

BANKING, BUSINESS, AND CONTRACT LAW

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This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court (“Court”) and Indiana Court of Appeals (“Court of Appeals”) between September 1, 2015, and August 31, 2016. This Article will not itemize every banking, business, and contract law case decided during the survey period. Instead, it will highlight cases illustrating some of the big-picture issues in these fields, as well as some practice pointers for both transactions lawyers and litigators.¹ This Article will also discuss the Indiana Supreme Court’s commercial courts initiative and the enactment of new laws authorizing “Series LLCs” and harmonizing many provisions in five Indiana business entity statutes.

I. COMMERCIAL COURTS UPDATE

The Indiana Supreme Court launched its commercial court pilot project during the survey period on June 1, 2016, in the following locations:

- Allen Superior Court, Civil Division (Judge Craig Bobay)
- Elkhart Superior Court 2 (Judge Stephen Bowers)
- Vanderburgh Superior Court (Judge Richard D’Amour)
- Floyd Superior Court 3 (Judge Maria Granger)
- Lake Superior Court (Judge John Sedia)
- Marion Superior Court, Civil Division 1 (Judge Heather Welch)²

Any civil case that is filed after June 1, 2016 (including both jury and non-jury cases; cases seeking injunctions, TROs, and declaratory judgments; and

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** This Article is adapted from remarks delivered on September 22, 2016, at the Annual Indiana Law Update CLE program organized by Justice Steven H. David and Judge Cale J. Bradford. I thank Justice David and Judge Bradford for including me in this distinguished CLE program. I also thank Alexander Swider for his research assistance in connection with and Peter M. Elliott, Justin B. McGiffen, Dylan A. Pittman, and Andrea Kochert Townsend for their helpful comments on this Article.

1. This Article includes discussion of many so-called not-for-publication “memorandum” decisions of the Court of Appeals because such decisions often establish new law; clarify, modify, or criticize existing law; or involve legal or factual issues of unique interest or substantial public importance. Whatever the appellate rules are at the moment about the citation of memorandum decisions, they contain critical guidance on Indiana law and cannot be ignored. Indiana Appellate Rule 65 provides decisions of the Indiana Court of Appeals that are not published in West’s Northeastern Reporter “shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.” IND. R. APP. P. 65.

2. Order Establishing the Indiana Commercial Court Pilot Project, No. 94S00-1601-MS-31, 2016 Ind. LEXIS 29 (Ind. