

BANKING, BUSINESS, AND CONTRACT LAW

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This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court and Indiana Court of Appeals between September 1, 2013 and August 31, 2014. This Article includes discussion of many not-for-publication “memorandum” decisions of the court of appeals because such decisions often establish new law, clarify, modify, or criticize existing law, or involve legal or factual issues of unique interest or substantial public importance.

Whatever the appellate rules may be at the moment about the citation of memorandum decisions, they contain critical guidance on Indiana law and cannot be ignored.¹

This Article does not itemize every banking, business, and contract law case decided during the survey period. Instead, it highlights cases illustrating some of the big-picture issues in these fields as well as some practice pointers for both transactions lawyers and litigators to take away from the last year or so of Indiana appellate cases.

This Article also discusses a change to the Indiana Business Corporation Law concerning forum selection provisions in corporate charters.

I. LENDING AND BORROWING

A. *Who Owns the Debt?*

There have been serious questions raised about the documentation of mortgage ownership in many mortgage foreclosure transactions throughout the country. Beginning in September 2010, several servicers announced that they were halting or reviewing their foreclosure proceedings after allegations that the documents accompanying judicial foreclosures may have been inappropriately

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1. Indiana Appellate Rule 65 provides that decisions of the court of appeals that are not published in West’s Northeastern Reporter “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.” During the Indiana Supreme Court’s annual consideration of rule changes in 2014, the court did not adopt a proposal of its own rules committee to allow citation of memorandum decisions as “persuasive precedent.” This proposal had been advanced by three sections of the Indianapolis Bar Association and Professor Joel M. Schumm, a professor at the Indiana University Robert H. McKinney School of Law and one of the state’s foremost appellate practitioners. See Joel M. Schumm, *Ind. Courts—NFP Decisions Cannot Be Cited—Or Can They?*, IND. L. BLOG (Sept. 10, 2014), http://indianalawblog.com/archives/2014/09/ind_courts_nfp_1.html, archived at <http://perma.cc/6RVN-MLCW>.

signed or notarized.² The servicers subsequently resumed foreclosures, but following these allegations, some homeowners have challenged the validity of foreclosure proceedings.³ Indeed, the United States Government Accountability Office did a major study of the issue.⁴ Perhaps because of a heightened awareness of this general issue, the question frequently arose as to whether the party seeking to foreclose a mortgage actually owned it.

One example was *Beneficial Financial I Inc. v. Hatton*, where a company called Beneficial Mortgage Co. of Indiana made a mortgage loan to Sharon Hatton.⁵ When the loan went into default, it was a company called Beneficial Financial I, Inc. that foreclosed.⁶ Hatton contended that the foreclosing company had not proved its interest in the property.⁷ In this particular case, the first of the two entities just mentioned had merged into the second.⁸ The foreclosing party had attached to its complaint the Certificate of Merger issued by the Indiana Secretary of State, reflecting that the original mortgagee had been merged into the foreclosing party and that the foreclosing party was the surviving entity following the merger.⁹ It was clear that, as a matter of law, the foreclosing party had assumed all of the rights, title, and interest of the original mortgagee, and the court held that the attachment of the Certificate of Merger to the complaint was adequate evidence of that fact.¹⁰

Hatton is an example of a successor mortgagee by operation of law.¹¹ *Riviera Plaza Investments, LLC v. Wells Fargo Bank, N.A.* is an example of a successor mortgagee by assignment.¹² Riviera granted a mortgage to Citibank N.A. (“Citibank”) to secure a loan.¹³ The loan was guaranteed by Haresh Shah.¹⁴ Riviera subsequently defaulted on the loan and Citibank foreclosed.¹⁵ LSREF2 Nova Investments, LLC (“Nova”), thereafter appeared and indicated that it had been assigned Citibank’s interest in the matter; Nova was substituted for Citibank.¹⁶ At Nova’s subsequent request, Shah was added as a party.¹⁷ Wells

2. U.S. GOV’T ACCOUNTABILITY OFFICE, PUB. NO. 11-433, MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEALED NEED FOR ONGOING REGULATORY OVERSIGHT 1 (2011), available at <http://www.gao.gov/new.items/d11433.pdf>, archived at <http://perma.cc/9VXE-9ZRJ>.

3. *Id.*

4. *Id.*

5. *Beneficial Fin. I Inc. v. Hatton*, 998 N.E.2d 232, 233 (Ind. Ct. App. 2013).

6. *Id.* at 235-36.

7. *Id.* at 238.

8. *Id.*

9. *Id.*

10. *Id.* at 237.

11. *See generally id.*

12. *Riviera Plaza Invs., LLC v. Wells Fargo Bank, N.A.*, 10 N.E.3d 541 (Ind. Ct. App. 2014).

13. *Id.* at 543.

14. *Id.*

15. *Id.* at 544.

16. *Id.*

17. *Id.*

Fargo thereafter appeared and indicated that it had been assigned Nova's interest in the matter; Wells Fargo was substituted for Nova.¹⁸

At issue in the court of appeals was whether Citibank's interest had been assigned properly to Wells Fargo.¹⁹ The court reviewed the documentation of the assignment from Citibank to Nova and from Nova to Wells Fargo and concluded that the assignments had been made properly.²⁰ In particular, the court examined whether Citibank's interest in Shah's guaranty, as well as its interest in the loan and mortgage, had been assigned and found that the respective bills of sale covered "all guarantees" of the indebtedness.²¹

Federal Home Loan Mortgage Corp. v. Stern shows that sometimes the lenders have a hard time figuring out whether they are mortgagees or not.²² In 2007, Janice Stern defaulted on a mortgage loan and home equity line with Chase Manhattan Mortgage Corporation ("Chase").²³ Chase foreclosed on both loans, and in 2009, the two cases were consolidated.²⁴ In May 2012, Chase assigned its interest to Freddie Mac.²⁵ In September 2012, Chase sent a letter to Stern that said that it was "canceling the amount owed to Chase" as part of a national mortgage servicing settlement.²⁶ In reliance on this cancellation letter, Stern filed for summary judgment in the foreclosure case.²⁷ Freddie Mac answered that the original mortgage was still owed, while acknowledging that Stern's home equity obligation had been canceled.²⁸ The trial court granted summary judgment in favor of Stern.²⁹

At issue in the court of appeals was whether the cancellation letter forgave the debt secured by the original mortgage.³⁰ The court held that while Stern ultimately might prevail, the designated evidence did not establish as a matter of law that the mortgage loan (as opposed to the home equity line) had been forgiven, noting that Freddie Mac's evidence provided to the contrary.³¹ Summary judgment for Stern was reversed.³²

Nor was it just in the mortgage foreclosure arena that debtors questioned

18. *Id.*

19. *Id.* at 543

20. *Id.* at 550.

21. *Id.* at 549-52.

22. *Fed. Home Loan Mortg. Corp. v. Stern*, No. 82A04-1306-MF-282, 2014 WL 840977 (Ind. Ct. App. Mar. 3, 2014).

23. *Id.* at *1.

24. *Id.*

25. *Id.*

26. *Id.* at *1-2.

27. *Id.* at *2.

28. *Id.*

29. *Id.*

30. *Id.* at *3.

31. *Id.*

32. *Id.*

their liability to purported successors of their original creditors.³³ Perhaps the most dramatic example of this was *Seth v. Midland Funding LLC*, a rare victory for a debtor.³⁴ In this case, Midland Funding sued Seth to collect on an alleged \$3400 credit card debt.³⁵ The case suggests that Seth had opened a Visa card account at Columbus Bank & Trust and that the amount owed was on that account.³⁶ But the court held that to make out a prima facie case for summary judgment, Midland was required to prove that it was the assignee of that debt.³⁷ Midland's designated evidence consisted of unsworn statements and unverified exhibits that the court found insufficient.³⁸ In particular, the court said, the evidence did not show that "Midland owned Seth's credit card account, only that it acquired 'certain' accounts issued by Columbus Bank."³⁹

Cases during the survey period show mortgagors quick to demand evidence that parties bringing foreclosure actions are actually the successors in interest to their original mortgagees. *Seth* shows such a demand in the consumer debt arena as well.⁴⁰ To generalize, what is at stake is the adequacy of the documentation of transfers and assignments of legal interests. The takeaway from this inquiry into "Who owns the debt?" is that the transactions lawyer must be attentive if not meticulous in documenting transfers and assignments of legal interests so that if there is litigation in the future, those transfers and assignments can be quickly and easily proven to the court.

