

2. The Commission was established by Indiana Code section 23-1-54-3 for the purpose of considering recommendations to the general assembly, from time to time, concerning amendments to . . . any . . . corporation, limited liability company, or partnership laws, or new or additional legislation affecting corporations, limited liability companies, partnerships, or other business entities (domestic or foreign) authorized to do business or doing business in Indiana.

IND. CODE § 23-1-54-3(a) (2011). The Commission currently consists of thirteen members who are appointed by the Indiana governor, who “serve without compensation and without reimbursement for expenses.” *Id.* § 23-1-54-3(b).

3. 2011 Ind. Acts 350.

4. INDIANA BUSINESS LAW SURVEY COMMISSION, FINAL REPORT TO THE LEGISLATIVE COUNSEL OF THE INDIANA GENERAL ASSEMBLY (2011), available at <http://www.in.gov/legislative/igareports/agency/reports/SECST03.pdf>.

5. *Id.* at 4.

changes, if any, to the Indiana LP Act, along with general updating (utilizing 2001 ULPA as a basis) so that there is appropriate consistency among the laws governing other ‘pass-through’ business entities.”⁶

Regarding the Revised Limited Liability Company Act, the Commission recommended as follows: “Consider favorable provisions and concepts from RULLCA for ‘importation’ into the Indiana LLC Act.”⁷

II. SECURITIES REGULATION AND LITIGATION

The Indiana Uniform Securities Act (IUSA) prohibits the sale of a “security” unless the security is either registered with the Indiana Secretary of State or it is exempt from registration.⁸ “Security” is defined in the IUSA through a list of investment vehicles that may constitute securities, including, among numerous other instruments, an “investment contract.”⁹

In *West v. State*,¹⁰ the Indiana Court of Appeals held that the IUSA’s predecessor statute, which also prohibited the sale of an unregistered security, was not “unconstitutionally vague” due to its failure to statutorily define “investment contract.”¹¹ In *West*, Christopher West (West) was “charged with and convicted of” violating Indiana Code section 23-2-1 by offering to sell an unregistered “security”—specifically, an “investment contract.”¹² West convinced Anthony and Taura Wiggins¹³ to invest \$10,000 into West’s partnership, which owned an apartment complex.¹⁴ West, who was not a broker,

6. *Id.* at 8.

7. *Id.*

8. IND. CODE § 23-19 (2011).

9. *Id.* § 23-19-1-2(28).

10. 942 N.E.2d 862 (Ind. Ct. App. 2011).

11. *Id.* at 866. The statutes applicable to West’s crimes were repealed and recodified in 2008 “as the Indiana Uniform Securities Act at Indiana Code section 23–19–1 *et seq.*” *Id.* at 863 n.1. The IUSA’s definition of “security” also includes “investment contract,” but provides further that the term “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.

IND. CODE § 23-19-1-2(28)(D) (2011). The predecessor to the current IUSA “exclusively governs all actions or proceedings that are pending on June 30, 2008, or may be instituted on the basis of conduct occurring before July 1, 2008.” *Id.* § 23-19-1-0.2.

12. *West*, 942 N.E.2d at 865.

13. After learning that Wiggins was diagnosed with terminal lung cancer, West, who had previously sold Wiggins a life insurance policy with Farm Bureau Insurance, suggested that Wiggins cash out the policy before Wiggins’s death and when he delivered the check, West asked for a \$90,000 investment. *Id.* at 864.

14. *Id.*

provided that the Wiggins “would be repaid with interest from the apartment rent money.”¹⁵ Taura contacted the police after a post-dated check from West was refused for insufficient funds.¹⁶ After an investigation, West was ultimately convicted of violating Indiana’s securities statute.¹⁷

West appealed his conviction, arguing, as he did to the trial court on a motion to dismiss, that the statute was “unconstitutionally void for vagueness.”¹⁸ Specifically, West argued “that Indiana Code section 23-2-1-1(k), which defines security, is unconstitutionally vague as applied because the term ‘investment contract’ is undefined.”¹⁹

The court recognized that Indiana Code section 23-2-1-1(k) defined “security” to include an “investment contract,” but the court noted the statute did not define “investment contract.”²⁰ Despite the lack of a statutory definition, the court recognized that several common law tests have been established “to determine whether an instrument is an investment contract.”²¹ Specifically, the court explained that Indiana follows the test established in *S.E.C. v. W.J. Howey Co.*,²² as interpreted by *American Fletcher Mortgage Co. v. U.S. Steel Credit Corp.*,²³ to determine “whether a transaction is an investment contract.”²⁴ The *Howey* test provides that “an investment contract arises whenever a person (1) invests money (2) in a common enterprise (3) premised upon a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others.”²⁵

The court applied the *Howey* test to the facts in West’s case.²⁶ The court in *West* reasoned:

Although an individual of ordinary intelligence may not generally understand whether a particular instrument or document falls under the definition of a security, that lack of comprehension does not render the statu[t]e void for vagueness in this case because the jury was given sufficient information to determine whether the investment contract was a security.²⁷

Therefore, according to the court in *West*, the statute was not void for vagueness

15. *Id.*

16. *Id.*

17. *Id.* at 864-65.

18. *Id.* at 865.

19. *Id.* at 866.

20. *Id.*

21. *Id.* (citing *Szpunar v. State*, 783 N.E.2d 1213, 1220 (Ind. Ct. App. 2003)).

22. 328 U.S. 293, 298-99 (1946).

23. 635 F.2d 1247, 1253 (7th Cir. 1980).

24. *West*, 942 N.E.2d at 866 (citing *Manns v. Skolnik*, 666 N.E.2d 1236, 1243 (Ind. Ct. App. 1996)).

25. *Id.* (citing *American Fletcher*, 635 F.2d at 1253).

26. *Id.*

27. *Id.* (citing *Szpunar v. State*, 783 N.E.2d 1213, 1220 (Ind. Ct. App. 2003)).

as to the definition of an “investment contract” as a “security.”²⁸

III. PARTNERSHIP

A. *Creation of a Partnership*

In *Life v. F.C. Tucker Co.*, the court held that a real estate company was a not a builder’s “unnamed partner,” and as such, did not share a duty or contractual liability to the homeowners.²⁹ When Ben and Elaine Life (the Lifes) were looking for a home builder, they were referred by Home Link, a F.C. Tucker entity, to Maintenance One pursuant to a marketing agreement between Home Link and Maintenance One.³⁰ After entering into a construction “contract with ‘M-One, LLC’ for the purchase and construction of a house,” a dispute arose between the parties, “and the Lifes filed suit against Maintenance One, as well as F.C. Tucker and Home Link as unnamed partners, alleging breach of the construction contract and negligent construction of their home.”³¹

F.C. Tucker filed a motion for summary judgment, and after the Lifes responded, F.C. Tucker moved to strike the Lifes’ “Untimely Response to Motion for Summary Judgment.”³² The trial court found in favor of F.C. Tucker, denied the Lifes’ response to F.C. Tucker’s motion for summary judgment, and granted F.C. Tucker’s motion for summary judgment.³³

On appeal, the Lifes argued that even though F.C. Tucker was not a party to the Lifes’ contract with Maintenance One, it nonetheless owed the Lifes a duty of care in constructing their home because F.C. Tucker was “an unnamed partner with Maintenance One.”³⁴ The court agreed with the plaintiff’s premise that “if [F.C.] Tucker [wa]s a partner with Maintenance One, it may be liable for breach of contract and negligence in pursuit of that partnership.”³⁵ As such, the court looked to whether F.C. Tucker was in a partnership with Maintenance One.³⁶ The court first looked to Indiana Code section 23-4-1-6(1), which defines a partnership as “an association of two or more persons to carry on as co-owners of a business for profit.”³⁷ According to the court, “[t]he two requirements of a partnership are: (1) a voluntary contract of association for the purpose of sharing profits and losses which may arise from the use of capital, labor, or skill in a common enterprise; and (2) an intention on the part of the parties to form a

28. *Id.*

29. *Life v. F.C. Tucker Co.*, 948 N.E.2d 346, 351, 352-53 (Ind. Ct. App. 2011).

30. *Id.* at 349.

31. *Id.* (citation omitted).

32. *Id.*

33. *Id.*

34. *Id.* at 351.

35. *Id.*

36. *Id.*

37. *Id.* (citing IND. CODE § 23-4-1-6(1) (2011)).

partnership.”³⁸ At issue in *Life* was whether Home Link and Maintenance One agreed to share returns and profits.³⁹ The court noted that “receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner of the business,”⁴⁰ while “[t]he sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.”⁴¹

The court, in looking at the agreement between Home Link and Maintenance One, concluded that the parties had agreed to only share returns, but it would not share profits.⁴² Specifically, the court pointed to language in the agreement, which provided that Maintenance One would “pay a transaction fee ‘equal to 5% of the *total gross bill (before taxes)* for all services rendered to customers of [Home Link].”⁴³ This provision did not mention the “sharing in Maintenance One’s losses, and on its face it appears that [F.C.] Tucker receives its fee regardless of whether Maintenance One profits from constructing homes. This arrangement for a share of the total gross bill falls short of ‘co-ownership’ or a ‘community of profits’ exhibited in a partnership.”⁴⁴

After finding no profit sharing relationship between F.C. Tucker and Maintenance One the court moved to the second element of partnership creation—the intent element.⁴⁵ According to the court, Indiana has long recognized that:

[t]he intent, the existence of which is deemed essential, is an intent to do those things which constitute a partnership. Hence, if such an intent exists, the parties will be partners, notwithstanding that they proposed to avoid the liability attaching to partners or (have) even expressly stipulated in their agreement that they were not to become partners. It is the substance, and not the name of the arrangement between the[m], which determines their legal relation towards each other, and if, from a consideration of all the facts and circumstances, it appears that the parties intended, between themselves, that there should be a community of interest of both the property and profits of a common business or venture, the law treats it as their intention to become partners, in the absence of other controlling facts.⁴⁶

In determining the intent of the parties, the court again looked to the agreement

38. *Id.* at 352 (citing *Weinig v. Weinig*, 674 N.E.2d 991, 995 (Ind. Ct. App. 1996)).

