

# BANKING, BUSINESS, AND CONTRACT LAW

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This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court (“Supreme Court”) and Indiana Court of Appeals (“Court of Appeals”) between September 1, 2021, and August 31, 2022 (the “Survey Period”). Three of the decisions grew out of or were affected by the COVID-19

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pandemic;<sup>1</sup> more are sure to follow in future Survey Periods.

This Article will not itemize every banking, business, and contract law case decided during the Survey Period. Instead, it will highlight cases illustrating some of the big-picture issues in these fields, as well as some practice pointers for both transaction lawyers and litigators. This Article also gives a brief update on the Supreme Court's commercial courts initiative<sup>2</sup> and concludes with a special note discussing Indiana's summary judgment standard.

Following the close of the Survey Period, the Supreme Court announced that effective January 1, 2023, it would allow so-called not-for-publication "memorandum" decisions of the Court of Appeals to "be cited for persuasive value to any court."<sup>3</sup> In the opinion of the author of this Article, this is a highly salutary development: these decisions contain critical guidance on Indiana law and cannot be ignored. Indeed, they often establish new law; clarify, modify, or criticize existing law; or involve legal or factual issues of unique interest or substantial public importance. For these reasons, these decisions are discussed in this Article as they have been in past years.

#### I. COMMERCIAL COURTS UPDATE

The Supreme Court established "Commercial Courts" in six Indiana counties in 2019<sup>4</sup> and added courts in four additional counties two years later.<sup>5</sup>

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1. See *PNC Bank, NA v. Page*, 186 N.E.3d 633 (Ind. Ct. App. 2022), *infra* notes 52-60 and accompanying text; *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App.), *trans. denied* (5-0), 193 N.E.3d 372 (Ind. 2022), *infra* notes 192-207 and accompanying text; *Sethi v. Petroleum Traders Corp.*, 2022 WL 3025532 (Ind. Ct. App. 2022) (unpublished disposition), *infra* notes 327-349 and accompanying text.

2. See *infra* notes 4-10 and accompanying text.

3. Order Amending Rules of Appellate Procedure, No. 22S-MS-1 (Ind. Dec. 19, 2022). This order amended Indiana Appellate Rule 65 to provide in relevant part: "Unless later designated for publication in the official reporter, a memorandum decision is not binding precedent for any court precedent and must not be cited to any court except to establish *res judicata*, collateral estoppel, or law of the case. However, a memorandum decision issued on or after January 1, 2023, may be cited for persuasive value to any court by any litigant. But there is no duty to cite a memorandum decision except to establish *res judicata*, collateral estoppel, or law of the case." IND. R. APP. P. 65 (as amended effective Jan. 1, 2023). Prior to amendment, the rule dictated that memorandum decisions "shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case." IND. R. APP. P. 65 (as in effect prior to Jan. 1, 2023). Memorandum decisions have been posted on the website of the Indiana Court of Appeals since 2006. Order, No. 94S00-060-MS-299 (Ind. Aug. 21, 2006).

4. Order, *In re Indiana Commercial Courts*, No. 19S-MS-295 (Ind. May 16, 2019). The counties are Allen, Elkhart, Vanderburgh, Floyd, Lake, and Marion.

5. Sydney Byerly, *New State Commercial Courts Are Open in 10 Indiana Counties*, STATEHOUSE FILE (Sept. 14, 2022), [https://www.thestatehousefile.com/briefs/new-state-commercial-courts-are-open-in-10-indiana-counties/article\\_edb29962-3472-11ed-a95c-9743a225094a.html](https://www.thestatehousefile.com/briefs/new-state-commercial-courts-are-open-in-10-indiana-counties/article_edb29962-3472-11ed-a95c-9743a225094a.html) [https://perma.cc/UD7Q-27AB]; *Vigo County to Open a Commercial Court*,

Commercial courts seek to streamline a court's efficiency, educate judges and litigants, and create predictable business case law that encourages companies to incorporate or complete transactions within the state.<sup>6</sup> In this regard, the Supreme Court has enhanced the functionality of Odyssey, its statewide online court case management system, to include substantive order searches of commercial court dockets.<sup>7</sup>

At a special program shortly after the close of the Survey Period, the Court reported that almost 1,500 cases had been filed in Commercial Courts and more than 600 orders have been made available in the Odyssey database.<sup>8</sup> Attorneys participating in the program expressed an extremely high degree of satisfaction with the expeditious and expert way that commercial courts decide cases, much of it due to the cost savings resulting from the streamlined discovery and fast-track scheduling.<sup>9</sup> One particularly interesting report was that transaction lawyers are now including in their contracts forum selection clauses calling for any disputes arising under the contract to be litigated exclusively in a commercial court.

One attorney with an extensive commercial practice said that he had found filing in Commercial Courts to be much faster and more cost-effective than traditional alternative dispute resolution.<sup>10</sup> Perhaps Commercial Court is the new ADR!

## II. LENDING AND BORROWING

The mandate of this Article encompasses "banking," and the author includes within that charge litigation between financial institutions and their borrowers.

### A. Commercial Lending: A Floor-plan Financing

*CT102 LLC v. Automotive Finance Corp.*<sup>11</sup> illustrates "floor-plan financing," a term used to describe a form of inventory financing where the loan is paid off as the goods are sold.<sup>12</sup> It is often deployed when the inventory consists of big-ticket items such as automobiles, farm equipment, and manufactured housing. Some of the details of this case illustrate the operation of this financing technique.

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TERRE HAUTE TRIBUNE-STAR (Dec. 2, 2020), [https://www.tribstar.com/news/local\\_news/vigo-county-to-open-a-commercial-court/article\\_fa8db806-1a13-5ce5-95a3-587f853e0a2b.html](https://www.tribstar.com/news/local_news/vigo-county-to-open-a-commercial-court/article_fa8db806-1a13-5ce5-95a3-587f853e0a2b.html) [https://perma.cc/9R8X-FMT5]. The counties added are Hamilton, Madison, St. Joseph, and Vigo.

6. Tyler Moorhead, *Business Courts: Their Advantages, Implementation Strategies, and Indiana's Pursuit of Its Own*, 50 IND. L. REV. 397, 398 (2016).

7. TERRE HAUTE TRIBUNE-STAR, *supra* note 5.

8. Jordan Morey, *CLE Highlights Benefits of Commercial Courts*, IND. LAW. (Sept. 15, 2022), <https://www.theindianalawyer.com/articles/cle-highlights-benefits-of-commercial-courts> [https://perma.cc/5PB7-X3CE].

9. *See id.*

10. *See id.*

11. 175 N.E.3d 869 (Ind. Ct. App. 2021).

12. *Financing, Floor-plan Financing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

CT102, d/b/a Metro Motors, was an LLC and Jeffrey Baker was its manager, or at least a member.<sup>13</sup> Automotive Finance Corporation (“AFC”) provided funds to enable Metro to purchase vehicles for sale in its used-car business.<sup>14</sup> The terms were set forth in a promissory note signed by Baker on behalf of Metro.<sup>15</sup> In addition, Baker personally guaranteed payment of all of Metro’s obligations under the note.<sup>16</sup>

Under the parties’ agreement, upon the sale of any vehicle financed by AFC, Metro was to “hold the amount received from the disposition of inventory in trust for the benefit of [AFC]” and “remit the proceeds of [the] sale of any AFC-financed vehicle within forty-eight (48) hours of disposition.”<sup>17</sup>

A year into the financing, numerous checks that AFC received from Metro “bounced.”<sup>18</sup> When an AFC branch manager conducted an audit at Metro, he discovered that Metro had sold eight vehicles “out of trust,” i.e., Metro had not remitted the proceeds from the sale of those vehicles to AFC as provided under the agreement.<sup>19</sup> Additional audits revealed that Metro had sold other vehicles out of trust.<sup>20</sup> Metro promised to make the payments and AFC gave Metro additional time to pay, but Metro did not make the payments.<sup>21</sup>

The branch manager returned to the Metro lot “to conduct a lot audit and request vehicle keys, intending to amicably secure possession of AFC’s collateral” under the terms of the agreement.<sup>22</sup> However, Metro refused to give the manager the keys.<sup>23</sup> The manager then “discovered that an additional six vehicles had been sold out of trust, and four vehicles financed by AFC were missing from the lot. Metro owed AFC a total of \$78,996.46 for those ten vehicles (‘the SOT vehicles’).”<sup>24</sup>

AFC was able to reduce the total amount due by repossessing fifteen AFC-financed vehicles from Metro’s lot and selling them at auction but even after doing so, a deficiency of approximately \$124,000 remained under the financing agreement.<sup>25</sup>

AFC’s lawsuit against Metro alleged breach of contract and conversion.<sup>26</sup> AFC sought to leverage the conversion claim by seeking treble damages under

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13. *CT102 LLC*, 175 N.E.3d at 871.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 871-72.

25. *Id.* at 872.

26. *Id.*

the Crime Victim's Relief Act ("CVRA").<sup>27</sup> The trial court entered a judgment of approximately \$322,000 (including interest and attorney's fees) in favor of AFC on its breach of contract claim, but the trial court held that Metro did not commit conversion.<sup>28</sup> Both sides appealed.<sup>29</sup>

Metro argued that the trial court had miscalculated damages by including a \$79,000 item twice.<sup>30</sup> AFC conceded the point, and the Court of Appeals reduced the amount of the award accordingly.<sup>31</sup>

For its part, AFC contended the trial court had committed clear error in not finding Metro guilty of conversion, thereby opening the door to treble damages under the CVRA.<sup>32</sup> The trial court judge had found that AFC had not proved conversion even by a preponderance of the evidence.<sup>33</sup> The Court of Appeals agreed, and its analysis is instructive.<sup>34</sup>

Judge Najam recited precedent to the effect that "money may be the subject of a conversion action only if it is 'a determinate sum with which the defendant was entrusted to apply to a certain purpose.'"<sup>35</sup> He said that this so-called "determinate sum entrusted to apply to a certain purpose is known as a 'special chattel'" and that "money may be the subject of an action for conversion *only* if it is capable of being identified as a special chattel."<sup>36</sup> Now, AFC did not argue at trial that its debt under the agreement constituted a "special chattel" and that was good enough for the Court of Appeals to hold that the record supported the trial court's conclusion on this issue.<sup>37</sup>

The author of this Article is of the view that the "special chattel" requirement was met. The security arrangement specifically said that the proceeds of the sale of the collateral was to be held in trust for AFC and remitted almost immediately. However, Court of Appeals only said that the "special chattel" requirement had been forfeited, not that such a floor-plan arrangement was not a special chattel as a matter of law. And, of course, the Court of Appeals said nothing one way or the other about whether the elements of a conversion claim had been made out by a preponderance of the evidence. The necessity of proving—or disproving—the presence of a "special chattel" is an important practice pointer for civil conversion cases.

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27. *Id.*; see IND. CODE § 34-24-3-1 (2023).

28. *CT102 LLC*, 175 N.E.3d at 872.

29. *Id.*

30. *Id.* at 872-73.

31. *Id.* at 873.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 874 (quoting *Huff v. Biomet, Inc.*, 654 N.E.2d 830, 836 (Ind. Ct. App. 1995), *abrogated on other grounds*, *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699 (Ind. 2002)).

36. *Id.* (citing *Bowden v. Agnew*, 2 N.E.3d 743, 750 (Ind. Ct. App. 2014)).

37. *Id.*

*B. Residential Mortgage Loans: Lapse of More Than Ten Years  
After Judgment of Foreclosure*

Suppose a financial institution forecloses on a mortgage but more than ten years passes before it seeks to sell the property. This was the scenario in *U.S. Bank Trust National Ass’n v. Dugger*.<sup>38</sup>

A financial institution obtained a judgment of foreclosure against Joshua Dugger in 2009, but the financial institution never sold the property.<sup>39</sup> Then Joshua Dugger received a Chapter 7 bankruptcy discharge in 2011.<sup>40</sup> Next, Joshua Dugger sold the property to Steven Dugger in 2016.<sup>41</sup> And finally, Steven Dugger sold the property to the Bainbridges in 2020.<sup>42</sup>

A bank assumed the rights of the foreclosing financial institution in 2021, more than ten years after the date of the foreclosure.<sup>43</sup> The bank then sought to sell the property subject to the 2009 foreclosure order by filing what in the arcane language of Indiana debtor-creditor law is called a “motion for leave to file a praecipe for sheriff’s sale.”<sup>44</sup>

This twelve-year lapse between judgment and praecipe implicated two statutes. The first provides in relevant part: “All final judgments for the recovery of money or costs . . . constitute a lien upon real estate . . . (1) after the time the judgment was entered and indexed; and (2) until the expiration of ten (10) years after the rendition of the judgment . . . .”<sup>45</sup> Did this mean that the judgment against Joshua Dugger ceased to exist because the original mortgagee had not renewed the lien? No, said the Court of Appeals; “[a]lthough a judgment lien expires after ten years, a judgment still exists for at least another ten years.”<sup>46</sup>

While the judgment lien had expired, the judgment had not. However, because neither the foreclosing financial institution nor the bank had renewed the judgment prior to the ten-year mark, a second statute was implicated.<sup>47</sup> It provides in relevant part: “After the lapse of ten (10) years after: (1) the entry of judgment . . . an execution can be issued only on leave of court . . . .”<sup>48</sup> That is, the bank needed to obtain leave of court in order to praecipe for sheriff’s sale.<sup>49</sup>

What about Joshua Dugger’s 2011 bankruptcy? Didn’t that cut off the foreclosing financial institution’s interest in the property? No, the Court of

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38. 193 N.E.3d 1015 (Ind. Ct. App. 2022).

