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

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[**] This Article is primarily adapted from remarks delivered on September 12, 2024, at the Annual Indiana Law Update CLE program organized by Justice Mark S. Massa and Judge Leanna K. Weissmann. The author thanks Justice Massa and Judge Weissmann for including him in this distinguished CLE program, and Megan Ward Esterline for her research in connection with those remarks. The author also attended and found extremely helpful the Indianapolis Bar Association 2024 Commercial Law Update Year in Review: State Court Commercial Law Cases (March 26, 2025) by Reynold T. Berry and Joshua W. Casselman, and the materials distributed in connection therewith.

("Court of Appeals") between September 1, 2023, and August 31, 2024 (the "Survey Period").[1]

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 several practice pointers for both transaction lawyers and litigators. This Article also gives a brief update on the Supreme Court's commercial courts initiative.[2]

I. COMMERCIAL COURTS UPDATE

The Supreme Court established "Commercial Courts" in six Indiana counties in 2019 and added courts in four additional counties two years later.[3] 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.[4] In this regard, the Court has enhanced the functionality of Odyssey, its statewide online court case management system, to include substantive order searches of commercial court dockets.[5]

Early in the Survey Period, Marion Superior Court Judge Heather A. Welch announced her resignation from the bench. Judge Welch was a leader in establishing commercial courts in Indiana and presided over the busiest commercial court in Indianapolis. Her contributions to the success of the commercial court project and her contribution to the state's business and commercial law cannot be overstated. She was replaced on the Commercial

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1. This Article marks the eleventh consecutive year that the author has surveyed Indiana banking, business, and contract law for the *Indiana Law Review*, and he is grateful to the Editors-in-Chief, other editors, and staff of the ILR for their support and assistance. He is grateful as well to Judge Margret G. Robb, who is the proximate cause of this effort. Prior Survey Articles are cited *passim* by year covered, e.g., "2022–2023 Survey Article." All the Articles are denominated "Banking, Business, and Contract Law." Here are the full citations for the prior ten Articles: 48 IND. L. REV. 1195 (2015) (covering 2013–2014); 49 IND. L. REV. 981 (2016) (covering 2014–2015); 50 IND. L. REV. 1179 (2017) (covering 2015–2016); 51 IND. L. REV. 945 (2018) (covering 2016–2017); 52 IND. L. REV. 635 (2019) (covering 2017–2018); 53 IND. L. REV. 821 (2021) (covering 2018–2019); 54 IND. L. REV. 783 (2022) (covering 2019–2020); 55 IND. L. REV. 461 (2022) (covering 2020–2021); 56 IND. L. REV. 669 (2023) (covering 2021–2022); and 57 IND. L. REV. 811 (2024) (covering 2022–2023).

2. *Commercial Courts Committee*, IND. JUD. BRANCH, https://www.in.gov/courts/iocs/committees/commercial-courts/ [https://perma.cc/9VZS-UNY7] (last visited Feb. 20, 2025).

3. Sydney Byerly, *New Commercial Courts are Open in 10 Indiana Counties*, The 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://perma.cc/3HNW-E3ZS]; *Vigo County to Open a Commercial Court*, 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.

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

5. TERRE HAUTE TRIBUNE-STAR, *supra* note 3.

Court by Judge Christina R. Klineman.[6] Another Commercial Court Judge who made important contributions to the project, Judge Cristal C. Brisco of St. Joseph County, was appointed by President Biden to the United States District Court for the Northern District of Indiana. She was succeeded on the Commercial Court by Judge Stephanie E. Steele.[7]

II. BANKING LAW

The mandate of this Article encompasses "banking," and the author includes within that charge litigation, including debt collection actions, between financial institutions and their borrowers.[8] In past Surveys, this has often been the smallest section of the Article. However, during this Survey Period there were more than a few cases of particular interest, resulting in this section being approximately equal in length to the others combined.

A. Accord and Satisfaction

Mayes v. Goldman Sachs Bank USA reviews the law of "accord and satisfaction" with a most-familiar fact pattern.[9]

The bank demanded payment of $9000 due on an installment loan.[10] The borrower's lawyer sent the bank a check for $200 in a letter saying that cashing the check would be considered payment in full.[11] The bank cashed the check and later sued to collect the remaining amount of the debt.[12] Borrower defended, arguing accord and satisfaction under UCC § 3-311: A "claim is discharged if . . . [t]he instrument or an accompanying written communication contained a conspicuous statement . . . that the instrument was tendered as full satisfaction of the claim."[13]

The trial court granted summary judgment for the lender and the Court of Appeals affirmed.[14] The Court of Appeals was correct.

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6. Alexa Shrake, *Klineman Appointed to Fill Welch's Upcoming Vacancy on Commercial Court*, IND. LAW. (Dec. 21, 2023), https://www.theindianalawyer.com/articles/klineman-appointed-to-fill-welchs-upcoming-vacancy-on-commercial-court [https://perma.cc/5WX6-NZYN].

7. *Judge Steele Appointed to Commercial Court*, IND. LAW. (Mar. 21, 2024), https://www.theindianalawyer.com/articles/judge-steele-appointed-to-commercial-court [https://perma.cc/FE32-PF25].

8. *See* discussion of debt collection actions not involving financial institutions discussed *infra* Part IV, CONTRACTS.

9. *Mayes*, 232 N.E.3d 1164 (Ind. Ct. App. Mar. 27, 2024).

10. *Id.* at 1165.

11. *Id.*

12. *Id.* at 1166.

13. *Id.* The U.C.C. § 3-311 has been adopted and codified in Indiana as IND. CODE § 26-1-3.1-311 (2024).

14. *Mayes*, 232 N.E.3d at 1166.

UCC § 3-311 deals with precisely this situation: the person against whom a claim like the bank asserts here:

> may attempt an accord and satisfaction of the disputed claim by tendering a check to the [bank] for some amount less than the full amount claimed. . . . A statement will be included on the check or in a communication accompanying the check to the effect that the check is offered as full payment or full satisfaction of the claim. Frequently, there is also a statement to the effect that obtaining payment of the check is an agreement by the claimant to a settlement of the dispute for the amount tendered.[15]

Before enactment of revised Article 3, the case law was in conflict over the question of whether obtaining payment of the check had the effect of an agreement to the settlement proposed by the borrower.[16]

Under the common law rule, a seller or lender, by obtaining payment of the check, accepted the offer of compromise by a buyer or borrower.[17] Under the common law rule, a seller or borrower could refuse the check or could accept it subject to the condition stated by the buyer or borrower, but the seller or lender couldn't accept the check and refuse to be bound by the condition.[18] Crucially, however, and directly applicable in this case, the rule applied only to an unliquidated claim or a claim disputed in good faith by the buyer or borrower.[19]

Section 3-311 "follows the common law rule with some minor variations that reflect modern business conditions."[20] It is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.[21]

Official Comment 4 to Section 3-311 provides that:

> "Good faith" in subsection (a)(i) is defined in Section 3-103(a)(6) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing.[22] The meaning of "fair dealing" will depend upon the facts in the particular case. For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The victim is in desperate straits and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking

15. U.C.C § 3-111 cmt. 1 (AM. L. INST. & UNIF. COMM'N 2022).
16. *Id.*
17. *Id.* § 3-311 cmt. 2.
18. *Id.*
19. *Id.* (*citing* RESTATEMENT (SECOND) OF CONTRACTS § 281 cmt. d (AM. L. INST. 1981)).
20. *Id.*
21. *Id.* § 3-311 cmt. 3.
22. *Id.* § 3-311(a).

> unfair advantage of the victim, an accord and satisfaction would not result from payment of the check because of the absence of good faith by the insurer in making the tender.[23]

However, "Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute."[24] This was what *Mayes* turned on: there was no bona fide dispute or question but that Mayes owed the entire amount to the bank.[25]

In conclusion, the person seeking the accord and satisfaction has the burden of proving that the requirements of subsection (a) are met.[26] If that person also proves that the statement required by subsection (b) was given, the claim is discharged.[27]

B. Proceedings Supplemental

Converging Capital, LLC v. Steglich discusses the application of—really the non-application of—statutes of limitations to proceedings supplemental.[28]

Resurgence Financial sued its debtor to collect an unpaid debt and received a money judgment of about $6300 in 2006.[29] The debt was never collected and ultimately sold or otherwise assigned to Converging Capital in 2013.[30] Converging Capital brought proceedings supplemental to collect the underlying debt in 2022.[31]

There are two statutes of limitations implicated here: the familiar 10-year statute of limitations on actions upon judgments of courts of record,[32] and a more obscure one that holds that leave of the court is required to obtain execution more than 10 years after entry of judgment.[33] On grounds that Converging Capital had waited too long in violation of these statutes, the trial court dismissed Converging Capital's claim.[34]

The Court of Appeals reversed.[35] The Court said that Indiana law does not impose any limitations period on the initiation of proceedings supplemental.[36]

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23. *Id.* § 3-311 cmt. 4.
24. *Id.*
25. *Id.* § 3-311, cmt. 4; *see also* Mayes v. Goldman Sachs Bank USA, 232 N.E.3d 1164, 1170 (Ind. Ct. App. Mar. 27, 2024).
26. *Mayes*, 232 N.E.3d at 1164.
27. *Id.*
28. Converging Capital, LLC v. Steglich, 234 N.E.3d 902 (Ind. Ct. App. May 1, 2024).
29. *Id.* at 903.
30. *Id.*
31. *Id.*
32. IND. CODE § 34-11-2-11 (2024).
33. *Id.* § 34-55-1-2(a).
34. *Steglich*, 234 N.E.3d at 903.
35. *Id.* at 906.
36. *Id.* at 904 (citing Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 818, 820–21 (Ind. Ct. App. 2005)).

This is "[b]ecause proceedings supplemental are a continuation of the original action, rather than an 'action' on a judgment of a court of record, they are not subject to the ten-year statute of limitations for actions for the payment of money."[37]

As to the execution statute, the court acknowledged that there is sometimes confusion regarding execution and the equitable remedy of proceedings supplemental.[38] The only issue presented in proceedings supplemental is that of affording the judgment-creditor relief to which the creditor is entitled under the terms of the judgment.[39] Because proceedings supplemental are neither an "action" nor an "execution," the judgment creditor "need not have obtained leave of the court for an action beyond ten years" in order to initiate supplemental proceedings.[40]

C. Repossession of Collateral After Default

Centier Bank v. 1987 Troy Road LLC, is a sharp reminder to secured creditors that they must not be dilatory in exercising their rights, including the right to take possession of collateral.[41] A bank held a security interest in the property of a construction company securing a loan commitment of approximately $6,000,000.[42] The debtor's property—the collateral—was located on premises leased from an unrelated third party.[43]

The debtor defaulted on its obligation to the bank and the bank's collection lawsuit sought to recover the debtor's property in which it had a security interest from the leased premises.[44] However, the bank did not name the owner of the premises as a party in its lawsuit.[45] This occurred in February 2021.[46]

The debtor also defaulted on the lease, which the property owner terminated.[47] The property owner took possession of the premises in May 2021, and then sold the premises to an unrelated third party who took possession of the premises, and personal property within, at the end of August 2021.[48]

In January 2022, the bank tried to amend its complaint to add the property owner as a party in an effort to recover the debtor's personal property in which

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37. *Id.* (quoting Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 821 (Ind. Ct. App. 2005)).

38. *Steglich*, 234 N.E.3d at 905.

39. *Id.*

40. *Id.* at 905 (citing Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 817 (Ind. Ct. App. 2005)).

41. Centier Bank v. 1987 Troy Rd. LLC, No. 23A-MF-1261, 2024 WL 340327 (Ind. Ct. App. Jan. 30, 2024) (unpublished disposition); *see* U.C.C § 9-609(a)(1) ("After default, a secured party: (1) may take possession of the collateral.").

42. *Centier*, 2024 WL 340327, at *1.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

it had had a security interest.[49] At the time that the property owner was terminating the lease, the bank's lawyer had advised the property owner that the bank believed all of its property would be removed from the premises by May 3, 2021.[50]

The trial court refused to permit the bank to amend its complaint and the Court of Appeals affirmed.[51] "The Property Owner voluntarily gave the Bank the time the Bank requested to get its property, and the Property Owner had no obligation to sit around indefinitely awaiting confirmation from the Bank."[52]

D. The Mortgage Electronic Registration System (MERS)

V.L. Davis Properties v. Deutsche Bank National Trust Co. as Trustee of Accredited Mortgage Loan Trust 2004-3 Asset Backed Notes is a nice reprise of a very significant Indiana Supreme Court decision from a dozen years before, *Citimortgage, Inc. v. Barabas*, written by Justice Mark Massa.[53]

During the last several decades of the twentieth century and first several of this, practice with residential mortgages has evolved to the point where it would be highly unusual if the originating lender did not almost immediately assign the mortgage to another commercial entity as part of a process known as "mortgage securitization."[54]

The problem the court addressed in *Barabas*—and which faced the court in *V. L. Davis*—is grounded in this evolution of practice. A homebuyer borrows money from a lender, securing the repayment obligation with a mortgage on the purchased residence.[55] In the olden days, the lender would be content to collect the principal and interest on the loan when due.[56] But today, the lender sells the loan and mortgage to financial intermediaries who "pool" the loans; the payments by the homeowner are forwarded to the mortgage pool. Interests in these mortgage pools—which are usually referred to as "mortgage-backed securities"—are sold to investors.[57] The homebuyers' payments are processed to follow the same chain so that the investors ultimately receive the payments of principal and interest in accordance with the terms of their investment.[58]

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at *2.
53. V.L. Davis Properties v. Deutsche Bank Nat'l Tr. Co., 243 N.E.3d 340 (Ind. Ct. App. 2024); Citimortgage, Inc. v. Barabas, 975 N.E.2d 805 (Ind. 2012).
54. *Id.* (citing Christopher L. Peterson, Foreclosure, *Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1367–68 (2009–2010)); David Messerschmitt, Note, *Overview of the Subprime Mortgage Market*, 27 REV. BANKING & FIN. L. 3, 3 (2007); and Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 116 (2011–2012).
55. *Barabas*, 975 N.E.2d at 809.
56. *Id.* at 808.
57. *Id.*
58. *Id.* at 808–09.