B. Priorities Among Creditors

The first-to-file rule of mortgage priority was reaffirmed several times during the survey period.⁴¹

In *Ericson v. Bloomfield State Bank*, the mortgagor granted a mortgage to the bank that was recorded on March 28, 2005.⁴² In addition, the mortgagor granted a mortgage to Brady and Tiffany Ericson that also was recorded on March 28, but after the bank's mortgage.⁴³ The bank subsequently foreclosed on its mortgage, naming the Ericsons among the defendants.⁴⁴ The Ericsons did not dispute that

33. See generally *Seth v. Midland Funding LLC*, 997 N.E.2d 1139 (Ind. Ct. App. 2013).

34. See generally *id.*

35. *Id.* at 1139.

36. *Id.*

37. *Id.* at 1140-41.

38. *Id.*

39. *Id.* at 1142.

40. See generally *id.* at 1139.

41. See generally *Ericson v. Bloomfield State Bank*, No. 53A04-1307-MF-376, 2014 WL 1168729 (Ind. Ct. App. March 21, 2014); *Co-Alliance LLP v. Monticello Farm Serv., Inc.*, 7 N.E.3d 355 (Ind. Ct. App. 2014); *Lunsford v. Deutsche Bank Trust Co.*, 996 N.E.2d 815 (Ind. Ct. App. 2013).

42. *Ericson*, 2014 WL 1168729.

43. *Id.* at *1.

44. *Id.*

the bank's mortgage was recorded prior to theirs, but they argued that theirs was superior pursuant to the doctrine of equitable subrogation.⁴⁵ The trial court granted the Bank summary judgment on the basis of its evidence that its mortgage was filed first. The Ericsons did not respond to the Bank's summary judgment motion.⁴⁶

The issue in the court of appeals was whether the Ericsons' mere reliance on the allegations in their answer—which was never designated to the trial court by either party—was sufficient to create an issue of fact concerning their affirmative defense.⁴⁷ The court held that it was not.⁴⁸

Similarly, in *Lunsford v. Deutsche Bank Trust Co. Americas*, Walter Lunsford sold property to Elizabeth Cottler on a land contract but did not record the land contract until six years later.⁴⁹ In the intervening time period, Cottler mortgaged the property to Deutsche Bank.⁵⁰ In a subsequent foreclosure proceeding, Lunsford attempted to claim priority over the Deutsche Bank mortgage, but the court held that because the mortgage was recorded before the land contract, the mortgage was senior in priority.⁵¹ Additionally, because Lunsford was made a party to Deutsche Bank's foreclosure action and given the opportunity to assert his junior interest in the real estate, the judgment was conclusive as to him.⁵²

An interesting debate as to priority occurred in *Co-Alliance LLP v. Monticello Farm Service, Inc.*, where a farming enterprise had pledged its 2010 crops and other property as collateral for loans from three different creditors in the following order of priority: (1) First Farmers Bank & Trust ("Farmers Bank"); (2) Co-Alliance; and (3) Monticello.⁵³

Farmers Bank later agreed to subordinate its interest in the proceeds of the 2010 crops in return for Monticello providing certain additional financing.⁵⁴ In a subsequent foreclosure proceeding, there were insufficient assets to satisfy all the secured creditors.⁵⁵ Co-Alliance argued for a rule of "complete subordination," recognized by some jurisdictions, to the effect that, because Farmers Bank had agreed to be subordinate to Monticello, Farmers Bank would drop to the end of the priority line.⁵⁶ If this were the case, Co-Alliance would

45. *Id.*

46. *Id.*

47. *Id.* at *1-2.

48. *Id.* at *2.

49. *Lunsford v. Deutsche Bank Trust Co. Ams.*, 996 N.E.2d 815 (Ind. Ct. App. 2013).

50. *Id.* at 817.

51. *Id.* at 818.

52. *Id.* at 822.

53. *Co-Alliance LLP v. Monticello Farm Serv., Inc.*, 7 N.E.3d 355, 356-58 (Ind. Ct. App. 2014) (Shepard, Sr. J.).

54. *Id.* at 357.

55. *Id.* at 360.

56. *Id.* at 359 (citing cases from Alabama, Georgia, and Idaho).

have access to the collateral before both Monticello and Farmers Bank.⁵⁷

But the court read the agreement of the parties to effect what is called “partial subordination” under which Monticello, by virtue of the subordination agreement, would be paid first, but only up to the amount of Farmers Bank’s senior claim—to which Co-Alliance was junior.⁵⁸

The court found this to reflect the intent of the parties—and therefore to conform with “a bedrock principle” in Indiana law that the intent of the parties controls the contract. In addition, the court made a cogent policy argument for adopting the partial subordination approach.⁵⁹ Co-Alliance, the court pointed out, was not a party to the subordination agreement, gave no consideration, and should not be entitled to the windfall it would receive if it could step ahead of Farmers Bank.⁶⁰ Furthermore, Farmers and Monticello clearly did not intend to make Co-Alliance a third-party beneficiary of their subordination agreement.⁶¹

C. Guaranties

A lender’s typical use of guaranties and cross-collateralization is illustrated in *Finley v. First Federal Savings Bank*.⁶² The bank made several loans to David and Diane Finley and to a corporation owned by Diane, and of which David and Diane were officers.⁶³ The loans were secured by certain property of the Finleys and assets of the corporation.⁶⁴ The loans also were guaranteed by the Finleys and the corporation.⁶⁵ The security agreements securing the loans and the guaranties were all cross-collateralized.⁶⁶ When the Finleys defaulted on two of the loans and the corporation failed to pay on its guarantee, the Bank foreclosed.⁶⁷ The foreclosure litigation between the bank and the Finleys was resolved by a settlement agreement, but the bank later auctioned certain inventory belonging to the corporation.⁶⁸ The Finleys filed this lawsuit against the Bank, alleging conversion.⁶⁹

At issue in the court of appeals was whether the bank’s security interest in

57. *Id.* at 361.

58. *Id.* at 360. The court found “partial subordination” to be the majority approach to subordination agreements. *Id.* at 359 (citing cases from the Second and Seventh Circuits, the Western District of Michigan (Bankruptcy), Arizona, and Texas).

59. *See id.* at 358-61.

60. *Id.* at 359-60.

61. *Id.* at 360.

62. No. 02A03-1302-PL-48, 2013 WL 6629207 (Ind. Ct. App. Dec. 16, 2013), *trans. denied*, 10 N.E.3d 9 (Ind. 2014).

63. *Id.* at *1.

64. *Id.*

65. *Id.* at *1-2.

66. *Id.*

67. *Id.* at *2.

68. *Id.* at *2-3.

69. *Id.* at *3.

the corporation's assets survived the settlement agreement between the bank and the Finleys.⁷⁰ The court first pointed out that because the corporation had not fulfilled its obligations under its guaranty, it was in default and the bank was entitled to take possession of the corporation's assets.⁷¹ Second, the settlement agreement only was between the bank and the Finleys and did not otherwise release the corporation of any of its obligations.⁷² Finally, although a guarantor can be relieved of liability in the event of "material alteration" of its obligation, the court held that there had been no material alteration of the corporation's liability here.⁷³ The bank's sale of the collateral was approved.⁷⁴

D. Foreclosure Settlement Conferences

In response to the mortgage foreclosure crisis, the Indiana General Assembly established a statutory procedure intended to facilitate settlement conferences between mortgagors and mortgagees.⁷⁵ A very fine opinion written by Judge Robb covered in last year's survey, *Nationstar Mortgage, LLC v. Curatolo*, held that this is strictly a voluntary procedure and that a court has no authority to obligate either party.⁷⁶ The settlement conference, in other words, is meant to facilitate the lender and the borrower making a mutually satisfactory modification to their contract—but it does not authorize the court to re-write the parties' agreement.⁷⁷ Indeed, as Judge Robb pointed out in *Curatolo*, it would be unconstitutional for the court to do so.⁷⁸ Something similar happened during the current survey period in *OneWest Bank v. Jarvis*, where the court of appeals reversed a trial court order that had prohibited a mortgagee from attempting to enforce a note and mortgage in the future as a sanction, at least in part, for settlement conference-related behavior.⁷⁹

Another case along these lines was *Ewing v. U.S. Bank*.⁸⁰ After an unsuccessful settlement conference, the mortgagor moved for summary judgment on its foreclosure petition.⁸¹ The mortgagor contended that U.S. Bank failed to act in good faith during the settlement discussions, pointing out specific violations of the Indiana Supreme Court's Alternative Dispute Resolution Rules

70. *Id.* at *1.

71. *Id.* at *6.

72. *Id.* at *6-7.

73. *Id.* at *7.

74. *Id.* at *8.

75. IND. CODE §§ 32-30-10.5-1 to -11 (2014).

76. *Nationstar Mortg., LLC v. Curatolo*, 990 N.E.2d 491 (Ind. Ct. App. 2013).

77. *Id.* at 493.

78. *Id.* at 495-96.