39. *Id.* at 1017.

40. *Id.*

41. *Id.* at 1018.

42. *Id.*

43. *Id.* at 1017.

44. *Id.*

45. IND. CODE § 34-55-9-2 (2023).

46. *Dugger*, 193 N.E.3d at 1019 (citing IND. CODE § 34-11-2-12) (“Every judgment . . . shall be considered satisfied after the expiration of twenty (20) years.”).

47. *See id.*

48. IND. CODE § 34-55-1-2(a).

49. *Dugger*, 193 N.E.3d at 1019.

Appeals again answered. “[A] bankruptcy discharge removes the ability of creditors to seek to collect against the debtor personally, but a mortgage lien, which is in rem (i.e., a right against the property), survives the bankruptcy and remains enforceable.”<sup>50</sup>

Because the underlying mortgage remained in default, the Court of Appeals concluded, the trial court was required to grant leave to the bank to praecipe for a sheriff’s sale.<sup>51</sup>

*C. Residential Mortgage Loans: Impact of COVID-19 Emergency  
Orders on Interest Calculations*

*PNC Bank, National Ass’n v. Page*<sup>52</sup> resolved some disagreement over a provision in Supreme Court “Emergency Orders” issued during the COVID-19 pandemic regarding court administration.

The trial court had granted a money judgment and decree of foreclosure requested by a bank in respect of its customer’s defaulted equity line of credit but had excluded from the judgment interest that had accrued on the debt from March 16, 2020, to August 14, 2020, based upon its understanding of the Emergency Orders.<sup>53</sup>

The trial court held that the interest was not due because several of the Emergency Orders provided that “*no interest shall be due* or charged during this tolled period.”<sup>54</sup> These orders, in effect from March 16, 2020, to August 14, 2020, also tolled “laws, rules, and procedures setting time limits” for trials, orders, and all other matters before the courts of Marion County.<sup>55</sup>

Following the issuance of the Emergency Orders—and separate and apart from the *Page* litigation—various financial institutions petitioned the Supreme Court to clarify that the “no interest shall be due” language of the Emergency Orders did not purport to “curtail the accrual of interest [as] provided . . . [in] private mortgage contracts.”<sup>56</sup> The Court deemed the petition to be an inappropriate request for an “advisory opinion,” thereby relegating such issues to appellate review.<sup>57</sup>

*Page* provided such appellate review. The Court of Appeals held that the “no interest shall be due” language of the Emergency Orders did not limit the bank’s ability to collect unpaid interest that had accrued from March 16 to August 14,

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50. *Id.* at 1020 (citing *McCullough v. CitiMortgage, Inc.*, 70 N.E.3d 820, 820 (Ind. 2017)).

51. *Id.*

52. *PNC Bank, Nat’l Ass’n v. Page*, 186 N.E.3d 633 (Ind. Ct. App. 2022).

53. *Id.* at 634.

54. *Id.* at 635-36 (emphasis added).

55. *Id.* at 635-36; 636 n.4.

56. *In re Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123 (Ind. Mar. 19, 2021).

57. *Id.*; see also *Denman v. St. Vincent Med. Grp., Inc.*, 176 N.E.3d 480, 503 n.12 (Ind. Ct. App. 2021).

2020.<sup>58</sup> The Court grounded its conclusion in separation of powers principles: each branch of government acts within its constitutionally prescribed boundaries.<sup>59</sup> In this context, this meant that the Supreme Court was without constitutional authority to “suspend the automatic accrual of non-discretionary interest provided by the terms of a private loan instrument and as permitted by statute.”<sup>60</sup>

*Flannagan v. Lakeview Loan Servicing, LLC*<sup>61</sup> is an unfortunate tale of lawyers not getting paid for their work. After a residence was destroyed by fire, the homeowner’s attorneys negotiated a settlement with the homeowner’s insurer, which issued two checks, each payable jointly to the homeowner, mortgagee, and attorneys: one for the attorneys’ fees and expenses under their contingency fee contract; and the other for the remaining amount of loss.<sup>62</sup> The mortgagee did not endorse the checks and sought to keep the entire settlement for itself pursuant to the mortgage.<sup>63</sup>

Three salient facts conspired against the lawyers here. First, the mortgagee was not a party to the agreement between the homeowner and lawyers to negotiate with the insurance company.<sup>64</sup> Second, the mortgage loan on the home was in arrears and the amount of the debt exceeded the amount of the insurance proceeds by approximately thirty percent.<sup>65</sup> And third, the mortgage itself provided that “[a]ll or any part of the insurance proceeds may be applied by Lender . . . to the reduction of the indebtedness under the Note and this Security Instrument . . . .”<sup>66</sup>

The lawyers mounted two arguments, one in contract and a second in equity, neither of which were availing at either the trial court or the Court of Appeals.<sup>67</sup> The contract argument was that “insurance proceeds” in the mortgage should be construed to mean insurance proceeds net of attorney fees, but the court found no basis for reading the mortgage in that way.<sup>68</sup> The equitable claim was basically that the insurance proceeds would not exist without the lawyers’ efforts, though it was cast as “unjust enrichment, an equitable attorney lien, equitable subrogation, and the common fund doctrine.”<sup>69</sup> Effectively finding that the lawyers’ work did not result in any benefit to the mortgagee which the mortgagee would not have otherwise realized, the court was also not persuaded by the

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58. *Page*, 186 N.E.3d at 639.

59. *Id.*

60. *Id.*

61. *Flannagan v. Lakeview Loan Servicing, LLC*, 184 N.E.3d 691 (Ind. Ct. App. 2022).

62. *Id.* at 694-95.

63. *See id.* at 695.

64. *Id.*

65. *Id.*

66. *Id.* at 694.

67. *Id.* at 696-99.

68. *Id.* at 696-97.

69. *Id.* at 697.



equitable claim.<sup>70</sup>

### III. BUSINESS LAW

#### *A. Non-Liability for the Torts of Independent Contractors*

Painting with the broadest of brushes, a principal will be liable for contracts made on the principal's behalf by an agent if the agent's authority falls within the common law definitions of express, implied, apparent, or (in some jurisdictions) inherent authority.<sup>71</sup> An employer will be liable for the torts committed by the employee if the employee's acts fall within the common law definition of "scope of employment."<sup>72</sup> However, an employer will not be liable for the torts committed by an employee if the employee falls within the common law definition of an "independent contractor."<sup>73</sup>

In 1999, these separate contract and tort agency doctrines intersected in a most interesting Supreme Court case, *Sword v. NKC Hospitals, Inc.*<sup>74</sup>

At issue was whether a hospital could be held liable for the negligence of an independent contractor anesthesiologist committed during the course of a childbirth at the hospital.<sup>75</sup> The Court made an exception to the general rule of non-liability for the torts of independent contractors, adopting Restatement (Second) of Torts § 429, titled, "Negligence in Doing Work Which is Accepted in Reliance on the Employer's Doing the Work Himself":

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.<sup>76</sup>

The rationale resembled apparent authority—where a hospital by its words or conduct caused a patient reasonably to believe that the physician was the

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70. *Id.* at 698.

71. RESTATEMENT (THIRD) OF AGENCY §§ 2.01-.03, 3.01, 3.03 (AM. LAW INST. 2006). For inherent authority, see *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1211-12 (Ind. 2000) (Sullivan, J.) (discussing cases). See also RESTATEMENT (THIRD) OF AGENCY § 2.03, rep. noted (AM. LAW INST. 2006) (criticizing *Menard*, 726 N.E.2d 1206).

72. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006).

73. RESTATEMENT (SECOND) OF AGENCY § 250 (AM. LAW INST. 1958). The Restatement (Third) of Agency does not use the term "independent contractor." Section 7.07(3) states the criteria that classify a person as an employee, as opposed to a non-agent service provider, for purposes of an employer's vicarious liability for torts committed within the scope of employment. RESTATEMENT (THIRD) OF AGENCY § 7.07, cmt. c (AM. LAW INST. 2006).

74. *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999).

75. *Id.* at 144-45.

76. *Id.* at 149 (quoting RESTATEMENT (SECOND) OF TORTS § 429 (AM. LAW INST. 1965)).

hospital's agent, the hospital should have vicarious liability for the physician's torts.<sup>77</sup> And in fact, courts that have held hospitals liable for the negligence of independent contractor physicians under apparent agency generally employ tests that focus primarily on two basic factors:

- The hospital's manifestations, sometimes described as an inquiry whether the hospital "acted in a manner which would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital."<sup>78</sup>
- The patient's reliance, sometimes characterized as an inquiry as to whether "the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence."<sup>79</sup>

The takeaway was that even where an independent contractor relationship exists, vicarious liability may be imposed where a principal's words or actions create a reasonable belief in a third party that the independent contractor is an employee of the principal, and the third party relies on this belief.<sup>80</sup>

*Sword* was the key precedent for the 2019 federal court case, *Webster v. CDI Indiana, LLC*,<sup>81</sup> which was, in turn, the predicate to two agency cases during the Survey Period: *Arrendale v. American Imaging & MRI, LLC*,<sup>82</sup> and *Wilson v. Anonymous Defendant 1*.<sup>83</sup>

*Webster* was a diversity case regarding a medical malpractice lawsuit arising from a radiologist's negligence.<sup>84</sup> The plaintiff had a CT scan performed at CDI Indiana, LLC's (CDI) diagnostic imaging facility in Carmel.<sup>85</sup> The radiologist, an independent contractor hired by Medical Scanning Consultants (MSC), missed the plaintiff's cancer, which then festered for over a year before being diagnosed.<sup>86</sup> The plaintiff suffered a drastically diminished likelihood of survival, which likely would not have been the case if diagnosed and treated earlier.<sup>87</sup>

The plaintiff and her husband sued CDI.<sup>88</sup> CDI, in response, insisted that the Websters could not hold it liable because of the rule of non-liability for the torts of independent contractors: CDI did not directly employ the radiologist; and the radiologist was an independent contractor.<sup>89</sup> The district court rejected this

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77. *Id.* at 150-51.

78. *Id.* at 151 (quoting *Kashishian v. Port*, 481 N.W.2d 277, 284-85 (Wis. 1992)).

79. *Id.* (quoting *Kashishian*, 481 N.W.2d at 285).

80. *Id.* at 151-52.

81. *Webster v. CDI Ind., LLC*, 917 F.3d 574 (7th Cir. 2019), *aff'g* 337 F. Supp. 3d 818 (S.D. Ind. 2018).

82. *Arrendale v. Am. Imaging & MRI, LLC*, 183 N.E.3d 1064 (Ind. 2022).

83. *Wilson v. Anonymous Defendant 1*, 183 N.E.3d 289 (Ind. 2022).

84. *Webster*, 917 F.3d at 575-76.

85. *Id.* at 575.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 576.

argument and applied Indiana's apparent agency holding in *Sword*, which, as just described, holds that a medical provider is liable if a patient reasonably relied on its apparent authority over the wrongdoer.<sup>90</sup> The jury returned a \$15 million verdict in favor of the plaintiffs,<sup>91</sup> and the Seventh Circuit affirmed.<sup>92</sup>

This was a dramatic demonstration of the importance of the *Sword* decision but likely small consolation for the deceased plaintiff's husband and their children, in part given the damage limitations imposed by the Indiana Medical Malpractice Act ("IMMA").<sup>93</sup>

But lo and behold, the IMMA damage cap did not apply; the plaintiff was entitled to the entire award!

How could that be?

The Indiana Legislature has capped the damages that a plaintiff in a medical malpractice case can recover from a health care provider who "qualifies" under the IMMA—qualification essentially meaning voluntarily subjects itself to the requirements of the IMMA.<sup>94</sup> But a health care provider that does not qualify—does not voluntarily subject itself to—the IMMA is not covered by its damage "and is subject to liability under the law without regard to [the IMMA]."<sup>95</sup>

The diagnostic imaging facility, perhaps thinking itself protected from liability by the independent contractor doctrine, did not subject itself to the requirements of the IMMA, i.e., was not qualified under the Act and therefore not entitled to its protections.<sup>96</sup> This was a straight-up negligence lawsuit with no limitations on damages beyond what due process permits.

*Arrendale* looked a lot like *Webster*. On doctor's orders, Arrendale went to a medical imaging facility called American Imaging & MRI, LLC a/k/a Marion Open MRI to get MRIs of his spine.<sup>97</sup> Marion Open MRI contracted with a radiologist to read the MRIs on an independent contractor basis.<sup>98</sup> The radiologist's "reports and conclusions from reviewing Arrendale's MRIs appeared on Marion Open MRI letterhead and gave no indication of his independent contractor status."<sup>99</sup>

Arrendale's subsequent medical malpractice claim alleged failure to diagnose and treat spinal arteriovenous fistula, resulting in permanent injuries.<sup>100</sup>

The medical imaging facility's argument was pretty much that *Sword* only

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90. *Id.*; *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 151-52 (Ind. 1999).