The problem is that each time a mortgage is assigned from a lender to a mortgage pool, the new mortgagee's priority is jeopardized unless the recording of the mortgage is updated.[59] To address this problem, a consortium of financial institutions created Mortgage Electronic Registration Systems, Inc. (MERS), in the mid-1990s.[60]

The idea was that instead of the lending financial institution being listed on a residential mortgage as the mortgagee, MERS is shown as both the mortgagee and the "nominee" of the lender.[61] The agreement among MERS members is that they can buy and sell loans and mortgages among themselves without recording an assignment of the mortgage.[62] In the event of default, MERS advises the member bank that currently owns the loan, and that bank can foreclose on the borrower.[63]

In *Barabas*, the holder of a second mortgage foreclosed and sent notice to the original lending bank, but not to MERS.[64] Only after the property had been sold at a Sheriff's sale did CitiMortgage—which by then was the owner of the first mortgage loan—try to intervene to protect its interest.[65] The Court concluded that the parties intended to designate MERS as the lender's agent for service of process in any foreclosure proceeding.[66] As MERS had not been served, the Court held that CitiMortgage was entitled to relief from the judgment of foreclosure.[67]

V.L. Davis was analogous to *Barabas*. When a homeowners' association foreclosed on the mortgagor, it gave notice to the lender but not to MERS.[68] When the bank later foreclosed, the court held that the bank retained its first mortgage lender status because MERS had not been sued or notified in the homeowners' proceeding.[69]

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59. *Id.* at 809.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citing Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 116 (2011); and Kevin M. Hudspeth, *Clarifying Murky MERS: Does Mortgage Electronic Registration Systems, Inc., Have Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action?*, 31 N. ILL. U. L. REV. 1, 9 (2010)).

64. *Id.* at 814–15.

65. *Id.* at 811.

66. *Id.* at 816.

67. V.L. Davis Properties v. Deutsche Bank Nat'l Tr. Co., 243 N.E.3d 340 (Ind. Ct. App. Aug. 21, 2024).

68. *Id.*

69. *Id.* at 818.

E. "Who Owns the [Student Loan] Debt?"

King v. National Collegiate Student Loan Trust 2006-4 is a collection case in which the underlying debt was a student loan.[70]

In prior Survey Articles, the author has periodically discussed debt collection issues under the heading "Who Owns the Debt?"[71] This began in the wake of the Great Recession's mortgage foreclosure crisis, and many defendant mortgagors were challenging plaintiffs' documentation of their entitlement to recovery.[72] In fact, several mortgage loan servicers temporarily halted foreclosure proceedings in 2010 following allegations that the documents accompanying judicial foreclosures had been inappropriately signed or notarized.[73] Then, in 2011, a major study of the issue by the United States Government Accountability Office reported "pervasive problems with [mortgage servicers'] document preparation."[74]

The very first of these Survey Articles discussed a number of cases in which mortgagors were quick to demand evidence that parties bringing foreclosure actions against them were actually the successors in interest to their original mortgagees.[75] But mortgagors rarely prevailed, and by 2019, real estate lenders had pretty much gotten their act together on this.[76] Along the way, there were also cases where credit card lenders were denied summary judgment because they did not have their paperwork.[77] Finally, there were cases where lenders had difficulties collecting on student loans for exactly the same reason.[78]

It seems like the entire industry has gotten its act together, and *King* is an illustration of that. The trial court granted a student loan lender assignee's motion for summary judgment on unpaid student loans.[79] On appeal, the student challenged the plaintiff's evidence relying on one of those cases just alluded

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70. *King*, 232 N.E.3d 646 (Ind. Ct. App. Feb. 21, 2024).

71. *See 2013–2014 Survey Article*, *supra* note 1, at 1195.

72. *Id.*

73. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11–433, MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEALED NEED FOR ONGOING REGULATORY OVERSIGHT 1 (2011).

74. *Id.*

75. *2013–2014 Survey Article*, *supra* note 1, at 1195.

76. *2018–2019 Survey Article*, *supra* note 1, at 824-26.

77. *See, e.g.*, Menendez v. CACH, LLC, No. 29A02-1511-CC-2026, 2016 WL 4442487 (Ind. Ct. App. Aug. 23, 2016); Reef v. Asset Acceptance, LLC, 43 N.E.3d 652 (Ind. Ct. App. 2015), discussed in *2017–2018 Survey Article*, *supra* note 1, *but see* Yuan v. Wells Fargo Bank, N.A., 162 N.E.3d 481, 481 (Ind. Ct. App. 2020), *and* Taylor v. Public Serv. Credit Union, No. 20A-CC-2233, 2021 WL 2643646 (Ind. Ct. App. June 28, 2021), discussed in *2020–2021 Survey Article*, *supra* note 1, at 467-68.

78. *See* Jones v. Shenandoah Funding Tr., No. 20A-CC-553, 2020 WL 6040233 (Ind. Ct. App. Oct. 13, 2020), discussed in *2020–2021 Survey*, *supra* note 1, at 468-69; *but see* Nat'l Collegiate Student Loan Tr. 2006-4 v. Vance, No. 18A-CC-1061, 2018 WL 5316987 (Ind. Ct. App. Oct. 29, 2018), discussed in *2018–2019 Survey*, *supra* note 1, at 826–27.

79. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 649 (Ind. Ct. App. Feb. 21, 2024).

to.[80] But the Court of Appeals found that that the lenders had met the standards found wanting that case and affirmed the trial court, using as supporting authority several more recent Court of Appeals decisions in which student loan lenders prevailed.[81]

The take-away here is that a borrower in an action foreclosing on a mortgage, credit card, or student loan debt, can hold the creditor's feet to the fire and make it prove it owns the debt. While most of the cases in recent years have found creditors able to do so, creditors have the burden of proof in doing so. This is appropriate in this day and age when originating lenders of all sorts of credits almost always sell or assign their debts to others, either for collection or as part of a securitization process, as illustrated by *Barabas*.[82]

F. Fair Debt Collection Practices Act (FDCPA)

The Court of Appeals decided two substantial cases under the Fair Debt Collection Practices Act during the Survey Period.

Rock Creek Capital, LLC v. Tibbett is a very serious and sophisticated piece of work by Judge Elaine Brown in a student loan case that implicates the Fair Debt Collection Practices Act (FDCPA).[83]

Brianna Tibbett enrolled in a proprietary higher education program and took out a student loan from the owner of the school, a company called Ross Education LLC.[84] It is alleged that the student loan went into default and that Ross sold the loan to Rock Creek Capital LLC.[85] The case on appeal is Rock Creek's lawsuit against Tibbett to collect.[86] Note that Ross *sold* the loan to Rock Creek; Rock Creek *owns* the debt; it's not just Ross's agent collecting the debt.[87]

Tibbett defended not by claiming that she didn't owe the money—nor by claiming that Rock Creek didn't own the debt.[88] Instead, she argued that Rock Creek was a rogue debt collector, collecting debts without complying with relevant consumer protection statutes governing debt collectors.[89]

Consider "repo" men who don't make any loans themselves but are hired to recover collateral from debtors who have defaulted. They are quintessential "debt collectors." At the other end of the spectrum is Old Reliable National Bank, which engages in commercial and consumer lending, and if one of its

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80. *Id.* at 651 (discussing Holmes v. National Collegiate Student Loan Tr., 94 N.E.3d 722, 724 (Ind. Ct. App. 2018)).

81. *Id.* 651–52 (citing Smith v. National Collegiate Student Loan Tr., 153 N.E.3d 222 (Ind. Ct. App. 2020), *and* Akinlemibola v. National Collegiate Student Loan Tr. 2007-01, 205 N.E.3d 1014, 1017 (Ind. Ct. App. 2023)).

82. *See supra* notes 58–70 and accompany text.

83. Rock Creek Cap., LLC v. Tibbett, 231 N.E.3d 256 (Ind. Ct. App. Mar. 13, 2024).

84. *Id.* at 258.

85. *Id.*

86. *Id.*

87. *Id.* at 264.

88. *Id.*

89. *Id.*

customers defaults on the loan, Old Reliable sometimes has to go to court to collect. We don't think of Old Reliable as a debt collector.

But somewhere in between are enterprises like Rock Creek—on the one hand, they go to court to collect money owed them (in this respect, like Old Reliable but unlike the repo guys); on the other hand, they do not actually lend money to anyone (in this respect, like the repo guy but unlike Old Reliable). Is Rock Creek a debt collector?

Why does this matter? Well, for one thing, in Indiana, debt collectors have to have a license.[90] Compliance with that requirement is beyond the scope of this Article.

In addition, if a business is a "debt collector" under the FDCPA, significant responsibilities and potential liabilities are triggered. In general, the FDCPA provides that a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.[91] This is as binary as it seems—if an entity is a debt collector, it is prohibited from engaging in any of these practices; if it is not, it is not prohibited from doing so.

Henson v. Santander Consumer USA Inc. is a relatively recent U.S. Supreme Court opinion bearing on this issue.[92] The decision turns on the policy choice that Congress made when it enacted the FDCPA.[93] As just noted, the statute prohibits false, misleading, and deceptive debt collection activities—many listed in the statute but in a non-exclusive list—but only when they are engaged in by a "debt collector."[94] What that means is that Old Reliable's activities collecting credit-card debts from its cardholders are wholly unregulated by the FDCPA, but if it hires a third party to collect those same debts, the activities of that third party will be subject to pervasive scrutiny under the FDCPA. As in *Rock Creek*, *Santander* involved a third fact scenario, relatively unusual at the time Congress adopted the statute, that arises when a creditor *sells* its debts for collection by a completely separate entity.[95]

Santander involved a series of car loans that CitiFinancial made to the petitioners, Ricky Henson and a group of other individuals.[96] Like *Rock Creek*, after the borrowers went into default Santander purchased the loans, which it was attempting to collect on its own account.[97]

Before 2015, most courts, including the federal appellate circuits, interpreted the definitions of creditor and debt collector in the FDCPA to be mutually exclusive—an entity must be either a creditor or debt collector but could not be both at the same time.[98] Under that analysis, whether an entity was

90. *See* IND. CODE § 25-11-1-4 (2024).
91. 15 U.S.C. § 1692e.
92. *Santander*, 582 U.S. 79 (2017).
93. *Id.* at 88.
94. 15 U.S.C. § 1692e.
95. *Santander*, 582 U.S. at 81.
96. *Id.*
97. *Id.*
98. *Id.*

a debt collector or creditor under the FDCPA depended solely on whether the debt was in default at the time of acquisition: if the debt was in default, the entity was a debt collector, and if it was not, it was a creditor.[99] The Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"), the federal agencies charged with enforcing the FDCPA, also supported this interpretation.[100] The debt was in default when Santander bought it from Citi, and so under the previous line of cases, Santander would be a debt collector.[101]

A unanimous Supreme Court was of a different view. It held that a company may collect debts that it purchased for its own account, like Santander did, without triggering the statutory definition in dispute.[102] By defining debt collectors to include those who regularly seek to collect debts "owed . . . another," the Court held, the statute's plain language focused on third party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect debts for itself. Santander was not a debt collector.[103]

Rock Creek makes clear that reading *Santander* to say that a business that collects debts for its own account is not a debt collector goes too far.

Under the FDCPA's definition of "debt collector," there are two ways for a plaintiff to prove a defendant is a debt collector: either (1) its "principal purpose . . . is the collection of any debts," or (2) it "regularly collects or attempts to collect . . . debts owed or due . . . another."[104] *Santander* held—and only held—that when Santander purchased the debts and then sought to collect them for its own account, it did not fall under the second prong of the definition because that prong is limited to entities who regularly collect debts due a third party.[105]

Santander does not address the first prong of the definition: that an entity is a debt collector for purposes of the statute if its "principal purpose . . . is the collection of any debts."[106] That is dispositive here. *Santander* is one of the world's largest banks—many times bigger than Old Reliable!—and so there is no possible way that it would fall under the first prong of this definition—principal purpose of which is the collection of debts.[107]

How about Rock Creek Capital? There was a lot of evidence taken at trial to the effect that Rock Creek Capital's business was nothing more than buying debt that was in default and then trying to collect it.[108] Judge Brown found Rock Creek Capital to be, therefore, a debt collector within the meaning of the

99. *Id.*
100. *Id.*
101. *Id.* at 82.
102. *Id.* at 90.
103. *Id.* at 83.
104. 15 U.S.C. § 1692a(6).
105. *Santander*, 582 U.S. at 83.
106. *Id.* at 82.
107. *Id.* at 89–90.
108. Rock Creek Cap., LLC v. Tibbett, 231 N.E.3d 256, 258 (Ind. Ct. App. Mar. 13, 2024).

FDCPA.[109] She was on solid ground in so holding; there are at least two U.S. Circuit Court opinions decided after *Santander* consistent with her opinion,[110] and none that the author of this Article is aware of to the contrary. A very impressive piece of work.