79. *OneWest Bank v. Jarvis*, No. 45A05-1312-MF-615, 2014 WL 2810043 (Ind. Ct. App. June 20, 2014). The same trial court judge was reversed in both *Curatolo* and *Jarvis*.

80. 5 N.E.3d 775 (Ind. Ct. App. 2014), *reh'g denied*, *trans. denied*.

81. *Id.* at 776.

(“A.D.R. Rules”).⁸² The court held that the bank was not bound by the A.D.R. Rules, as the trial court did not order mediation nor did the parties engage a mediator or agree to be bound by the A.D.R. Rules.⁸³

E. Factoring

*Sterling Commercial Credit—Michigan, LLC v. Hammert’s Iron Works, Inc.*⁸⁴ is an example of the financing arrangement known as “factoring.”⁸⁵ National Steel Erectors (“NSE”) was a subcontractor to Hammert’s Iron Works on a construction project.⁸⁶ NSE entered into a factoring arrangement with Sterling, under which Sterling could agree to pay NSE eighty-five percent of the amount of certain NSE invoices and be assigned the amount due on the invoices.⁸⁷ As is typical in a factoring arrangement, the payments were on a nonrecourse basis—Sterling assumed the cost of collection.⁸⁸

Under the arrangement, Sterling paid NSE for invoices due from Hammert’s after verification from Hammert’s that the work to which the invoice related had been completed and accepted and that there were no third-party claims to the amount due.⁸⁹ When Hammert’s failed to pay one of the invoices, Sterling sued to collect the amount of the unpaid invoice.⁹⁰

At issue in the court of appeals was whether Sterling had standing to collect an amount that Hammert’s owed NSE.⁹¹ The court examined the language of the verification provided by Hammert’s and concluded that the verification equated to a promise to Sterling and induced a substantial change of position by Sterling in reliance upon the promise.⁹² As such, the court held that Hammert’s was estopped from denying the enforceability of the promise.⁹³ The court observed that while this was a case of first impression in Indiana, the ruling aligned with those in other jurisdictions.⁹⁴

There are two takeaways from this case. First, it is a good illustration of how factoring works. For a client with strong receivables, it might be a form of financing worth exploring. Second, this is a very good example of the more general legal principle of collateral estoppel.

82. *Id.*

83. *Id.* at 779.

84. 998 N.E.2d 752 (Ind. Ct. App. 2013).

85. *Id.* at 754.

86. *Id.*

87. *Id.*

88. *Id.* at 756.

89. *Id.* at 754.

90. *Id.*

91. *Id.* at 755.

92. *Id.* at 757.

93. *Id.*

94. *Id.*

F. Practice Pointers

Here are a few practice pointers before leaving the world of lending and borrowing.

John M. Abbott, LLC v. Lake City Bank is illustrative of challenges to the use of the 365/360 interest calculation method that have been filed against banks across the country.⁹⁵ The underlying business issue is the difficulty of calculating equal daily and monthly interest charges during a traditional 365-day calendar year or 366-day leap year.⁹⁶ Typically, one of three computations is used to calculate interest charges: the 365/365 method (called exact day interest), the 360/360 method (called ordinary interest), and the 365/360 method.⁹⁷ Banks most commonly use the 365/360 calculation method for commercial loans to standardize the daily interest rates based on a thirty-day month.⁹⁸ To calculate the interest payment under the 365/360 method, banks multiply the stated interest rate by 365, then divide by 360.⁹⁹ However, due to the numerator and denominator not matching, the 365/360 method has been held to increase the effective interest rate by 0.01389 in a non-leap year.¹⁰⁰

Borrowers challenge the 365/360 method as ambiguous, and indeed, the borrower in this case was able to get class certification.¹⁰¹ When the case reached the court of appeals, the court found use of the 365/360 ratio in calculating interest had withstood a number of challenges.¹⁰² Largely following an Ohio Supreme Court case, *JNT Properties LLC v. KeyBank National Ass'n*,¹⁰³ the court held the provision enforceable.¹⁰⁴

This case falls under the practice pointer category because the court bolstered its conclusion that the provision was enforceable by pointing to additional language in the note that clearly explained the way in which the 365/360 method operated and its effect on the interest rate.¹⁰⁵ While this case likely settles the issue of ambiguity in Indiana, the careful lawyer will utilize the explanatory language that the Indiana Court of Appeals found in bank clients' promissory notes.¹⁰⁶

The next practice pointer comes from *Centier Bank v. 1st Source Bank*.¹⁰⁷

95. *John M. Abbott, LLC v. Lake City Bank*, 14 N.E.3d 53 (Ind. Ct. App. 2014).

96. *Id.* at 57.

97. See Allan W. Vestal, *No Longer Bending to the Purposes of the Money Lenders: Prohibiting the "Bank Method" of Interest Calculation*, 70 N.C.L. REV. 243, 244-66 (1991).

98. *Id.* at 249.

99. *Id.* at 247-48.

100. *Id.* at 247.

101. See *John M. Abbott, LLC*, 14 N.E.3d at 55.

102. *Id.* at 58.

103. 981 N.E.2d 804 (Ohio 2012).

104. See *John M. Abbott, LLC*, 14 N.E.3d at 58.

105. *Id.* at 57.

106. *Id.* at 58.

107. No. 64A03-1309-MF-356, 2014 WL 2918308 (Ind. Ct. App. June 25, 2014), *trans.*

When 1st Source went to foreclose on a mortgage, a junior creditor questioned whether 1st Source's mortgage was inadequate under Indiana Code section 32-29-1-5, because it did not list a maturity date or adequately describe the debt it secured.¹⁰⁸

Here is the language of the statute:

A mortgage of land that is:

(1) worded in substance as "A.B. mortgages and warrants to CD." (here describe the premises) "to secure the repayment of" (here recite the sum for which the mortgage is granted, or the notes or other evidences of debt, or a description of the debt sought to be secured, and the date of the repayment) . . . is a good and sufficient mortgage¹⁰⁹

The junior lien holder contended that the use of the "date of the repayment" language in the statute created a mandatory condition for a mortgage's language.¹¹⁰ But the court of appeals held that the statute does not require—even on its face—literal accuracy in describing a debt.¹¹¹ The description only need be "correct, so far as it goes, and full enough to direct attention to the sources of correct information in regard to it, and be such as not to mislead or deceive, as to the nature or amount of it, by the language used."¹¹² In particular, "[t]he statute does not require that the mortgage refer specifically to the amount of indebtedness or the notes which evidence the debt. It only requires the debt to be described."¹¹³ Nevertheless, the careful practitioner will remember this statutory provision when drafting a mortgage.

In *Stoffel v. JPMorgan Chase Bank*, a bank foreclosed on a residential mortgage and then assigned its foreclosure judgment to Fannie Mae.¹¹⁴ Fannie Mae purchased the property at sheriff's sale with a credit bid of approximately \$152,000.¹¹⁵ Joel Stoffel sued to recover the difference between the credit bid amount and the amount of the foreclosure judgment, which he alleged to be approximately \$140,000.¹¹⁶ As it turned out, the \$140,000 figure was the principal amount of the debt.¹¹⁷ The foreclosure judgment also included an unspecified amount of post-judgment costs and expenses.¹¹⁸ Those costs equaled

denied, opinion certified.

108. *Id.* at *4-5.

109. IND. CODE § 32-29-1-5 (2014).

110. *Centier Bank*, 2014 WL 2918308, at *5.

111. *Id.* at *6.

112. *Id.* at *6 (quoting *Bowen v. Ratcliff*, 39 N.E. 860, 861-62 (Ind. 1895)).

113. *Id.* at *8 (quoting *Commercial Bank v. Rockovits*, 499 N.E.2d 765, 767 (Ind. Ct. App. 1986), *reh'g denied, trans. denied.*).

114. *Stoffel v. JP Morgan Chase Bank*, 3 N.E.3d 548 (Ind. Ct. App. 2014), *trans. denied, opinion certified.*

115. *Id.* at 551.

116. *Id.*

117. *Id.* at 555.

118. *Id.*

almost exactly the approximately \$12,000 difference between the credit bid amount and the \$140,000; it wasn't a surplus at all.¹¹⁹ However, had the foreclosure judgment not included a specific reference to post-judgment costs and expenses, the amount likely would have been treated as a surplus—a point to keep in mind when drafting foreclosure judgments for submission to the court.