91. *Webster*, 917 F.3d at 577.

92. *Id.* at 578.

93. IND. CODE art. 34-18 (2023).

94. *See id.* § 34-18-2-24.5; *Webster*, 917 F.3d at 576.

95. *Id.* § 34-18-3-1.

96. *Webster*, 917 F.3d at 576.

97. *Arrendale v. Am. Imaging & MRI, LLC*, 183 N.E.3d 1064, 1067 (Ind. 2022).

98. *Id.*

99. *Id.*

100. *Id.*

applied to hospitals.<sup>101</sup> Another way of phrasing it would be to say that the *Webster* case, which you will remember was decided in federal court, was wrongly decided because it had applied *Sword* outside the hospital setting to a medical imaging facility. It seemed like a pretty slender reed, especially considering that the federal court decision had been rendered by Judge Magnus-Stinson and unanimously affirmed by an ideologically diverse Seventh Circuit panel. And so it was; a unanimous Indiana Supreme Court ruled in favor of the plaintiff, holding that *Sword* applied.<sup>102</sup>

*Wilson* was a little different. A doctor in an orthopedic group performed the surgery on Darci Wilson and then directed her to physical therapy in a physical therapy facility on the second floor of the same building in which the orthopedic group's offices were located.<sup>103</sup> The physical therapy facility was operated by a company called Athletico, which appeared from the record to be an entirely separate business entity, completely unaffiliated with the orthopedic practice.<sup>104</sup>

Wilson was treated by a physical therapist named Christopher Lingle who was employed by Athletico.<sup>105</sup> Wilson's medical malpractice complaint against Lingle, Athletico, and the orthopedic group alleged that "Lingle performed a procedure that caused her 'excruciating pain.'"<sup>106</sup> The orthopedic group defended on grounds that Athletico and its employee, Lingle, were neither employees nor independent contractors of the orthopedic group; that Wilson in effect had employed Athletico for physical therapy and because the orthopedic group was completely separate from Athletico, it could not be held liable.<sup>107</sup>

This distinguished *Wilson* from *Sword*, *Webster*, and *Arrendale*. In those cases, the defendants all had contractual relationships with the doctors who committed the malpractice: the anesthesiologist in *Sword*; the radiologists in *Webster* and *Arrendale*. Lingle and Athletico had no such relationship with the orthopedic group here.<sup>108</sup> This distinction seemed to make a difference below: a very good trial court judge granted the orthopedic group summary judgment on this basis, and the Court of Appeals unanimously affirmed.<sup>109</sup>

But in a quite persuasive opinion for an essentially unanimous Court, Justice Steven David wrote that Wilson's cause of action against the orthopedic group could proceed.<sup>110</sup> He acknowledged that *Sword* did not apply because there was no "legal relationship between the alleged principal and the alleged apparent

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101. *Id.*

102. *Id.* at 1074.

103. *Wilson v. Anonymous Defendant 1*, 183 N.E.3d 289, 292 (Ind. 2022).

104. *Id.*

105. *Id.*

106. *Id.* at 293.

107. *Id.* at 294.

108. *Id.*

109. *Id.* at 293.

110. *Id.* at 298. Chief Justice Rush, and Justices Massa and Goff concurred; Justice Slaughter concurred in judgment with a separate opinion. *Id.* at 298.

agent.”<sup>111</sup> But that did not let the orthopedic group off the hook.<sup>112</sup>

As noted above, *Sword* relied on Restatement (Second) of Torts § 429.<sup>113</sup> In *Wilson*, Justice David accurately observed that *Sword* had also cited Restatement (Second) of Agency § 267 which provides:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.<sup>114</sup>

Note that there is no requirement for any legal relationship here. Justice David continued:

Our rationale in *Sword* did not turn on any qualities unique to hospitals, nor on the specific employment or contractual arrangements between hospitals and their physicians. Instead, our concern was with what a patient reasonably believes because of specific representations that a provider has made—an issue that is just as relevant in the context of non-hospital medical providers.<sup>115</sup>

Because genuine issues of material fact remained as to whether Lingle was the orthopedic group’s apparent agent under section 267, summary judgment was reversed.<sup>116</sup>

#### *D. Existence of Principal-Agent Relationship*

*Steak N Shake Operations, Inc. v. National Waste Associates, LLC* is a most interesting case in which both parties to a contract sought to enforce the same cross-indemnification provision against each other.<sup>117</sup> Steak N Shake Operations, Inc. (“SNS”), contracted with National Waste Associates, LLC, (“National”), to provide waste hauling and recycling services to SNS restaurants.<sup>118</sup> The contract in this case is discussed in greater detail later in this Article,<sup>119</sup> but one of the key

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111. *Id.* at 294.

112. *See id.* at 295.

113. *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999).

114. *Wilson*, 183 N.E.3d at 295 (quoting RESTATEMENT (SECOND) OF AGENCY § 267 (AM. LAW INST. 1958)).

115. *Id.*

116. *Id.* at 298. In a separate opinion, Justice Slaughter took the view that there was a genuine issue of material fact as to whether a legal relationship existed between the orthopedic group and Lingle. *Id.* (Slaughter, J., concurring in judgment). If one did, then the case would fall under Restatement (Second) of Torts § 429, not Restatement (Second) of Agency § 267. *Id.*

117. *Steak N Shake Operations, Inc. v. Nat’l Waste Assocs., LLC*, 177 N.E.3d 816 (Ind. Ct. App. 2021).

118. *Id.* at 819.

119. *See infra* notes 303-26 and accompanying text.

issues in the case—whether a third company, Simon Waste Consulting, LLC (“Simon”), was the agent of SNS—is discussed here.

Prior to SNS contracting with National, SNS had contracted with Simon to provide the same services.<sup>120</sup> Simon in turn had subcontracted with Aspen Waste Systems of Missouri, Inc. (“Aspen”) to provide the services in the St. Louis area.<sup>121</sup> Although SNS had terminated its contract with Simon, Simon had never terminated its contract with Aspen.<sup>122</sup>

National later became embroiled in litigation in Missouri with Aspen, litigation that National maintained had been caused by Simon’s failure to terminate its contract with Aspen.<sup>123</sup> When the Missouri litigation ended, National, proceeding on the theory that Simon was SNS’s agent, initiated this litigation to recover its costs under the indemnification clause of its contract with SNS.<sup>124</sup> The trial court held that the Missouri litigation was caused by Simon’s failure to cancel the Simon-Aspen contract which would be attributable under agency law to SNS.<sup>125</sup> However, SNS argued—and the Court of Appeals agreed—that as a matter of Indiana law, Simon was not SNS’s agent.<sup>126</sup>

“‘Agency’ is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that *the agent shall act on the principal’s behalf and subject to the principal’s control*, and the agent manifests assent or otherwise consents so to act.”<sup>127</sup> A principal is accountable for the acts or omissions of an agent, “first, because the [agent] acts upon an implied command from [the principal] and, second, because the [principal] is presumed to exercise control over the behavior of [the agent].”<sup>128</sup>

The SNS-Simon contract said both that Simon was SNS’s “exclusive agent” and also that Simon and SNS were “independent contracting parties and not agents.”<sup>129</sup> The Court of Appeals deemed this language ambiguous and not helpful in determining the parties’ intent, noting that “the mere express denial of the existence of an agency relationship is not in itself determinative of the matter.”<sup>130</sup> “Thus, the contract’s statements both that Simon was an ‘exclusive agent’ and also ‘not an agent’ cannot be reconciled and do not resolve the agency

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120. *Steak N Shake*, 177 N.E.3d at 819.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 819. The indemnification clause extended to “claims and suits of whatever type, including damages, court costs, attorney’s fees, and other expenses, *caused by any act or omission of themselves or their respective agents.*” *Id.* at 821-22.

125. *Id.* at 819.

126. *Id.* at 820.

127. *Id.* at 827 (citing *Yost v. Wabash Coll.*, 3 N.E.3d 509, 518-19 (Ind. 2014) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006))).

128. *Id.* (quoting *Yost*, 3 N.E.3d at 519).

129. *Id.* at 828.

130. *Id.* at 829 (quoting *Dutton v. Int’l Harvester Co.*, 504 N.E.2d 313, 317 n.2 (Ind. Ct. App. 1987)).

question.”<sup>131</sup>

In determining whether an agency relationship existed, the Court of Appeals introduced its analysis with two decisions, both of which emphasized the degree of the principal’s direction and control of an agent’s activities. In *Carlisle v. Deere & Co.*,<sup>132</sup> the Seventh Circuit had said that the “principal’s control over the purported agent’s day-to-day operations is of paramount importance. Day-to-day operations could include such things as personnel decisions, bookkeeping and financial matters, and buying and selling inventory and supplies.”<sup>133</sup> In *Smith v. Delta Tau Delta, Inc.*,<sup>134</sup> the Supreme Court had held that no principal-agent relationship existed between a national fraternity and a local chapter. Central to its conclusion was that the “national fraternity has no right to direct or control a local fraternity member’s personal actions and behavioral choices. The national fraternity’s role in imposing post-conduct sanctions does not establish the right to control for purposes of creating an agency relationship.”<sup>135</sup> Furthermore, the Supreme Court said the “local fraternity’s everyday management and supervision of activities and conduct of its resident members . . . is not undertaken at the direction and control of the national fraternity.”<sup>136</sup>

From this authority, the Court of Appeals concluded that the “true test” in determining whether an agency relationship exists is how much control the alleged principal has over the alleged agent.<sup>137</sup> Here the court said:

The designated evidence is clear that [SNS] did not reserve the right to control Simon in the performance of its contractual obligations to [SNS]. Rather, the [SNS]-Simon contract described the work to be performed and reserved to [SNS] the right to alter or amend the description and scope of that work. The contract further gave [SNS] post-conduct remedial measures against Simon in the event of Simon’s breach or failure to perform. But the [SNS]-Simon contract did not reserve to [SNS] a right to control the “everyday management and supervision” of Simon’s “activities and conduct” in performing the services described under the contract. The contract did not give [SNS] control over how Simon was to go about conducting its day-to-day operations or its means and methods.<sup>138</sup>

The Court of Appeals bolstered its conclusion that, as a matter of law, the SNS-Simon contract did not establish an agency relationship between SNS and

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131. *Id.*

132. 576 F.3d 649 (7th Cir. 2009) (applying Indiana law).

133. *Id.* at 656 (citing *Leon v. Caterpillar Indus., Inc.*, 69 F.3d 1326, 1333 (7th Cir. 1995)) (citation omitted).

134. 9 N.E.3d 154 (Ind. 2014).

135. *Id.* at 164.

136. *Id.*

137. *Steak N Shake Operations, Inc. v. Nat’l Waste Assocs., LLC*, 177 N.E.3d 816, 830 (Ind. Ct. App. 2021).

138. *Id.*

Simon with three additional points. First, the court said that the designated evidence did not indicate that SNS attempted to exercise any such control over Simon.<sup>139</sup> Second, the text of the SNS-Simon contract demonstrates that it was the parties' intent to make Simon responsible for management of solid waste disposal and recycling without SNS's involvement.<sup>140</sup> Third, discovery showed that National admitted as much when, in a letter to Aspen, it stated that Simon's vice-president "did not sign" the Simon-Aspen contract "as the agent for [SNS]."<sup>141</sup>

#### IV. CONTRACT LAW

##### *A. Back to Basics*

This assignment often gives the author a chance to dig into some really complicated issues. But sometimes, it allows going back to basics. Three breach-of-contract cases during the Survey Period fall into the latter category: the first was resolved on whether there had been an "offer"; the second on whether there had been "consideration"; and the third on whether there had been an "accord and satisfaction."

1. *Offer*.—The first is *Clark County REMC v. Reis*.<sup>142</sup> An REMC—a Rural Electric Membership Cooperative—is a creature of President Roosevelt's response to the Great Depression.<sup>143</sup> In 1935, during the Great Depression, only about ten percent of rural Americans had access to electricity, in contrast to ninety percent of urban Americans.<sup>144</sup> The main cause of this disparity was the cost of constructing power lines.<sup>145</sup> It was simply not profitable for companies to string miles and miles of cable to service widely dispersed farms.<sup>146</sup> By executive order later ratified by Congress, President Roosevelt established the Rural Electrification Administration (REA), which distributed low-cost loans, grants, and structural templates to groups of rural residents, as part of the president's New Deal program.<sup>147</sup> Many of these rural groups organized as cooperatives or "co-ops" which are tax-exempt, nonprofit entities owned by the members they serve. Now a "cooperative" is a special form of business entity, but its structure

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139. *Id.*

140. *Id.*

141. *Id.*

142. 178 N.E.3d 315 (Ind. 2021).

143. See JOHN M. BLUM ET AL., *THE NATIONAL EXPERIENCE* 700 (2d ed. 1968).

144. *Id.*; Chris Dobbs, *Rural Electrification Act*, NEW GA. ENCYCLOPEDIA (Jan. 6, 2021), <https://www.georgiaencyclopedia.org/articles/business-economy/rural-electrification-act/#:~:text=During%20the%201930s%20stark%20differences,people%20living%20in%20rural%20areas> [https://perma.cc/YSS4-X8T8].