In *Mercer Belanger Professional Corp. v. Gaeta*, there was no question that the defendant was a debt collector for purposes of the FDCPA; the question was whether the substantive prohibitions of the Act had been violated.[111] This was the third iteration of this case to reach the Indiana Court of Appeals.[112] In the prior proceedings, it had been established that Huntington National Bank had loaned Gaeta funds to purchase a residence, secured by a mortgage.[113] Because the loan was insured by the Federal Housing Administration ("FHA"), Huntington was subject to certain regulations,[114] one of which provided (with certain exceptions) that a "mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid."[115] And because Huntington had failed to comply with this requirement, it was precluded from foreclosing on the mortgage and a trial court's order of foreclosure was reversed.[116] However, the money judgment against Gaeta for the unpaid amount of the loan remained in full force and effect.[117]

At some point along the way, Huntington Bank engaged Mercer Belanger Professional Corp. to pursue collection from Gaeta. Mercer did so by obtaining a writ of execution to collect Huntington Bank's money judgment.[118] Gaeta's residence was sold, and Huntington Bank's judgment was satisfied.[119]

This brings us to the present litigation. Gaeta sued Mercer alleging various violations of the FDCPA, primarily arising out of the fact that Mercer had pursued foreclosure despite knowing that its client, Huntington Bank, had not complied with applicable federal requirements.[120] Implicated were the FDCPA

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109. *Id.* at 269.

110. *See* Tepper v. Amos Fin., LLC, 898 F.3d 364, 371 (3d Cir. 2018); McAdory v. M.N.S. & Assocs., LLC, 952 F.3d 1089, 1090 (9th Cir. 2020).

111. Mercer Belanger Prof'l Corp. v. Gaeta, 241 N.E.3d 1159 (Ind. Ct. App. 2024), *trans. denied*, 2025 WL 774932 (Ind. Mar. 6, 2025). For the reasons explained in the next footnote, this decision will be referred to as "Gaeta III."

112. An earlier iteration of this case was discussed in the 2018–2019 Survey Article as a mortgage foreclosure case that implicated the Servicemembers Civil Relief Act. Gaeta v. Huntington Nat'l Bank, No. 18A-MF-408, 129 N.E.3d 825, 2019 WL 2571993 (Ind. Ct. App. June 24, 2019) (unpublished disposition) ("Gaeta I"), discussed in 2018–2019 Survey Article at 825–26. Still, another iteration of this case was decided by the Indiana Court of Appeals in Gaeta v. Huntington Nat'l Bank, 164 N.E.3d 782 (Ind. Ct. App. 2021) ("Gaeta II").

113. *Gaeta I*, at *1.

114. *Id.*

115. 24 C.F.R. § 203.604 (1996).

116. *Id.* at *10.

117. *Gaeta II*, 164 N.E.2d at 787.

118. *Gaeta III*, 241 N.E.2d at 1155.

119. *Id.*

120. *Id.*

prohibitions on unfair or unconscionable attempts to collect a debt;[121] false and misleading representations in connection with debt collection;[122] improper communications with a party represented by counsel;[123] and improper disclosures in Mercer's initial communication.[124]

In the trial court, Mercer was successful in receiving grants of summary judgment on Gaeta's claims that Mercer had failed to cease collection efforts during a time period that it was prohibited from doing so;[125] that a "dunning letter" from Mercer to Gaeta was not misleading for failing to mention that Mercer might file a new lawsuit against Gaeta;[126] that the dunning letter was not an unfair or unconscionable attempt to collect a debt that Mercer was not expressly authorized to collect;[127] that the dunning letter was not an unlawful attempt to communicate with a consumer Mercer knew was represented by counsel;[128] and that Mercer did not unlawfully collect attorneys' fees.[129]

The foregoing items are set forth primarily to illustrate to the reader of this Article the range of substantive prohibitions that the FDCPA imposes on debt collectors. The central claim in this case was whether or not it was unlawful for Mercer to pursue foreclosure against Gaeta to execute on Huntington Bank's money judgment when Mercer knew that the Bank was not entitled to foreclose on the mortgage because the Bank had been held to have violated the Federal Housing Act's regulation on face-to-face meetings. The specific FDCPA violations alleged were falsely representing that foreclosure was permitted by law;[130] threatening to foreclose when foreclosure was not permitted by law;[131] and attempting to foreclose when not permitted by law.[132] On this most consequential issue, the trial court entered summary judgment in favor of Gaeta as to liability and set the matter for trial.[133] A jury assessed damages for Gaeta of $331,000 and a bench trial on fees and expenses added another $131,131, for a final judgment of $463,131.[134]

On the crucial issue as to whether Gaeta was entitled to summary judgment on the issue of liability, the Court of Appeals affirmed the trial court's conclusion.[135] It reviewed the purposes and text of the FDCPA setting forth Mercer's obligations, found that Gaeta had made a prima facie showing that

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121. 15 U.S.C. § 1692f.
122. 15 U.S.C. § 1692e.
123. 15 U.S.C. § 1692c.
124. 15 U.S.C. § 1692g.
125. *Gaeta III*, 241 N.E.2d at 1166–67.
126. *Id.* at 1167.
127. *Id.*
128. *Id.*
129. *Id.*
130. 15 U.S.C. § 1692e(2)(A).
131. 15 U.S.C. § 1692e(5).
132. 15 U.S.C. § 1692f.
133. *Gaeta III*, 241 N.E.3d at 1167.
134. *Id.* at 1168.
135. *Id.* at 1170.

there were no genuine issues of material fact, and held that Mercer had not presented evidence establishing the existence of a material fact.[136] And because Mercer had not questioned the amount of damages found by the jury or trial court, the Court of Appeals affirmed the trial court's judgment.[137]

Taken together, *Rock Creek Capital, LLC v. Tibbett*[138] and *Mercer Belanger Professional Corp. v. Gaeta*,[139] demonstrate the viability of claims under the FDCPA. It is worth noting that both of these cases were litigated to successful conclusion by the plaintiffs in state court; that statutory attorneys' fees are available under the FDCPA;[140] and that oftentimes claims parallel to those available under the FDCPA are also available under the Indiana Deceptive Consumer Sales Act.[141]

G. A Priority Contest Between a Mortgage and a Mechanic's Lien

EdgeRock Development, LLC v. C.H. Garmong & Son, Inc., a case pending before the Supreme Court as of the date of this Article's publication, involves the financial travails of a commercial construction project called the "Trails of Westfield."[142]

EdgeRock Development LLC ("EdgeRock") contracted with C.H. Garmong & Son, Inc. ("Garmong"), Fox Contractors Corp. ("Fox"), and a third company to complete certain aspects of a retail and multi-family housing project spanning five different parcels of land, two of which were owned by EdgeRock, two by ZPS Westfield, LLC ("ZPS"), and one by a third party.[143] The two EdgeRock parcels were encumbered by a mortgage to secure the payment by EdgeRock of the purchase price of the two parcels.[144] (This mortgage is referred to throughout the litigation as the "Acquisition Mortgage.")[145]

Work began on the project in 2017.[146] ZPS contracted directly with EdgeRock for the work to be completed on its two parcels and paid its financial obligations outlined in its contract with EdgeRock in full.[147] In December 2018, following five months of nonpayment from EdgeRock, Garmong filed a notice

136. *Id.*
137. *Id.* at 1175.
138. 231 N.E.3d 256 (Ind. Ct. App. 2024).
139. 241 N.E.3d 1159 (Ind. Ct. App. 2024).
140. 15 U.S.C. § 1692k.
141. IND. CODE § 24-5-0.5-4(a) (2024).
142. EdgeRock Dev., LLC v. C.H. Garmong & Son, Inc., 227 N.E.3d 907 (Ind. Ct. App.), *trans. granted, vacated*, 235 N.E.3d 135 (Ind. 2024). Oral argument before the Supreme Court was held on September 5, 2024.
143. *EdgeRock Dev.*, LLC, 227 N.E.3d at 913.
144. *Id.* at 916.
145. *Id.*
146. *Id.* at 915.
147. *Id.* at 913.

of intention to hold a mechanic's lien and recorded a mechanic's lien in the amount of approximately $2.1 million.[148]

Shortly thereafter, First Bank agreed to loan $4.9 million to EdgeRock, the proceeds of which were used to discharge the Garmong mechanic's lien (approximately $2.1 million), which was released; pay off the Acquisition Mortgage on EdgeRock's two parcels (approximately $2.0 million), which also was released; provide funds to EdgeRock (approximately $400,000); and other purposes. (First Bank refers to this loan as a "refinancing," and it did, indeed, take out the earlier Acquisition Mortgage on EdgeRock's two parcels.)[149] First Bank was not aware that Garmong "had an outstanding claim for work performed of over $1 million in addition to the Garmong mechanic's lien of $2.1 million that was being paid off at the closing."[150]

In August and September, 2019, Fox recorded mechanic's liens—each totaling approximately $1.7 million—against ZPS's two parcels and EdgeRock's two parcels.[151] In September, 2019, Garmong also recorded mechanic's liens—each in the approximate amount of $1.0 million—against ZPS's two parcels and Edge Rock's two parcels.[152] This case was filed in December, 2019, in which Garmong and Fox sought to foreclose on their mechanic's liens and damages for breach of contract and unjust enrichment.[153] Although there are other issues of interest in this case, only the validity of the Garmong and Fox mechanics' liens and the priority of the First Bank mortgage will be addressed.[154]

After trial, the court held:

- Garmong was entitled to foreclose its mechanic's liens both on the EdgeRock parcels and on the ZPS parcels.
- Fox was entitled to foreclose its mechanic's liens both on the EdgeRock parcels and on the ZPS parcels.
- First Bank only had priority for the approximately $2.1 million of its loan that was paid to Garmong.[155]

First Bank, ZPS, and EdgeRock all appealed.[156]

First Bank argued that while it certainly was entitled to priority the trial court had awarded it with respect to the $2.1 million of its loan that was paid the

148. *Id.* at 916.
149. *Id.*
150. *Id.* at 916–17.
151. *Id.* at 917.
152. *Id.*
153. *Id.*
154. Claims by another party in this litigation and in collateral litigation is beyond the scope of this Article.
155. *EdgeRock Dev.*, 227 N.E.3d at 919.
156. *Id.* at 913.

Garmong, it was for several reasons also entitled to priority as to at least the additional $2.0 million that was paid to extinguish the Acquisition Mortgage.[157] The trial court's determination that the bank was not entitled to priority as to the amount paid to retire the Acquisition Mortgage was grounded in its reading of the phrase "for the specific project" in Indiana Code section 32-28-3-5(d).[158] The relevant portion of that subsection provides:

> The mortgage of a lender has priority over all liens created under this chapter that are recorded after the date the mortgage was recorded, to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate.

The trial court determined that funds loaned by First Bank to pay off the original investors in the real estate development venture, profit paid back to the developer, and interest and fees retained by First Bank were not "funds actually owed to the lender for the specific project to which the lien rights relate."[159] (It was because the $2.1 million paid to Garmong was "for the specific project" that the trial held that First Bank had priority to that amount.)[160]

First Bank challenged this interpretation as overly narrow. It argued that all of the proceeds of the $4.9 million loan were for the specific project—the refinancing of the purchase of the land and attendant expenses of the "Trails of Westfield" development.[161] Amicus Indiana Bankers Association adds a policy justification for this result: preventing mechanic's lienholders from interfering with construction financing. An interpretation of the statute that denies lenders that refinance an existing construction mortgage the priority enjoyed by lenders that provide the funds needed to acquire or clear title to the project land at the outset, gives junior mechanic's lienholders the power to control project refinancing.[162]

In addition to its holding in respect of the meaning of "specific project" in Indiana Code section 32-23-8-5(d), the trial court held that Garmong's and Fox's liens dated from the date work began rather than the date the mechanic's liens were recorded. The bank disputed this as well, relying on Indiana Code section 32-28-3-5(b) which provides in relevant part:

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157. Brief of Appellant First Bank Richmond at 21–22, EdgeRock Development, LLC v. C.H. Garmong & Son Inc., 227 N.E.3d 907 (Ind. Ct. App. Feb. 27, 2023) (No. 22A-PL-01968).

158. Findings of Fact, Conclusions of Law, and Judgment at 64, C. H. Garmong & Son, Inc. v. EdgeRock Development, LLC, (Hamilton Super. Ct. 5 May 25, 2022) (No. 29D05-1912-PL-011500).

159. *Id.*

160. *Id.*

161. Brief of Appellant First Bank Richmond, at 31–35 EdgeRock Development LLC v. C.H. Garmong & Son Inc., 227 N.E.3d 907 (Ind. Ct. App. Feb. 27, 2023) (No. 22A-PL-01968).

162. Brief of Amicus Curiae Indiana Bankers Association at 20–21, EdgeRock Development, LLC, 227 N.E.3d 907 (Ind. Ct. App. May 10, 2023) (No. 22A-PL-01968).

> When the statement and notice of intention to hold a lien is recorded, the lien is created. The recorded lien relates back to the date the mechanic or other person began to perform the labor or furnish the materials or machinery. Except as provided in subsections (c) and (d), a lien created under this chapter has priority over a lien created after it.