II. BUSINESS LAW CASES

A. Disputes Among Shareholders or Members

Several disputes among business owners reached the appellate courts during the survey period.¹²⁰ The splashiest such dispute was *Koch Development Corp. v. Koch*, in which Will, Dan, and Natalie (two brothers and their sister), collectively the owners of all the shares of Koch Development Corp. (“KDC”), had entered into a “buy-sell” agreement obligating KDC to redeem the shares owned by any deceased shareholder at the price and on the terms in the agreement.¹²¹

After Will died, Dan assumed management responsibilities of KDC.¹²² KDC and Dan then purported to tender to Will's estate the consideration required by the agreement to redeem and purchase the estate's shares.¹²³ In doing so, KDC and Dan set off against the consideration and tendered the amount owed to KDC on a promissory note, evidencing a debt owed to the company by Will at the time of his death.¹²⁴ The estate refused to surrender its shares, taking the position that the terms of the buy-sell agreement had not been complied with.¹²⁵

As it turned out, the case was pretty much a straightforward matter of contract interpretation.¹²⁶ The court of appeals examined the record and concluded that KDC and Dan had breached the agreement by tendering consideration for the estate's shares with a value less than that required by the agreement and by failing to perform timely the agreement's requirements.¹²⁷ That was about all there was to it.

There are, however, two aspects of the decision worth highlighting. At the time of Will's death, there was an outstanding substantial loan from the corporation to Will.¹²⁸ When KDC and Dan made their tender for the estate's

119. *Id.* at 553.

120. *See Koch Dev. Corp. v. Koch*, 996 N.E.2d 358 (Ind. Ct. App. 2013), *trans. denied, opinion certified*; *Bowden v. Agnew*, 2 N.E.3d 743 (Ind. Ct. App. 2014).

121. *Koch*, 996 N.E.2d at 358.

122. *Id.* at 363.

123. *Id.*

124. *Id.*

125. *Id.* at 365.

126. *Id.* at 378.

127. *Id.* at 372-73.

128. *Id.* at 365.

shares, they deducted the principal balance of the loan from the purchase price.¹²⁹ The estate challenged their right to do so, and the court agreed that there was no entitlement to a setoff.¹³⁰ This was because “the note had not yet matured, was current on its payments, did not contain an acceleration clause, and did not make [Will’s] death an event of default.”¹³¹

The second point is that the court of appeals was called upon to make two legal determinations of consequence: the breaches of the shareholder agreement were material and the breaches excused the estate from performing its obligations under the agreement.¹³² In analyzing both of these issues, the court looked to American Law Institute Restatements.¹³³ The court analyzed the materiality question by applying factors set forth in the Restatement (Second) of Contracts section 241.¹³⁴ The court examined the excused performance issue with reference to section 242 of the same Restatement.¹³⁵

129. *Id.*

130. *Id.* at 372.

131. *Id.* at 375.

132. *Id.* at 374-78.

133. *Id.* at 373.

134. *Id.* at 373 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)). Section 241 states:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (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;
- (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.

135. *Id.* at 376 (citing RESTATEMENT (SECOND) OF CONTRACTS § 242 (1981)). Section 242 states:

In determining the time after which a party’s uncured material failure to render or to offer performance discharges the other party’s remaining duties to render performance under the rules stated in [Restatement (Second) of Contracts] §§ 237 and 238, the following circumstances are significant:

- (a) those stated in § 241;
- (b) the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;
- (c) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party’s remaining duties unless the circumstances, including

As the court's use of the Restatement illustrates, Restatements are particularly good sources for legal principles to apply in such circumstances. Restatements, produced by the American Law Institute ("ALI") which consists of lawyers, judges, and law professors of distinction, "are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court."¹³⁶ The court's impressive opinion in *Koch* shows the value of ALI's work and the very high degree of reliance on it by Indiana courts.¹³⁷

Bowden v. Agnew was litigation between members of an LLC that had been in the business of importing auto and truck parts from India.¹³⁸ Joel and Ruby Bowden were responsible for making the financial arrangements for the venture and over time comingled the LLC's income and expenses with that of other businesses they owned.¹³⁹ E.J. Agnew subsequently filed suit seeking an accounting and claiming breach of contract, conversion, and civil conspiracy on the part of the Bowdens.¹⁴⁰ The trial court awarded compensatory damages and treble damages on a finding of criminal conversion.¹⁴¹

The court reviewed Indiana Code section 34-24-3-1, which provides for treble damages plus costs and attorney fees if a plaintiff proves the elements of criminal conversion by a preponderance of the evidence.¹⁴² It concluded that money could be the subject of an action for conversion only if the defendant had been entrusted with a determinate sum to apply to a certain purpose.¹⁴³ "It is well established," the court said, "that refusal to pay a debt will not generally support a conversion claim."¹⁴⁴

The court held that the Bowdens were not guilty of conversion because "no specific, identifiable funds [had been] entrusted to the Bowdens to be held in a separate account for Agnew."¹⁴⁵ While not new law, this is an important reminder of when money can and cannot be the subject of a claim for criminal conversion.

In *Country Contractors, Inc. v. A Westside Storage of Indianapolis, Inc.*, a plaintiff attempted to reach the assets of the individual shareholders of a

the language of the agreement, indicate that performance or an offer to perform by that day is important.

136. *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and those Who Review Their Work*, THE AMERICAN LAW INSTITUTE 4 (2015). See also Frank Sullivan, Jr., *What I've Learned About Judging*, 48 VAL. U. L. REV. 195, 205 (2013).

137. Another example of Indiana courts' use of Restatements, *Guinn v. Applied Composites Eng'g, Inc.* 994 N.E.2d 1256 (Ind. Ct. App. 2013), is discussed later in this Article.

138. *Bowden v. Agnew*, 2 N.E.3d 743 (Ind. Ct. App. 2014).

139. *Id.* at 747.

140. *Id.*

141. *Id.*

142. IND. CODE § 34-24-3-1 (2014); see also *Bowden*, 2 N.E.3d at 750.

143. *Bowden*, 2 N.E.3d at 750.

144. *Id.*

145. *Id.* at 752.

corporation that allegedly had breached a contract to perform excavating work.¹⁴⁶ The court dealt sternly with the findings the trial court had made in allowing the plaintiff to “pierce the corporate veil.”¹⁴⁷ The trial court had emphasized that due to the corporation’s bankruptcy, the plaintiff “[had] no other recourse” except against the individual shareholders.¹⁴⁸ The court of appeals thundered:

The same could be said for any entity that contracts with a company that ends up in bankruptcy. The record shows that [the corporation] was unable to collect from many of its receivables due to its own customers’ bankruptcies. Lack of other recourse simply is not a proper basis for piercing the corporate veil.¹⁴⁹

The court’s fine and strong opinion should remind the bench and bar of the bedrock principle of limited liability for owners of corporations and LLCs and about how rarely a piercing claim will be availing.¹⁵⁰

B. Exemplary Damages Under the Indiana Sales Representative Act

Andrews v. Mor/Ryde International, Inc., an Indiana Supreme Court decision, involves the Indiana Sales Representative Act (“the Act”).¹⁵¹ This case lends itself to comment not so much about the Act itself but because it demonstrates a jurisprudential point about the “new” Indiana Supreme Court.¹⁵²

146. *Country Contractors, Inc. v. A Westside Storage of Indianapolis, Inc.*, 4 N.E.3d 677 (Ind. Ct. App. 2014), *reh’g denied, trans. denied, opinion certified*.

147. *Id.* at 687-90.

148. *Id.* at 690.

149. *Id.* at 690-91.

150. One of the courses that the author teaches at the Indiana University Robert H. McKinney School of Law is called “Closely Held Business Organizations,” a course that lawyers of previous generations took under the name of “Corporations.” With the rise of the LLC, the name of the course has been changed to “Business Associations” at most law schools. Although “Closely Held Business Organizations” is more verbose, it does give a very precise description of the subject matter of the course. At the very start of the course, the author teaches the bedrock principle of limited liability for owners of corporations and LLCs, spending some time explaining how important this principle was to the economic development and growth of our nation. Later, the author introduces students to the exception to the bedrock principle of limited liability known as “piercing the corporate veil.” Unfortunately, as soon as piercing the corporate veil is mentioned, the mercury is out of the vial and the exception swallows up the general rule. No matter how many times the author emphasizes that piercing the corporate veil is a rarely-invoked exception to the general rule, students try their hardest on the exam to find a way to impose liability on shareholders. *Country Contractors, Inc.*, 4 N.E.3d at 690-91, should help in this regard.

151. *Andrews v. Mor/Ryde Int’l, Inc.*, 10 N.E.3d 502 (Ind. 2014). The Indiana Sales Representative Act is codified at IND. CODE §§ 24-4-7-0.1 to -8 (2014).