145. See Dobbs, *supra* note 144.

146. *Id.*

147. See BLUM ET AL., *supra* note 143; Rural Electrification Act of 1936, Pub. L. 74-605, 49 Stat. 1363.



and operation is not relevant to this case.<sup>148</sup> It is enough to know that it is governed by a Board of Directors elected by the cooperative's members.<sup>149</sup>

A number of individuals who had been on the Board of Directors over the years filed this lawsuit against an REMC in southern Indiana, claiming that they were entitled to participate in the REMC's group health insurance plan even after they had left the Board of Directors.<sup>150</sup> There seems to be no dispute that the Board had adopted resolutions over time providing for exactly that: directors who had served on the Board for a specified number of years could continue to participate in the cooperative's group health insurance plan even after they retired.<sup>151</sup>

In 2014, the Board changed this policy, eliminating the eligibility for group health-insurance coverage for former directors, replacing it with a system of reimbursing the directors for a portion of the cost of their own health insurance.<sup>152</sup> And in 2018, the Board terminated that new reimbursement policy.<sup>153</sup>

The former directors—the plaintiffs in this litigation—maintained that this constituted a breach of contract.<sup>154</sup> Both the trial court and the Court of Appeals agreed and entered summary judgment against the REMC.<sup>155</sup> The Indiana Supreme Court unanimously reversed.<sup>156</sup> And it didn't just remand for fact-finding; it held for the REMC as a matter of law.<sup>157</sup>

The law here comes from contracts, not business organizations law. The Supreme Court held that the 2014 Board policy that established reimbursement benefits for former directors was not an offer because it did not convey with reasonable certainty promises manifesting an intention or invitation to contract with another.<sup>158</sup> With no offer, there was no contract, and the plaintiffs' breach-of-contract claims failed.<sup>159</sup>

This decision holds together as a matter of contract law, but its implications for the law of business organizations are tantalizing. They seem to be that action taken by a corporate board does not by itself create any legally binding obligation by the Corporation. If that is correct, a person doing business with a corporation should not rely on unilateral board action but instead enter into a bilateral contract with the corporation embodying the commitment made in the board resolution.

2. *Consideration.*—The next back-to-basics case is *Bassett v. Scott Pet*

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148. See IND. CODE ch. 8-1-13 (2023).

149. *Id.* § 8-1-13-6.

150. *Clark Cnty. REMC v. Reis*, 178 N.E.3d 315, 317 (Ind. 2021).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 317-18.

156. *Id.* at 320.

157. *Id.* at 317-18, 320.

158. *Id.* at 318-19.

159. *Id.* at 319.

*Products, Inc.*<sup>160</sup> A family that included Mike and Kathy Bassett sold their company to a company owned by a family named Harlan in 1999.<sup>161</sup> Mike and Kathy went to work for the Harlans' company, to be referred to as "SPP."<sup>162</sup> Mike then came to work for the Harlans pursuant to an employment contract that provided that Mike would receive "remuneration for his services an annual base salary" and there would be an annual review of Mike's performance and compensation, "at which time the compensation may be increased, decreased, or remain the same as the parties may mutually agree."<sup>163</sup> The employment agreement did not contain any mention of Mike receiving an ownership interest in the Harlans' company; and it contained an integration clause.<sup>164</sup>

Mike's employment pursuant to this agreement lasted almost twenty-one years until Mike was fired in 2020.<sup>165</sup>

At least two things of note happened in the intervening decades. First, the Harlans and Mike periodically negotiated Mike acquiring an equity interest in the Harlans' business.<sup>166</sup> "[T]he parties initially discussed him receiving a 20% interest, but after 2008, Mike's putative interest was always discussed as being 15%. These negotiations would periodically become more pointed or intense, only to eventually die out."<sup>167</sup>

Second, in 2008, the Harlans' company loaned Mike \$200,000 to assist in financing a transaction.<sup>168</sup> The loan documents recited that Mike's repayment obligation was secured by Mike's fifteen percent stake in the Harlans' company.<sup>169</sup> However, no shares in the Harlans' company were ever issued to Mike.<sup>170</sup> (As Mike repaid the loan in accordance with its terms, the availability of the stock as collateral never became an issue.)<sup>171</sup>

When Mike was fired, he sued for breach of contract to obtain the fifteen percent stake in SPP.<sup>172</sup> The Harlans said there was no contract as Mike had provided no consideration.<sup>173</sup> Mike responded that his work for the company for twenty years provided consideration and that the Harlans had acknowledged the existence of the fifteen percent interest through the doctrine of partial performance.<sup>174</sup> In addition, he said that the doctrine of promissory estoppel

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160. 194 N.E.3d 1185 (Ind. Ct. App. 2022), *trans. denied*, 205 N.E.3d 197 (Ind. 2023).

161. *Id.* at 1188.

162. *Id.*

163. *Id.* at 1188-89.

164. *Id.* at 1189.

165. *Id.*

166. *Id.*

167. *Id.* at 1189.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 1189-90.

173. *Id.* at 1191.

174. *Id.* at 1192.

entitled him to the fifteen percent.<sup>175</sup>

The court held that although the parties had agreed on many of the essential terms of Mike's ownership interest in SPP, the ownership agreement failed for lack of consideration.<sup>176</sup> Mike's work for the Harlans' company over the twenty years was pursuant to the initial employment agreement and did not provide independent consideration for the fifteen percent equity stake.<sup>177</sup>

Mike's additional argument that the parties' agreement that his pledge of stock in SPP as collateral for the \$200,000 loan constituted recognition by the Harlans that a contract existed fared no better. The court said that none of the documentation surrounding the loan had been signed by the Harlans or SPP, negating any inference of partial performance.<sup>178</sup>

Finally, the court rejected Mike's claim of promissory estoppel, finding no designated evidence of detrimental reliance on Mike's part to any promise of the fifteen percent equity interest.<sup>179</sup> Here, the court deployed the Restatement (Second) of Contracts definition of promissory estoppel, adopted as Indiana law by the Supreme Court in 1991.<sup>180</sup>

3. *Accord and Satisfaction*.—In *Armbruster v. Tran*, a commercial rent collection action, the trial court granted partial relief to the lessee on grounds of accord and satisfaction, but the Court of Appeals reversed.<sup>181</sup>

The lessee had signed a commercial lease with a lessor in 2008.<sup>182</sup> That lease had been terminated, and a second lease for the same property was signed in 2016 with a successor in interest to the original lessor.<sup>183</sup> The lessee accumulated substantial arrearages under both leases, and the second lease was terminated in 2018 after the lessee vacated the premises following demand from the lessor.<sup>184</sup>

The lessor accelerated the minimum rent, additional rent charges, and interest.<sup>185</sup> The lessor then filed suit the next year and the lessee filed a counterclaim for breach of contract.<sup>186</sup> The trial court awarded the lessor damages related to the second lease only, concluding that the doctrines of accord and satisfaction and waiver relieved the lessee of liability related to the first lease.<sup>187</sup> More specifically, the trial court held that the general partner of the lessor either accepted the payments made by lessee "in full satisfaction" of the obligations

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175. *Id.* at 1195.

176. *Id.* at 1192-95.

177. *Id.* at 1193-94.

178. *Id.* at 1195.

179. *Id.* at 1195-97.

180. *Id.* at 1195-96.

181. *Armbruster v. Tran*, 2021 WL 6122630 (Ind. Ct. App. Dec. 28, 2021) (unpublished decision).

182. *Id.* at \*1.

183. *Id.*

184. *Id.*

185. *Id.* at \*1-2.

186. *Id.* at \*2.

187. *Id.*

owing during the period of the first lease; or if not accepting the payments in full satisfaction of what was owed, the general partner, “waived the arrears of rent, taxes, and insurance.”<sup>188</sup>

“The term ‘accord’ denotes an express contract between two parties by means of which the parties agree to settle some dispute on terms other than those originally contemplated, and the term ‘satisfaction’ denotes performance of the contract.”<sup>189</sup> Under Indiana law, “a check tendered in satisfaction of a claim must be accompanied by an express condition that the acceptance is in full satisfaction of the claim and that the creditor takes the check subject to that condition. Further, and most importantly, the creditor must positively understand the condition upon which the check is tendered.”<sup>190</sup>

The Court of Appeals found no evidence in the record that the lessee ever tendered a check to the lessor “accompanied by an express condition that its acceptance was in full satisfaction of her then-current obligation, whether through language on the check to that effect or by any other means,” or that the general partner of the lessor ever accepted a check on behalf of the lessor “positively understanding that he was accepting it as full satisfaction for any obligation.”<sup>191</sup>

### *B. Insurance Coverage for COVID-19 Losses*

When COVID-19 emergency orders shuttered the venerable Indiana Repertory Theatre (IRT), did IRT’s business interruption insurance cover the economic losses sustained? “No,” answered the Marion County Commercial Court in granting the insurer’s motion for summary judgment.<sup>192</sup> A panel of the Court of Appeals unanimously affirmed.<sup>193</sup> And the Supreme Court unanimously denied transfer.<sup>194</sup>

The case was *Indiana Repertory Theatre v. Cincinnati Casualty Co.*,<sup>195</sup> and the theatre’s cause was championed by the intrepid advocates of insurance policy holders, Plews Shadley Racher and Braun LLP.<sup>196</sup> Amicus weighed in on both

188. *Id.* at \*3.

189. *Id.* (quoting *Mominee v. King*, 629 N.E.2d 1280, 1282-83 (Ind. Ct. App. 1994) (citing *Reed v. Dillon*, 566 N.E.2d 585, 590 (Ind. Ct. App. 1991))).

190. *Id.* at \*4 (quoting *Mominee*, 629 N.E.2d at 1282-83 (citing *Rauch v. Shots*, 533 N.E.2d 193, 194 (Ind. Ct. App. 1989))).

191. *Id.*

192. Order Denying Plaintiff’s Motion for Partial Summary Judgment, Granting Defendant’s Cross-Motion for Summary Judgment, *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, No. 49D01-2004-PL-013137 (Marion Cnty. Comm. Ct. Mar. 12, 2021).

193. *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App.), *trans. denied*, 193 N.E.3d 372 (Ind. 2022).

194. *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 193 N.E.3d 372 (Ind. 2022) (denying transfer 5-0).

195. *Ind. Repertory Theatre*, 180 N.E.3d 403.

196. PLEWS SHADLEY RACHER & BRAUN, <https://www.psr.com/> (last visited Apr. 16, 2023); see Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 54 IND. L. REV. 783, 814 (2022).

sides,<sup>197</sup> but in the end, the dispute was a straightforward matter of contract construction, using the special rules applicable to interpreting insurance contracts.

Judge Melissa May set forth those rules as enunciated in earlier decisions of the Supreme Court at the outset of her decision for the Court of Appeals:

When interpreting an insurance policy, we give plain and ordinary meaning to language that is clear and unambiguous. Policy language is unambiguous if reasonable people could not honestly differ as to its meaning. To this end, we look to see “if policy language is susceptible to more than one interpretation.” Further, “[a]mbiguous provisions in insurance policies are construed in favor of the insured. This is particularly true with unclear provisions that limit or exclude coverage. Where provisions limiting coverage are not clearly and plainly expressed, the policy will be construed most favorably to the insured, to further the policy’s basic purpose of indemnity. ‘This strict construal against the insurer is driven by the fact that the insurer drafts the policy and foists its terms upon the customer. “The insurance companies write the policies; we buy their forms or we do not buy insurance.”’”

“A reasonable construction that supports the policyholder’s position must be enforced as a matter of law.”<sup>198</sup>

Thus, the task was whether the relevant insurance policy language at issue was ambiguous. According to the Court of Appeals:

As part of its “BUILDING AND PERSONAL PROPERTY COVERAGE FORM (INCLUDING SPECIAL CAUSES OF LOSS)”, as part of ‘SECTION A. COVERAGE’, the Policy states, “We will pay for direct ‘loss’ to Covered Property at the ‘premises’ caused by or resulting from any Covered Cause of Loss.”

In the introduction to the policy, there is language indicating, in relevant part, “words and phrases that appear in quotation marks have special meaning. Refer to SECTION G. DEFINITIONS.”

Under “SECTION A. COVERAGE[,]” the phrase “Covered Causes of Loss” is defined as “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part.”

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197. *Ind. Repertory Theatre*, 180 N.E.3d at 404 n.2, n.3.

198. *Id.* at 407 (citing *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998); and *Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008, 1014 (Ind. 2010); and quoting *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998) (citing and quoting in turn *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Masonic Accident Ins. Co. v. Jackson*, 200 Ind. 472, 164 N.E. 628 (1929); and *American Economy Ins. Co. v. Liggett*, 426 N.E.2d 136, 142 (Ind. Ct. App. 1981))).