39. *Id.*

40. *Id.* (citing IND. CODE § 23-4-1-7(4) (2011); *Monon Corp. v. Townsend*, 678 N.E.2d 807, 810 (Ind. Ct. App. 1997)). The court also provided that share of profits is not evidence that a person is a partner when the money is wages or other specifically enumerated payments. *Id.*

41. *Id.* (alteration in original) (quoting IND. CODE § 23-4-1-7 (2011)).

42. *Id.*

43. *Id.* (alteration in original) (internal quotation marks omitted).

44. *Id.* (quoting *Kamm & Schellinger Co. v. Likes*, 179 N.E. 23, 25 (Ind. Ct. App. 1931)).

45. *Id.*

46. *Id.* (alteration in original) (quoting *Bacon v. Christian*, 111 N.E. 628, 630 (Ind. 1916)).

between Home Link and Maintenance One, which specifically provided that “no partnership is formed by the agreement.”⁴⁷ The court then looked outside of the partnership renunciation clause “because [courts] look to the substance of the relationship, not how the parties describe it.”⁴⁸ However, because the Lifes failed to timely respond to F.C. Tucker’s for summary judgment they failed to “properly offer[] any evidence to rebut [F.C.] Tucker’s evidence.”⁴⁹ The court concluded that “given the lack of profit sharing and lack of evidence of intent to form a partnership, the trial court could have properly concluded Maintenance One and Home Link were not partners.”⁵⁰

B. Partnership Property

In *Fisher v. Giddens*,⁵¹ the Indiana Court of Appeals reversed the trial court and concluded that when a limited partner bought an annuity in the name of the limited partnership and then had it put in his own name for tax purposes, the annuity remained partnership property despite the name change.⁵² Robert Fisher (Robert) and his wife formed the Fisher Family Limited Partnership as general partners with Carol Foland, Arthur Fite, John Fisher, and Janice Giddens as limited partners.⁵³ After Robert passed away there was a dispute regarding the ownership of an annuity, which was purchased and titled in the name of the limited partnership and later re-titled in Robert’s name due to negative tax consequences.⁵⁴ The probate court determined that the refund check for the annuity premium in the amount of \$527,829.30, was “in the decedent’s name at the date of death and should be distributed in his estate.”⁵⁵

The estate of former limited partner John Fisher (John’s Estate) appealed the decision.⁵⁶ On appeal, John’s Estate argued that the probate court’s determination “that the refund of the annuity premium” was the property of Robert’s Estate was an error because the annuity refund was partnership property.⁵⁷

The court began with a discussion of the Indiana Revised Uniform Limited Partnership Act (IRULPA).⁵⁸ The court first noted that while the IRULPA “does not contain a definition of the term ‘partnership property,’” the term is defined within the Indiana Uniform Partnership Act (IUPA).⁵⁹ Indiana Code section 23-

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 352-53.

51. 935 N.E.2d 308 (Ind. Ct. App. 2010), *trans. denied* (Apr. 14, 2011).

52. *Id.* at 308-09.

53. *Id.* at 309.

54. *Id.*

55. *Id.* (internal quotation marks omitted).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

16-12-3⁶⁰ makes the IUPA applicable to IRULPA.⁶¹ Therefore, the court looked to the IUPA's definition of "partnership property":

- (1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.
- (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.
- (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
- (4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.⁶²

In applying the statutory definition, the court concluded that the titling the annuity in the name of the limited partnership, the annuity became partnership property.⁶³

For further support that the annuity was partnership property, the court cited the limited partnership agreement, which provided that the general partner had the authority to "[t]o place record title to, or the right to use, Partnership assets in the name of a General Partner or the name of a nominee for any purpose convenient or beneficial to the Partnership."⁶⁴ Accordingly, Robert had the authority to re-title the annuity to avoid certain "tax consequences," which was "beneficial to the limited partnership."⁶⁵ Thus, re-titling the annuity "did not change the character of the property. Even upon re-titling, the annuity remained partnership property."⁶⁶ Additionally, the limited partnership agreement provided that once the annuity became partnership property, "no partner could have direct ownership of it."⁶⁷ Thus, even though "Robert re-titled the annuity in his name . . . , the annuity continued to be partnership property."⁶⁸

Robert's estate relied on Section 4.4(d) of the Limited Partnership Agreement, which gave the General Partner the authority "[t]o sell, transfer, assign, convey, lease, exchange, or otherwise dispose of any or all of the assets

60. The court noted, "In any case not provided for in this article, the provisions of IC 23-4-1 govern." *Id.* (quoting IND. CODE § 23-16-12-3 (2011)).

61. *Id.*

62. *Id.* at 309-10 (quoting IND. CODE § 23-4-1-8 (2011)).

63. *Id.* at 310 (citing IND. CODE § 23-4-1-8(1)).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

of the Partnership.”⁶⁹ However, the court rejected this argument because of Section 4.4(d)’s limiting phrase “in order to pursue the Partnership’s purposes.”⁷⁰ The court concluded “that taking the annuity (i.e., partnership property) from the partnership and turning possession of it over to a single partner” could not be in the pursuit of a partnership purpose.⁷¹ Moreover, the court noted that re-titling the annuity in Robert’s name could “be a breach of [his] fiduciary duty.”⁷² Specifically, the court noted that such action would violate Indiana Code section 23-4-1-21,⁷³ which provides:

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.⁷⁴

Therefore, the court “reverse[d] the order of the probate court and order[ed] the annuity premium refund to be deposited with the Fisher Family Limited Partnership.”⁷⁵

IV. AGENCY

A. Establishing an Agency Relationship

In *Demming v. Underwood*,⁷⁶ the court reversed summary judgment in favor of the defendants, finding that genuine issues of material fact existed as to whether the real estate agent had entered into an actual agency relationship with an investor.⁷⁷ Sheree Demming (Demming), a real estate investor, retained the services of Cheryl Underwood (Underwood), a real estate agent, to buy and sell several properties between 2002 and 2007.⁷⁸ Demming renovated and leased or sold properties in Bloomington, Indiana, and sought to obtain two properties near Indiana University’s campus.⁷⁹ During the course of this relationship, Underwood, on behalf and at the request of Demming, contacted the real estate agent managing the properties in this “target zone” every four to five months to

69. *Id.*

70. *Id.*

71. *Id.* at 311.

72. *Id.*

73. The court noted that this section was applicable to limited partnerships pursuant to Indiana Code section 23-16-12-3. *Id.*

74. *Id.* (quoting IND. CODE § 23-4-1-21 (2011)).

75. *Id.*

76. 943 N.E.2d 878 (Ind. Ct. App. 2011).

77. *Id.* at 882-83.

78. *Id.* at 882.

79. *Id.*

see if the owner would be interested in selling.⁸⁰ In 2007, Underwood learned that the owner “was willing to entertain” offers, and instead of sharing this information with Demming, Underwood submitted an offer and purchased the property.⁸¹

After learning that Underwood bought the property for her own business, Demming filed suit claiming Underwood had breached her fiduciary duty and also asserted constructive fraud.⁸² The trial court granted summary judgment for Underwood on all of the claims, concluding “that there were no genuine issues of material fact and that no agency relationship existed between Demming and Underwood.”⁸³

The court first addressed whether there was an issue of material fact regarding “whether Underwood owed Demming a fiduciary duty under the common law of agency.”⁸⁴ Following previous decisions, the court explained that “[a]gency is a relationship resulting from the manifestation of consent by one party to another that the latter will act as an agent for the former.”⁸⁵ The court described the elements required for an agency relationship:

To establish an actual agency relationship, three elements must be shown: (1) manifestation of consent by the principal, (2) acceptance of authority by the agent, and (3) control exerted by the principal over the agent. These elements may be proven by circumstantial evidence, and there is no requirement that the agent’s authority to act be in writing. Whether an agency relationship exists is generally a question of fact, but if the evidence is undisputed, summary judgment may be appropriate.⁸⁶

The trial court determined that there was no common law agency relationship as a matter of law “because Underwood never agreed to act as Demming’s agent.”⁸⁷ However, the court of appeals indicated that the plan developed by Underwood and Demming to acquire the properties, along with Underwood’s numerous attempts to contact the property manager on behalf of Demming, “supports an inference that Underwood agreed to act as Demming’s agent for the purpose of acquiring the properties.”⁸⁸ Such an inference, according to the court, created a genuine issue of material fact, precluding entry of summary judgment.⁸⁹

The court also concluded that the trial court erred in finding “that no agency relationship was established . . . because Demming did not exert sufficient control

80. *Id.*

81. *Id.* at 883.

82. *Id.*

83. *Id.*

84. *Id.* at 883-84.

85. *Id.* at 884 (citing *Meridian Sec. Ins. Co. v. Hoffman Adjustment Co.*, 933 N.E.2d 7, 12 (Ind. Ct. App. 2010) (quoting *Smith v. Brown*, 778 N.E.2d 490, 495 (Ind. Ct. App. 2002))).

86. *Id.* (citations omitted).