The bank gives this section the same interpretation that the Court of Appeals did in *Robert Neises Const. Corp. v. Grand Innovations, Inc.*:

> [T]he the plain language of the statute provides that the lien is created 'when the statement and notice of intention to hold a lien is recorded[.]' Reading the statute as a whole and construing its terms to avoid an absurd result, the 'relation back' provision authorizes the claimant to claim compensation for labor and materials provided back to the date he began work on the project, but it does not give the lien priority at any time before the date of filing.[163]

Finally, the bank contended that the trial court had erred in determining that its mortgage was not entitled to be equitably subrogated to the rights and obligations of the Acquisition Mortgage. Here the trial court found that the

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163. Robert Neises Const. Corp. v. Grand Innovations, Inc., 938 N.E.2d 1231, 1235 (Ind. Ct. App. 2010). In holding that the Garmong and Fox mechanic's liens dated back to when work began, the trial court relied on an earlier Court of Appeals decision, Greyhound Fin. Corp. v. R.L.C., Inc., 637 N.E.2d 1325, 1327 (Ind. Ct. App. 1994). At the time of the Greyhound decision, the relevant statutory language provided: "All liens so created shall relate to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery, and shall have priority over all liens suffered or created thereafter." IND. CODE 32-8-3-5, *repealed by* P.L. 2-2002, SEC. 128. The Greyhound court construed this language as follows: "Here, the only reasonable construction of the term 'created' as used in the mechanic's lien priority statute is that the term includes the act of recording the lien notice. It follows then that the next reference in the statute to a mechanic's lien's priority over all liens 'created thereafter' also means those liens recorded after a mechanic's lien claimant began to perform the labor or furnish the materials or machinery." *Greyhound*, 637 N.E.2d at 1327. Although Neises does not reference Greyhound, the two seemingly can be reconciled by noting that the language of the statute quoted in Neises differs from that quoted in Greyhound. And, indeed, this is the argument that First Bank makes to establish that the trial court erred.

The difficulty with this analysis is that the language quoted in Neises represented a *recodification* of, not an *amendment* to, the language quoted in Greyhound. As noted in the citation above, the language quoted in Greyhound was repealed in 2002 as part of a recodification of Title 32 of the Indiana Code. The language quoted in Neises is the recodified language. And P.L. 2-2002 (the recodification act) specifies that the changes to prior law enacted were for the purpose of "[recodifying] prior property law in a style that is clear, concise, and easy to interpret and apply." IND. CODE 32-16-1-2. Said differently, the purpose of the recodification was to clarify then-existing law, not enact substantive changes. *See* 36 Robert G. Solloway & Tanya D. Marsh, *Filling in the Gaps: The Continuing Evolution of Property Law in Indiana*, IND. L. REV. 1217, 1246–47 (2003). If this principle of recodification is honored, the two decisions cannot be reconciled.

Indiana mechanic's lien statute "abrogates the common law of equitable subrogation as applied to mechanic's liens."[164]

Equitable subrogation allows the refinancing lender to take the priority of the mortgage it pays off.[165] First Bank and Amicus Indiana Bankers Association point out that Indiana recognizes the doctrine of equitable subrogation in the refinancing context generally,[166] and argue that there is no authority for not applying the doctrine when mechanic's liens are involved.[167]

There was no answer from the Court of Appeals on any of these issues. Instead, the Court concluded that Garmong's and Fox's mechanic's liens against EdgeRock's property were invalid and as such, there was no question as to whether the liens had priority over First Bank's mortgage "because the liens no longer exist."[168]

The Court of Appeals first took up arguments relating to Garmong's and Fox's liens on ZPS's property. It found that the evidence at trial established that both Garmong's and Fox's liens filed against ZPS's property were "overstated" such that they included costs associated with work that had not been completed on ZPS's property.[169] The Court said that "mere mistake will not necessarily render [a] whole lien void when it is clear that no fraud was intended and that the claimant had not misled the defendant to his prejudice.[170] But here, the Court said, "the evidence demonstrates otherwise."[171] Garmong's and Fox's liens against ZPS's property were held to be void.[172]

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164. Findings of Fact, Conclusions of Law, and Judgment at 68, C. H. Garmong & Son, Inc. v. EdgeRock Development, LLC, (Hamilton Super. Ct. 5 May 25, 2022) (No. 29D05-1912-PL-011500).

165. *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.6(a) (AM. L. INST. 1997)).

166. *See* Bank of New York v. Nally, 820 N.E.2d 644, 653 (Ind. 2005) ("We agree with the Restatement . . . [a] lender providing funds to pay off an existing mortgage expects to receive the same security as the loan being paid off.").

167. Brief of Appellant First Bank Richmond at 37–44, EdgeRock Development, LLC v. C.H. Garmong & Son Inc. 227 N.E.3d 907 (Ind. Ct. App. Feb. 27, 2023) (No. 22A-PL-01968); Brief of Amicus Curiae Indiana Bankers Association at 22–25, EdgeRock Development, LLC, v. C.H. Garmong & Son Inc., 227 N.E.3d 907 (Ind. Ct. App. May 10, 2023) (No. 22A-PL-01968).

168. *EdgeRock Dev., LLC*, 227 N.E.3d at 931.

169. *Id.* 926 (Garmong); 927 (Fox).

170. *Id.* at 926 (citing Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 100 (Ind. Ct. App. 1999)).

171. *EdgeRock Dev., LLC*, 227 N.E.3d at 926 (Garmong); 927 (Fox).

172. In holding the liens invalid, the Court of Appeals rejected Garmong's and Fox's argument interpreting the words "is connected" in IND. CODE 32-28-3-1(b)(2):

> A person . . . may have a lien separately or jointly . . . on the interest of the owner of the lot or parcel of land: (A) on which the structure or improvement stands; or (B) with which the structure or improvement *is connected*; to the extent of the value of any labor done or the material furnished, or both, including any use of the leased equipment and tools.

Garmong and Fox argued that "connected" be interpreted broadly but the Court agreed with ZPS and EdgeRock that for property to be connected, it must be under common ownership. *Id.* at 924–25 (citing Windfall Nat. Gas, Mining & Oil Co. v. Roe, 85 N.E. 722 (Ind. App. 1908), overruled by Cline v. Indianapolis Mortar & Fuel Co., 117 N.E. 509 (Ind. App. 1917).

Next the Court of Appeals took up the arguments relating to Garmong's and Fox's liens on EdgeRock's property. Like ZPS, EdgeRock maintained that the Garmong's and Fox's liens filed against its property improperly included costs associated with work done on property owned by others. Here, the two contractors lodged an additional argument: that EdgeRock's status as the developer for the project subjected it to liability for the entire contract amount.[173] The Court of Appeals concluded that the fact that while Garmong and Fox "could clearly have received, and in fact did receive, money judgments against EdgeRock for the unpaid amount due under the parties' contracts, it does not necessarily follow that Garmong and Fox could assert mechanic's liens for work done on another's property against EdgeRock's property."[174] The Court of Appeals went on to conclude that there was no authority to encumber EdgeRock's property for work done on another's property by virtue of its status as the project developer.[175] And with that issue disposed of, the court held Garmong's and Fox's liens against EdgeRock's property void for the same reason that it had so held their liens against ZPS's.[176]

III. BUSINESS LAW

A. Andrew Nemeth Properties, LLC v. Panzica

Andrew Nemeth Properties, LLC v. Panzica, a case pending before the Supreme Court as of the date of this Article's publication, is a dispute between a real estate developer named Andrew Nemeth and the principals in an architectural and construction company, three brothers named Panzica.[177] Although the parties' narratives ultimately diverge, they start in agreement that Nemeth played a central role in arranging for Nello, Inc. ("Nello"), to consolidate its manufacturing operations in the South Bend area.[178] Nemeth assisted Nello in obtaining economic development incentives from both state and local government.[179] Nemeth also negotiated an agreement to purchase real estate upon which Nello's manufacturing facility would be located.[180] While Nemeth was the buyer on this agreement, executed May 1, 2014, the understanding was that Nello would fund the purchase price and become the owner of the property.[181]

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173. *Id.* 928
174. *Id.*
175. *Id.*
176. *Id.* at 928–29.
177. Andrew Nemeth Props., LLC v. Panzica, 234 N.E.3d 183 (Ind. Ct. App. Apr. 17, 2024), *vacated, trans. granted*, 2024 Ind. LEXIS 643 (Ind. Oct. 10, 2024). Oral argument before the Supreme Court was held on December 5, 2024.
178. *Id.* at 186.
179. *Id.*
180. *Id.*
181. *Id.*

It is at this point that the parties' narratives begin to diverge. Painting with broad strokes, Nemeth contacted the Panzicas to solicit their interest in contracting with Nello to build the new manufacturing facility and that they were interested in the project.[182] Subsequently, Nello expressed a desire to have a third party own both the real estate and the manufacturing facility and then lease the property to Nello.[183] Nemeth and the Panzicas then discussed forming an LLC for this purpose, the name of which would be NP3, LLC (for Nemeth and three Panzicas).[184] Email correspondence among the men and with Nello and a financial institution discuss this arrangement.[185] Nemeth filed Articles of Organization for NP3, LLC, with the Indiana Secretary of State on September 12, 2014, although no names of members of the LLC are listed.[186] The next month, NP3, LLC, and Nello executed a lease for a term of fifteen (15) years, and that the lease specifically states that NP3's members included Nemeth and two of the Panzicas.[187] Nevertheless, no written operating agreement or other instrument was ever drafted or signed by the four men evidencing the creation of the LLC or their membership in it.[188]

In early November, to facilitate the financing of the project, Nemeth assigned the real estate purchase agreement to an entity owned by the Panzicas.[189] The real estate closing was held in December; the Panzicas funded the purchase with loan proceeds and a cash contribution; Nemeth signed a guaranty with respect to the loan.[190] Some months later, the property was transferred from the Panzica entity to NP3, LLC.[191] During the following year, an operating agreement and other documentation was prepared by the Panzicas showing the Panzica entity as the sole member of NP3, LLC.[192]

Nemeth takes the position that an LLC was formed by oral agreement of the four men at or around the time that the Articles of Organization were filed and the lease with Nello was signed and that the Panzicas breached the LLC contract when they subsequently expelled him from the LLC.[193] He maintains that the Panzicas were thereby enriched at his expense and seeks damages.[194]

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182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 186–87. This disclosure was apparently required because the three men were licensed real estate brokers.
188. *Id.*
189. *Id.* at 187.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

The Panzicas take the position that no LLC was ever formed with Nemeth as a member; that the entity owned by them is the only member that the LLC has ever had.[195]

In the background is the Panzicas contention that Nemeth deliberately withheld from them—even to the point of altering the purchase agreement—that he was to receive a $260,000 commission on the closing of the sale of the real estate.[196]

The trial court found in favor of the Panzicas on the breach of contract claim, holding that Nemeth had never been a member of NP3, LLC, because there was no written operating agreement naming him as a member and there is no written consent from all of the members of the LLC for him to become a member as is required by Indiana Code section 23-18-6-1(a)(1).[197]

As to the unjust enrichment claim, the trial court first ruled that the "essential features" of the requested relief and the affirmative defense asserted were equitable in nature and so Nemeth had no right to a jury trial on his claim.[198] After the bench trial, the court focused on the $260,000 commission in ruling for the Panzicas.[199] The court reasoned that Nemeth's use of the altered purchase agreement induced the Panzicas into participating in the project until it was too late to extricate themselves.[200] "Nemeth's intentional misconduct precludes him from successfully recovering under his equitable claim of unjust enrichment."[201]

The Court of Appeals reversed on both issues.[202]The breach of contract claim turned on a question of statutory interpretation.[203] A member of an LLC is "a person admitted to membership in a limited liability company under Indiana Code section 23-18-6-1 . . ."[204] That section of the statute provides, in pertinent part:

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195. *Id.*

196. *Id.* at 188.

197. Orders on Motions for Partial Summary Judgment, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2 (Marshall Cir. Ct. Nov. 23, 2022). IND. CODE § 23-18-6-1(a)(1) provides in relevant part: "[A] person may become a member in a limited liability company: (1) in the case of a person acquiring an interest directly from the limited liability company, upon compliance with the operating agreement or if the operating agreement does not provide in writing, upon the written consent of all members." This provision will be discussed in greater detail infra.

198. Order Converting Jury Trial to Bench Trial, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2, (Marshall Cir. Ct. Dec. 1, 2022) (citing Songer v. Civitas Bank, 771 N.E.2d 61, 68 (Ind. 2002)).

199. *Id.*

200. *Id.*

201. Judgment for Defendants at 19, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2 (Marshall Cir. Ct. June 6, 2023).

202. *Panzica*, 234 N.E.3d at 186.

203. *Id.* at 188.

204. *Id.* at 189.

> [A] person may become a member in a limited liability company . . . in the case of a person acquiring an interest directly from the limited liability company, upon compliance with the operating agreement or if the operating agreement does not provide in writing, upon the written consent of all members.[205]

The Panzicas maintained that this provision dictates the exclusive method of becoming an LLC member, arguing that the language "precludes companies from having oral operating agreements that allow for oral admission to membership."[206]

Nemeth agreed that this section dictates how one becomes an LLC member, but argued that the Panzicas were reading the section incorrectly. He first pointed out that, under the plain language of the statute, an operating agreement can be either written or oral.[207] Given that fact, he posits that under the foregoing statute, he acquired his membership interest "directly from the limited liability company, upon compliance with the operating agreement."[208]

The Court of Appeals read the statute differently than either of the parties. It says that the statute "presupposes the existence of LLC members" and then concludes that "we see no reason why a pre-formation oral contract cannot be the means of establishing that membership."[209] For this reason, the Court held that the statute did not preclude Nemeth from being a member and that genuine issues of material fact remained as to whether he was.[210]

The Court of Appeals then turned to the question of unjust enrichment and the related issues of Nemeth's alleged misconduct in allegedly withholding information about his brokerage commission.[211] Indiana courts have a well-established methodology for analyzing whether a case in which both equitable and common law claims are asserted are to be tried entirely to the court, or whether the common law claims are to be tried separately by jury.[212] The trial court utilized that analysis in its decision that Nemeth was not entitled to a jury

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205. IND. CODE. § 23-18-6-1 (2024).