152. After experiencing no change in its membership from November 19, 1999 through September 30, 2010, the five-member Indiana Supreme Court has received three new appointed justices since September 30, 2010. See *Justice Biographies*, INDIANA SUPREME COURT,

The background of the case is that Ralph Andrews, an independent commissioned sales representative for Mor/Ryde International, Inc. (“Mor/Ryde”), sued for unpaid commissions after the business terminated his contract.¹⁵³ One count of the complaint sought recovery under the Act, which “requires certain businesses to pay their commissioned wholesale sales agents all accrued commissions within fourteen days of terminating the principal-agent relationship.”¹⁵⁴ The important thing about the Act for purposes of this discussion is that it allows “exemplary damages” in certain situations.¹⁵⁵

Mor/Ryde took the position that “exemplary damages” under the Act are subject to Indiana’s statutory restrictions on awards of “‘punitive damages,’ including proof by ‘clear and convincing evidence’ and diversion of three-quarters of the award to the State.”¹⁵⁶ Both the trial court and the court of appeals agreed with Mor/Ryde that the Indiana statutory restrictions on punitive damages did limit the amount that could be recovered under the Sales Representative Act, although Judge Barnes in the court of appeals did dissent.¹⁵⁷

But the Indiana Supreme Court reversed—unanimously—in an opinion written by now-Chief Justice Rush.¹⁵⁸ The court found that the statutory limitations on punitive damages apply only to “discretionary common-law punitive damage awards, not statutory damage awards,” and held that treble damages under the Act are not subject to the statutory limitations on punitive damages.¹⁵⁹

This is certainly a highly respectable point of view. It accords with the derogation canon of statutory construction—that statutes in derogation of the common law should be narrowly construed.¹⁶⁰ But it is also a statement—a unanimous statement—by the Indiana Supreme Court on an issue that does not invalidate a legislative tort reform measure but certainly limits its reach.¹⁶¹

Not too many years ago, the Indiana Supreme Court rejected a claim that the statutory limitations on punitive damages violated the Indiana Constitution.¹⁶²

<http://www.in.gov/judiciary/supreme/2332.htm> (last visited Feb. 14, 2015), *archived at* <http://perma.cc/9PT5-S2PY>.

153. *Andrews*, 10 N.E.3d at 503.

154. *Id.* at 503-04.

155. *Id.* at 504 (citing IND. CODE § 24-4-7-5(b) (2015)).

156. *Id.* (citing IND. CODE §§ 34-51-3-2 to -6 (2008) (Indiana Punitive Damages Act)).

157. *Id.*

158. *Id.* at 506.

159. *Id.* at 504.

160. *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013) (citing *City of Indianapolis v. Buschman*, 988 N.E.2d 791, 794 (Ind. 2013)).

161. *Andrews*, 10 N.E.3d at 504.

162. *Cheatham v. Pohle*, 789 N.E.2d 467, 474-77 (Ind. 2003) (holding three to two that the Indiana Punitive Damages Act did not violate the Takings Clause of the Fifth Amendment of the United States Constitution, the Takings and the Particular Services Clauses found in Article 1, Section 21 of the Indiana Constitution, or the Uniform and Equal Taxation Clause found in Article 10, Section 1 of the Indiana Constitution).

However, two justices took the position that the statute was unconstitutional.¹⁶³ Those two justices, Dickson and Rucker, are still on the court today; the three who voted to affirm the constitutionality of the statute have moved on.¹⁶⁴

C. Agency

Questions of agency can arise with respect to both tort and contract liability. There was a case involving each type of liability during the survey period. The tort case, *Indiana Restorative Dentistry, P.C. v. Laven Insurance Agency, Inc.*, makes some important points about duty, especially the duties of insurance agents, but it makes an even more important point about vicarious liability.¹⁶⁵ In this case, a dental practice sustained a fire loss in excess of its insurance coverage.¹⁶⁶ It sued both the insurance agency, through which the dental practice had purchased coverage, and the carrier to recover the uninsured losses resulting from the fire.¹⁶⁷

The procedural aspects of this case are complicated and relegated to the margin.¹⁶⁸ But the important agency point is one that extends well beyond the insurance field. Here, the insurance agency and the carrier had a written contract that specified that the agency was an independent contractor.¹⁶⁹ Of course, the general rule is that a party that employs an independent contractor has no vicarious liability for the contractor's actions.¹⁷⁰ But the Indiana Court of Appeals was unwilling to hold that the agency was an independent contractor on the basis of the contract because designated evidence of the carrier's

163. *Id.* at 478 (Dickson, J., dissenting) (Justice Dickson, who was joined by Justice Rucker, would have found that the Indiana Punitive Damages Act did violate the Takings Clause of the Fifth Amendment of the United States Constitution, the Takings and the Particular Services Clauses found in Article 1, Section 21 of the Indiana Constitution, and the Uniform and Equal Taxation Clause found in Article 10, Section 1 of Indiana Constitution).

164. *But see* State v. Doe, 987 N.E.2d 1066, 1072-73 (Ind. 2013) (holding five to zero that the Indiana Punitive Damages Act did not violate the Separation of Powers Clause found in Article III, Section 1 of the Indiana Constitution, or the Jury Trial Clause found in Article 1, Section 20 of the Indiana Constitution).

165. *Ind. Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 999 N.E.2d 922 (Ind. Ct. App. 2013), *reh'g denied, trans. denied as to Proassurance Indemnity Co.* (Ind. July 24, 2014), *aff'd in part, rev'd in part*, 27 N.E.3d 260 (Ind. 2015).

166. *Ind. Restorative Dentistry, P.C.*, 999 N.E.2d at 927.

167. *Id.*

168. At the trial court level, the dental practice, insurance agency, and carrier all sought summary judgment. *Id.* Some of these motions were granted, others denied, and some were considered on appeal by either or both of the court of appeals, *id.*, and the supreme court. *Ind. Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 27 N.E.3d 260 (Ind. 2015). The discussion in the text is limited to the insurer's contention that it could not be held vicariously liable for the actions of the insurance agency.

169. *Ind. Restorative Dentistry, P.C.*, 999 N.E.2d at 936.

170. *Bagley v. Insight Commc'ns Co., L.P.*, 658 N.E.2d 584, 586 (Ind. 1995).

considerable oversight and control of the agency was sufficient to create a genuine issue of material fact as to whether the agency was the carrier's agent and whether the carrier was, therefore, vicariously liable for the agency's actions.¹⁷¹ The Indiana Supreme Court summarily affirmed the decision of the court of appeals on this point.¹⁷²

Agency law teaches that vicarious liability turns on whether an agent is acting within the scope of employment.¹⁷³ The court's opinion appears to be consistent with that doctrine.¹⁷⁴

The contract case is *Herman & Kittle Properties, Inc. v. G & G Construction Co. of Indiana*.¹⁷⁵ G & G signed a contract to perform carpentry services on residential property owned by Merrillville Lakes, LLC ("Merrillville").¹⁷⁶ Herman & Kittle also signed this contract.¹⁷⁷ On the title page of the contract, Herman & Kittle was named as the contractor; "[u]nderneath this designation was also the phrase 'agent for owner.'"¹⁷⁸ G & G signed as the subcontractor and Merrillville signed as the owner.¹⁷⁹ "Throughout the contract, there are numerous references to the three distinct parties—contractor, subcontractor, and owner—and the different rights and responsibilities of each party."¹⁸⁰ This lawsuit was filed after a dispute arose among the parties.¹⁸¹

At issue in the court of appeals was whether Herman & Kittle's contention that it had signed the contract as Merrillville's agent and, therefore, had no personal liability under the contract.¹⁸² The court found that, although the contract separately defined and employed the terms "owner" and "contractor," there was nothing in the contract that indicated that the terms were interchangeable.¹⁸³ "Rather, the contract define[d] their rights and responsibilities differently, and treat[ed] them as separate parties in a number of

171. *Ind. Restorative Dentistry, P.C.*, 999 N.E.2d at 936-37.

172. *Ind. Restorative Dentistry, P.C.*, 27 N.E.3d at 264.

173. *Yost v. Wabash Coll.*, 3 N.E.3d 509, 519 (Ind. 2014); *Taylor ex rel. Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244, 247 (Ind. 1989).

174. The Indiana Supreme Court's ruling "summarily affirm[ing] the Court of Appeals' decision" warrants explanation. *Ind. Restorative Dentistry, P.C.*, 27 N.E.3d at 264. When the supreme court grants transfer to address less than all of the issues addressed by a court of appeals opinion, it uses the term "summarily affirm" to indicate that it declines to review the remainder of the opinion. In contrast, the term "expressly adopt" indicates that the supreme court accepts the reasoning of a court of appeals opinion as its own. *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 386 n.4 (Ind. 1998). See IND. APP. R. 58(A).