87. *Id.*

88. *Id.*

89. *Id.*

over Underwood regarding the method or terms on which [the] inquires were made.”⁹⁰ In addressing the control element of agency, the court explained “it was [not] necessary for Demming to specify the precise method by which Underwood was to [perform the task of contacting the manager and realtor for the property]; rather, it was enough that Demming instructed Underwood to [undertake the task].”⁹¹ The court provided that while it is necessary for the principal to have control over the agent “with respect to the details of the work,”⁹² “complete control over every aspect of the agent’s activities” is not necessary.⁹³ Therefore, the court reasoned that dictating the strategy by which Underwood was to accomplish the desired result was enough to “create a genuine issue of material fact regarding whether Demming exercised sufficient control over Underwood’s activities to support the existence of an agency relationship.”⁹⁴

After finding a material issue of fact regarding the existence of an agency relationship between Demming and Underwood, the court concluded that there was also a material issue of fact regarding whether Underwood breached her fiduciary duty.⁹⁵ Specifically, the court noted:

[W]hen we consider the evidence in the light most favorable to Demming, we conclude that Underwood was acting as Demming’s agent for the purpose of purchasing the Properties. Underwood clearly would have breached the fiduciary duties arising out of that relationship by purchasing the Properties for herself without informing Demming that [the owner] was entertaining offers.⁹⁶

The court of appeals reversed and remanded the case to the trial court.⁹⁷

B. Apparent Authority

In *Guideone Insurance Co. v. U.S. Water Systems, Inc.*,⁹⁸ the court held that a homeowner had apparent authority to act as the other homeowner’s agent.⁹⁹ Michael Schafstall and Andrew Alexander, homeowners, purchased a reverse

90. *Id.* (internal quotation marks omitted).

91. *Id.* at 885.

92. *Id.* (quoting *Turner v. Bd. of Aviation Comm’rs*, 743 N.E.2d 1153, 1163 (Ind. Ct. App. 2001)).

93. *Id.* (citing *Policy Mgmt. Sys. Corp., v. Ind. Dep’t of State Revenue*, 720 N.E.2d 20, 24 Ind. T.C. 1999)).

94. *Id.*

95. *Id.* at 885-86.

96. *Id.* at 887 (citing *Bopp v. Brames*, 713 N.E.2d 866, 871 (Ind. Ct. App. 1999)). The court also addressed whether an agency relationship existed under Indiana’s real estate agency statutes. *Id.* at 888.

97. *Id.* at 896.

98. 950 N.E.2d 1236 (Ind. Ct. App. 2011).

99. *Id.* at 1241-42.

osmosis drinking water filtration system (water system) from a Lowe's store.¹⁰⁰ Prior to the purchase, Schafstall and Alexander obtained information regarding an installation warranty, and when Schafstall purchased the system, he signed an addendum to the sales contract setting forth "detailed warranty terms."¹⁰¹ Lowe's engaged U.S. Water to install the water filtration system for Schafstall and Alexander, and half of a day after the installation, Schafstall and Alexander found water flowing from the water system onto their kitchen floor.¹⁰² The leak caused \$115,000 in water damage to the home.¹⁰³

The parties filed various motions for summary and partial summary judgment, and "[t]he trial court determined that U.S. Water was liable to Guideone in the amount [of] \$.01 and dismissed U.S. Water from the case."¹⁰⁴ The trial court concluded that Lowe's was liable only for "the value of the water system and its installation," or \$320 and \$.01, respectively.¹⁰⁵ Guideone appealed, arguing that Alexander was not bound by the warranty language in the contract between Lowe's and Schafstall.¹⁰⁶

The court first stated the general rule of agency that "a principal will be bound by a contract entered into by the principal's agent on his behalf only if the agent had authority to bind him."¹⁰⁷ Generally, an agent will have actual or apparent authority to enter into a contract on his principal's behalf.¹⁰⁸

Actual authority exists when the principal has, by words or conduct, authorized the agent to enter into a contract for the principal. Apparent authority, on the other hand, exists where the actions of the principal give the contracting party the reasonable impression that the agent is authorized to enter into an agreement on behalf of the principal.¹⁰⁹

The court explained that Alexander was "intimately involved in the purchase of

100. *Id.* at 1239.

101. *Id.* at 1240. The warranty agreement at issue provided that Lowe's warranted the installation of services would be performed in a workmanlike manner and that the customer agreed that its sole and exclusive remedy is for the reinstallation of the item. *Id.*

102. *Id.*

103. *Id.* Schafstall and Alexander turned the damage into their homeowners insurance, Guideone, which compensated them "for the damage pursuant to the terms of their homeowner's insurance contract." *Id.* Guideone then brought a lawsuit against Lowe's and U.S. Water to recover the \$115,000 it paid to Schafstall and Alexander. *Id.*

104. *Id.* at 1241. U.S. Water filed a motion to dismiss, contending "that the economic loss doctrine precluded Guideone from recovering from U.S. Water." *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (citing *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 675 (Ind. 2001)).

108. *Id.*

109. *Id.* (internal citations omitted). The court noted that questions regarding an agency relationship and an agent's authority are generally questions of fact. *Id.* (citing *Johnson v. Blankenship*, 679 N.E.2d 505, 507 (Ind. Ct. App.), *trans. granted and summarily affirmed*, 688 N.E.2d 1250 (Ind. 1997)).

the water system.”¹¹⁰ Alexander discussed the purchase of the water system with the salesperson and was “present when Schafstall completed the purchase [of the system] and signed the warranty contract.”¹¹¹ Moreover, the court noted that “an agent’s authority may arise by implication and may be shown by circumstantial evidence.”¹¹² Therefore, the court concluded that “[t]he actions of Schafstall and Alexander could reasonably give Lowe’s the impression that Schafstall was authorized to enter into the warranty contract on behalf of Alexander.”¹¹³

Lowe’s also argued that even if Schafstall did not act as Alexander’s agent, Alexander ratified the purchase and bound him to the warranty contract.¹¹⁴ The court explained that “ratification may be express, where the principal explicitly approves the contract, or implied, where the principal does not object to the contract and accepts the contract’s benefits.”¹¹⁵ Further, the court relied on *Heritage Development of Indiana, Inc. v. Opportunity Options, Inc.*, for a more developed explanation of the concept of ratification:

Ratification means the adoption of that which was done for and in the name of another without authority. It is in the nature of a cure for [lack of] authorization. When ratification takes place, the act stands as an authorized one, and makes the whole act, transaction, or contract good from the beginning. Ratification is a question of fact, and ordinarily may be inferred from the conduct of the parties. The acts, words, silence, dealings, and knowledge of the principal, as well as many other facts and circumstances, may be shown as evidence tending to warrant the inference or finding of the ultimate fact of ratification. . . . Knowledge, like other facts, need not be proved by any particular kind or class of evidence, and may be inferred from facts and circumstances.¹¹⁶

The court recognized that Guideone’s complaint and summary judgment motion and briefing provided that Schafstall and Alexander purchased the water system together, and the defendants owed the insureds a duty.¹¹⁷ Based on this evidence, and testimony presented before the trial court, the court “conclude[d] that, in the very least, Alexander ratified the contract and thus is bound by its terms.”¹¹⁸

110. *Id.* at 1242.

111. *Id.*

112. *Id.* (quoting *Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881, 888 (Ind. Ct. App. 2002)).

113. *Id.*

114. *Id.* Lowe’s based this argument on theory that Alexander, as a principal, may “be bound by a contract entered into by [Schafstall, Alexander’s agent,] on his behalf regardless of the agent’s lack of authority if the principal subsequently ratifies the contract as one to which he is bound.” *Id.* (citing *Heritage Dev. of Ind., Inc.*, 773 N.E.2d at 889).

115. *Id.*

116. *Id.* at 1242 (alterations in original) (citing *Heritage Dev. of Ind., Inc.*, 773 N.E.2d at 889-90 (quotation marks omitted)).

117. *Id.*

118. *Id.* at 1243.

V. NON-COMPETITION COVENANTS

In *Coates v. Heat Wagons, Inc.*,¹¹⁹ Steven Coates, a former sales manager and minority shareholder of Heat Wagons, Inc. (Heat Wagons), appealed the preliminary injunction entered against him, which prohibited him from operating a competing side business.¹²⁰ Coates worked for his father's portable heater business and related companies, including Heat Wagons, Manufacturers Products, Inc. (MPI), and Portable Heater Parts (PHP).¹²¹ After Coates's father died, all the shares of MPI and Heat Wagon, including Coates's shares, were sold,¹²² and the new owners retained Coates as an employee, requiring him to sign an employment agreement, which included a non-competition agreement.¹²³ After Coates learned of the pending sale of Heat Wagons and MPI, he began to operate a new company, Second Source—operating under the name S&S Supply (S&S).¹²⁴ Coates hid his continued involvement in S&S, which often sold parts to MPI.¹²⁵ It was not until after the new owners terminated Coates that they discovered his ownership of S&S.¹²⁶ After this discovery, “MPI filed a complaint seeking to enjoin Coates from continued operation of [S&S].”¹²⁷ After the trial court entered an Order Granting Preliminary Injunction against Coates, Coates appealed.¹²⁸

The court upheld the injunction and affirmed the trial court's ruling in all respects except with regard to use of a website.¹²⁹ The court first considered Coates's argument “that MPI [did] not face a risk of irreparable harm.”¹³⁰ The court described irreparable harm as:

119. 942 N.E.2d 905 (Ind. Ct. App. 2011).

120. *Id.* at 909.

121. *Id.* at 910.

122. *Id.*

123. *Id.*

124. *Id.* at 911.

125. *Id.* Coates used various methods to keep his involvement with S&S a secret, including using a friend's mailing address for S&S's checking account and swapping manufacturer's packing slips with S&S packing slips. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 912, 920-21. To obtain a preliminary injunction, the moving party has the burden of showing the following:

(1) its remedies at law are inadequate and that irreparable harm will occur during the pendency of the action as a result; (2) it has at least a reasonable likelihood of success on the merits by establishing a prima facie case; (3) the threatened harm it faces outweighs the potential harm the injunction would pose to the non-moving party; and (4) the public interest would not be disserved by granting the injunction.

Id. at 911-12 (citing *Zimmer, Inc. v. Davis*, 922 N.E.2d 68, 71 (Ind. Ct. App. 2010)).