206. Brief of Appellees at 31–32, Andrew Nemeth Properties, LLC v. Panzica, No. 23A-PL-01383 (Marshall Cir. Ct. Oct. 9, 2023).

207. Brief of Appellants at 39, Andrew Nemeth Properties, LLC v. Panzica, No. 23A-PL-01383 (Marshall Cir. Ct. Sept. 7, 2023). "Operating agreement" means any written or oral agreement of the members as to the affairs of a limited liability company and the conduct of its business that is binding upon all the members." I.C. § 23-18-1-16.

208. Brief of Appellants at 38–39, Andrew Nemeth Properties, LLC v. Panzica, No. 23A-PL-01383 (Marshall Cir. Ct. Sept. 7, 2023).

209. *Panzica*, 234 N.E.3d at 189–90.

210. *Id.* at 190.

211. *Id.* at 192.

212. See the discussion of *Colvin v. Taylor infra* note 200 and accompanying text for a discussion of this methodology.

trial.[213] Perhaps because it saw this case as involving only a common law claim, the Court of Appeals did not engage in this analysis. Instead, it declared that Nemeth was entitled to a trial on his unjust enrichment claim, relying on three cases in which claims of quantum meruit were held to be entitled to jury trials.[214]

The Court then dealt with the Panzicas' argument that even had the case been tried to a jury, the trial court would have been required to enter judgment in their favor on grounds that Nemeth's "unclean hands" precluded his recovery.[215] ("Unclean hands" refers to Nemeth's alleged deception of the Panzicas with respect to his $256,000 real estate commission.) The Court held that this "harmless error" contention was not availing simply because "unclean hands" is an equitable doctrine that is not available as a defense to a legal claim in Indiana.[216]

The Supreme Court granted the Panzicas' Petition to Transfer and held oral argument on December 5, 2024.[217] The Court will be aided in its analysis by three amici: Defense Trial Counsel of Indiana and the Indiana Trial Lawyers Association arguing, respectively, against and for the entitlement to a jury trial on a claim of unjust enrichment; and an amicus styled as "Indiana Business Law Attorneys," four prominent business lawyers who maintain that the Indiana LLC Act does not permit a member by "oral contract."[218]

IV. CONTRACT LAW

The following discussion of contract law first reviews several cases interpreting and enforcing particular types of contracts before turning its attention to additional cases interpreting particular types of contract clauses.

A. A Major Construction Contract Dispute: Delay Clause; Unjust Enrichment; and Mechanics' Liens

Luse Thermal Technologies, LLC v. Graycor Industrial Constructors, Inc., is a dispute between a subcontractor and a general contractor and the subcontractor and property owner in respect of a very substantial industrial construction project: the construction and installation at BP's plant in Whiting of a processing unit that removes sulfur from gasoline to reduce environmental

213. *See* Order Converting Jury Trial to Bench Trial, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2 (Marshall Cir. Ct. Dec.1, 2022) (citing Songer v. Civitas Bank, 771 N.E.2d 61, 68 (Ind. 2002)).

214. *Panzica*, 234 N.E.3d at 192 (citing Woodruff v. Ind. Fam. & Soc. Servs. Admin., 964 N.E.2d 784, 791 (Ind. 2012)); Nehi Beverage Co. v. Petri, 537 N.E.2d 78, 85 (Ind. Ct. App. 1989); and McKinney v. Springer, 6 Blackf. 511, 515 (1843).

215. *Id.* at 193.

216. *Id.* at 193 (citing Elwood v. Parker, 77 N.E.3d 835, 838 (Ind. Ct. App. 2017)); and Bayview Loan Servicing, LLC v. Golden Foods, Inc., 59 N.E.3d 1056, 1070 (Ind. Ct. App. 2016).

217. *Id.*

218. *Id.*

impact.[219] The overall contract was for $385 million, and the subcontract at issue here was for $6.5 million.[220] Three topics warrant attention in this dispute: the operation of a "delay clause" in the contract between the contractor and the subcontractor; the doctrine of unjust enrichment; and the availability of relief under the mechanic's lien statute.

1. At issue is a "Delay Claims" clause in the subcontract in which the subcontractor agreed that the contractor would not be liable to the subcontractor for any damages suffered because of delay in the construction project.[221]

The project fell behind schedule and then was completed at a greatly accelerated pace which caused the subcontractor to claim an additional $3.7 million in labor costs.[222] The subcontractor also filed a mechanic's lien against the owner for these costs.[223] This lawsuit is the subcontractor's attempt to foreclose the mechanic's lien.[224]

Of the $3.7 million claim, the Court of Appeals calculates that $1.6 million was attributable to project delay and therefore barred by the Delay Claims Clause.[225]

This part of the opinion includes an interesting discussion of the distinction between delay and acceleration. The issue is this: after the project was delayed through no fault of the subcontractor, the contractor and subcontractor agreed that the work would resume at an accelerated pace.[226] The subcontractor argued that because other aspects of the project had encountered delays, it was required to complete its work faster in order to comply with new deadlines.[227] As such, the expenses claimed were not damages for 'delay' at all but rather damages which were incurred due to a contractor-directed change to its work and "the adverse impacts incurred due first to [contractor]'s 'disruption' and then to [contractor]'s 'acceleration."[228]

The Court of Appeals was sympathetic to the argument but, in the end, rejected it.[229] "While we can support a distinction between delay and acceleration under certain circumstances, it would seem that in many cases, if not in most cases, the alleged 'acceleration' is, in fact, the result of 'delay,' or, to put it differently, because of delay caused by or attributable to the owner or a contractor, a contractor or subcontractor is of necessity forced to compress or

219. Luse Thermal Techs., LLC v. Graycor Indus. Constructors, Inc., 221 N.E.3d 701, 707 (Ind. Ct. App. 2023), *trans. denied*, 230 N.E.3d 893 (Ind. 2024).
220. *Id.*
221. *Id.*
222. *Id.* at 708.
223. *Id.* at 709.
224. *Id.*
225. *Id.* at 714.
226. *Id.* at 715.
227. *Id.* at 715–16.
228. *Id.* at 716.
229. *Id.*

speed up the work necessary to be completed before the contract completion date."[230]

2. The subcontractor asserted unjust enrichment claims against both the contractor and the owner.[231] A claim for unjust enrichment is a legal fiction that courts have conceived to permit recovery where the circumstances are such that "under the law of natural and immutable justice there should be a recovery."[232] "However, when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law."[233] The Court found that the circumstances underlying the unjust enrichment claim were covered by the express terms of the contract, thus precluding recovery for unjust enrichment.[234] The subcontractor tried to skirt this holding by arguing that the contractor had abandoned the contract given the changes to the project but the Court of Appeals found no basis for this argument.[235]

The subcontractor also asserted a claim of unjust enrichment against the owner of the project.[236] The general rule of law in this regard is that, in the typical owner-general contractor-subcontractor relationship, "the parties have voluntarily allocated the risks by contract, and the failure of the general contractor to perform does not generally give rise to an action for unjust enrichment against the owner."[237] However, Indiana courts have used the following four criteria to determine whether an owner has been unjustly enriched under those circumstances:

- Whether the owner impliedly requested the subcontractor to do the work.
- Whether the owner reasonably expected to pay the subcontractor, or the subcontractor reasonably expected to be paid by the owner.
- Whether there was an actual wrong perpetrated by the owner.
- Whether the owner's conduct was so active and instrumental that the owner "stepped into the shoes" of the contractor.[238]

The Court worked through each of these circumstances and found no genuine issues of material fact regarding at least two of the criteria necessary to assert a claim for unjust enrichment.[239]

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230. *Id.*
231. *Id.*
232. *Id.* at 718.
233. *Id.* (citing Keystone Carbon Co. v. Black, 599 N.E.2d 213, 16 (Ind. Ct. App. 1992)).
234. *Luse*, 221 N.E.3d at 718.
235. *Id.* at 719.
236. *Id.* at 722.
237. *Id.* at 722 (citing Indianapolis Raceway Park, Inc. v. Curtiss, 179 Ind. App. 557 (Ind. Ct. App. 1979)).
238. *Id.* (citing Stafford v. Barnard Lumber Co., 531 N.E.2d 202 (Ind. 1988); and Indianapolis Raceway Park, Inc. v. Curtiss, 179 Ind. App. 557 (Ind. Ct. App.1979)).
239. *Id.* at 722.

3. The decision contains an extremely consequential discussion of the mechanic's lien statute, which provides a remedy for a subcontractor who delivers goods and services on a construction project to establish liability on the part of the owner of the project for the amounts unpaid by the general contractor.[240]

This statute is often referred to as the "personal liability notice" ("PLN") statute because, in order for a subcontractor to acquire rights under it, the subcontractor must give the property owner "written notice particularly setting forth the amount of the person's claim."[241]

The Court of Appeals takes the position, consistent with its earlier *SLR Plumbing & Sewer, Inc. v. Turk*,[242] that for the notice to the owner to qualify under the mechanic's lien statute, it must make explicit reference to the statute. The subcontractor here asks for a less strict rule but the Court of Appeals adheres to precedent.[243]

B. A Student's Contract with a University

Florance v. Indiana University is an unusual breach of contract case with an unusual resolution.[244] A student dropped out of the IU Medical School soon after enrolling and sued the University for breach of contract, contending that it told him that he would not have to attend classes and then changed the attendance policy after he enrolled in reliance on that representation.[245] The trial court granted summary judgment for the University.[246]

The Court of Appeals was content to acknowledge the existence of a contract between the student and the University,[247] and, for summary judgment purposes, accepted that the "don't have to attend classes" representation was part of the contract.[248] But also part of the contract was the University handbook and the University handbook had a "reservation of rights clause" in it that allowed it to change University policies.[249] Because the University had the right to change its attendance policy, and did so; there was no breach. Summary judgment affirmed.[250]

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240. *Id.* at 720; *see also* IND. CODE § 32-28-3-9 (2024).

241. I.C. § 32-28-3-9; The notice must also set forth that the subcontractor's employer is indebted to the subcontractor and that the subcontractor holds the property owner responsible. *Id.*

242. SLR Plumbing & Sewer, Inc. v. Turk, 757 N.E.2d 193 (Ind. Ct. App. 2001).

243. *Luse*, 221 N.E.3d at 721–22.

244. *Florance v. Ind. Univ.*, No. 22A-CC-2653, 2023 WL 7410430 (Ind. Ct. App. Nov. 9, 2023), (unpublished disposition), *trans. denied*, 233 N.E.3d 400 (Ind. 2024).

245. *Florance*, 2023 WL 7410430, at *1.

246. *Id.* at *2.

247. *Id.* at *3.

248. *Id.* at *4.

249. *Id.*

250. *Id.* at *6.

C. Four Cases on the Sale and Financing of Real Estate

1. *Colvin v. Taylor* is another case like the *Nemeth v. Panzica* dispute *supra* that implicates the constitutional right to trial by jury.[251] Taylor, a land contract vendor, initiated foreclosure proceedings against Colvin, the land contract vendee.[252] Colvin counterclaimed for abuse of process and conversion of business and personal property, and demanded a jury trial.[253]

The Court of Appeals fully recognized that Article 1, § 20, of the Indiana Constitution guarantees that "[i]n all civil cases, the right of trial by jury shall remain inviolate."[254] At the same time, the court pointed out that this provision preserves the right to a jury trial only as it existed at common law, and that a party is not entitled to a jury trial on equitable claims.[255] The issue in *Colvin* was that while the foreclosure action was an equitable claim, the abuse of process and conversion claims were common law torts.[256]

The question of whether common law claims are entitled to be tried to a jury when the case also contains equitable claims is a frequently recurring one and its answer is complicated by the lack of alignment between the two principal Indiana Supreme Court decisions on the subject.

The first of these is *Songer v. Civitas Bank*, in which the Court started out by saying that recent practice and case law had narrowed the right to trial by jury by denying requests for jury trials whenever a complaint joined claims in law and equity.[257] The court explicitly disavowed the "theory" that any claim in equity "draws the whole lawsuit into equity."[258]

Instead, the *Songer* court conducted an exhaustive review of the cases, making two important observations along the way. The cases showed that where the essential features of a suit sound in equity, the entire controversy is drawn into equity, including incidental questions of a legal nature.[259] And, the Court said, the "inverse must also be true. Where equity does not take jurisdiction of the essential features of a cause, a multi-count complaint may be severed, and different issues may be tried before either a jury or the court at the same proceeding."[260] From this analysis, the Court formulated the following rule for the future:

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251. *See supra* note 78 and accompanying text.

252. *Colvin*, 233 N.E.3d at 499. In Indiana, a claim for breach of a land sale a land sale contract must be brought as a mortgage foreclosure action under the famous case of Skendzel v. Marshall, 261 Ind. 226 (Ind. 1973).

253. *Colvin*, 233 N.E.3d at 499.

254. *Id.* (citing IND. CONST. ART. I, § 20).

255. *Id.*

256. *Id.* at 500.

257. Songer v. Civitas Bank, 771 N.E.2d 61, 62 (Ind. 2002).

258. *Id.*

259. *Id.* at 66 (citing Field v. Brown, 146 Ind. 293 (Ind. 1896)).