“SECTION G. DEFINITIONS” defines loss as “accidental physical loss or accidental physical damage.”<sup>199</sup>

Judge Heather Welch of the Marion County Commercial Court interpreted this language as follows:

The Court finds that when read together and in context, the Policy’s requirement of direct physical loss or damage to property is not ambiguous. The Court points out that IRT must demonstrate that its insured property underwent some type of direct and physical loss or damage. Here IRT has asserted that it lost the use of its theatre for its intended purpose. The inquiry is whether this loss of use is a direct physical loss to property. The Court finds that it is not. IRT’s loss of use does not have any physical impact on its property. No evidence exists that the theatre was physically different on March 23, 2020 when IRT announced “the IRT is closed due to the State of Indiana’s COVID-19 orders.” To properly construe the Policy, the court must give effect to the “physical” requirement, which is also consistent with the law of Indiana and other jurisdictions that have dealt with the issue. If loss of use alone qualified as direct physical loss to the property, then the term “physical” would have no meaning. The Court cannot interpret the Policy in a way that nullifies one of its terms. The Court finds that the Policy requires physical alteration to the premises to trigger the business income coverage.

Other provisions of the Policy also support the conclusion that there is no business income coverage without structural alteration to property. The business income coverage applies to the “period of restoration.” The “period of restoration” begins with the date of loss and ends on the date when “the property at the ‘premises’ should be repaired, rebuilt or replaced” or “business is resumed at a new permanent location.” The Court notes that there is nothing to “repair,” “rebuild” or “replace” if the premises have not been damaged. The Court further notes that COVID-19 has not physically harmed or changed the theatre. IRT has produced no evidence that the virus was ever present at its theatre. In addition, the evidence shows that IRT undertook projects at the theatre during the pandemic, demonstrating that the theatre was not uninhabitable. This evidence defeats any conclusion that the loss of use IRT experienced had a physical impact on the theatre premises or that the theatre was completely unusable. Because there is nothing to repair, replace or rebuild; there has been no direct physical loss.<sup>200</sup>

The Court of Appeals reached the same conclusion. In doing so, it considered IRT’s argument that it could have suffered “‘physical loss or physical damage’

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199. *Id.*

200. *Id.* at 408.

without the premises being ‘altered or impacted’” because “IRT could not physically use the theatre to host live performances because doing so would expose patrons to a lethal disease.”<sup>201</sup> In doing so, IRT cited a number of pre-pandemic cases from outside Indiana to argue that “‘physical loss’ language included property that is unusable or unsafe for its intended purpose, even without tangible alteration or structural damage.”<sup>202</sup> The Court of Appeals found the cases inapt because the policies at issue included language providing protection from “risk of” loss, coverage not provided by IRT’s policy.<sup>203</sup> Rather, the court looked to other authority construing similar policy language which held that coverage was not provided.<sup>204</sup>

The court expressed sympathy for the plight of IRT and the “[m]illions of small business owners [who] suffered losses due to the COVID-19 pandemic,” stating that “the ensuing worldwide financial crisis is dire.”<sup>205</sup> But, the court said, “we cannot ignore well-established principles of insurance contract interpretation and add provisions in the Policy that do not exist. IRT did not suffer physical loss or physical damage under the language of the Policy because the premises covered, that is the theater building located at 140 W. Washington Street in Indianapolis, was not destroyed or altered in a physical way that would require restoration or relocation.”<sup>206</sup> The trial court’s grant of summary judgment in favor of Cincinnati Casualty “because the plain language of the Policy between the parties did not cover IRT’s claim” was affirmed.<sup>207</sup>

### *C. Two Cases Explicating the Economic Loss Rule*

The economic loss rule enunciates a dividing line between recovery in contract and recovery in tort. A defendant is not liable under a tort theory for any purely economic loss caused by its negligence.<sup>208</sup> But where parties are not in privity of contract, the economic loss doctrine does not bar recovery in tort by one party for damages caused by the tortious conduct of the other.<sup>209</sup> These principles were ably explicated by the Court of Appeals and Supreme Court, respectively, in two interesting cases during the Survey Period.

In *LPC Surgery Center. v. KJG Architecture*, two physicians who specialized

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201. *Id.* at 408-09.

202. *Id.* at 409 (citing *Hampton Foods Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986); *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 115 A.3d 799 (2015); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968)).

203. *Id.*

204. *Id.* at 410 (citing *Roundabout Theatre Co. v. Cont’l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021)).

205. *Id.*

206. *Id.*

207. *Id.* at 411.

208. *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 745 (Ind. 2010).

209. *Id.*

in pain management sought to expand the size and scope of their clinic.<sup>210</sup> They<sup>211</sup> hired a project architect who, in turn, hired both a consultant to assure that the project would meet Indiana State Department of Health (ISDH) regulations and a subcontractor to provide mechanical engineering services for the project.<sup>212</sup>

The project encountered difficulties, and the physicians and the company formed to own the project sued the architect, consultant, and subcontractor for both breach of contract and negligence.<sup>213</sup> They alleged “damages of \$5.7 million for loss of use, redesign, and reinstallation of HVAC system, as well as lost revenue of \$350,000 a month for each month that the procedure rooms could not be used” because they did not comply with ISDH regulations.<sup>214</sup> The trial court granted the defendants’ requests for summary judgment on the negligence claims on grounds that they were barred by the economic loss rule.<sup>215</sup>

Both sides in this case agreed that the damages alleged by the plaintiffs were for purely economic losses, but the plaintiffs maintained that they were not subject to the economic loss rule because the requisite privity of contract did not exist among the parties.<sup>216</sup> However, in *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*,<sup>217</sup> the Supreme Court held that even where the parties were not all in privity of contract with each other, “the economic loss rule precludes participants in major construction projects connected through a network or chain of contracts from proceeding against each other in tort for purely economic loss.”<sup>218</sup> Here, the Court of Appeals affirmed the trial court’s conclusion that the physicians, their company, and the architect, consultant, and subcontractor were connected through just such a network or chain of contracts and so any action in tort against the defendants was precluded.<sup>219</sup>

*Residences of Ivy Quad Unit Owners Ass’n v. Ivy Quad Development, LLC*,<sup>220</sup> which also implicated the economic loss rule, was a different kettle of fish from *LPC Surgery Center*.

The plaintiff was a homeowners’ association (“HOA”) comprised of the

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210. *LPC Surgery Ctr. v. KJG Architecture*, 2021 WL 4270073, at \*\*1 (Ind. Ct. App. Sept. 21, 2021) (unpublished decision), *trans. denied*, 180 N.E.3d 933 (Ind. 2022).

211. At some point after the physicians engaged the architect, the physicians appear to have transferred ownership of the project to a limited liability company. The Court of Appeals held that this was a distinction without a difference. *Id.* at \*\*5.

212. *Id.* at \*\*1.

213. *Id.* at \*\*3.

214. *Id.*

215. *Id.*

216. *Id.* at \*\*4.

217. *Indianapolis-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010) (Sullivan, J.).

218. *Id.* at 739.

219. *LPC Surgery Ctr.*, 2021 WL 4270073, at \*\*4-5.

220. *Residences at Ivy Quad Unit Owners Ass’n v. Ivy Quad Dev. LLC*, 179 N.E.3d 977 (Ind. 2022).



residents of what the author of this Article knows to be a sixty-eight-unit condominium complex called Ivy Quad across the street from the University of Notre Dame that alums and others have purchased for use while visiting the campus, especially during football season. In the fall of 2017, unit owners began noticing crumbling and cracking concrete and water infiltration at Ivy Quad.<sup>221</sup> The HOA hired an engineering firm that conducted multiple inspections and produced five reports identifying a wide range of construction and design defects.<sup>222</sup>

Armed with these reports, the HOA sued two categories of defendants for negligence: the “Matthews Defendants,” essentially the developer and affiliated entities; and various subcontractors involved in the construction of the complex.<sup>223</sup> The Matthews Defendants<sup>224</sup> filed a motion to dismiss, arguing that the negligence claim was barred by the economic loss doctrine, which the trial court granted in a brief order.<sup>225</sup> As the Court of Appeals and Supreme Court would later agree, the trial court was incorrect in doing so.<sup>226</sup>

First, the economic loss rule itself holds that a person is not subject to liability for negligence for “purely economic loss,”<sup>227</sup> i.e., pecuniary harm not resulting from an injury to the plaintiff’s person or property.<sup>228</sup> Just as in *LPC Surgery Center*,<sup>229</sup> for example, this provided no basis for granting defendants’ motion to dismiss because this was not “purely” economic loss: the plaintiffs did suffer substantial injury to their property.<sup>230</sup>

Second, as discussed in connection with *LPC Surgery Center*,<sup>231</sup> the economic loss rule mandates that where economic loss allegedly incurred is covered by the subject of a contract between the parties, the plaintiff cannot maintain a separate tort action.<sup>232</sup> This, too, did not provide a basis for granting the defendants’ motion to dismiss because the plaintiff HOA did not recite or allege the existence of a contract or contracts between itself and the defendants.<sup>233</sup>

*LPC Surgery Center* turned in large part on the Supreme Court’s holding in *Charlier Clark & Linard*: that even where the parties were not all in privity of

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221. *Id.* at 980.

222. *Id.*

223. *Id.* at 980-81.

224. The trial and appellate court decisions to be discussed here involve only the Matthews Defendants.

225. *Residences at Ivy Quad*, 179 N.E.3d 977 at 981.

226. *Id.* at 981, 983-84.

227. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 (AM. L. INST. 2020).

228. *Id.* at § 2.

229. *LPC Surgery Ctr., LLC v. KJG Architecture, Inc.*, 2021 WL 4270073 (Ind. Ct. App. Sept. 21, 2021) (unpublished decision), *trans. denied*, 180 N.E.3d 933 (Ind. 2022); *see supra* notes 209-218 and accompanying text.

230. *Residences at Ivy Quad*, 179 N.E.3d at 983-94.

231. *LPC Surgery Ctr.*, 2021 WL 4270073, at \*\*4; *supra* notes 210-219 and accompanying text.

232. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 3 (AM. L. INST. 2020).

233. *Residences at Ivy Quad*, 179 N.E.3d at 984.

contract with each other, “the economic loss rule precludes participants in major construction projects connected through a network or chain of contracts from proceeding against each other in tort for purely economic loss.”<sup>234</sup>

The trial court in *Residences of Ivy Quad* likely thought that this principle exonerated the defendants from liability but, if that was its reasoning, it was wrong for two reasons. First and foremost, the plaintiff in *Charlier Clark & Linard* was the owner of the project—the Public Library—which had commissioned the library renovation and expansion project and owned it throughout construction.<sup>235</sup> (These were also the facts in *LPC Surgery Center*.)<sup>236</sup> In contrast, in *Residences of Ivy Quad*, neither the HOA nor the individual unit owners commissioned the condominium construction project nor owned it or any part of it until construction was completed and units were sold by the developer.<sup>237</sup> Second, even if there had been a network or chain of contracts among the defendants, neither the plaintiff nor any of the unit holders was connected to it.<sup>238</sup>

Recognizing that neither general principles of economic loss nor *Charlier Clark & Linard* applied, the Court of Appeals reversed in a very careful and impressive examination of the economic loss rule.<sup>239</sup> The Supreme Court unanimously affirmed the decision of the Court of Appeals.<sup>240</sup> Its grounds were narrower than the views just expressed but only slightly so: “the HOA’s complaint includes nothing about if, or to what extent, the parties were connected contractually. . . . And without a factual basis demonstrating any contractual relationship between the HOA and the Matthews Defendants, it would be unjust to foreclose a tort theory of relief based on the economic loss doctrine.”<sup>241</sup>

#### *D. A Land Sales Contract in Bankruptcy*

Under the famous Indiana case of *Skendzel v. Marshall*, the Supreme Court held land sales contracts to be in the nature of mortgage financings and subject to all of the applicable remedies at law and in equity, including the right of redemption.<sup>242</sup> As such, the land contract sellers in *Newby v. Newby* were required to file a foreclosure action to recover land sold on contract to a married couple

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234. *LPC Surgery Ctr.*, 2021 WL 4270073, at \*\*4 (quoting Indianapolis-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 739 (Ind. 2010)).

235. *Charlier Clark & Linard*, 929 N.E.2d at 725.

236. *LPC Surgery Ctr.*, 2021 WL 4270073, at \*\*1-2.

237. *Residences of Ivy Quad Unit Owners Ass’n v. Ivy Quad Dev., LLC*, 164 N.E.3d 142, 145 (Ind. Ct. App. 2021), *vacated*, 179 N.E.3d 977 (Ind. 2022).

238. *Id.* at 150-51.

239. *Id.* at 149-53.

240. *Residences at Ivy Quad Unit Owners Ass’n v. Ivy Quad Dev. LLC*, 179 N.E.3d 977 (Ind. 2022).

241. *Id.* at 984 (citation omitted).

242. *Skendzel v. Marshall*, 301 N.E.2d 641, 646 (Ind. 1973).

following the couple's default.<sup>243</sup> But because the property was being purchased on contract, the land contract purchasers did not own the property as tenants by the entireties (or otherwise)—they were separate parties on the land sale contract.<sup>244</sup> This gave them some protections under the Bankruptcy Code that tenants by the entireties do not have in a mortgage financing.