130. *Id.* at 912.

[T]hat harm which cannot be compensated for through damages upon resolution of the underlying action. Mere economic injury is not enough to support injunctive relief. The trial court should only award injunctive relief where a legal remedy will be inadequate because it provides incomplete relief or relief that is inefficient to the ends of justice and its prompt administration.¹³¹

The court specifically reviewed its 2002 decision in *Robert's Hair Designers, Inc. v. Pearson*¹³² regarding "the proper use of a preliminary injunction" against former employees.¹³³ The court explained that in *Robert's Hair Designers*, "the salon's inability to quantify its loss was 'irrelevant' because the loss of goodwill and future revenue when its employees departed, taking the salon's customers with them, 'would warrant a finding of irreparable harm.'"¹³⁴

The court found that Coates's continued involvement in the sale of heater parts after his termination by MPI could constitute irreparable harm due to:

Coates's knowledge of the portable heater market, his knowledge of vendors, and his recognition by both vendors and customers. Moreover, Coates's competition poses a significant potential of future harm to MPI because each party would be in competition with the other for a limited supply of DESA parts as a result of that company's 2008 closing. Coates's competition with PHP holds a potentially unique risk of harm because of how well informed Coates was on DESA products as a result of his work for PHP.¹³⁵

As such, the court could not "say that the trial court's order [was] clearly erroneous on the question of irreparable harm or lack of adequate remedy at law."¹³⁶

Next, the court addressed MPI's reasonable likelihood of success on the merits by first considering whether MPI had a legitimate interest that was subject to protection.¹³⁷ The court began its analysis by stating that "Indiana courts strongly disfavor as restraints of trade covenants not to compete in employment contracts."¹³⁸ Moreover, in order for such covenants to be enforceable:

[T]he provisions of a covenant not to compete must be reasonable, which is a question of law. To be reasonable, an agreement containing such a covenant must protect legitimate interests of the employer, and the restrictions established by the agreement must be reasonable in scope as

131. *Id.* (citations and internal quotation marks omitted).

132. 780 N.E.2d 858, 865 (Ind. Ct. App. 2002).

133. *Coates*, 942 N.E.2d at 912.

134. *Id.* (quoting *Robert's Hair Designers, Inc.*, 780 N.E.2d at 865).

135. *Id.*

136. *Id.* at 913.

137. *Id.*

138. *Id.* (citing *Central Ind. Podiatry v. Krueger*, 882 N.E.2d 723, 728-29 (Ind. 2008)).

to time, activity, and geographic area.¹³⁹

In addressing legitimate protectable interests under Indiana law, the court explained:

A legitimate protectable interest is an advantage possessed by an employer, the use of which by the employee after the end of the employment relationship would make it “unfair to allow the employee to compete with the former employer.” This court has held that goodwill, including “secret or confidential information such as the names and address of customers and the advantage acquired through representative contact,” is a legitimate protectable interest. Also subject to protection as goodwill is the competitive advantage gained for an employer through personal contacts between employee and customer when the products offered by competitors are similar. The “general skills” acquired in working for an employer, however, may be transferred unless this occurs “under circumstances where their use [is] adverse to his employer and would result in irreparable injury.”¹⁴⁰

In applying these factors, the court concluded that it could not say “that the trial court’s findings and conclusions were clearly erroneous.”¹⁴¹ The facts demonstrated “that Coates had retained his knowledge of the business and used that knowledge to acquire/retain customers that he had prior transactions with through PHP.”¹⁴² In addition, the court pointed to “[t]he nature of the heater parts market in which PHP operates” to support its finding that IMP had a protectable interest.¹⁴³ As the court found that Coates’s familiarity with the heater market and the specific needs of PHP’s customers was not based on “general skill or knowledge—it [was] specific to how PHP operates.”¹⁴⁴

Next, the court examined the scope of the non-compete clause’s restriction.¹⁴⁵ The court rejected Coates’s argument that the restriction was void because its scope was unreasonable as to the geography and types of activity the covenant prohibited.¹⁴⁶ Moreover, the court found that in an instance where a provision may have been unreasonable the trial court properly used the blue pencil doctrine to strike that such a provision.¹⁴⁷

The reasonableness of a covenant’s geographic constraints “depends upon the

139. *Id.* (citing *Cent. Ind. Podiatry*, 882 N.E.2d at 729).

140. *Id.* at 913-14 (alteration in original) (citations omitted).

141. *Id.* at 914.

142. *Id.* (internal quotation marks omitted).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 914-15.

147. *Id.* at 915. In Indiana, a court may strike an unreasonable provision from those which are reasonable if the unreasonable provision is divisible. *Id.* (citing *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005)).

employer's interest served by those restrictions."¹⁴⁸ MPI, whose business spans a majority of the nation, must "protect[] its interests in each state in which it conducts business in the heater and heater parts market."¹⁴⁹ Therefore, the court found the trial court's determination that the scope of the non-compete permissibly included all the states in which Coates had contact with customers or vendors was not clearly erroneous.¹⁵⁰

The court then considered the scope of the restriction on Coates's activities.¹⁵¹ The reasonableness of restricting an employee's activities in a non-compete agreement "is determined by the relationship between the interest the employer seeks to protect and the activities circumscribed by the provisions of the covenant."¹⁵² As such, a court will find these provisions "invalid if they prohibit competition with portions of a business with which an employee had no association or activities that are seemingly harmless in relation to the protected interest."¹⁵³

Coates argued that his covenant was unreasonable because it was overbroad to include Heat Wagon in the meaning of Employer "because Heat Wagon deals with large construction heaters instead of portable heater."¹⁵⁴ However, based on the evidence, the court determined that it could be concluded that Coates worked for both MPI and Heat Wagons.¹⁵⁵

Judge Kirsch dissented, stating "Covenants not to compete in employment contracts are in restraint of trade and have long been disfavored in the law."¹⁵⁶ Judge Kirsch believed Coates's covenant was unreasonable in terms of the scope of both activity and geographic area.¹⁵⁷ With respect to geographic scope, Judge Kirsch found the geographic scope of the restriction, which "applied to all the states in which [MPI had] done business, was without regard to whether" Coates

148. *Id.* (quoting *Cent. Ind. Podiatry v. Krueger*, 882 N.E.2d 723, 730 (Ind. 2008)).

149. *Id.*

150. *Id.* at 916. Specifically, the court provided that the trial court did not err "in its use of the blue pencil doctrine to restrict the scope of the Order to the nineteen states in which Coates had customer contact." *Id.* at 915. The covenant not to compete at issue "referred to a specific exhibit listing individual states, each of which could be stricken without resulting in the absence of any limitation of the geographical scope of the covenant." *Id.* Further, the court noted that the list of the individual states was "not at all like the 'catch all' language in [other cases] which . . . sought to limit all activity by the restricted employee throughout the entirety of the United States without regard to the extent of the employer's interest with respect to the employee." *Id.* at 916.

151. *Id.*

152. *Id.*

153. *Id.* (citing *MacGill v. Reid*, 850 N.E.2d 926, 930-31 (Ind. Ct. App. 2006) (quoting *Seach v. Richards, Dieterle Co.*, 439 N.E.2d 208, 214 (Ind. Ct. App. 1982)).

154. *Id.*

155. *Id.* at 917.

156. *Id.* at 921 (citing *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 237, 239 (Ind. 1955)).

157. *Id.*

actually conducted activities in those states.¹⁵⁸ Judge Kirsch also disagreed with the trial court's "re-writing of a contract as a matter of policy."¹⁵⁹ Specifically, Judge Kirsch noted that "[h]ere, as a result of re-writing the employer's contract by the trial court, a contract that is unreasonable in its scope and unenforceable as over-broad becomes enforceable against the employee."¹⁶⁰

VI. BUSINESS TORTS

A. Corporate Opportunity Doctrine

In *DiMaggio v. Rosario*,¹⁶¹ the court of appeals held that even if non-fiduciary liability for usurpation of corporate opportunity was a recognized cause of action, the plaintiff failed to state a claim when he did not allege that defendant acted "knowingly or intentionally in usurping the corporate opportunity."¹⁶²

Victor J. DiMaggio III (DiMaggio) and his business partner, Elias Rosario (Rosario), started and were shareholders in a real estate company, Galleria Realty Corporation (Galleria).¹⁶³ Several years later, Rosario formed LLE, a limited liability real estate company in an adjacent county.¹⁶⁴ DiMaggio filed a complaint against Rosario and the other members of LLE (the Appellees), "alleging, among other things, that the Appellees usurped a corporate opportunity from Galleria, which caused damages to DiMaggio."¹⁶⁵ The Appellees filed, and the trial court granted, a motion to dismiss DiMaggio's complaint for failing to state a claim upon which relief could be granted.¹⁶⁶

DiMaggio appealed the trial court's ruling, arguing that "a cognizable claim was asserted against the dismissed [Appellees]," specifically, as Indiana courts have recognized, "that non-fiduciaries can be held liable for usurping a corporate opportunity."¹⁶⁷

Indiana courts have recognized that shareholders in a closely-held corporation, similar to a partnership, have a fiduciary duty to each other.¹⁶⁸ The court stated:

Consequently, shareholders in a close corporation stand in a fiduciary

158. *Id.* at 922.

159. *Id.*

160. *Id.*

161. 950 N.E.2d 1272 (Ind. Ct. App. 2011).

162. *Id.* at 1276.

163. *Id.* at 1273.

164. *Id.* at 1273-74.

165. *Id.* at 1274.

166. *Id.*

167. *Id.* (internal quotation marks omitted) (citing *McLinden v. Coco*, 765 N.E.2d 606, 615 (Ind. Ct. App. 2002) ("A shareholder's fiduciary duty requires that he 'not appropriate to his own use a business opportunity that in equity and fairness belongs to the corporation.'")).