260. *Id.*

> The appropriate question is whether the essential features of the suit are equitable. To determine if equity takes jurisdiction of the essential features of a suit, we evaluate the nature of the underlying substantive claim and look beyond both the label a party affixes to the action and the subsidiary issues that may arise within such claims. Courts must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded. In the appropriate case, the issues arising out of discovery may also be important.[261]

While the Court of Appeals in *Colvin v. Taylor* cited *Songer*, it relied primarily on a more recent Indiana Supreme Court decision, *Lucas v. U.S. Bank, N.A.*, which, while professing adherence to Songer, formulated the court's task as follows:

> If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.[262]

Is the *Lucas* standard a deviation from that set forth in *Songer*? Two justices thought so.[263] They argued:

> Instead of focusing simply on whether multiple causes of action are "distinct and severable," the standard prescribed in Songer, the majority superimposes a further test—whether the legal claims "significantly overlap" with the subject matter of the original equitable claim. In my view, this new test may often foreclose a defendant's right to a jury trial on distinct and severable legal claims.[264]

As just noted, the *Colvin* court closely follows *Lucas*'s mode of analysis and concludes that the "core legal issues overlap with the foreclosure issue to a considerable degree."[265] Because Colvin's counterclaims arose "wholly out of

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261. *Id.* at 68 (footnote omitted).

262. Lucas v. U.S. Bank, N.A., 953 N.E.2d 457, 465–66 (Ind. 2011).

263. *Id.* at 467 (Dickson, J., dissenting). Justice Robert Rucker joined Justice Dickson's dissent. The majority opinion was written by Justice Steven David and was joined by Chief Justice Randall Shepard and the author of this Article when he was a member of the Court.

264. *Id.*

265. Colvin v. Taylor, 233 N.E.3d 497, 501 (Ind. Ct. App. Apr. 18, 2024).

Taylor's complaint" and were "significantly intertwined with Taylor's action," the Court said that the essential features of the lawsuit were equitable and held that this pulled coven's legal claims into equity.[266]

The author of this Article agrees that Colvin was not entitled to a jury trial on his claims. But *Songer*, and the view of the dissent in *Lucas*, reminds that this will not always be the case; the standard set forth in *Songer* must be rigorously applied to assure that no litigant is deprived of the constitutional right to trial by jury provided by Article 1, § 20.

2. In *Zitzka v. Brogdon*, the buyers of a residence sued the sellers after the closing, alleging fraudulent misrepresentation based upon sellers' failure to disclose structural problem on the statutory disclosure form.[267] A jury trial was held, and the jury was instructed, in part, that the buyers were required to use reasonable care in guarding against fraud, meaning be careful and use good judgment and common sense.[268] The jury found for the sellers.[269]

When the case reached the Court of Appeals, it landed in the hands of the perfect judge to write it: Judge Nancy Vaidik.[270]

Indiana's residential real-estate sales-disclosure statutes require sellers of residential real estate to complete and provide to prospective buyers a form that discloses the condition of key parts of the property.[271] The buyers' main argument on appeal was that the disclosure statutes eliminated the element of reasonable reliance for fraudulent misrepresentation claims based on disclosure forms and that the trial court erred by instructing the jury that the buyers had to act reasonably.[272] The buyers offered in support of their position *Johnson v. Wysocki* in which the Indiana Supreme Court engaged in an extensive examination of the effect of the enactment of the real-estate sales-disclosure statute on the state's long-standing common law rule of caveat emptor with respect to the sale of property.[273] After that analysis, the court concluded that

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266. *Id.* The Court called this an application of the "equitable clean-up doctrine." *Id.* This expression only appears a few times in Indiana cases. In *Lucas*, Justice Steven David referred to it as "a doctrine that, under certain circumstances, involves drawing legal claims into equity, thus extinguishing the right to a jury trial on those legal claims." *Lucas*, 953 N.E.2d at 460. The only prior use of the term in an Indiana case that the author has been able to locate was in Morris v. Bank One, Indiana, N.A., 789 N.E.2d 68, 70 (Ind. Ct. App. 2003), where Judge Melissa May assigned it to the principle from *Field v. Brown* quoted in *Songer supra* note 208 and accompanying text: "Where equity takes jurisdiction of the essential features of a cause, it will determine the whole controversy, though there may be incidental questions of a legal nature." *Songer*, 771 N.E.2d at 66 (citing Field v. Brown, 146 Ind. 293 (Ind. 1896)). It is perhaps more than coincidence that Morris affirmed a trial court judgment rendered by Judge Steven David prior to his appointment to the Supreme Court.

267. Zitzka v. Brogdon, 222 N.E.3d 1025, 1026 (Ind. Ct. App. Oct. 31, 2023), *trans. denied*, 232 N.E.3d 634 (Ind. Mar. 5, 2024).

268. *Id.* at 1026.

269. *Id.*

270. *Id.*

271. IND. CODE §§ 32-21-5-1–13 (2024).

272. *Zitzka*, 222 N.E.3d at 1026.

273. *See generally* Johnson v. Wysocki, 990 N.E.2d 456 (Ind. 2013).

the disclosure statutes "create liability for sellers when they fail to fully or truthfully disclose the condition of those certain features of their property."[274]

In enunciating this new rule of Indiana property law, the Supreme Court adopted precisely the position advocated by Judge Vaidik in an earlier case.[275] There was likely no judge on the Court of Appeals in a better position than Judge Vaidik to assess whether the buyers in *Zitka* were entitled to relief under *Johnson v. Wysocki*.

Judge Vaidik concluded that the buyers misread *Johnson* when they contended that the disclosure statutes eliminated the element of reasonable reliance for fraudulent-misrepresentation claims.[276] Rather, under *Johnson*, reasonable reliance is an element of a fraudulent-misrepresentation claim based on a disclosure form, and there is a statutory presumption of reasonable reliance, but the seller can present evidence to rebut the presumption.[277] As such, the jury was properly instructed.[278]

3. In *Koy v. Armstrong Family Trust, LLC*, Koy acquired four parcels by "special warranty deed" in which the grantor made no warranties concerning the condition of the title of the properties prior to the date the grantor acquired title.[279] It turned out that the properties were encumbered and Koy sued for breach of contract.[280] The trial court granted summary judgment to the grantor and the Court of Appeals affirmed.[281]

Judge Dana Kenworthy's opinion contains a nice explanation of just what a "special warranty deed" is: a deed that limits the usual covenants—seisin, right to convey, freedom from encumbrances, quiet enjoyment, and warranty.[282]

Koy and Defendants did not dispute the deeds at issue here were special warranty deeds.[283] Nor could they. The deeds contained only the covenant of warranty: "Grantor shall warrant and defend title to the same unto the Grantee against every person lawfully claiming or to claim the whole or any part thereof by, through or under the Grantor, but not otherwise."[284] The deeds went on to provide: "Grantor makes no representations or warranties, of any kind or nature whatsoever, other than those set out above, whether expressed, implied, implied by law, or otherwise, concerning the condition of the title of the property prior to the date the Grantor acquired title."[285] As such, an absence of prior

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274. *Id.* at 464–65.

275. *See* Dickerson v. Strand, 904 N.E.2d 711, 717–18 (Ind. Ct. App. 2009) (Vaidik, J., dissenting).

276. *Zitzka*, 222 N.E.3d at 1029.

277. *Id.* at 1029.

278. *Id.* at 1030.

279. Koy v. Armstrong Family Tr., LLC, 2024 WL 3824810, at *1 (Ind. Ct. App. Aug. 15, 2024) (unpublished disposition).

280. *Id.*

281. *Id.* at *4.

282. *Id.* at *3.

283. *Id.*

284. *Id.* at *1.

285. *Id.*

encumbrances had not been warranted by the deed and summary judgment in favor of the grantor was affirmed.[286]

4. *Chitwood v. Guadagnoli* is an illustration of the old adage: "Anything that can go wrong will go wrong."[287]

A creditor named Guadagnoli obtained a default judgment in July, 2006, against a debtor named Chitwood, giving Guadagnoli a judgment lien on Chitwood's real estate.[288] In October, 2008, Guadagnoli filed a complaint to foreclose the default judgment.[289] Two weeks later, Chitwood filed for bankruptcy, thereby staying the foreclosure action.[290] The bankruptcy was dismissed in July, 2012, approximately three years and nine months later.[291] Guadagnoli did not return to court to enforce its rights until April, 2019,[292] but soon thereafter, the proceedings were again placed in abeyance due to Covid.[293] The litigation finally got back on track in the spring of 2023 and in August, the trial court entered summary judgment to the effect that Guadagnoli was entitled to a decree of foreclosure.[294]

As the foregoing indicates, the delays here caused by Chitwood's bankruptcy, Covid, and Guadagnoli's own inaction meant that almost 17 years elapsed between the entry of the default judgment and the decree of foreclosure.[295] Were Guadagnoli's rights cut off because of the lapse of time? Here is what the Court of Appeals says:

> Guadagnoli's default judgment was granted on September 21, 2006. Because the default judgment constituted the recovery of money, the judgment lien expired on September 21, 2016. However, because Chitwood filed bankruptcy proceedings on October 31, 2008, 11 U.S.C. § 362(a) provided for an automatic stay, restraining creditors, like Guadagnoli, with an injunction from taking actions against Chitwood and the property. The bankruptcy proceeding was dismissed on July 24, 2012. Accordingly, as the proceedings were stayed for three years and nine months, Guadagnoli's lien on Chitwood's real property expired in June 2020.
>
> During the eleventh through twentieth years after judgment, no lien exists as to the debtor's real estate. I.C. § 34-55-9-2(2). However, with the permission of the trial court, execution against real estate may

286. *Id.* at *4.
287. Chitwood v. Guadagnoli, 230 N.E.3d 932 (Ind. Ct. App. 2024).
288. *Id.* at 935.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 936.
295. *Id.*

> still issue, albeit without the benefit of a judgment lien. I.C. § 34-55-1-2. . . .
>
> Here, while the judgment lien has expired, Guadagnoli's default judgment against Chitwood has not. And, as the designated evidence does not reflect that Guadagnoli renewed the judgment prior to the expiration of the judgment lien, he must obtain leave of the trial court in order to execute on the judgment.[296]

The bottom line is that the creditor could still go after the real estate, but must obtain the leave of the trial court to execute the judgment.[297] The author of this Article is tempted to ask whether an alternative available to the creditor here would have been to file proceedings supplemental where, as established by *Converging Capital, LLC v. Steglich* discussed above,[298] there is no statute of limitations?

D. Three Insurance Contract Cases

1. In *First Chicago Insurance Co. v. Jones*, an automobile insurance company denied coverage on grounds that the driver did not have a valid driver's license as required by the policy.[299] The driver did have a driver's license from Nigeria, and on that basis, the trial court ruled in favor of coverage.[300] However, the Court of Appeals cited Indiana Code section 9-24-1-7(a)(4) which provides that a new Indiana resident has sixty days after establishing her residency to obtain an Indiana driver's license and cannot legally drive with a license issued by another state or another country.[301] The driver had been in the country since 2016.[302] The Court directed that summary judgment be granted to the insurer.[303]

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296. *Id.* at 938–39 (citations omitted). Of interest, but not affecting the outcome, the Court also said:

> While a judgment may be renewed before the expiration of the lien, we are unaware of any requirement to renew. Rather, it has been noted that "[b]ecause of the confusing complexity of execution and proceedings supplemental, and the added uncertainty caused by the two attendant decade-long time periods, most sophisticated judgment creditors 'renew' their judgments shortly before the expiration of the first (and each successive) decade after judgment." Such renewal actions may take place ad infinitum.

Id. (citations omitted).

297. *Id.* at 939.

298. *See supra* note 28 and accompanying text.

299. First Chicago Ins. Co. *v.* Jones, 237 N.E.3d 1122, 1123 (Ind. Ct. App. June 4, 2024).

300. *Id.*

301. *Id.* at 1124.

302. *Id.* at 1123.

303. *Id.* at 1125.