175. No. 49A05-1304-PL-169, 2013 WL 6913160, at *1 (Ind. Ct. App. Dec. 31, 2013).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at *2.

ways, such as in requiring that both contractor and owner be named as additional insureds.”¹⁸⁴ In addition, the contract also gave Herman & Kittle a number of individual rights as contractor that were separate and distinct from Merrillville’s.¹⁸⁵ The express language of the contract indicated that Herman & Kittle agreed to be bound directly, rather than to act simply in an agency capacity.¹⁸⁶

III. CONTRACT LAW

A. Insurance Contracts

In each survey period, a disproportionate number of the cases interpreting contracts inevitably are cases that interpret insurance contracts. Of particular interest in this survey period were two cases that gave detailed examinations to the critical insurance-related concepts of “subrogation” and “indemnification.”¹⁸⁷

The subrogation case, *Puente v. Beneficial Mortgage Co. of Indiana*, involved title insurance.¹⁸⁸ Guadalupe Puente filed this lawsuit against multiple parties involved in his lengthy and ultimately unsuccessful effort to acquire a parcel of real property.¹⁸⁹ The property had been foreclosed upon in 2000 by the mortgage holder, Beneficial Mortgage Company of Indiana (“Beneficial”), which received a sheriff’s deed.¹⁹⁰ At approximately the same time, James and Rebecca Wolverton purchased the same property at a tax sale.¹⁹¹ The next year, Puente purportedly purchased the property from Beneficial, financing the purchase with a loan from PNC Bank.¹⁹² The Wolvertons ultimately were determined to be the owners of the property and Puente vacated the premises.¹⁹³ Fidelity National Title Insurance Company (“Fidelity”), which had insured Puente’s purported purchase, then paid various claims arising from the fact that Puente had not received good title.¹⁹⁴ Lastly, Puente filed this lawsuit, seeking damages for his failure to receive good title from various financial institutions, title insurance companies, and lawyers.¹⁹⁵ The trial court held that Fidelity was entitled to subrogation of all of Puente’s claims, except a claim of legal malpractice against

184. *Id.*

185. *Id.*

186. *Id.*

187. *See generally* *Puente v. Beneficial Mortg. Co. of Ind.*, 9 N.E.3d 208 (Ind. Ct. App. 2014); *Dana Cos., LLC v. Chaffee Rentals*, 1 N.E.3d 738 (Ind. Ct. App. 2013), *trans. denied*.

188. *Puente*, 9 N.E.3d at 210.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 211.

193. *Id.* at 213.

194. *Id.*

195. *Id.*

one of the lawyers; Puente could not pursue them in his own right.¹⁹⁶

At issue in the court of appeals was whether Fidelity was in fact subrogated to any claims that Puente may have had against various financial institutions and title insurance companies.¹⁹⁷ The court pointed out that the Fidelity policy provided that the insurer was subrogated to and entitled to all rights and remedies that Puente would have if the policy had not been issued.¹⁹⁸ As such, the court agreed with the trial court that Puente could not maintain his other claims.¹⁹⁹

In response to Puente's argument that subrogation was an equitable, not a contractual, right, the court engaged in a lengthy discussion of the difference between equitable and contractual subrogation, concluding that, while subrogation as an equitable doctrine has long been recognized in Indiana, it was not applicable here.²⁰⁰ Rather, the plain terms of the policy "eliminate[] any need to consider the equities because Fidelity is entitled to subrogation as a matter of contractual right."²⁰¹ While recognizing that some other jurisdictions do permit consideration of the equities in such circumstances, the court held that:

[w]here[, as here,] an insurer has paid an insured's entire loss under an insurance policy and has attained the right to pursue all causes of action associated with the loss, the insured can no longer sue in its own name; instead, the insurer[, here Fidelity,] stands in the shoes of its insured with respect to those potential causes of action. . . . Simply put, Puente lacks standing to pursue these causes of action²⁰²

The indemnification case, *Dana Companies, LLC v. Chaffee Rentals*, involved a hazardous waste cleanup matter.²⁰³ In 1985, Chaffee purchased from Dana an industrial facility that was under EPA supervision for having generated hazardous waste.²⁰⁴ Chaffee thereupon leased the plant to BRC Rubber Group, Inc. ("BRC").²⁰⁵ In 1988, the Indiana Department of Environmental Management ("IDEM") directed BRC to remediate polychlorinated biphenyl ("PCB") contamination at the site.²⁰⁶ In 1992, Dana, Chaffee, and BRC signed a settlement agreement under which Dana indemnified Chaffee and BRC against any and all administrative, civil, and criminal liability that they may suffer "arising out of or relating solely to Dana's alleged treatment, storage or disposal

196. *Id.* at 214.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 217-18.

201. *Id.* at 214.

202. *Id.* at 219.

203. *Dana Cos., LLC v. Chaffee Rentals*, 1 N.E.3d 738, 742 (Ind. Ct. App. 2013), *trans. denied*.

204. *Id.*

205. *Id.*

206. *Id.* at 743.

of hazardous waste or hazardous substances.”²⁰⁷ In 1996, BRC entered into a voluntary remediation program (“VRP”) with IDEM, during which IDEM learned of the Dana-Chaffee-BRC settlement agreement.²⁰⁸ In 1999, BRC’s participation in the VRP terminated and IDEM then issued a notice of violation (“NOV”).²⁰⁹ Dana incurred substantial expenses in remediating the violation and then filed this lawsuit, seeking reimbursement of some of those expenses from Chaffee and BRC.²¹⁰

At issue in the court of appeals was whether Chaffee and BRC were responsible for some of the remediation expenses because such expenses were not “fortuitous” but, rather, that they occurred because BRC triggered the NOV by terminating participation in the VRP.²¹¹

The court began by pointing out that the terms “insurance” and “indemnification” are often interchangeable.²¹² Indeed, “insurance” sometimes is defined as a “contract of indemnity”²¹³ and “[i]mplicit in the concept of insurance is that the loss occur as a result of an event that is fortuitous, rather than planned, intended, or anticipated.”²¹⁴ This is called the “fortuity” doctrine.²¹⁵ Dana contended that because BRC triggered the NOV by terminating participation in the VRP, the remediation expenses were anticipated and it should be relieved of responsibility.²¹⁶ But the court, noting that not every contract that contains an indemnity clause is a contract of insurance, held that BRC did not seek to “insure” its business activities through Dana.²¹⁷

[T]he settlement agreement was born out of BRC’s desire to seek reimbursement or to properly assign the cleanup costs to Dana for its use of PCBs. . . . BRC did not offer valuable consideration to Dana in exchange for payment for a future loss. Indemnity in this context is more geared toward the appropriate parties taking responsibility for the costs associated with conduct that has already occurred.²¹⁸

As such, *Chaffee Rentals* was not an insurance case at all.²¹⁹ But the question

207. *Id.*

208. *Id.* at 744-45.

209. *Id.* at 745.

210. *Id.*

211. *Id.* at 746.

212. *Id.* at 747.

213. *Id.* (citing *Motorists Mut. Ins. Co. v. Morris*, 654 N.E.2d 861 (Ind. Ct. App. 1995); *City of Gary v. Allstate Ins. Co.*, 612 N.E.2d 115 (Ind. 1993)).

214. *Id.* at 748 (citing *Gen. Housewares Corp. v. Nat’l Sur. Corp.*, 741 N.E.2d 408, 414-15 (Ind. Ct. App. 2000) (quoting 7 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE*, § 102:7, 17 (3d ed. 1997))).

215. *Id.* at 747.

216. *Id.*

217. *Id.* at 748.

218. *Id.*

219. *Id.*

of whether general commercial liability (“GCL”) policies cover environmental cleanup frequently is litigated and the Indiana Supreme Court has taken an extremely skeptical view of “pollution exclusions” in GCL policies.²²⁰ This started with Justice DeBruler’s 1996 opinion in *American States Insurance Co. v. Kiger*²²¹ and was reaffirmed forcefully in Justice Rucker’s 2012 opinion in *State Automobile Mutual Insurance Co. v. Flexdar, Inc.*²²² In sum, these cases held that the pollution exclusions in the GCL policies at issue were unenforceable for ambiguity.²²³

In one of the cases this year, *Chubb Custom Insurance Co. v. Standard Fusee Corp.*, the court of appeals held that, as a matter of Maryland law, the pollution exclusion was enforceable.²²⁴ The Indiana Supreme Court denied transfer, perhaps thereby acknowledging that Maryland law is different in this respect from Indiana law.²²⁵ The second of the cases, *Indiana Insurance Co. v. Kopetsky*,²²⁶ followed *Kiger* and *Flexdar* in finding coverage under the policy notwithstanding the pollution exclusion.²²⁷ The supreme court initially granted transfer in this case but, after oral argument, vacated its transfer order and reinstated the decision of the court of appeals.²²⁸

At least one more insurance case deserves mention. In *Selective Insurance Co. of South Carolina v. Erie Insurance Exchange*, Welch & Wilson Properties, LLC d/b/a Hammons Storage (“Welch”) leased warehouse space from 500 Rangeline, LLC (“Rangeline”).²²⁹ The lease assigned to Rangeline the duty to maintain the fire system.²³⁰ During late December 2008, the sprinkler system failed due to freezing temperatures, causing water to escape and damaging the insulation manufactured by Knauf Insulation KnbH stored there.²³¹ Welch was covered by an insurance policy issued by Erie Insurance that listed Rangeline as an additional insured.²³²

220. See *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996).

221. 662 N.E.2d at 945.