168. *Id.* (citing *McLinden*, 765 N.E.2d at 615 (quoting *Melrose v. Capitol City Motor Lodge, Inc.*, 705 N.E.2d 985, 991 (Ind. 1998))).

relationship to each other, and as such, must deal fairly, honestly, and openly with the corporation and with their fellow shareholders. Moreover, shareholders may not act out of avarice, expediency, or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation. A shareholder's fiduciary duty requires that he not appropriate to his own use a business opportunity that in equity and fairness belongs to the corporation.¹⁶⁹

However, not having such a relationship with the Appellees, DiMaggio sought to infer a non-fiduciary cause of action for usurping a corporate opportunity based on the court's decision in *Dreyer & Reinbold, Inc. v. AutoXchange.com, Inc.*¹⁷⁰ The court disagreed with DiMaggio's assertion that the appellate court's silence on an issue not before the court—specifically, whether Indiana law allowed a claim to proceed against a non-fiduciary for usurping a corporate opportunity—did not “support[] an inference that [the court] tacitly” approved of such a claim.¹⁷¹

Without express guidance from Indiana courts, DiMaggio pointed to outside jurisdictions in an attempt to persuade the court that non-fiduciaries can be liable for usurping a corporate opportunity.¹⁷² The court provided that several jurisdictions have found that “a person who knowingly joins with or aids and abets a fiduciary in an enterprise constituting a breach of the fiduciary relationship becomes jointly and severally liable with the fiduciary for any damages accruing from such breach.”¹⁷³

169. *Id.* at 1275 (citations omitted).

170. *Id.* (citing *Dreyer & Reinbold, Inc. v. AutoXchange.com, Inc.*, 771 N.E.2d 764, 767-69 (Ind. Ct. App. 2002)). In *Dreyer & Reinbold*, the plaintiff, AutoXchange, filed a suit against Dreyer, claiming “that Dreyer had conspired with a shareholder of AutoXchange to usurp AutoXchange's corporate opportunity.” *Id.* (citing *Dreyer & Reinbold*, 771 N.E.2d at 766). Defendant's Trial Rule 12(B)(6) motion to dismiss for failure to state a claim was denied by the trial court, no appeal was filed, and the court of appeals did not address the issue when the case came to the court of appeals for issues unrelated to the motion to dismiss. *Id.* (citing *Dreyer & Reinbold*, 771 N.E.2d at 766).

171. *Id.*

172. *Id.* The court agreed that such decisions may be informative, noting that “‘where no Indiana cases adequately address the issues involved in a case, decisions of other jurisdictions may be instructive.’” *Id.* (quoting *Blakley Corp. v. EFCO Corp.*, 853 N.E.2d 998, 1004 (Ind. Ct. App. 2006)).

173. *Id.* at 1275-76 (citing *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 485 (Ky. 1991) (alteration in original) (“[A] person who knowingly joins with or aids and abets a fiduciary in an enterprise constituting a breach of the fiduciary relationship becomes jointly and severally liable with the fiduciary for any profits that may accrue.”); *BBF, Inc. v. Germanium Power Devices Corp.*, 430 N.E.2d 1221, 1224 (Mass. App. Ct. 1982) (holding the “trial court was justified in concluding that third-party defendant who did not owe fiduciary duty to company could still be jointly and severally liable when non-fiduciary knowingly participated with fiduciary in appropriating corporate opportunity of company”); *Raines v. Toney*, 313 S.W.2d 802, 810 (Ark.

However, without making a determination as to whether Indiana should recognize such a claim, the court affirmed the trial court's motion to dismiss for failure to state a claim.¹⁷⁴ According to the court, even if such a claim were recognized, the plaintiff failed to allege that the non-fiduciaries acted knowingly when joining or aiding a fiduciary in a breach of the fiduciary relationship.¹⁷⁵ Instead DiMaggio alleged only that Appellees "actively participated with Rosario in usurping Galleria's corporate opportunity thereby causing damages to DiMaggio."¹⁷⁶ The court noted that "[a]ll of the cases from other jurisdictions cited by DiMaggio require that the non-fiduciary must act knowingly when he or she joins a fiduciary in an enterprise constituting a breach of fiduciary duty."¹⁷⁷ As such, the court decided to "save for another day the decision as to whether Indiana should adopt such a cause of action" and affirmed the trial court's decision to grant the Appellees' motion to dismiss.¹⁷⁸

B. Breach of Employee's Fiduciary Duty of Loyalty

In *SJS Refractory Co. v. Empire Refractory Sales, Inc.*,¹⁷⁹ an employer brought a breach of fiduciary duty claim against a former employee who planned to work for a competitor.¹⁸⁰ Larry Snell (Snell) owned a refractory services company, Empire Refractory Sales, Inc. (Empire) that produced, sold, installed, and serviced refractory materials.¹⁸¹ Snell hired Bill Sale (Sale), a sales representative, and as part of his employment contract Sale signed a non-compete agreement.¹⁸² Over time, as Snell began to be less involved in the day-to-day operation of Empire, Sale became more involved, and he hired two friends, Patrick Johnson (Johnson) and Patrick Salwolke (Salwolke), as sales representatives.¹⁸³ Although Snell required all full-time sales representatives to sign non-compete agreements, Sale failed to require Johnson and Salwolke to

1958) (alteration in original) ("[O]ne who knowingly aids, encourages, or cooperates with a fiduciary in the breach of his duty becomes equally liable with such fiduciary."); *L.A. Young Spring & Wire Corp. v. Falls*, 11 N.W.2d 329, 343 (Mich. 1943) ("One who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise.")).

174. *Id.* at 1276.

175. *Id.*

176. *Id.* (citations omitted).

177. *Id.*

178. *Id.*

179. 952 N.E.2d 758 (Ind. Ct. App. 2011).

180. *Id.* at 763-64.

181. *Id.* at 762.

182. *Id.* The non-compete agreement provided that Sale would not engage in any business in competition with Empire within a 150-mile radius during the period of the contract and for two years after its termination. *Id.*

183. *Id.*

sign such agreements.¹⁸⁴

Sale and Snell were unable to reach an agreement for Sale to purchase Empire from Snell, and when Sale was financially unable to purchase Empire, Johnson and Salwolke began planning and preparing to launch a competing company, SJS Refractory Co., LLC (SJS).¹⁸⁵ Further, Johnson and Salwolke began soliciting Empire's customers¹⁸⁶ and diverting work to SJS.¹⁸⁷ Moreover, "Johnson went to Empire and removed customer forms, tools, equipment, and works-in-progress, all of which he took to SJS."¹⁸⁸

As a result of this conduct, Empire filed a lawsuit against SJS, Johnson, Salwolke, and Sale, alleging, among other things "that Salwolke, Johnson, and Sale breached their fiduciary duty to Empire."¹⁸⁹ In October 2009, more than one year after the conclusion of a nine-day bench trial, the trial court entered a forty-eight-page judgment" in favor of Empire.¹⁹⁰ SJS, Johnson, and Salwolke appealed.¹⁹¹

The court began its analysis by recognizing that under Indiana law, "[a]n employee owes his employer a fiduciary duty of loyalty."¹⁹² In addressing situations in which an employee competes with employer, the court provided:

To that end, an employee who plans to leave his current job and go into competition with his current employer must walk a fine line. Prior to his termination, an employee must refrain from actively and directly competing with his employer for customers and employees and must continue to exert his best efforts on behalf of his employer. An employee may make arrangements to compete with his employer, such as investments or the purchase of a rival corporation or equipment. However, the employee cannot properly use confidential information specific to his employer's business before the employee leaves his employ. These rules balance the concern for the integrity of the

184. *Id.*

185. *Id.* at 762-63. These planning activities included using Empire's facility and tools to build hot gunning nozzles for SJS, contacting a bank for a line of credit, using Empire e-mail account to find and secure a space to lease for SJS. *Id.* at 763. After SJS' Articles of Incorporation became effective, Salwolke and Johnson offered six Empire employ accepted. *Id.*

186. *Id.* To illustrate, in February 2006, Johnson met with representatives from companies that had been long-time been customers of Empire. *Id.* Johnson used his Empire expense account to take these representatives out for dinner to procure business for SJS. *Id.*

187. *Id.* Johnson received a call from an Empire customer for a bid, and Johnson told the customer that SJS could complete the job for him the following week. *Id.*

188. *Id.* at 764. While some items were returned the following week, SJS did not return \$53,275.28, the value of the worth of equipment and inventory. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 766.

192. *Id.* at 768 (citing *Kopka, Landau & Pinkus v. Hansen*, 874 N.E.2d 1065, 1070 (Ind. Ct. App. 2007)).

employment relationship against the privilege of employees to prepare to compete against their employers without fear of breaching their fiduciary duty of loyalty.¹⁹³

The court recognized that in situations where an employee breaches his or her fiduciary duty by planning to compete with his or her current employer, the remedy is to require “the agent to disgorge all compensation received during the period of employment in which the agent was also breaching his fiduciary duty.”¹⁹⁴

According to the trial court, “Johnson began breaching his fiduciary duty on January 1, 2006, and . . . Salwolke began breaching his fiduciary duty on January 13, 2006.”¹⁹⁵ The court of appeals found no error in the trial court’s order of disgorgement of Johnson’s and Salwolke’s salaries and benefits beginning on those dates.¹⁹⁶

C. Tortious Interference with Contract

In *Murat Temple Ass’n v. Live Nation Worldwide, Inc.*,¹⁹⁷ the court of appeals held that Live Nation did not breach its contract with Murat Temple Association (MTA) by entering into a naming rights agreement with Old National Bank, which precluded MTA’s claim of tortious interference with a contractual relationship.¹⁹⁸ MTA entered into a lease with Murat Centre, L.P., for the Murat Theatre Building, and under the lease, Live Nation was a successor in interest to Murat Centre, L.P.¹⁹⁹ After learning that Live Nation was planning to sell the naming rights to the Murat Shrine Center, MTA informed Live Nation that any name change was subject to MTA’s approval.²⁰⁰ Without obtaining MTA’s approval, “Live Nation announced that it had entered into a naming rights

193. *Id.* (citations omitted) (citing *Kopka*, 874 N.E.2d at 1070-71). The court also cited to the *Restatement (Third) of Agency*:

In retrospect it may prove difficult to assess the propriety of a former agent's conduct because many actions may be proper or improper, depending on the intention with which the agent acted and the surrounding circumstances. For that reason it may be difficult to draw a clean distinction between actions prior to termination of an agency relationship that constitute mere preparation for competition, which do not contravene an employee's or other agent's duty to the principal, and actions that constitute competition.