Shortly after the land contract sellers filed for foreclosure, the wife filed a petition for bankruptcy under Chapter 13.<sup>245</sup> Under § 362 of the Bankruptcy Code, bankruptcy petitions automatically stay proceedings, recovery of claims, and enforcement of judgments against debtors.<sup>246</sup> As such, the foreclosure action against the wife's interest in the land could not proceed. And the foreclosure action against the husband's interest was also stayed by operation of Chapter 13's co-debtor protection provision in § 1301 that prohibits "act[ing], or commenc[ing] or continu[ing] any civil action, to collect all or any part of a consumer debt of the debtor *from any individual that is liable on such debt with the debtor*."<sup>247</sup>

At some point, the wife's Chapter 13 petition was dismissed.<sup>248</sup> However, she filed a second Chapter 13 petition about one year after filing the first, again staying the foreclosure proceedings against both her (by operation of § 362) and her husband (by operation of § 1301).<sup>249</sup> Nine months later, this second petition was dismissed although the foreclosure court was not notified of the second dismissal until another eight months had passed.<sup>250</sup> Thirty days after that notice was filed, wife again filed for bankruptcy, this time under Chapter 7.<sup>251</sup>

Soon thereafter, the trial court entered a money judgment against husband and foreclosed his interest in the land.<sup>252</sup> On appeal, husband argued that the foreclosure action should have continued to have been stayed given his status as a codebtor with his wife on the land contract.<sup>253</sup> But while wife's two Chapter 13 bankruptcy filings had stayed the proceedings against both husband and wife, this time wife's third bankruptcy filing had been under Chapter 7, not Chapter 13.<sup>254</sup> "Chapter 7 bankruptcy filings act to stay proceedings only against debtor(s). There is no provision under Chapter 7 that extends the protections of Section 362 to co-debtors."<sup>255</sup> Thus, the trial court was not precluded from entering judgment

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243. *Newby v. Newby*, 2022 WL 760761, at \*\*2 (Ind. Ct. App. Mar. 14, 2022) (unpublished decision).

244. *See id.*

245. *Id.*

246. 11 U.S.C. § 362.

247. *Newby*, 2022 WL 760761, at \*\*6 (quoting 11 U.S.C. § 1301(a)).

248. *Id.* at \*\*2 n.4.

249. *Id.* at \*\*2.

250. *Id.* at \*\*2, \*\*5.

251. *Id.* at \*\*3.

252. *Id.* at \*\*6-7.

253. *Id.* at \*\*6.

254. *Id.*

255. *Id.*

against the husband.<sup>256</sup>

*E. The Statute of Frauds and Promissory Estoppel*

*Hutsler v. Snyder* is a nice case that reminds us of the relationship between the Statute of Frauds and the equitable principle of promissory estoppel.<sup>257</sup>

This is a dispute between a brother and a sister.<sup>258</sup> In 2002, their mother's home was sold for \$225,512.44 following the mother's death.<sup>259</sup> At that time, the sister received \$30,000 toward her one-half share of \$112,756.22.<sup>260</sup> The sister and her brother agreed that the remaining balance of \$82,756.22 would be paid to her on her twenty-fifth birthday in 2006.<sup>261</sup> When 2006 arrived, he told her he did not have the money and would pay her on her thirtieth birthday in 2011.<sup>262</sup> And then, in 2012, he told her and her lawyer that he would not pay her at all.<sup>263</sup> In the meantime, the brother had transferred to the sister amounts ranging from \$2,800 to \$5,000 on four occasions between 2003 and 2009.<sup>264</sup> This lawsuit was filed in 2014.<sup>265</sup>

Indiana's codification of the Statute of Frauds provides, in pertinent part:

A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent: . . .

(5) An action involving any agreement that is not to be performed within one (1) year from the making of the agreement.<sup>266</sup>

Both brother and sister "agree[d] the Agreement at issue was never reduced to writing and, therefore, falls within the Statute of Frauds."<sup>267</sup> However, the sister relies on Supreme Court authority that "[e]ven when oral promises fall within the Statute of Frauds, they may be enforced under the doctrine of promissory estoppel."<sup>268</sup>

In this regard, "promissory estoppel has five elements: '(1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3)

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256. *Id.* at \*\*7.

257. *Hutsler v. Snyder*, 2022 WL 2232326 (Ind. Ct. App. June 22, 2022) (unpublished decision).

258. *Id.* at \*1.

259. *Id.*

260. *Id.* at \*1-2.

261. *Id.* at \*2.

262. *Id.*

263. *Id.* at \*5.

264. *Id.*

265. *Id.* at \*1.

266. *Id.* at \*4 (quoting IND. CODE § 32-21-1-1(b)).

267. *Id.*

268. *Id.* (quoting *Brown v. Branch*, 758 N.E.2d 48, 51 (Ind. 2001)).

which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise.”<sup>269</sup>

The trial court determined the sister’s claim of promissory estoppel failed on the second and third elements, but the Court of Appeals disagreed.<sup>270</sup>

As to the expectation of reliance, the court held that this element was satisfied by the brother’s admission that he expected his sister to rely on his promise to pay her one-half of the proceeds of the sale and that she did rely until 2012, when he refused to pay her the remainder due.<sup>271</sup>

As to the reasonableness element, the court found “a genuine issue of material fact about the reasonableness of [the sister’s] continued reliance on [her brother’s] promise.”<sup>272</sup> Without more information about these two siblings, and their relationship before the agreement was made and during the ten years in which the brother repeatedly gave his sister small amounts of money with continued promises to pay the remainder, the court said that it could not “declare, as a matter of law, that [the sister’s] continued reliance on [her brother’s] promise that she would receive half of the value of their mother’s house was reasonable or unreasonable.”<sup>273</sup>

#### *F. Unjust Enrichment – Not*

“Unjust enrichment” is a label given to so-called “constructive contracts” which are not actually contracts at all; such “contracts” are also called quantum meruit, contracts implied-in-law, or quasi contracts.<sup>274</sup> It is “a legal fiction invented by the common-law courts in order to permit a recovery . . . where, in fact, there is no contract, but where the circumstances are such that under the law of natural and immutable justice there should be a recovery as though there had been a promise.”<sup>275</sup>

In *Scott v. McQuiddy*, Rick Scott and Nicholas McQuiddy had what they both agreed was a verbal rent-to-own agreement under which Scott would pay \$500 per month to McQuiddy toward a \$43,500 purchase price of some real estate.<sup>276</sup> The property turned out to be star-crossed: the house on the property burned down such that it was uninhabitable, was condemned by the building commissioner, and was determined to be in a floodplain such that it was “almost impossible to be able to rebuild there.”<sup>277</sup>

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269. *Id.* (quoting *Brown*, 758 N.E.2d at 52).

270. *Id.* at \*4-5.

271. *Id.* at \*5.

272. *Id.*

273. *Id.*

274. *See, e.g.,* *Zoeller v. E. Chi. Second Century, Inc.*, 904 N.E.2d 213, 220-21 (Ind. 2009).

275. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991) (quoting *Clark v. Peoples Sav. & Loan Ass’n*, 46 N.E.2d 681, 682 (Ind. 1943)).

276. *Scott v. McQuiddy*, 2021 WL 4998498, at \*1 (Ind. Ct. App. 2021) (unpublished decision).

277. *Id.*

Nevertheless, Scott still desired the property, and he and McQuiddy agreed that the purchase price would be reduced to \$18,500.<sup>278</sup> Eventually, however, Scott stopped paying because “no improvements had been made,” which he said McQuiddy promised to make.<sup>279</sup> Scott sued McQuiddy to recover the amount paid.<sup>280</sup>

The sole issue on appeal was whether Scott was entitled to recover the amount paid on the theory of “unjust enrichment.”<sup>281</sup> Scott was relegated to the theory of unjust enrichment because the agreement itself was unenforceable as violative of the Statute of Frauds.<sup>282</sup>

“Indiana courts articulate three elements for an unjust enrichment claim.”<sup>283</sup> Scott had the burden of proving “that: (1) he conferred a benefit upon another at the express or implied consent of such other party; (2) allowing the other party to retain the benefit without restitution would be unjust; and (3) he *expected payment*.”<sup>284</sup>

The Court of Appeals held that Scott failed to meet his burden to establish he had an expectation of recouping the money paid to McQuiddy toward the purchase of the property.<sup>285</sup> Indeed, “Scott had testified that he was never told by McQuiddy that he would be reimbursed for the \$500 monthly payments.”<sup>286</sup>

#### *G. The Enforceability of Agreements to Agree*

A mere “agreement to agree” at some future time is not an enforceable contract.<sup>287</sup> That is, “the so-called ‘contract to make a contract’ is not a contract at all.”<sup>288</sup> Parties may enter into an enforceable contract that requires them to execute a subsequent final written agreement if all the essential terms are detailed in the first agreement.<sup>289</sup> But “an agreement with the understanding that neither party is bound until a subsequent formal written document is executed” is not an enforceable contract “until the subsequent document is executed.”<sup>290</sup>

In *Ring v. Patel*, Ring was interested in purchasing certain commercial real

278. *Id.*

279. *Id.*

280. *Id.* at \*2.

281. *Id.* at \*1, \*2-4.

282. *Id.* at \*3 n.4. “The Indiana Statute of Frauds requires that contracts for the sale of real property be in writing and ‘signed by the party against whom the action is brought.’” *Id.* (quoting IND. CODE § 32-21-1-1(b)(4)).

283. *Id.* at \*3.

284. *Id.* (citing *Woodruff v. Ind. Fam. & Soc. Servs. Admin.*, 964 N.E.2d 784, 791 (Ind. 2012)).

285. *Id.*

286. *Id.*

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

288. *Id.* at 675 (quoting 1 ARTHUR LINTON CORBIN AND JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.8 (rev. ed. 1993)).

289. *Id.* at 674-75.

290. *Id.* at 675.

estate from Patel.<sup>291</sup> Ring first sent a letter of interest to Patel; Patel then submitted a revised letter. Both signed the revised letter.<sup>292</sup> “Negotiations continued and ‘different purchase agreements [were] sent back and forth between the parties[,]’” but no purchase agreement was ever signed, and Ring did not tender any earnest money.<sup>293</sup>

Ring filed this complaint for specific performance.<sup>294</sup>

The Supreme Court has held that in such circumstances, a court is to examine “whether the parties intended to be bound by the agreement, or whether they intended that they would be bound only after executing a subsequent written document.”<sup>295</sup>

Applying this test, the Court of Appeals concluded that the parties had intended that once the revised letter of intent was executed, Ring would submit a purchase agreement incorporating the agreed-upon terms.<sup>296</sup> The letter, the court said, was clear “that the parties’ rights and obligations would be governed ‘*solely* by the Purchase Agreement’ after the parties were in final agreement in a form that was approved by their respective attorneys.”<sup>297</sup> Indeed, the court pointed to language in the letter itself that it was not “intended to be and *shall not constitute a contract or binding agreement and shall not create any legal rights or obligations between the parties.*”<sup>298</sup>

“[T]he parties contemplated further negotiation and a future agreement *if* they could agree on all the material terms,” the court held.<sup>299</sup> “[T]he designated evidence supports the conclusion that the parties never arrived at a final agreement as to what the various and material terms of a purchase agreement should be or were.”<sup>300</sup>

## V. COMMON CONTRACT CLAUSES

### A. Covenants Not to Compete

Unlike past Survey Periods, this Article does not discuss any cases construing covenants not to compete. After the completion of the Survey Period, however, at least two developments occurred that assure that this topic will be discussed in next year’s Article. First, the Federal Trade Commission announced that it plans to ban most non-compete agreements nationwide and released a Notice of

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291. Ring v. Patel, 2022 WL 175789, at \*1 (Ind. Ct. App. Jan. 20, 2022) (unpublished decision).

292. *Id.*

293. *Id.* at \*2.

294. *Id.*

295. *Wolvos*, 668 N.E.2d at 675 (citing *Foster v. United Home Improvement Co.*, 428 N.E.2d 1351, 1355 (Ind. Ct. App. 1981)).

296. *Ring*, 2022 WL 175789, at \*4.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

Proposed Rulemaking to that effect.<sup>301</sup> Second, the Indiana General Assembly passed and Governor Eric Holcomb signed into law a ban on non-compete agreements between employers and primary care physicians. The new law also purports to render unenforceable all physician non-compete agreements (1) if the employer terminates the physician's employment without cause; (2) if the physician terminates the physician's employment for cause; or (3) if the physician's employment contract expires and the physician and employer have fulfilled their respective contractual obligations.<sup>302</sup>

### *B. A Cross-Indemnification Clause*

Consider the following standard cross-indemnification clause in a services contract between two businesses:

Contractor and Customer shall indemnify and hold harmless each other from and against any and all such claims, except for such liability, claim, or demand arising directly out of the sole negligence of the other. Contractor and Customer further agree to indemnify, defend and hold harmless each other and the other's agents, officers, directors and employees from all claims and suits of whatever type, including damages, court costs, attorneys' fees, and other expenses, caused by any act or omission of themselves or their respective agents, officers, employees and subcontractors.<sup>303</sup>

*Steak N Shake Operations, Inc. v. National Waste Associates, LLC*, is a case in which each party sought to enforce this very same indemnification clause against the other.<sup>304</sup> The case features the interesting twist that the trial court granted summary judgment, that is, found as a matter of law, both that the contractor was entitled to indemnification from the customer and that the customer was not entitled to indemnification from the contractor.<sup>305</sup> But the Court of Appeals found just the opposite: that as a matter of law, the contractor was not

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301. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482-3546 (proposed Jan. 19, 2023); see also Patrick S. McCarney, *Federal Trade Commission Takes Steps to Ban Most Non-Compete Agreements Nationwide*, RILEY BENNETT EGLOFF LLP (Jan. 9, 2023), <https://rbelaw.com/federal-trade-commission-takes-step-to-ban-most-non-compete-agreements-nationwide/> [<https://perma.cc/NR7C-YYHQ>].