222. 964 N.E.2d at 845.

223. See *State Auto. Mut. Ins. Co.*, 964 N.E.2d at 852; *Am. States Ins. Co.*, 662 N.E.2d at 950. As a justice on the Indiana Supreme Court, the author dissented in *Flexdar* and *Kiger*; the author would have enforced the exclusions.

224. *Chubb Custom Ins. Co. v. Standard Fusee Corp.*, 2 N.E.3d 752, 762-63 (Ind. Ct. App. 2014), *trans. denied, opinion certified*.

225. *Id.*

226. 11 N.E.3d 508 (Ind. Ct. App. 2014), *opinion corrected on reh’g*, 14 N.E.3d 850 (Ind. Ct. App. 2014), *trans. denied*, 27 N.E.3d 1068 (Ind. Apr. 2, 2015).

227. *Id.*

228. *Id.*

229. *Selective Ins. Co. of S.C. v. Erie Ins. Exchange*, 14 N.E.3d 105 (Ind. Ct. App. 2014), *trans. denied*, 24 N.E.3d 958 (Ind. Feb. 6, 2015).

230. *Id.* at 108-09.

231. *Id.*

232. *Id.* at 108-10.

The question was whether the “additional insured” endorsement in Erie’s policy extended to Rangeline in these particular circumstances.²³³ The court held that it did on the basis that there was a significant, rather than isolated, connection between the accident and the leased premises.²³⁴ The court specifically rejected Erie’s argument that the sprinkler system was not a part of the leased premises, which would have removed Rangeline from coverage.²³⁵ Judge Robb dissented, believing that the additional insured endorsement only protects a landlord from vicarious liability for the acts of the tenant and that there was no connection between the tenant here and the occurrence.²³⁶

B. Leases

There were several cases dealing with shopping center leases during the survey period.²³⁷ One was *Claire’s Boutiques, Inc. v. Brownsburg Station Partners LLC*, where a tenant vacated without notice the retail space that it was leasing from Brownsburg in a shopping center.²³⁸ When Brownsburg sued the tenant for breach of the lease, the tenant responded that it had terminated the lease as permitted by the lease’s “operating co-tenancy” clause.²³⁹ That provision specified that if the shopping center’s occupancy level remained below a certain percentage for a period of one year, then the tenant had the “option of terminating” the lease.²⁴⁰

The court of appeals interpreted the “operating co-tenancy” clause in accord with the tenant’s position and also held that in the absence of any definition of “termination” in the lease or notice requirement, the tenant exercised its option to terminate when it vacated the premises.²⁴¹ These determinations seem to be extremely friendly to the tenant.²⁴² This case is worth a close look for anyone who drafts shopping center leases for landlords.²⁴³

In *Lily, Inc. v. Silco, LLC*, on the other hand, the court went the landlord’s

233. *Id.* at 112.

234. *Id.* at 125.

235. *Id.*

236. *Id.* at 126 (Robb, J., dissenting). Judge Robb’s view of the function of additional insured endorsements to property and casualty insurance policies accords with the author’s view. Chief Justice Rush and Justice David may have had a similar view; both voted to grant transfer. *Selective Ins. Co. of S.C. v. Erie Ins. Exchange*, 24 N.E.3d 958 (Ind. Feb. 6, 2015) (order).

237. See generally *Claire’s Boutiques, Inc. v. Brownsburg Station Partners LLC*, 997 N.E.2d 1093 (Ind. Ct. App. 2013); *Lily, Inc. v. Silco, LLC*, 997 N.E.2d 1055 (Ind. Ct. App. 2013), *reh’g denied, trans. denied, opinion certified*.

238. *Claire’s Boutiques, Inc.*, 997 N.E.2d at 1093.

239. *Id.* at 1096.

240. *Id.*

241. *Id.* at 1101.

242. *Id.*

243. *Id.* at 1101-02.

way.²⁴⁴ The *Lily* case involved a tenant who was trying to operate a cafeteria.²⁴⁵ Along the way, the landlord leased space in the shopping center to a blood plasma center that the cafeteria contended substantially interfered with its business, essentially scaring away elderly customers.²⁴⁶ Among the arguments made by the tenant was that the lease to the plasma center violated the landlord's covenant of quiet enjoyment.²⁴⁷ The court of appeals rejected this contention on the grounds that when the plasma center came in, the tenant already was in arrears as to rent and therefore was not entitled to quiet enjoyment.²⁴⁸

C. Non-competition Covenants

There were four cases worthy of comment during the survey period involving non-competition covenants.²⁴⁹ The first two, *Buffkin v. Glacier Group*²⁵⁰ and *Clark's Sales and Service, Inc. v. Smith*,²⁵¹ both involve the standard examination of the enforceability of non-compete covenants in employment agreements for mid-level employees. In both cases, the court found the agreements unenforceable.²⁵²

In *Buffkin*, Daniel Buffkin's agreement was found to be unenforceable because the training, knowledge, and skills he gained working as a sales recruiter did not constitute protectable interests; furthermore, the court found that the employer had provided no evidence of Buffkin enticing old clients from Glacier.²⁵³ The court also found the agreement's geographic restrictions—the entire United States—and activity restrictions—the entire employee recruitment field—to be unreasonably broad.²⁵⁴

In *Smith*, the court acknowledged that the employer had a legitimate interest in protecting its unique brand in the industry.²⁵⁵ Nevertheless, the court held that the scope of the covenant was unreasonable both because its attempt to protect a customer base that spanned John Smith's entire fourteen-year tenure of

244. *Lily, Inc. v. Silco, LLC*, 997 N.E.2d 1055 (Ind. Ct. App. 2013), *reh'g denied, trans. denied, opinion certified*.

245. *Id.* at 1060.

246. *Id.*

247. *Id.* at 1066.

248. *Id.*

249. *Buffkin v. Glacier Group*, 997 N.E.2d 1 (Ind. Ct. App. 2013); *Clark's Sales and Service, Inc. v. Smith*, 4 N.E.3d 772 (Ind. Ct. App. 2014), *trans. denied* 10 N.E.3d 1004 (2014); *Guinn v. Applied Composites Eng'g, Inc.*, 994 N.E.2d 1256 (Ind. Ct. App. 2013), *trans. denied, opinion certified*; *Kuntz v. EVI, LLC*, 999 N.E.2d 425 (Ind. Ct. App. 2013).

250. 997 N.E.2d at 1.

251. 4 N.E.3d at 772.

252. *Id.* at 786-87; *Buffkin*, 997 N.E.2d at 15.

253. *Buffkin*, 997 N.E.2d at 15.

254. *Id.*

255. *Smith*, 4 N.E.3d at 781.

employment and its geographic scope of the entire country was too broad.²⁵⁶

Guinn v. Applied Composites Engineering, Inc., was different than the two above mentioned cases, and presents a highly cautionary tale.²⁵⁷ Joseph Guinn signed a non-competition agreement while employed by Applied as an airplane mechanic.²⁵⁸ When Guinn left Applied to go to work for a new employer, Applied contacted Guinn's new employer, asserting that its hiring of Guinn violated Guinn's non-competition agreement.²⁵⁹ The new employer terminated Guinn shortly thereafter.²⁶⁰

The issue before the court of appeals involved Guinn's claim against Applied for tortious interference with Guinn's employment with the new company.²⁶¹ The court of appeals reversed the trial court's grant of summary judgment in favor of Applied after examining the factors set forth in the Restatement (Second) of Torts section 767²⁶² and concluded that a genuine issue of material fact existed as to whether Applied's conduct was justified or fair and reasonable under the circumstances.²⁶³

Kuntz v. EVI, LLC is of a completely different character than the three cases just mentioned because it involves a covenant not to compete given by Robert Kuntz in connection with the sale of a business.²⁶⁴ As such, there was little question about its enforceability; the issue was its requirements.²⁶⁵ Kuntz sold his auto parts business to JS Hare, Inc. ("Hare"); the transaction included a lease from Kuntz to Hare of the premises in which Kuntz had conducted his business and an agreement by Kuntz not to compete with Hare.²⁶⁶ Hare subsequently sold

256. *Id.* at 786-87.

257. *Guinn v. Applied Composites Eng'g, Inc.*, 994 N.E.2d 1256 (Ind. Ct. App. 2013), *trans. denied*.

258. *Id.* at 1259.

259. *Id.* at 1259-60.

260. *Id.* at 1261.

261. *Id.* at 1266.