Id. (citing RESTATEMENT (THIRD) OF AGENCY § 8.04 cmt. c (2006)).

194. *Id.* (citing *Wenzel v. Hopper & Galliher*, 830 N.E.2d 996, 1001 (Ind. Ct. App. 2005)).

195. *Id.* at 769.

196. *Id.* The court affirmed in part, reversed in part, and remanded the case to the trial court for a determination of the fair rental value of the converted property. *Id.* at 771.

197. 953 N.E.2d 1125 (Ind. Ct. App. 2011).

198. *Id.* at 1132 (citing *Gatto v. St. Richard Sch., Inc.*, 774 N.E.2d 914, 922 (Ind. Ct. App. 2002)).

199. *Id.* at 1127.

200. *Id.*

agreement with Old National.”²⁰¹

Subsequently, MTA filed a complaint against Live Nation and Old National, asserting tortious interference with both a business relationship and a contractual relationship.²⁰² MTA appealed the trial court order granting the defendants’ motions to dismiss.²⁰³

Initially, the court addressed MTA’s claim that Old National had tortiously interfered with a business relationship.²⁰⁴ The court noted that it has “consistently held that an action for intentional interference with a business relationship arises where there is no contract underlying the relationship.”²⁰⁵ The court found that the relationship between MTA and Live Nation was governed by a contract; therefore, the trial court properly dismissed MTA’s claim for tortious interference with a business relationship.²⁰⁶

The court then explained that a claim for tortious interference with contract requires that a plaintiff “allege 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 breach of the contract, 4) the absence of justification, and 5) damages resulting from the defendant’s wrongful inducement of the breach.”²⁰⁷ The issue of intentional inducement of breach of contract was the dispositive issue before the court because the court already concluded “that Live Nation did not breach the [l]ease by entering into a naming rights agreement with Old National.”²⁰⁸ Therefore, “MTA’s claim for tortious interference with a contractual relationship must fail, and the trial court did not err by dismissing this claim.”²⁰⁹

D. Tortious Interference with Employment Contract

In *Haegert v. McMullan*,²¹⁰ a former university professor, John Haegert (Haegert), brought a lawsuit against his supervisor, alleging tortious breach of employment contract after he was terminated for alleged sexual harassment.²¹¹

201. *Id.*

202. *Id.* at 1128.

203. *Id.*

204. *Id.* at 1132.

205. *Id.* (citing *Levee v. Beeching*, 729 N.E.2d 215, 220 (Ind. Ct. App. 2000)).

206. *Id.*

207. *Id.* (citing *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000)).

208. *Id.* The court noted that the plain language of the lease granted Live Nation the “authority to sell naming rights to the Leased Premises and to post appropriate signs and advertising.” *Id.* at 1131.

209. *Id.* (citing *Gatto v. St. Richard Sch., Inc.*, 774 N.E.2d 914, 922 (Ind. Ct. App. 2002) (“determining that the plaintiff’s claim for tortious interference with a contractual relationship could not succeed because the plaintiff had failed to establish the existence of a breach of contract”)).

210. 953 N.E.2d 1223 (Ind. Ct. App. 2011).

211. *Id.* at 1228-29.

Haegert joined the faculty at the University of Evansville (the University) in 1979, was tenured in 1982, and became a full English professor in 1992.²¹² The University promoted Margaret McMullan (McMullan) to the chair of the English Department in 2002.²¹³ After an interaction between McMullan and Haegert, McMullan filed a formal complaint of harassment against Haegert with the University.²¹⁴ As a result of McMullan's complaint, Haegert's employment with the university was terminated.²¹⁵

After his termination was upheld by the Faculty Appeals Committee, Haegert filed a complaint against McMullan, alleging, in part, "tortious breach of Haegert's employment contract;" the trial court granted summary judgment in McMullan's favor.²¹⁶

The court provided that "Indiana has long recognized that intentional interference with a contract is an actionable tort, and includes an intentional, *unjustified interference by third parties* with an employment contract."²¹⁷ The court enumerated the elements for tortious interference with an employment contract: "(1) that a valid and enforceable contract exists; (2) the defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) damages resulting from defendant's wrongful inducement of the breach."²¹⁸

The court noted that it has previously cited to the *Restatement (Second) of Torts* sections 766 and 766A to aid the court in analyzing the claim of tortious interference with an employment contract.²¹⁹ The court noted that the *Levee v. Beeching*²²⁰ decision provided:

Comment. b to § 766 provides that "there is a general duty not to interfere intentionally with another's reasonable business *expectancies* of trade with third persons." (Emphasis added). Comment. a to § 766A indicates that liability will attach where one intentionally interferes with a plaintiff's performance of his own contract, "either by preventing that performance or making it more expensive *or burdensome*." (Emphasis added). Thus, where a third party's conduct substantially and materially impairs the execution of an employment contract, frustrating an

212. *Id.* at 1226.

213. *Id.*

214. *Id.* at 1228.

215. *Id.* at 1228-29.

216. *Id.* at 1229.

217. *Id.* at 1233 (quoting *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1234 (Ind. 1994) (citing *Bochnowski v. Peoples Fed. Sav. & Loan*, 571 N.E.2d 282, 284 (Ind. 1991)) ("This cause of action recognizes the public policy that contract rights are property, which are entitled to enforcement and protection from, under proper circumstances, those who tortiously interfere with rights.").

218. *Id.* (citing *Winkler*, 638 N.E.2d at 1235).

219. *Id.* at 1234.

220. 729 N.E.2d 215 (Ind. Ct. App. 2000).

employee's expectations under her contract and making performance of her contractual duties more burdensome, the inducement of breach element of a claim for tortious interference with a contractual relationship is satisfied.²²¹

In addition, the court explained that "[i]n claims involving officers or directors of a corporation alleging tortious interference with the corporation's contracts, liability will not be found where the directors and officers are acting as agents of the corporation when acting in the scope of their official capacity."²²² McMullan reclaimed on this defense, arguing that she could not tortiously interfere with the contract because she was not a third party to the contract, i.e., she was acting within the scope of her employment as an agent of University.²²³ While noting that "[i]t would not be a stretch" to find that McMullan could not be liable for the actions done in the scope of her employment, the court "[a]ssum[ed] without deciding that McMullan [was] a third party."²²⁴

Rather than deciding whether McMullan was a third party, the court addressed whether McMullan's conduct was "justified."²²⁵ The court looked to the *Restatement* for factors to help determine whether McMullan acted with justification, specifically:

(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.²²⁶

Moreover, the court noted that "the central question to be answered is whether the defendant's conduct has been fair and reasonable under the circumstances."²²⁷ Further, "[t]he absence of justification is established by showing 'that the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another.'"²²⁸ Conversely, if the defendant can demonstrate "[t]he existence of a

221. *Haegert*, 953 N.E.2d at 1234 (citing *Levee*, 729 N.E.2d at 222).

222. *Id.* (citing *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 138-39 (Ind. 2006)).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* (quoting *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994) (citing RESTATEMENT (SECOND) OF TORTS § 767 (1977))).

227. *Id.* (citing *Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 759 N.E.2d 239, 252 (Ind. Ct. App. 2001)).

228. *Id.* at 1234-35 (*Bilimoria Computer Sys., LLC v. America Online, Inc.*, 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005)).

legitimate reason for the defendant's actions."²²⁹

In looking at the materials designated to the trial court, the court of appeals concluded that it could infer "from the facts and circumstances . . . that McMullan's actions that were at issue were justified."²³⁰ McMullan's conduct was consistent with her past practices and the University's policy involving sexual harassment complaints.²³¹ The court also noted that "McMullan consistently stated that she wanted to stop Haegert's pattern of harassing students and faculty of the University."²³² As such, the court upheld the trial court order granting summary judgment in favor of McMullan regarding Haegert's claim of tortious interference with an employment contract.²³³

VII. CONTRACT PERFORMANCE AND BREACH

A. *Definiteness of Terms—Enforceability of Letter of Intent*

In *Block v. Magura*,²³⁴ the court held that a letter of intent contained sufficiently definite terms to constitute an enforceable contract.²³⁵ The letter of intent between Dr. Mark Magura (Magura) and Dr. Dennis Block (Block) provided that it was "to set forth the terms and conditions of the acquisition by [Magura], of the total ownership interest of [Block] in CRH & B Partnership."²³⁶ The letter of intent also provided that Block would sell his 35% ownership interest in the partnership for \$600,000.²³⁷ The letter stated that if any of the other partners exercised their right of first refusal, as provided in the partnership agreement, the letter would "be deemed void."²³⁸ Magura failed to prepare a formal written agreement to confirm the purchase, as demanded by Block, nor did he take any steps to otherwise complete the purchase.²³⁹ Block filed suit on the purported "contract," and the trial court granted Magura's motion for summary judgment, finding that "the letter of intent at issue in this cause does not contain sufficient language to make it enforceable as a contract."²⁴⁰

The parties disputed whether the letter of intent created an enforceable contract.²⁴¹ Initially, the court of appeals cited *Conwell v. Gray Loan Outdoor Marketing Group, Inc.*, an Indiana Supreme Court opinion, describing the

229. *Id.* at 1235.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. 949 N.E.2d 1261 (Ind. Ct. App. 2011).