2. *Pious Trans, Inc. v. Certain Underwriters at Lloyd's London* required the Court of Appeals to consider the meaning of "commercial driver's license" (CDL) in several related but different contexts.[304]

A trucker operating a large tractor-trailer owned by his employer, Pious Trans, Inc., was involved in a collision with another tractor-trailer.[305] Although both the trucker and the particular tractor-trailer involved in the accident had been added to Pious's physical-damage insurance policy, the carrier denied coverage.[306] Pious brought this action against the insurance company for breach of contract and bad-faith denial which was resolved on summary judgment in favor of the insurance company.[307]

At issue is a policy provision that required a covered driver to "[h]ave a minimum two (2) years (twenty-four (24) consecutive months) of Commercial Driver's License experience, at the time of policy inception or date of hire, whichever is the later, driving similar equipment to that insured under this Policy."[308] The driver did not meet this test but Pious made two arguments in favor of coverage.[309] First, the driver had held since 2002 a New York-issued Class E operator's license that was equivalent to a CDL and had operated vehicles similar to those insured by the policy.[310] Second, the policy's terms (specifically, "Commercial Driver's License" and "similar equipment") were ambiguous and should be construed in favor of coverage.[311]

The Court of Appeals held for the insurance company.[312] The Court found that "CDL" was a term of art with a specific statutory definition—not ambiguous—and that to interpret in accordance with the insured's argument would have taken the word "commercial" in the policy outside of its relevant context.[313] In fact, the Court of Appeals order goes the extra mile here to differentiate the experience that the driver had with that required by the policy.[314]

3. *Trustees of Purdue University v. American Home Assurance Co.* was an unsuccessful effort by Purdue to recover under a commercial insurance policy for loss of income during the Covid-19 pandemic, including losses stemming from cancellation of athletic events and conferences, lower rates of housing and

304. Pious Trans., Inc. v. Certain Underwriters at Lloyd's London, 233 N.E.3d 501 (Ind. Ct. App. Apr. 22, 2024).
305. *Id.* at 503.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 504.
310. *Id.*
311. *Id.*
312. *Id.* at 506.
313. *Id.* at 505.
314. *Id.* at 506.

campus hotel occupancy, and decreased sales of food, retail items, and health services.[315]

Purdue faced an uphill climb. In two recent cases brought by the Indiana Repertory Theatre ("IRT"), the Indiana Court of Appeals had rejected claims that commercial business interruption insurance covered loss of income due to Covid-19—and the Supreme Court had denied review in both cases.[316] The first of these decisions held that the policy at issue parties then presented argument to the trial unambiguously contemplated a physical loss or physical damage to trigger recovery;[317] the second, holding that the COVID-19 virus—which dies off—did not physically alter the insured's property.[318] Indeed, Purdue's carrier argued that these decisions were dispositive.[319]

Purdue maintained that its policy materially differed from the policy at issue in the IRT cases because Purdue was insured against the "risk" of physical loss or damage and the policy "doesn't require property to [be] repaired, rebuilt, [or] replaced."[320] Purdue also argued that the policy language was ambiguous and the policy's exclusion for damages from a "virus" lacked adequate specificity, implicating the *contra proferentem* doctrine. [321]

It was to no avail. The Court of Appeals gave a very close look at the language in Purdue's policy and found that it too required "physical alteration."[322] The court buttressed its conclusion with citations to holdings from other jurisdictions, including two from the United States Court of Appeals for the Seventh Circuit.[323]

E. Prejudgment Interest

Gotfried v. Popovich is a rather straightforward debt collection case but is noteworthy for an important reminder concerning the availability and calculation of "prejudgment interest." [324] While there is a statute on prejudgment interest,[325] its availability and calculation in a particular case is

315. Tr. Of Purdue Univ. v. Am. Home Assurance Co., 227 N.E.3d 986 (Ind. Ct. App. Feb. 28, 2024); Purdue was represented by Plews Shadley Racher & Braun LLP, cited in earlier Survey Articles for its advocacy on behalf of insureds. *See, e.g.*, *2022–2023 Survey Article*, *supra* note 1, at 852.

316. Ind. Repertory Theatre v. Cincinnati Cas. Co., 180 N.E.3d 403 (Ind. Ct. App. 2022); Ind Repertory Theatre, Inc. v. Cincinnati Cas. Co., 203 N.E.3d 555 (Ind. Ct. App. 2023).

317. *Ind. Repertory Theatre*, 180 N.E.3d at 405.

318. *Ind. Repertory Theatre, Inc.*, 203 N.E.3d at 557.

319. *Tr. of Purdue Univ.*, 227 N.E.3d at 989.

320. *Id.*

321. *Id.*

322. *Id.* at 995.

323. *Id.* at 994–95 (citing Stant USA Corp. v. Factory Mut. Ins. Co., 61 F.4th 524 (7th Cir. 2023); Sandy Point Dental P.C. v. Cincinnati Ins. Co., 20 F.4th 327 (7th Cir. 2021)).

324. Gotfried v. Popovich, No. 23A-CC-01666, 2024 WL 1828202 (Ind. Ct. App. 2024).

325. IND. CODE § 34-6-2-113 (2024).

sometimes a matter of dispute.[326] But in *Gotfried*, the underlying promissory note specified that prejudgment interest would be available at a rate of 10%.[327] Judge Peter Foley explains with care how the calculation is to be made according to the terms of the note and emphasizes the fact that the provision in the promissory note itself overrides any conflicting provisions in the statute.[328]

F. Non-Competition Clauses in Employment Agreements

The enforceability of non-competition clauses in employment agreements has been a front-burner issue for several years. The Indiana General Assembly's entry into what has historically been an arena reserved to the common law prompted extended treatment in last year's Survey Article.[329]

The prior year's Survey Article reported on the Federal Trade Commission (FTC) proposal to ban most non-compete clauses in employer-employee agreements nationwide.[330] During the Survey Period, the FTC finalized and promulgated the rule, effective September 4, 2024.[331] Legal challenges were swiftly lodged, beginning just hours after the FTC's vote approving the rule, and on August 20, 2024, a federal court set aside the rule and prohibited the FTC from enforcing it.[332]

The court's decision, *Ryan v. Federal Trade Commission*, reviewed the proposed non-compete rule through the prism of the Administrative Procedure Act (APA), as that statute governs judicial review of certain agency actions, findings, and conclusions.[333] The APA directs that, when reviewing an agency's action, it must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[334]

The court first addressed the statutory authority of the FTC to promulgate the non-compete rule and found it lacking. The FTC asserted its authority under two sections of the Federal Trade Commission Act: §6(g) and § 18.

Under § 6(g), the FTC has the power to "classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[335] "By a plain

326. *Gotfried*, 2024 WL 1828202, at *1.

327. *Id.*

328. *Id.* at *3 (citing Noble Roman's, Inc. v. Ward, 760 N.E.2d 1132, 1140 (Ind. Ct. App. 2002)).

329. *See 2022–2023 Survey Article*, *supra* note 1, at 836, 865.

330. *2021–2022 Survey Article*, *supra* note 1, at 699.

331. 16 C.F.R. Part 910.

332. Ryan LLC v. Federal Trade Commission, 46 F. Supp. 3d 369 (N.D. Tex., Aug. 20, 2024).

333. 5 U.S.C. § 706(2); Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 391 (2024).

334. 5 U.S.C. § 706(2)(A)–(C).

335. 15 U.S.C. § 46(g).

reading" of this language, the court said that § 6(g) does not grant the FTC "authority to promulgate substantive rules regarding unfair methods of competition."[336]

Under § 18, the FTC has the authority to prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce."[337] However, the court says that § 18 limits the FTC's ability to make rules dealing with unfair or deceptive practices—not unfair authority to promulgate substantive rules regarding unfair methods of competition.[338]

While the court acknowledged that the FTC has some authority to promulgate rules precluding unfair methods of competition, it concluded that the FTC lacked the authority to create substantive rules through this method.[339]

The court next addressed the plaintiffs' contention that the non-compete rule was arbitrary and capricious under the APA.[340] It held that the rule was arbitrary and capricious because it was "unreasonably overbroad without a reasonable explanation."[341] The rule, the court said, imposed "a one-size-fits-all approach with no end date, which fails to establish a 'rational connection between the facts found and the choice made.'"[342] The court gave two reasons for this conclusion. First, it said that the record did not support the rule.[343] It looked at the materials that the FTC cited in support of the rule and found them to be "based on inconsistent and flawed empirical evidence."[344] Furthermore, the court said that the FTC had failed to consider the positive benefits of non-compete agreements and had disregarded the substantial body of evidence supporting non-competes.[345] Second, the court said that the FTC had failed "to sufficiently address alternatives" to issuing the rule.[346]

Having determined that the FTC lacked statutory authority to promulgate the non-compete rule and that the rule was arbitrary and capricious, the court declared that the rule would not take effect on its effective date, nor could it be enforced.[347] This order applies nationwide.[348]

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336. *Ryan LLC*, 46 F. Supp. 3d at 384.
337. 15 U.S.C. § 57a.
338. *Ryan LLC*, 46 F. Supp. 3d at 384.
339. *Id.*
340. 5 U.S.C. § 706(2)(A).
341. *Ryan LLC*, 46 F. Supp. 3d at 388.
342. *Id.* (citation omitted).
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.* at 390.
348. *Id.*

The FTC appealed the court's decision while President Biden was still in office.[349] On March 7, 2025, the government asked the court to hold the appeal in abeyance for 120 days.[350]

Meanwhile, a decision of note involving a non-compete clause in an employment agreement was rendered by the Court of Appeals during the Survey Period: *Kesler v. Indiana Univ. Health Care Associates, Inc.*[351]

Kenneth Kesler, M.D. sought a declaratory judgment to relieve him from the restraints contained in a non-compete clause of his employment agreement with Indiana University Health Care Associates, Inc.[352] The employer responded with a request for a preliminary injunction enforcing the non-compete, which the trial court granted: Dr. Kessler was prohibited from treating patients within the restricted geographical area set out in the employment agreement.[353]

The Court of Appeals reversed, holding that two of the standards for a preliminary injunction had not been met: (1) that "the threatened injury to the movant outweigh[ed] the potential harm to the nonmoving party from the granting of an injunction" and (2) that "the public interest would not be disserved by granting the requested injunction."[354]

The case is intriguing because, as to the first of these factors, the employee was able to focus the court's attention on the geographic limitation and then persuade the court that if he were to simply move outside of the geographic limitation, all of his patients would follow him.[355] As such, he argued – and the court agreed – that the breach of the geographic condition did not cause the former employer any harm.[356]

Look for future litigation of non-competes to emphasize the relative harm to be suffered by the respective parties and the public interest by granting injunctive relief.

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349. *Id.*, *appeal docketed*, No.24-10951 (5th Cir. Oct. 24, 2024).

350. *Id.*, Motion to Hold Appeal in Abeyance for 120 Days, No. 24-10951 (5th Cir. Mar. 7, 2025).

351. Kesler v. Ind. Univ. Health Care Assocs., Inc., 234 N.E.3d 206 (Ind. Ct. App. Apr. 25, 2024), *reh'g denied* (June 24, 2024).

352. *Id.* at 208.

353. *Id.* at 209.

354. *Id.* at 211.

355. *Id.* at 213.

356. *Id.* It appears that the parties settled following the opinion of the Court of Appeals as they jointly petitioned to have the appeal dismissed, i.e., the parties effectively agreed that neither would seek transfer. Order Granting Motion and Dismissing Appeal with Prejudice, Kesler v. Ind. Univ. Health Care Assocs., Inc., 234 N.E.3d 206 (Ind. Ct. App. July 12, 2024) (No. 23A-PL-2111).

G. Arbitration Clauses: Supreme Court Decision

Illinois Casualty Co. v. B&S of Fort Wayne Inc. was decided by the Supreme Court during the Survey Period.[357] The Court of Appeals decision in this case was given extensive treatment in last year's Survey Article's discussion of insurance contracts.[358] One of several issues discussed there was the focus of the new Supreme Court decision—arbitrability—and so it is discussed this year under the heading of Arbitration Clauses.

The interested reader is referred to last year's Survey Article for the details on this litigation.[359] For purposes of this discussion, it is sufficient to say that an insurance company (Illinois Casualty Company ("ICC")) and the assignees of its insured (33 models ("Models")) disagree about the reach of arbitration language in some of the ten insurance policies at issue.

The Supreme Court described its task as follows:

> [ICC and the] Models contest on the surface whether arbitration is proper based on the assignment of several business insurance policies . . . . But on a deeper level, this case is about whether the parties agreed to have an arbitrator, rather than the courts, resolve whether their arbitration agreement requires arbitration. Here, two questions exist: First, does the incorporation of American Arbitration Association ("AAA") rules constitute "clear and unmistakable" intent to delegate arbitrability to an arbitrator? Second, did ICC . . . and the Models by way of assignment—agree to arbitrate arbitrability for the claims asserted by each Model?[360]

Some recent guidance from the U.S. Supreme Court is of consequence here. Its decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, held that in general, courts can determine whether an arbitration agreement "exists."[361] But, the Court said, when it comes to threshold arbitrability—the power to decide whether a dispute must be first resolved by arbitration—parties may choose to delegate that matter to an arbitrator through agreement.[362] And the Court imposed an additional interpretive rule that "clear and unmistakable evidence" is required to establish an intent to delegate arbitrability.[363]

Some factual background is also of consequence. As noted above, the Models were assignees of ten "Businessowners" insurance policies issued by ICC for coverage between 2014 and 2020. Each of the Policies contained similar language guaranteeing that ICC would pay the "sums" if its insured became

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357. Illinois Cas. Co. v. B&S of Fort Wayne Inc., 235 N.E.3d 827 (Ind. 2024).
358. *2023–2024 Survey Article*, *supra* note 1, at 850–51.
359. *Id.*
360. *Illinois Cas. Co.*, 235 N.E.3d at 830.
361. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 69 (2019)
362. *Id.* at 67–68.
363. *Id.* at 72.