262. RESTATEMENT (SECOND) OF TORTS § 767 (1979). Section 767 states:

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

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

263. *Guinn*, 994 N.E.2d at 1276.

264. *Kuntz v. EVI, LLC*, 999 N.E.2d 425 (Ind. Ct. App. 2013).

265. *Id.* at 429-30.

266. *Id.* at 426-27.

the business to EVI, including assigning its rights under the lease and non-compete to EVI.²⁶⁷ EVI vacated the leased premises at the expiration of the lease's term and Kuntz thereupon leased the property to a competitor of EVI.²⁶⁸

The issue in the court of appeals was whether Kuntz violated the non-compete by leasing the premises to a competitor of EVI.²⁶⁹ The court examined the agreements between Kuntz and Hare and found that the "nearly exhaustive" scope of the non-compete clause was meant "to restrict all competitive activity in any capacity," including acting as lessor for a competitor.²⁷⁰ This holding is well worth keeping in mind when drafting non-competition agreements in connection with the sale of a business where the seller will lease property to the buyer for a term less than the term of the non-compete itself.²⁷¹

D. Defenses in Contract Cases

In *Imbody v. Fifth Third Bank*, the defendant in a collection action successfully asserted a statute of limitations defense.²⁷² The bank repossessed Robert Imbody's truck on May 31, 2006 and subsequently sold the truck, applying the proceeds to the unpaid balance of Imbody's loan.²⁷³ Imbody made a payment on the deficiency balance on February 29, 2008, but none thereafter.²⁷⁴ The bank did not sue to collect the deficiency until June 5, 2012.²⁷⁵

At issue in the court of appeals was when the six-year statute of limitations applicable to written contracts for the payment of money²⁷⁶ began to run.²⁷⁷ The court noted the contract contained an acceleration clause and, following authority from other jurisdictions,²⁷⁸ concluded the bank's repossession of the truck triggered the acceleration clause, along with the running of the statute of limitations.²⁷⁹ The court held that because the bank waited more than six years from the date the acceleration clause had been triggered, the statute of limitations

267. *Id.*

268. *Id.* at 427.

269. EVI also claimed that Kuntz had violated the non-compete in a substantial number of other respects. These issues were not contested on appeal. Kuntz did contend on appeal that the non-compete clause did not extend to EVI, but the court made short work of that contention, quoting language from the non-compete that clearly extends its benefits to Hare's assignees. *Id.* at 429.

270. *Id.* at 430.

271. *Id.* at 429-30.

272. *Imbody v. Fifth Third Bank*, 12 N.E.3d 943 (Ind. Ct. App. 2014).

273. *Id.* at 944.

274. *Id.*

275. *Id.*

276. IND. CODE § 34-11-2-9 (2014).

277. *Imbody*, 12 N.E.3d at 944-45.

278. *Id.* at 945 (citing *Baseline Fin. Servs. v. Madison*, 278 P.3d 321, 322 (Ariz. Ct. App. 2012) (citing case law from five other jurisdictions)).

279. *Id.* at 945.

had run and the bank could no longer seek a deficiency.²⁸⁰

In *Terrazas v. Menchaca*, a more complicated case, the court of appeals rejected a statute of frauds defense.²⁸¹ Alfonso Menchaca sued Elias Terrazas claiming that Terrazas had breached their oral agreement to divide the expenses of maintaining a newly constructed house, built with the proceeds of a mortgage loan obtained by Menchaca.²⁸² Terrazas denied making such a promise and asserted the statute of frauds as an affirmative defense.²⁸³ The trial court found that the oral agreement between Terrazas and Menchaca had been made and was enforceable.²⁸⁴

The court of appeals affirmed²⁸⁵ over a dissent from Judge Mathias.²⁸⁶ The court acknowledged that the statute of frauds renders unenforceable an “unwritten agreement to answer for the debt of another,” but also recognized that there are exceptions to that rule, including an exception for “part performance.”²⁸⁷ The court found it likely that Menchaca’s securing the mortgage financing constituted part performance, removing it from the requirements of the statute of frauds.²⁸⁸ Additionally, the court held that Terrazas was estopped from asserting the statute of frauds defense because Terrazas had pursued Menchaca actively to invest in the construction project in the first place.²⁸⁹ Judge Mathias’s dissent was grounded in his belief that the doctrine of part performance was inapplicable to the circumstances presented.²⁹⁰

IV. AMENDMENT TO THE INDIANA BUSINESS CORPORATION LAW

The Indiana General Assembly in the 2014 legislative session adopted an amendment to the Indiana Business Corporation Law (“BCL”) expressly authorizing Indiana corporations to adopt charter or bylaw provisions establishing exclusive jurisdiction in Indiana state courts for lawsuits on intra-corporate governance matters.²⁹¹ The BCL provides that, “unless [a corporation’s] articles of incorporation provide otherwise, every corporation has perpetual duration in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and

280. *Id.*

281. *Terrazas v. Menchaca*, No. 45A03-1309-PL-0382, 2014 WL 4177236 (Ind. Ct. App. Aug. 22, 2014).

282. *Id.* at *1.

283. *Id.* at *2.

284. *Id.* at *3.

285. *Id.* at *11. The court reversed the trial court on another issue.

286. *Id.*

287. *Id.* at *7.

288. *Id.*

289. *Id.* at *8.

290. *Id.* at *11.

291. S.E.A. 377, 118th Gen. Assemb., 2nd Reg. Sess. (Ind. 2014).

affairs.”²⁹² Prior to the 2014 amendment, this BCL section proceeded to set forth a non-exclusive list of fifteen such powers such as making “donations for the public welfare or for charitable, scientific, or educational purposes.”²⁹³ The 2014 amendment added a sixteenth non-exclusive power, giving an Indiana corporation (unless its articles of incorporation provide otherwise) authority to:

adopt, either in the corporation’s articles of incorporation or bylaws, a provision establishing exclusive jurisdiction in the circuit or superior courts of any county in Indiana or in the United States district courts of Indiana, for:

- (A) any derivative action brought on behalf of, or in the name of the corporation;
- (B) any action asserting a claim for breach of a fiduciary duty owed by any director, officer, employee, or agent of the corporation to:
 - (i) the corporation; or
 - (ii) any of the corporation’s constituents identified in IC 23–1–35–1(d);
- (C) any action asserting a claim arising under:
 - (i) any provision of this article; or
 - (ii) the corporation’s articles of incorporation or bylaws; or
- (D) any actions otherwise relating to the internal affairs of the corporation.²⁹⁴

While the Delaware General Corporation Law (“DGCL”) does not have a provision equivalent to the 2014 Indiana amendment,²⁹⁵ some background for the Indiana provision is provided by reference to a 2013 decision of the Delaware Chancery Court.²⁹⁶ In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, stockholders sued two Delaware corporations that had adopted bylaw provisions specifying that litigation relating to their internal affairs should be conducted in Delaware.²⁹⁷ The court began with the question of whether forum selection bylaws address a proper subject matter for corporate bylaws under the DGCL, i.e., “the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”²⁹⁸ Consequently, the court found that the forum selection bylaws related “quintessentially” to this subject matter.²⁹⁹

292. IND. CODE § 23-1-22-2 (2014).

293. *Id.* The classic corporate law case of *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919), had held that it was beyond the power of a Michigan Corporation to engage in charitable activities, the sole purpose of a corporation being to earn a profit for its stockholders.

294. S.E.A. 377, 118th Gen. Assemb., 2nd Reg. Sess. (Ind. 2014).

295. *Id.*

296. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

297. *Id.* at 937.

298. *Id.* at 950-51.

299. *Id.* at 951.

The court then turned to the stockholders' claim that the forum selection bylaws are invalid because they were adopted by the board rather than by the stockholders.³⁰⁰ While the stockholders contended that boards cannot modify bylaws in a manner that arguably diminishes or divests pre-existing shareholder rights absent stockholder consent, the court held that Delaware precedent was clear that where a corporation's articles or bylaws "put all on notice that the bylaws may be amended at any time," stockholders have "no vested rights . . . that would contractually prohibit an amendment."³⁰¹

While it is likely that Indiana courts would have reached the same conclusion as that reached by the Delaware Chancery Court in *Boilermakers*,³⁰² the amendment to the statute definitively answers the question.³⁰³ Whether Indiana corporations will—or should—take advantage of this authority are, of course, different questions.

300. *Id.* at 954-55.

301. *Id.*

302. See generally Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (2013) (arguing before *Boilermakers* that, absent a finding that plaintiffs' rights under the chartering state's laws cannot be protected adequately by courts in the chartering state, intra-corporate forum selection provisions are likely to be enforced in the very large majority of circumstances).

303. S.E.A. 377, 118th Gen. Assemb., 2nd Reg. Sess. (Ind. 2014).