235. *Id.* at 1262.

236. *Id.* at 1263.

237. *Id.*

238. *Id.* at 1263-64 ("None of the other partners exercised their right of first refusal.").

239. *Id.* at 1264.

240. *Id.* (internal quotation marks omitted).

241. *Id.* at 1264-65.

common law requirements for an enforceable contract:

To be valid and enforceable, a contract must be reasonably definite and certain. All that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom; absolute certainty in all terms is not required. Only essential terms need be included to render a contract enforceable. Thus, where any essential element is omitted from a contract, or is left obscure or undefined, so as to leave the intention of the parties uncertain as to any substantial term of the contract, the contract may not be specifically enforced. A court will not find that a contract is so uncertain as to preclude specific enforcement where a reasonable and logical interpretation will render the contract valid.²⁴²

Even though the letter of intent identified the item to be purchased, the purchaser, the purchase price, and the asset's condition, Magura argued that the letter of intent nonetheless lacked "sufficiently definite and certain terms to create an enforceable contract," because the letter was "silen[t] regarding such matters as when the sale was to occur and close, how the ownership interest was to be transferred, how the purchase price was to be paid, and whether the purchase price was subject to financing."²⁴³

The court addressed Magura's arguments and concluded that the letter of intent contained sufficiently definite terms.²⁴⁴ First, the court noted that the "when" of the purchase was "incorporated from the Partnership Agreement which the Letter of Intent specifically referenced."²⁴⁵ According to the court, the partnership agreement governed the timing of the sale and provided for a 135-day period to close.²⁴⁶ Similarly, the court pointed to the partnership agreement in rejecting the argument that "the absence of a number of terms relating to business affairs of the Partnership" created insufficient or uncertain terms.²⁴⁷ The court provided that even if the letter of intent did not contain all of the terms, the letter of intent could still be an enforceable contract.²⁴⁸ Therefore, the court found that

242. *Id.* at 1265 (citing *Conwell v. Gray Loan Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 813 (Ind. 2009)).

243. *Id.*

244. *Id.* at 1266.

245. *Id.* at 1265. The court noted that the legal obligation to abide by the partnership agreement was part of the letter as "all applicable law in force at the time an agreement is made impliedly forms a part of the agreement." *Id.* (quoting *Johnson v. Sprague*, 614 N.E.2d 585, 589 (Ind. Ct. App. 1993)).

246. *Id.*

247. *Id.* at 1265-66.

248. *Id.* at 1266 (citing *Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc.*, 824 N.E.2d 388, 398-99 (Ind. Ct. App. 2005) (finding the agreement was enforceable even though it did not include "the manner of payment"); *Johnson*, 614 N.E.2d at 590 (concluding that the "writing[] created an enforceable contract" even though it did not include nonessential, but customary, real estate terms)).

the letter was sufficient and enforceable where it specified “the Partnership interest to be purchased, by and from whom, the purchase price, the condition of the asset, and the timing of the sale. These are all of the essential terms for an enforceable contract.”²⁴⁹

The court then addressed whether the letter of intent demonstrated the parties’ intent to be bound or, rather, whether the letter was merely an “agreement to agree.”²⁵⁰ The court explained that “[i]t is well settled that ‘a mere agreement to agree at some future time is not enforceable.’ ‘Nevertheless, parties may make an enforceable contract which obligates them to execute a subsequent final written agreement.’”²⁵¹ As such, the court would “consider the parties’ ‘intent to be bound’ as a question separate from but related to the definiteness of terms.”²⁵²

The court distinguished the terms of the parties’ letter of intent from the letter at issue in *Equimart Ltd. v. Epperly*,²⁵³ which provided that “the parties would ‘attempt, in good faith, to negotiate a definitive purchase agreement’ for the sale of stock.”²⁵⁴ Further, “‘consummation of the transaction . . . will be subject to the execution of delivery of a Final Agreement in a form reasonably satisfactory to the parties and their respective counsel.’”²⁵⁵

Conversely, the letter of intent in *Magura* contained language indicating that the parties did not have a mere “agreement to agree.”²⁵⁶ Specifically, the court noted that the letter stated that “the subsequent formal agreement ‘will’ incorporate ‘the terms of this Letter of Intent,’ not these and other terms.”²⁵⁷ Moreover, the court noted that the letter “states the parties presently ‘are willing to complete’ the purchase and uses the terms ‘[o]ffer made’ and ‘accepted’ to denote the consequence of the parties’ signatures.”²⁵⁸ This language, taken as a whole, “indicates the parties’ intent to be bound.”²⁵⁹ Additionally, the court noted in a footnote that the parties’ subjective understanding regarding the intent to be bound “is insufficient to create a genuine issue of fact because intent to be bound is measured objectively, by the parties’ words and conduct, not their subjective state of mind.”²⁶⁰ Therefore, the court found that the letter of intent was an enforceable contract.²⁶¹ However, the court remanded the case to the trial court

249. *Id.*

250. *Id.* (quoting *Equimart Ltd. v. Epperly*, 545 N.E.2d 595, 598 (Ind. Ct. App. 1989)).

251. *Id.* (quoting *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996)).

252. *Id.* (quoting *Wolvos*, 668 N.E.2d at 675).

253. *Id.* (citing *Equimart Ltd.*, 545 N.E.2d at 598).

254. *Id.* (citing *Equimart Ltd.*, 545 N.E.2d at 598).

255. *Id.* (quoting *Equimart Ltd.*, 545 N.E.2d at 598).

256. *Id.* at 1266-67.

257. *Id.* at 1267 (citation omitted).

258. *Id.* (alteration in original) (citation omitted).

259. *Id.*

260. *Id.* at 1267 n.2 (citing *Real Estate Support Servs., Inc. v. Nauman*, 644 N.E.2d 907, 910 (Ind. Ct. App. 1994)).

261. *Id.* at 1268.

for a determination of damages, as material issues of fact remained.²⁶²

B. Condition Precedent

In *Anderson Property Management, LLC v. H. Anthony Miller, Jr., LLC*,²⁶³ the court held that a presumption on which an agreement was based was a condition precedent that burdened both parties such that the vendor's unilateral waiver did not render the agreement enforceable.²⁶⁴ H. Anthony Miller, Jr. LLC (Miller) and Anderson Property Management, LLC (Anderson) entered into an agreement where Anderson would purchase a portion of Miller's property and Miller was required to separate a single building the straddled the property, line into two independent structures.²⁶⁵ Miller hired a surveyor to perform a land survey to mark the boundaries of the portion of the land that Anderson was purchasing.²⁶⁶ After the survey was complete Miller began the demolition of a portion of the building.²⁶⁷ However, before Miller could complete the project, the parties clashed over the extent of the demolition, and "Miller filed a complaint requesting a declaration of the parties' rights and obligations under the Sale Agreement and its easements."²⁶⁸

The parties were able to successfully mediate their dispute, and as part of the settlement agreement, a second survey was conducted which "revealed that Anderson's building, in some places, encroached as much as 7.3 feet onto Miller's property."²⁶⁹ Due to the scope of the encroachment, Anderson considered the agreement unenforceable.²⁷⁰ As a result, Miller filed a motion with the court to enforce the agreement.²⁷¹ The court entered an order which provided, in pertinent part, that the settlement agreement set forth a condition precedent, but Anderson waived this condition precedent, therefore, the agreement was enforceable.²⁷²

The court looked to general principles of contract law to interpret the parties' settlement agreement.²⁷³ The court explained:

The interpretation and construction of a contract is a function for the courts. If the contract language is unambiguous and the intent of the

262. *Id.*

263. 943 N.E.2d 1286 (Ind. Ct. App. 2011).

264. *Id.* at 1292.

265. *Id.* at 1287-88.

266. *Id.* at 1288.

267. *Id.*

268. *Id.*

269. *Id.* at 1289.

270. *Id.*

271. *Id.*

272. *Id.* at 1289-90.

273. *Id.* at 1291. Specifically, the court noted that "courts have held that '[s]ettlement agreements are governed by the same general principles of contract law as any other agreement.'" *Id.* (quoting *Fackler v. Powell*, 891 N.E.2d 1091, 1095 (Ind. Ct. App. 2008)).

parties is discernible from the written contract, the court is to give effect to the terms of the contract. A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation; however, the terms of a contract are not ambiguous merely because the parties disagree as to their interpretation. When the contract terms are clear and unambiguous, the terms are conclusive and we do not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions.²⁷⁴

Anderson argued that the contract contained a condition precedent, specifically pointing to the following language in the settlement agreement:

The parties presume that existing building of Defendant [Anderson], except 3 encroachment, is located on Defendant's property as verified by survey (1/2 to each party of cost).

The parties agree, contingent on above:²⁷⁵

In addressing whether this language constituted a condition precedent, the court explained that "a condition precedent is a condition that must be performed before the agreement of the parties becomes a binding contract or that must be fulfilled before the duty to perform a specific obligation arises."²⁷⁶ The court found that the plain meaning of the settlement agreement provided for a condition precedent.²⁷⁷

The court of appeals then addressed the trial court's conclusion that Miller, who according to the trial court was burdened by the condition, was able to unilaterally waive the condition.²⁷⁸ Regarding the waiver of a condition in a contract, the court provided:

Ordinarily, a party can waive any contractual right provided for his or her benefit. A condition in a contract may be waived by the conduct of the party. Once a condition has been waived, and such waiver has been acted upon, the failure to perform the condition cannot be asserted as a breach of contract.²⁷⁹

However, the language of the contract at issue in the present case provided that the "presumption was that of both *parties*."²⁸⁰ According to the court, "[b]ecause the condition precedent ran to the benefit of both parties, both parties must agree to waive it."²⁸¹ Therefore, the court of appeals concluded that the trial

274. *Id.* (quoting *Fackler*, 891 N.E.2d at 1095-96).