"legally obligated to pay as damages" resulting from "bodily injury," "property damage," or "personal and advertising injury." ICC agreed to defend them "against any 'suit' seeking those damages."[364]

In 2016, ICC added a Cyber Protection Endorsement ("CPE") that limited the personal and advertising injury coverage. The CPE, relevant here, included the following arbitration clause:

> Notwithstanding any provision of this form or the Policy, any irreconcilable dispute between us and an "insured" is to be resolved by arbitration in accordance with the then current rules of the American Arbitration Association, except that the arbitration panel shall consist of one arbitrator selected by the "insured," one arbitrator selected by us, and a third independent arbitrator selected by the first two arbitrators. Judgment upon the award may be entered in any court having jurisdiction. The arbitrator has the power to decide any dispute between us and the "insured" concerning the application or interpretation of this form. However, the arbitrator shall have no power to change or add to the provisions of this form. The "insured" and us will share equally in the cost of arbitration. Because the CPE was added in 2016, it only applied to six of the ten Policies.[365]

The Supreme Court held, as a matter of first impression in Indiana, that an agreement to arbitrate in accordance with AAA or similar rules reflects "clear and unmistakable" evidence of an intent to delegate arbitrability to an arbitrator.[366] This question was left open by the Supreme Court in *Henry Schein*[367] but the Court's rule tracks most jurisdictions to have answered this question.[368] And it held that the language here was clear and unambiguous: ICC agreed to arbitration "in accordance with the then current rules of American Arbitration Association."[369] As such, the parties "agreed to arbitrate arbitrability."[370]

The Court went on to say that applying this rule to the policies at issue here "yields a nuanced disposition."[371] While for 2016 and later claims, the trial court must defer to the arbitrator because the agreement incorporates the AAA rules,

364. *Illinois Cas. Co.*, 235 N.E.3d at 831.
365. *Id.*
366. *Id.* at 837.
367. *Id.* at 835.
368. *Id.* at 836–37. *But see* Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 514 n.6 (7th Cir. 1992) (considering the NASD Code).
369. *Illinois Cas. Co.*, 235 N.E.3d at 839.
370. *Id.*
371. *Id.* at 830.

the Models could not compel arbitration for claims deriving before 2016, because no agreement to arbitrate existed between ICC and its insureds.[372]

Justice Christopher Goff made several interesting points in a separate opinion. To him, the reference to the AAA in the policy language was not sufficient itself to require that arbitrability be arbitrated.[373] Among the points he made was that the AAA rules in effect at the time the policy language was written were not as unequivocal as they are today on whether arbitrators had power to determine their own jurisdiction absent a prior judicial decision on the matter.[374] "It is difficult to credit contracting parties with the clear and unmistakable intent to conform to rules not yet known," Justice Goff wrote.[375]

Nevertheless, he found additional language in the policies that led him to conclude that ICC and its insureds had agreed to arbitrate arbitrability here.[376] As to the Court's decision on pre-2016 claims, Justice Goff was of the view that under Henry Schein, the question of arbitrability of those claims is a matter for the arbitrator alone.[377]

H. Arbitration Clauses: Court of Appeals Decisions

While reciting fealty to Indiana's "strong policy favoring arbitration agreements,"[378] the Court of Appeals set a different tone from the past during the 2021–2022 and 2022–2023 Survey Periods. Arbitration is no "magic wand" that prevails over the language of parties' contract, the Court said in one of the cases.[379] Nor can an arbitration requirement be "shoehorn[ed]" into an agreement where it does not reasonably fit, the court said in another.[380] In point of fact, during the 2021–2022 Survey Period, the Court of Appeals found arbitration clauses unenforceable in three separate cases;[381] one of those decisions was affirmed by the Supreme Court during the 2022–2023 Survey Period;[382] and another during the current Survey Period.[383]

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372. *Id.* The opinion was written by Justice Mark Massa and joined by Chief Justice Rush, Justice Geoffrey Slaughter, and Justice Derek Molter.

373. *Id.* at 841 (Goff, J., concurring in result and dissenting in part).

374. *Id.* at 841–42.

375. *Id.* at 842.

376. *Id.*

377. *Id.* at 842–43.

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

379. Fin. Ctr. First Credit Union v. Rivera, 178 N.E.3d 1245, 1253 (Ind. Ct. App. 2021).

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

381. *Id.* at 219; Decker v. Star Fin. Grp., 187 N.E.3d 937 (Ind. Ct. App. 2022); Fin. Ctr. First Credit Union v. Rivera, 178 N.E.3d 1245 (Ind. Ct. App. 2021).

382. Decker v. Star Fin. Grp., 204 N.E.3d 918 (2023).

383. Land v. IU Credit Union, 201 N.E.3d 246 (Ind. Ct. App. 2022), *aff'd*, 218 N.E.3d 1282 (Ind. 2023), *aff'd on reh'g*, 226 N.E.3d 194 (Ind. 2024). Although decided after the close of the 2022–2023 Survey Period, these decisions were discussed at length in the *2023–2024 Survey Article*, *supra* note 1, at 839, and that discussion, therefore, will not be presented here.

There was another case involving an arbitration clause of note during the Survey Period, and that was *Sherratt v. Jefferson Capital Systems LLC*.[384] The defendant had defaulted on a car loan, and the creditor that owned the debt sued to collect.[385] The defendant debtor counterclaimed, alleging unfair debt collection practices.[386] At this point, the creditor filed a motion to compel arbitration of the counterclaims, invoking an explicit arbitration clause in the purchase agreement that provided for mandatory arbitration at the option of either party.[387] The trial court granted the motion, and the Court of Appeals affirmed.[388]

The underlying transaction in this case followed a common pattern in financing automobile purchases. The defendant purchased the automobile from a CarMax dealership on credit, and, pursuant to an assignment clause in the purchase agreement, CarMax immediately assigned its rights to a financial institution, Santander Consumer USA.[389] When the purchaser defaulted, Santander repossessed the vehicle, sold it, and then assigned its rights to collect a remaining deficiency to a collection agency.[390] The principal issue facing the court was whether the collection agency succeeded to the right of CarMax and Santander to invoke the arbitration clause.[391]

The relevant provision of the purchase agreement specifies that for purposes of the arbitration clause, the term "Seller" (i.e., CarMax) includes "its respective subsidiaries, affiliates, agents, employees and officers, or anyone to whom the Seller transfers its rights under the Contract."[392] The defendant argued that this language covered the assignment from CarMax to Santander, but, "since Santander was not 'the Seller,' Santander could not further assign the rights under the Arbitration Provision."[393] The Court rejected this analysis. It said that "Indiana law generally allows for the assignment of contractual rights unless the contract provides 'an expression of contrary intent.'"[394] The language of the contract does not express an intent to limit assignments. "Once 'the Seller' transfers its rights by assignment, the assignee possesses all rights under the agreement, including the ability to subsequently transfer contractual rights."[395]

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384. Sherratt v. Jefferson Capital Sys. LLC, No. 23A-CC-1276, 2024 WL 1191831 (Ind. Ct. App. Mar. 20, 2024) (unpublished disposition).

385. *Id.* at *1.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* For a good explanation of the auto financing system, see FEDERAL RESERVE SYSTEM, NUTS AND BOLTS OF TODAY'S AUTO FINANCE MARKET, 4 CONSUMER & CMTY. CONTEXT NO. 2, https://www.federalreserve.gov/publications/2023-november-consumer-community-context.htm [https://perma.cc/ZEW9-GLDB] (last updated Nov. 30, 2023).

390. *Sherratt*, 2024 WL 1191831, at *1.

391. *Id.*

392. *Id.*

393. *Id.* at *3.

394. *Id.* (citing Kuntz v. EVI, LLC, 999 N.E.2d 425, 429 n.5 (Ind. Ct. App. 2013).

395. *Id.*

The collection agency had the same set of rights that CarMax possessed when it executed the purchase agreement and could enforce the arbitration clause.[396]

I. Forum Selection Clauses

Sophisticated commercial contracts often include forum selection clauses and consents to jurisdiction.[397] At issue *Perdue Farms, Inc. v. L&B Transport, LLC* is the enforceability of a forum selection clause in a contract under which U.S. Security Associates, Inc., provided security guards for a Perdue Farms poultry-processing plant in Washington, Indiana.[398] Perdue sued U.S. Security Associates and three of its security guards in an Indiana state court, alleging the guards' negligence caused an industrial accident at the plant.[399] This was despite the fact that the contract had an explicit forum selection clause that designated the federal District Court in Maryland as the proper venue for disputes arising between them.[400]

U.S. Security moved to dismiss on the basis of the clause.[401] Perdue responded that trying the case in Maryland would violate Indiana public policy and that the three employee-defendants could not invoke the forum selection clause because they were not parties to the contract.[402]

The Court had little difficulty in holding that Perdue was bound by the forum selection clause with U.S. Security:

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396. *Id.*

397. Forum selection clauses often present interesting questions of commercial law. For example, forum selection clauses are regularly held to be "material alterations" under UCC § 2-207(2)(b) in "Battle of the Forms" litigation. *See, e.g.*, Nw. 1 Trucking Inc. v. Haro, 613 F. Supp. 3d 1081 (N.D. Ill. 2020); Bent Glass Design v. Scienstry, Inc., 2014 WL 550548 (E.D. Pa. Feb. 12, 2014); Barrette Outdoor Living, Inc. v. Vi-Chem Corp., 84 UCC Rep. Serv. 2d 158 (E.D. Tenn. July 21, 2014); Bent Glass Design v. Scienstry, Inc., 2014 WL 550548 (E.D. Pa. Feb. 12, 2014); *In re* Ebro Foods, Inc., 424 B.R. 420 (Bankr. N.D. Ill. 2010), *aff'd in part, rev'd in part*, 449 B.R. 759 (N.D. Ill. 2011).

Another example arises under the negotiability requirements of UCC Article 3, where the general rule is that the instrument may not state any undertaking or instruction by the person promising or ordering payment to do any act beyond the payment of money. U.C.C. § 3-104(a)(3). The recent 2022 Amendments to the UCC provide an exception to this general rule for forum selection clauses, i.e., the presence of a forum selection clause in an instrument will not destroy its negotiability. U.C.C. § 3-104(a)(3)(v); *see* Frank Sullivan, Jr., *New Law Amends the Uniform Commercial Code to Accommodate Emerging Technologies*, 57 IND. L. REV. 775, 781–82 (2024).

In the realm of business law, the Indiana General Assembly in its 2014 session adopted an amendment to the Indiana Business Corporation Law expressly authorizing Indiana corporations to adopt charter or by law provisions establishing exclusive jurisdiction in Indiana state courts for lawsuits on intra-corporate governance matters. IND. CODE § 23-1-22-2(16), as amended by P.L. 63-2014, § 3; *see 2013–2014 Survey Article*, *supra note* 1, at 1220.

398. Perdue Farms, Inc. v. L&B Transp., LLC, 239 N.E.3d 842 (Ind. 2024).

399. *Id.* at 845.

400. *Id.* at 844.

401. *Id.* at 846.

402. *Id.*

> We seldom relieve contracting parties from their agreed forum. Commercial parties seeking such relief face an especially onerous burden. They must show the chosen forum will be so burdensome as to deprive them of their day in court. We hold that Perdue has not met this burden. Thus, the forum selection clause is enforceable here. Perdue must litigate its claims against U.S. Security in the Maryland federal court.[403]

However, the Court went on to say that because the three U.S. Security employees were not parties to the contract, they were not subject to its terms—and that U.S. security failed to present a "viable argument" for applying the forum selection clause to the employees.[404]

The Court concluded that, while Perdue would have to pursue its claims against U.S. Security in Maryland, it could pursue its claims against the individual employees in Indiana.[405] It did so, saying that Perdue's suing the Indiana-based employees individually constituted "strategic pleading" to avoid the forum selection clause.[406]

V. CONCLUSION

Shortly after the conclusion of the Survey Period, the author of this Article was honored to be invited to participate on a panel with Chief Justice Loretta Rush, Justice Derek Molter, and Judge Heather Welch discussing the value of businesses organizing their enterprises under Indiana law. The audience was the Indiana chapter of the Association of Corporate Counsel, consisting of in-house counsel from Indiana businesses. The event was sponsored by the Barnes & Thornburg LLP law firm and the session moderated by Joshua Hollingsworth, a leading corporate lawyer.

There are many reasons for a business to incorporate or otherwise register in Indiana. First, our merit-based judicial selection process for our appellate courts removes partisan influences from judicial decision-making and gives lawyers and litigants confidence that their cases will be decided based upon the law and proven facts, and not extraneous factors. Second, as discussed at the outset of this Article, Indiana has developed a network of Commercial Courts with expertise in the prompt resolution of business and commercial disputes. Third, Indiana's technology infrastructure—both within the courts and the Office of the Secretary of State—leads the country, making readily available to businesses detailed information from court dockets, corporate law filings, and secured transactions financing statements. Fourth, fees associated with a business being incorporated or registered in Indiana are nominal.

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403. *Id.*
404. *Id.* at 846–47.
405. *Id.* at 844.
406. *Id.*

Such a discussion oftentimes causes people to compare incorporating or registering to do business in Indiana with incorporating or registering to do business in Delaware, which is home to more than half of the Fortune 500 and New York Stock Exchange companies. For the reasons set forth in the preceding paragraph, the author believes that incorporating or registering to do business in Indiana can compare favorably with Delaware. And indeed, the shareholders of Simon Property Group, Inc., will vote on May 14, 2025, to change the company's state of incorporation to Indiana from Delaware.[407]

During the Survey Period and since its conclusion, incorporation in Delaware has been the subject of national attention due to criticism by Elon Musk and some other leading figures in business of decisions by the Delaware courts unfavorable to them. A New York Times story in February reported that Tesla had moved its state of incorporation outside of Delaware, that Dropbox had received shareholder approval to do so, and that Meta was considering following suit.[408] The Times story says that the impetus for this exodus is a series of court decisions favoring shareholders who own a minority stake in corporations at the expense of founders like Musk who have controlling shares.[409]

As noted a moment ago, the author of this Article would be pleased to see more businesses incorporate or register here in Indiana, including businesses now organized under Delaware law. But he does not believe that businesses should leave Delaware because of a perception that Delaware law is too shareholder-friendly or, for that matter, too management-friendly. Delaware courts have long had the reputation of being the nation's most expert on questions of corporate and business entity law, and it is the author's perception that that reputation is well deserved. Beyond that, reasonable minds can debate the relative balance of power between controlling and minority shareholders, of course, and maybe the Delaware judges have been straying somewhat from precedent. The author's impression is that Delaware has always been protective of minority interests and that that has been good for businesses because it means that investors (especially the big pension funds and other institutional investors) are comfortable putting their money into Delaware businesses, since they know they will be protected.

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407. 2025 Proxy Statement, Simon Property Group, Inc., (Apr. 1, 2025).

408. Lauren Hirsch, *Delaware Law Has Entered the Culture War*, N.Y. TIMES (Feb. 8, 2025), https://www.nytimes.com/2025/02/08/business/dealbook/delaware-law-has-entered-the-culture-war.html.

409. *Id.*