302. The new provisions apply only to agreements entered into on or after July 1, 2023. S.B. 7, 123d Gen. Assemb., Reg. Sess. (Ind. 2023); see also Robert Frederick Seidler and Zachary A. Ahonen, *Indiana Bans Physician Non-Competes for Primary Care Physicians, Adds Restrictions for Others*, JACKSON LEWIS (April 26, 2023), <https://www.jacksonlewis.com/publication/indiana-bans-physician-non-competes-primary-care-physicians-adds-restrictions-others> [<https://perma.cc/2VL6-ZBZG>].

303. *Steak N Shake Operations, Inc. v. Nat'l Waste Assocs., LLC*, 177 N.E.3d 816, 821-22 (Ind. Ct. App. 2021).

304. *Id.* at 819.

305. *Id.*



entitled to indemnification from the customer and that the customer was entitled to indemnification from the contractor.<sup>306</sup>

The customer here is Steak N Shake Operations, Inc. (“SNS”), and it contracted with National Waste Associates, LLC (“National”) for the removal of SNS’s solid waste and recyclable materials from its restaurants.<sup>307</sup> Over a period of approximately four years, National subcontracted with Aspen Waste Systems of Missouri, Inc. (“Aspen”), to provide these services in the St. Louis area.<sup>308</sup> Prior to contracting with National for these services, SNS had contracted with Simon Waste Consulting, LLC (“Simon”) for these same services.<sup>309</sup> Simon, too, had subcontracted with Aspen in the St. Louis area.<sup>310</sup> While SNS had terminated its contract with Simon, the Court of Appeals says that “Simon failed to terminate its contract with Aspen.”<sup>311</sup> Adding further complexity to the facts, while National and Aspen entered into their own subcontract for Aspen to provide the same services to National that Aspen had provided to Simon, National and Aspen never reduced their subcontract to writing.<sup>312</sup>

After National and Aspen had done business together for about four years, National began removing Aspen’s equipment from various SNS locations.<sup>313</sup> This triggered litigation in the Missouri courts among Aspen, SNS, and National.<sup>314</sup> The Missouri litigation was ultimately resolved but not before both SNS and National had incurred attorney fees and other expenses.<sup>315</sup>

Following the completion of the Missouri litigation, SNS filed this litigation against National under the cross-indemnification clause set forth above to recover its attorney fees and other expenses.<sup>316</sup> National counterclaimed under the same cross-indemnification clause, seeking to recover its attorney fees and other expenses.<sup>317</sup>

National’s contention was that Simon’s failure to terminate its contract with Aspen caused the Missouri litigation,<sup>318</sup> and that because Simon was the agent of SNS in respect of that contract, SNS was liable under the indemnification clause which extends to “claims and suits of whatever type, including damages, court costs, attorneys’ fees, and other expenses, caused by any act or omission of themselves or their respective *agents*.”<sup>319</sup>

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306. *Id.* at 819-20.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 819.

312. *Id.* at 822.

313. *Id.* at 823.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 824.

319. *Id.* at 821-22 (emphasis added).

As suggested above, the trial court agreed with this analysis and entered summary judgment in favor of National, but the Court of Appeals reversed.<sup>320</sup> In an extended analysis discussed elsewhere in this Article,<sup>321</sup> the Court of Appeals concluded that Simon was not SNS's agent and, as such, could not be held responsible under the indemnification clause for any damages suffered by National that were caused by Simon.<sup>322</sup>

Turning to SNS's indemnification claim against National, the Court of Appeals had little difficulty directing summary judgment in favor of SNS. The indemnification clause was triggered, in the Court's view, when Aspen sued SNS in the Missouri litigation:

The designated evidence shows that the immediate cause of the Missouri litigation was National's act of removing Aspen's equipment from various St. Louis-area [SNS] locations. But it was also National's omission that caused Aspen to file suit over its contract rights when, after four years, National had failed to reach a definitive agreement on the terms of its subcontract with Aspen. In other words, the Missouri litigation was unmistakably a breach-of-contract dispute between National and its subcontractor, which National caused both by its act in removing Aspen's equipment and its omission in having not resolved the terms of its contract with Aspen.<sup>323</sup>

In interpreting the indemnification clause in this way, the Court of Appeals issued an important reminder on the reach of such contractual obligations. It did not matter, the Court said, whether National or Aspen has caused the dispute or which side had prevailed.<sup>324</sup> The clause covered "'all claims and suits of whatever type . . . caused by' National's act or omission or that of its subcontractors."<sup>325</sup> Under the clause, National had a duty to indemnify SNS from the Missouri litigation, and SNS was entitled to judgment as a matter of law.<sup>326</sup>

### C. A Notice Requirement

*Sethi v. Petroleum Traders Corp.* provides a window on the adverse impact of the COVID-19 pandemic on the wholesale and retail petroleum industry.<sup>327</sup>

Petroleum Traders Corp. ("PTC") entered into "futures contracts" with its customers to provide a set amount of fuel in the future for set prices.<sup>328</sup> PTC then

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320. *Id.* at 831.

321. *See supra* notes 117-41 and accompanying text.

322. *Steak N Shake*, 177 N.E.3d at 830.

323. *Id.* at 831.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Sethi v. Petroleum Traders Corp.*, 2022 WL 3025532 (Ind. Ct. App. Aug. 1, 2022) (unpublished decision).

328. *Id.* at \*1.

purchased its own fuel futures contracts to protect itself (or “hedge”) against adverse supply and price changes.<sup>329</sup> If one of PTC’s customers did not purchase fuel as agreed, PTC would have to sell (or “liquidate”) its futures contract.<sup>330</sup> “When PTC must liquidate a contract, it suffers losses resulting from both the profit it would have realized had the customer performed its contract and from the sale of its futures position at a loss.”<sup>331</sup> PTC protects itself from the adverse effect of liquidating its contracts in part by requiring that a payment (a “Margin Payment”) be made if the contract’s fair market value falls below a set amount based on the market price of fuel being purchased.<sup>332</sup>

Fine Enterprises, Inc., and Dharminder Sethi (collectively, “FEI”) agreed to purchase certain monthly volumes of fuel from PTC. The contract contained the “margin call” provision just described;<sup>333</sup> when market conditions dramatically deteriorated in March 2020 due to the COVID-19 pandemic, PTC demanded a Margin Payment, which FEI failed to pay.<sup>334</sup> PTC then filed this action to enforce its rights under the contract.<sup>335</sup>

The trial court found FEI to be in breach of contract for failing to pay PTC’s margin call.<sup>336</sup>

On appeal, FEI maintained that because PTC sent the margin call demand via email, “PTC failed to serve or deliver any legally effective notice or demand for margin call payment as consistent with the requirements of Section 19” of the parties’ contract.<sup>337</sup> Section 19 specified that:

All notices required in this Agreement shall be deemed effective if made in writing and delivered to the recipient’s address listed on the first page of this Agreement by any of the following means: (i) hand delivery, (ii) registered or certified mail, postage prepaid, with return receipt requested, (iii) first class or express mail, postage prepaid, (iv) overnight courier service.<sup>338</sup>

The Court of Appeals agreed with FEI that a margin call under the contract was notice under the contract and, therefore subject to Section 19.<sup>339</sup> As such, the court said, PTC emailing FEI the margin call demand was contrary to Section 19

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329. *Id.*

330. *See id.* at \*2-3.

331. Appellee’s Brief at 5, *Sethi*, 2022 WL 3025532 (No. 22A-CC-00223) (Apr. 27, 2022).

332. *Id.*

333. Under Section 12 of the Agreement: “[PTC] shall have the right, in its sole discretion, to make a margin call if [FEI’s] accounts’ mark-to-market position exceeds the Threshold, due to unfavorable price movement or other unforeseen events.” *Sethi*, 2022 WL 3025532, at \*1.

334. *Id.* at \*2.

335. *Id.* at \*3.

336. *Id.*

337. *Id.* at \*4.

338. *Id.* at \*1.

339. *Id.* at \*4.

and a breach of the contract.<sup>340</sup>

But the Court of Appeals went on to hold that the breach was not material.<sup>341</sup> The court cited authority that a party in material breach of a contract “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.”<sup>342</sup> However, the court continued, an immaterial breach “should not be allowed to result in a windfall for the non-breaching party by excusing performance.”<sup>343</sup> To assess materiality, the court considered the following factors:

- (A) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (B) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (C) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (D) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (E) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.<sup>344</sup>

The court’s analysis was that while PTC did send FEI email notification of the margin call, FEI did “not argue that it failed to receive the notice, or that the form of the notice in some way deprived FEI of its ability to pay the Margin Call in a timely manner.”<sup>345</sup> The court concluded “that PTC’s failure to send the Margin Call demand pursuant to the requirements of Section 19 did not constitute a material breach of the Agreement,” and therefore, PTC was not precluded from maintaining an action against FEI.<sup>346</sup>

The court bolstered its conclusion with several addition points. First, the benefit of which FEI was deprived—receiving a notice that complied with Section 19—“was not monetary in nature nor was it related to the main purpose of the contract, purchasing fuel.”<sup>347</sup> Second, there was “also no indication PTC’s actions were done in bad faith”: in addition to sending the email, PTC contacted FEI via phone the next day.<sup>348</sup> And third, although Section 12 of the contract

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340. *Id.*

341. *Id.* at \*4-5.

342. *Id.* at \*4 (citing *Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871, 875 (Ind. Ct. App. 1998)).

343. *Id.* (citing *Wilson v. Lincoln Fed. Sav. Bank*, 790 N.E.2d 1042, 1049 (Ind. Ct. App. 2003)).

344. *Id.* at \*5 (citing *Ream v. Yankee Park Homeowner’s Ass’n, Inc.*, 915 N.E.2d 536, 543 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 789 (Ind. 2010)).

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

provided that “FEI was required to make the Margin Call payment within twenty-four hours of the Margin Call, PTC gave FEI substantially more time to make the Margin Call before terminating the” contract.<sup>349</sup>

#### *D. Three Arbitration Clauses*

The ubiquity and privileged status of arbitration clauses has been discussed in previous years’ iterations of this Article.<sup>350</sup> But while reciting fealty to Indiana’s “strong policy favoring arbitration agreements,”<sup>351</sup> the Court of Appeals set a different tone during the Survey Period. Arbitration is no “magic wand” that prevails over the language of parties’ contract, the court said in one of the cases.<sup>352</sup> Nor can an arbitration requirement be “shoehorn[ed]” into an agreement where it does not reasonably fit, the court said in another.<sup>353</sup> And in point of fact, the Court of Appeals found arbitration clauses unenforceable in three separate cases and the Supreme Court affirmed the conclusion one of those cases, albeit on slightly different grounds.

In *Decker v. Star Financial Group*, a purported class of customers sued their bank for the allegedly improper assessment and collection of overdraft fees.<sup>354</sup> The trial court granted the bank’s request to compel arbitration predicated upon an arbitration clause in the customers’ contracts with the bank covering their checking accounts.<sup>355</sup> The Court of Appeals reversed on grounds that there had been no “reasonable notice” to the customers that their contracts had been amended to add the arbitration clause.<sup>356</sup>

After the conclusion of the Survey Period, the Supreme Court granted transfer and later decided the case.<sup>357</sup> With the Court of Appeals, it too found the arbitration clause unenforceable but on different grounds.<sup>358</sup>

The customers’ account agreements contained the following language:

(10) Amendments and Termination. We may change any term of this

349. *Id.*

350. See Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 51 IND. L. REV. 945, 981-84 (2018) (“*Arbitration, Arbitration Everywhere*”); Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 50 IND. L. REV. 1179, 1209-10 (2017).

351. See *Haddad v. Properplates, Inc.*, 192 N.E.3d 219, 221 (Ind. Ct. App. 2022) (citing *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 521 (Ind. 2021)); *Decker v. Star Fin. Grp.*, 187 N.E.3d 937, 943 (Ind. Ct. App. 2022) (citing *Reitenour v. M/I Homes of Indiana, L.P.*, 176 N.E.3d 505, 510 (Ind. Ct. App. 2021)), *aff’d on other grounds*, 204 N.E.3d 918 (Ind. 2023); *Fin. Ctr. First Credit Union v. Rivera*, 178 N.E.3d 1245, 1250 (Ind. Ct. App. 2021).

352. *Fin. Ctr. First Credit Union*, 178 N.E.3d at 1253.

353. *Haddad*, 192 N.E.3d at 221.

354. *Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 919 (Ind. 2023).

355. *Id.* at 920.

356. *Id.* at 920 (citing *Decker v. Star Fin. Grp., Inc.*, 187 N.E.3d 937 (Ind. Ct. App. 2022)).