275. *Id.*

276. *Id.* (internal quotation marks omitted) (quoting *McGraw v. Marchioli*, 812 N.E.2d 1154, 1157 (Ind. Ct. App. 2004)).

277. *Id.*

278. *Id.*

279. *Id.* (quoting *Salcedo v. Toepp*, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998)).

280. *Id.* at 1292.

281. *Id.*

court erred when it found that Miller was able to unilaterally waive the condition precedent.²⁸²

D. Mutual Mistake

In *Tracy v. Morell*,²⁸³ the court held that the sale of a tractor with an altered identification number was subject to rescission on the grounds of mutual mistake and violation of public policy.²⁸⁴ James Tracy (Tracy) purchased a used tractor from Steve Morell (Morell) in 2002.²⁸⁵ As part of the purchase, Tracy signed a promissory note, but he stopped making payments in June 2003.²⁸⁶ Around that same time period, Morell was criminally charged with receiving stolen property, including farm equipment.²⁸⁷ During the police investigation, it was discovered that the tractor's identification number had been altered, but the police were unable to prove that the tractor was stolen.²⁸⁸ After Morell pled guilty to receiving stolen property, Tracy filed suit, alleging fraud in "that Morell knowingly misrepresented that he owned the tractor," and Morell filed a counterclaim for the unpaid balance of the promissory note on which Tracy had defaulted.²⁸⁹ Following a bench trial, the trial court dismissed Tracy's complaint with prejudice for failing to meet his burden of proof and found Tracy liable for the unpaid balance of the promissory note.²⁹⁰

On appeal, the court found that the promissory note was not an enforceable contract.²⁹¹ First, the court concluded that mutual assent, which is a prerequisite to the creation of a contract, was lacking.²⁹² Further, the court explained:

Where both parties share a common assumption about a vital fact upon which they based their bargain, and that assumption is false, the transaction may be avoided if because of the mistake a quite different exchange of values occurs from the exchange of values contemplated by the parties. There is no contract, because the minds of the parties have in fact never met.²⁹³

The court analogized the case to the "landmark" decision in *Sherwood v.*

282. *Id.*

283. 948 N.E.2d 855 (Ind. Ct. App. 2011).

284. *Id.* at 858.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 858-59.

289. *Id.* at 859.

290. *Id.* at 860, 862.

291. *Id.* at 864.

292. *Id.*

293. *Id.* (internal citations omitted) (citing *Wilkin v. 1st Source Bank*, 548 N.E.2d 170, 172 (Ind. Ct. App. 1990)).

Walker,²⁹⁴ finding that “the undisputed evidence shows that the sale was based upon a common, mistaken assumption about a vital fact regarding ‘the very nature of the thing.’”²⁹⁵ The court reasoned that both parties were mistaken about the tractor’s value as they were both unaware that the tractor’s identification number had been altered.²⁹⁶ According to the court, “[t]he essential terms, including both the sale and the sale price, were based on a mutual mistake about a vital fact that Morell had good title and lawful authority to sell the tractor to Tracy free and clear.”²⁹⁷ Further, “[t]here was a mutual mistake of fact between them that went to the heart of the bargain, to the substance of the whole contract, and, as such, there was no contract, as a matter of law.”²⁹⁸

The court also concluded that public policy prohibited the enforcement of the agreement.²⁹⁹ The court stated that it “cannot be called upon to enforce contracts that violate the law or that violate public policy. While certain agreements are prohibited outright by statute and thus void, others may be found void on public policy grounds.”³⁰⁰ Here, the court explained, the transactions involved the sale of altered property, which is a crime under Indiana law.³⁰¹ Although Morell’s prosecution did not involve the tractor, the court did not find any lawful purpose for destroying the tractor’s identification number.³⁰² As such, the court:

decline[d] to adopt a rule that someone may sell altered property with impunity and then claim ignorance as a complete defense in a civil action arising from the sale. Such a rule would violate public policy because in the sale of personal property, unless otherwise agreed, the seller’s ownership free and clear of liens and encumbrances is presumed.³⁰³

According to the *Tracy* court, “the law should not permit a seller to transfer property with an altered identification number without being held accountable for it.”³⁰⁴

294. 33 N.W. 919 (Mich. 1887). In *Sherwood*, both the seller and purchaser of a cow wrongfully believed that the cow was barren and would not breed and agreed on a price due to this mistaken belief. *Tracy*, 948 N.E.2d at 864 (citing *Sherwood*, 33 N.W. at 923). The court concluded that due to the mistake of the parties the transaction was voidable noting the mistake “‘was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. . . . She was not a barren cow, and, if this fact had been known, there would have been no contract.’” *Id.* (alteration in original) (quoting *Sherwood*, 33 N.W. at 923).

295. *Tracy*, 948 N.E.2d at 864 (quoting *Sherwood*, 33 N.W. at 923).

296. *Id.*

297. *Id.* at 865.

298. *Id.*

299. *Id.*

300. *Id.* (citing *Straub v. B.M.T.*, 645 N.E.2d 597, 599 (Ind. 1994)).

301. *Id.* (citing IND. CODE § 35-43-4-2.3 (2011)).

302. *Id.*

303. *Id.*

304. *Id.*

Holding that the contract should be rescinded based on the mutual mistake of the parties and public policy, the court explained that it must “adjust the equities and return the parties to the status quo ante.”³⁰⁵ In order to return the parties to the status quo ante, the court held that Morell was “the owner and is entitled to possession of the tractor, subject to any impoundment and storage charges, that the promissory note is null and void, and that Tracy is entitled to recover the amount he has paid on the promissory note.”³⁰⁶

E. Unjust Enrichment

In *Coppolillo v. Cort*,³⁰⁷ the court of appeals, as a matter of first impression, addressed whether the existence of an express agreement precluded an investor’s claim in equity for unjust enrichment where the agreement did not cover the investor’s equitable claim.³⁰⁸ Antony Cort (Cort) was a shareholder in Zuncor, Inc., which owned Zuni’s Restaurant.³⁰⁹ Cort’s mother had an ownership interest in the real property on which the restaurant was located.³¹⁰ Steven Coppolillo (Coppolillo), who was also the chef, agreed “to purchase Cort’s one-fourth ownership share of Zuncor” for \$50,000 up front, plus twenty-five monthly payments of \$2000.³¹¹ During that time period, Cort was negotiating to sell the real property.³¹² The new owner of the property provided the restaurant with only a three-month lease, and without a new location, the restaurant closed, and Coppolillo lost his investment.³¹³ As a result, Coppolillo brought suit against Cort, alleging, among other things, unjust enrichment.³¹⁴

In addressing Coppolillo’s appeal regarding his claim of unjust enrichment, the court in *Cort* explained:

Unjust enrichment is also referred to as quantum meruit, contract implied-in-law, constructive contract, or quasi-contract. Unjust enrichment permits recovery where the circumstances are such that under the law of natural and immutable justice there should be a recovery. To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant’s retention of the benefit without payment would be unjust.³¹⁵

305. *Id.* at 866 (citing *Smith v. Brown*, 778 N.E.2d 490, 497 (Ind. Ct. App. 2002)).

306. *Id.*

307. 947 N.E.2d 994 (Ind. Ct. App. 2011).

308. *Id.* at 999.

309. *Id.* at 996.

310. *Id.*

311. *Id.*

312. *Id.* 996-97.

313. *Id.* at 997.

314. *Id.*

315. *Id.* (citations and internal quotation marks omitted).

However, because Coppolillo's claim was based on the sale agreement, Cort argued that "Coppolillo's remedy, if any, against him must be sought under the contract rather than in equity."³¹⁶ The court agreed that when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law.³¹⁷ Further, the court explained, "[t]he existence of an express contract precludes a claim for unjust enrichment because: (1) a contract provides a remedy at law; and (2) as a remnant of chancery procedure, a plaintiff may not pursue an equitable remedy when there is a remedy at law."³¹⁸

The court then addressed the "exceptions to this general rule."³¹⁹ Specifically, the court explained that "[a]lthough not previously addressed in Indiana, several other jurisdictions have determined that when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice."³²⁰

The court applied this new exception and concluded that the express terms of the parties' contract did not fully address Coppolillo's claim.³²¹ Specifically, the court reasoned that "the Agreement is not a contract for services and does not fully encompass the parties' payment arrangements."³²² Therefore, the court concluded "that the parties' contract [did] not preclude Coppolillo's claim in equity against Cort for unjust enrichment."³²³

316. *Id.*

317. *Id.* at 998 (citing *Zoeller v. E. Chi. Second Century, Inc.*, 904 N.E.2d 213, 221 (Ind. 2009)).

318. *Id.* (citing *King v. Terry*, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004)).

319. *Id.*

320. *Id.* Specifically, the court cited *Town of New Hartford v. Connecticut Resource Recovery Authority*, 970 A.2d 592, 612 (Conn. 2009), and *Porter v. Hu*, 169 P.3d 994, 1007 (Haw. Ct. App. 2007) ("endorsing the principle that equitable restitution is appropriate where an express contract does not fully address an injustice" (internal quotation marks omitted)); *see also Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 786 (8th Cir.1996) (applying Arkansas law). The court stated that "the existence of a contract, in and of itself, does not preclude equitable relief which is not inconsistent with the contract." *Rent-A-PC, Inc. v. Rental Mgmt., Inc.*, 901 A.2d 720, 723 (Conn. Ct. App. 2006).

321. *Cort*, 947 N.E.2d at 999.

322. *Id.* at 998. On the substance of Coppolillo's unjust enrichment claim, the court found that material issues of fact existed, precluding summary judgment. *Id.* at 998-99.

323. *Id.* at 999.