357. *Id.* at 920.

358. *Id.* at 923.

agreement. Rules governing changes in interest rates are provided separately in the Truth-in-Savings disclosure or in another document. For other changes, we will give you reasonable notice in writing or by any other method permitted by law.... Reasonable notice depends on the circumstances . . . . If we have notified you of a change in any term of your account and you continue to have your account after the effective date of the change, you have agreed to the new term(s).<sup>359</sup>

The account agreement did not mention arbitration, class actions, or dispute resolution at all.<sup>360</sup> The Court explained that the customers were “e-statement customers,” having “directed the bank to ‘send them their checking account statements and other notices and disclosures relating to the terms and conditions of their checking account via email.’”<sup>361</sup> According to the Court, at some point after the customers agreed to the original terms of the contract, the bank sent an email to the customers which noted links to an “updated Miscellaneous Fee Schedule and the Privacy Notice but did not mention changes to the accounts’ Terms and Conditions.”<sup>362</sup> Customers who clicked the link and logged into their accounts

received a fourteen-page statement, which included eleven pages of information on transactions for the account; a page of images of the checks written that month; and an Arbitration and No Class Action Clause Addendum on pages thirteen and fourteen. The beginning of the Addendum was in bold capital letters and noted that the Addendum would become effective in ten days if the customer still had an account with [the bank] at that time.<sup>363</sup>

The Supreme Court’s analysis is an eye-popping exercise in careful contract construction. The contract allows the bank to “change” any term in the agreement. That’s not the same, the Court says, as “a blank check to amend the agreement any way [the bank] saw fit.”<sup>364</sup>

The Court’s language is strong and provides clear direction to the drafters of contracts:

If the Bank wanted such flexibility, it might have given itself the power to “change this agreement” as desired. Instead, the section is more limited in scope. It limits the Bank to changing “any term of this agreement.” Words matter. The difference between a far-reaching power to amend “this agreement” and the narrower power to amend “any term

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359. *Id.* at 919-20.

360. *Id.* at 920.

361. *Id.* at 920.

362. *Decker v. Star Fin. Grp., Inc.*, 187 N.E.3d 937, 945 (Ind. Ct. App. 2022).

363. *Id.*

364. *Decker*, 204 N.E.3d at 921.

of this agreement” makes all the difference on this record.<sup>365</sup>

The Supreme Court held “the specific language of the account agreement’s change-of-terms clause did not permit the Bank to add the addendum. Thus, the addendum was not a valid amendment to the account agreement.”<sup>366</sup>

*Financial Center First Credit Union v. Rivera* requires untangling a procedural knot before getting to the arbitration clause issue.<sup>367</sup> A bank’s customer defaulted on an auto loan whereupon the bank repossessed and then sold the car.<sup>368</sup> A deficiency balance remained, and the bank sued its customer to collect.<sup>369</sup> The customer filed a counterclaim alleging that the bank violated requirements of the Uniform Commercial Code related to the repossession and reasonable disposition of collateral.<sup>370</sup> At this point, the bank sought summary judgment on its entitlement to a deficiency.<sup>371</sup> Next, the customer sought to amend the counterclaim, converting the individual claim into a class action.<sup>372</sup>

The trial court denied the bank’s motion for summary judgment and allowed the customer’s amendment converting the claim to a class action.<sup>373</sup> At that point, the bank moved to compel arbitration pursuant to arbitration provisions in the auto loan agreement.<sup>374</sup> The trial court denied the bank’s request, and the Court of Appeals affirmed.<sup>375</sup>

The bank’s request was denied for two reasons. First, as to the customer’s individual claim, the bank did not file its motion to compel arbitration until after the trial court had denied its motion for summary judgment on the customer’s deficiency.<sup>376</sup> “[B]y acting in a manner inconsistent with an intent to arbitrate, [the bank] waived its contractual right to arbitration of the individual claim.”<sup>377</sup>

Second, to the extent that the bank’s motion to compel arbitration related to amended counterclaim as a whole, including the class action allegations,<sup>378</sup> the court found the language of the auto loan agreement dispositive: “The plain

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365. *Id.*

366. *Id.* The court did not rule on the “reasonable notice” issue that was examined in detail by the Court of Appeals.

367. *Fin. Ctr. First Credit Union v. Rivera*, 178 N.E.3d 1245 (Ind. Ct. App. 2021).

368. *Id.* at 1248-49.

369. *Id.* at 1249.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 1249-50.

375. *Id.* at 1250, 1253.

376. *Id.* at 1252.

377. *Id.* (citing *St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir. 1992)).

378. The Court of Appeals termed it “ambiguous” “as to as to whether [the bank] sought to compel arbitration of just [the customer’s] underlying individual claim or of the amended counterclaim as a whole, including the class action allegations.” *Id.*

language of the contract makes it unambiguously clear that *if* a claim is to be arbitrated it *cannot* be in the style of a class action.”<sup>379</sup>

In the course of explaining its reasoning, the Court of Appeals offers up a nice line as to resolving conflicting policies favoring, on the one hand, arbitration and, on the other, freedom of contract and private ordering:

[The bank] places a great deal of emphasis upon the well-known public policy favoring arbitration and the honoring of contractually evinced intent of parties to arbitrate. We cannot, however, treat that policy preference as a magic wand. Just as a contract containing an arbitration provision establishes the circumstances in which parties to the contract agree to arbitrate, so too does it establish the circumstance in which the parties *do not* agree to arbitrate.<sup>380</sup>

The bank did not seek Supreme Court review.<sup>381</sup>

Suppose the language in the contract had not prohibited arbitration of class actions and the litigation had otherwise unfolded in the same way, e.g., bank’s summary judgment motion on the individual claim denied; class action count added; bank moves to compel arbitration? In a footnote, the court says, “we do not agree with [the customer’s] argument that the counterclaim and [the bank’s] original complaint are “inextricably intertwined” so as to constitute a single claim. This is inaccurate both as a matter of contractual interpretation and as an understanding of the doctrine underpinning our trial rules generally.”<sup>382</sup> This suggests to the author of this Article that if the bank could demonstrate that the original complaint and the counterclaim were distinct, the bank would be entitled to arbitration.<sup>383</sup>

In *Haddad v. Properplates, Inc.*, the owner of a construction project and the general contractor had a contract that DID NOT require any claims by the owner against the general contractor be arbitrated but DID require that all claims by the

379. *Id.* The contract provided in relevant part:

If either party elects to resolve a Claim through arbitration, you and we agree that no trial by jury or other judicial proceeding will take place. Instead, the Claim will be arbitrated on an individual basis and not on a class or representative basis. \* \* \* \* YOU GIVE UP ANY RIGHT THAT YOU MAY HAVE TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER IN ANY CLASS ACTION OR CLASS ARBITRATION AGAINST US **IF A DISPUTE IS ARBITRATED.**

*Id.*

380. *Id.* at 1253.

381. *See* Fin. Ctr. First Credit Union v. Rivera, No. 21A-CC-00845 (Ind. Ct. App. Jan. 7, 2022).

382. *Fin. Ctr. First Credit Union*, 178 N.E.3d at 1252 n.5.

383. Ohio courts have held in a trio of recent cases that a plaintiff’s filing of a complaint did not waive its right to compel arbitration upon the defendant’s filing of a counterclaim. *See* U.S. Bank Nat’l Ass’n v. Allen, 52 N.E.3d 1237 (Ohio Ct. App. 2016); *Am. Gen. Fin. v. Griffin*, 2013 WL 3422900 (Ohio Ct. App. July 3, 2013); and *U.S. Bank, N.A. v. Wilkens*, 2010 WL 323432 (Ohio Ct. App. Jan. 28, 2010).



general contractor against the owner be arbitrated.<sup>384</sup>

The owner filed a complaint against the general contractor alleging breach of contract, breach of warranty, indemnification, and negligence.<sup>385</sup> The general contractor denied the owner's claims and filed counterclaims for breach of contract, fraud in the inducement of contract, and tortious interference with a business relationship.<sup>386</sup>

The general contractor then moved to dismiss the owner's complaint and compel arbitration of both parties' claims under the terms of the construction contract.<sup>387</sup> The owners opposed the general contractor's motion, "arguing that the contract's arbitration clause only applied to [the general contractor's] counterclaims, not to the claims asserted in the [owner's] complaint."<sup>388</sup> The trial court agreed with the general contractor, concluding that because the general contractor denied the owner's complaint, the general contractor had the requisite dispute under the contract to trigger the arbitration requirement.<sup>389</sup>

The Court of Appeals reversed.<sup>390</sup> While acknowledging Indiana's strong policy favoring arbitration agreements, the court said that the contract only required the owner to "submit" to arbitration claims of the general contractor, but that the contract did not require the owner to arbitrate its own contract disputes.<sup>391</sup> "In other words," the court said, "the plain language of the contract contemplates non-arbitrable claims."<sup>392</sup>

The court viewed the general contractor's "interpretation of the contract effectively [to] render[] all claims arbitrable, regardless of the party that brings them. The plain language of the contract reflects no such intent. Despite this State's policy favoring arbitration, we cannot shoehorn such a requirement where it does not reasonably fit."<sup>393</sup>

The court went on to say that "there is likely overlap between the [owner's] claims and [the general contractor's] counterclaims."<sup>394</sup> But it said that there is a statute that applies in just such circumstances that authorizes a court to "delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies."<sup>395</sup>

Deploying the language this statute and the plain language of the contract, the court reversed the trial court's submission of the owner's claims to arbitration and dismissal of the case and remanded for consideration of "whether to delay

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384. *Haddad v. Properplates, Inc.*, 192 N.E.3d 219, 221 (Ind. Ct. App. 2022).

385. *Id.* at 220.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* at 222.

391. *Id.* at 221.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* (quoting IND. CODE § 34-57-2-3(f)).

arbitration pending the resolution of the [owner's] claims.”<sup>396</sup> The general contractor did not seek Supreme Court review.<sup>397</sup>

## VI. CONCLUSION: INDIANA’S SUMMARY JUDGMENT STANDARD

Indiana’s *Hughley* summary judgment standard is professedly non-movant friendly,<sup>398</sup> but with changes in the membership of the Indiana Supreme Court and other recent developments, change might be in the air.

Indiana’s current summary judgment standard is best traced to *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,<sup>399</sup> in which Justice Brent E. Dickson distinguished Indiana’s approach to summary judgment from that of the federal *Celotex*<sup>400</sup> standard.<sup>401</sup> A vote by the Indiana Supreme Court in 2000 suggested that there were then two votes to replace *Jarboe* with *Celotex*.<sup>402</sup> However, those two Justices (Theodore R. Boehm and Randall T. Shepard) left the Court in 2010 and 2012, respectively. In 2014, Chief Justice Loretta Rush authored *Hughley v. State*<sup>403</sup>—about as full-throated an endorsement of *Jarboe* as one could possibly imagine—for a unanimous Court.

Should *Hughley* be revisited? The author of this Article has written of *Hughley*’s abuse.<sup>404</sup> Justice Slaughter (joined by Justice Massa), in a 2019 dissent from a decision affirming a trial court’s grant of summary judgment, said that the majority’s “lowered bar for satisfying the movant-defendants’ obligation on summary judgment represents a de facto embrace of the federal summary-judgment standard and leaves *Hughley* a distinct state-law standard in name only.”<sup>405</sup> Florida, too, had a non-movant friendly summary judgment standard, but

396. *Id.* at 222.

397. *Haddad v. Properplates, Inc.*, No. 21A-PL-02560 (Ind. Ct. App. Sept. 27, 2022).

398. *See, e.g.*, *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (“Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims. [It is a] relatively high bar . . .”).

399. 644 N.E.2d 118, 123 (Ind. 1994).

400. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

401. Meanwhile, in federal court, some Indiana lawyers have mistakenly argued *Hughley*’s provisions rather than *Celotex*’s. *See, e.g.*, *Welch v. Kroger Ltd. P’ship I*, 2022 WL 345105, at \*4 n.1 (S.D. Ind. Feb. 4, 2022).

402. *Lenhardt Tool & Die v. Lumpe*, 735 N.E.2d 221 (Ind. 2000) (order denying transfer) (Rucker, J., not participating); *see also Lenhardt Tool & Die Co. v. Lumpe*, 722 N.E.2d 824 (Ind. 2000) (Boehm, J., dissenting from denial of transfer).

403. 15 N.E.3d 1000, 1003-04 (Ind. 2014).

404. *See Frank Sullivan, Jr.*, *Banking, Business, and Contract Law*, 52 IND. L. REV. 635, 638-39 (2019) (“*Is Hughley’s High Hurdle Too High?*”).

405. *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208, 219-20 (Ind. 2019) (Slaughter, J., concurring in part and dissenting in part).

its Supreme Court voted in 2020 to adopt *Celotex*.<sup>406</sup> With all this in the air and three new Justices having joined the Court since *Hughley* was decided, the author of this Article would not be surprised to see the Indiana Supreme Court reconsider *Hughley* before too long.

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406. In re Amendments to Florida Rule of Civil Procedure 1.510, No. SC20-1490, 309 So.3d 192 (Fla. 2020).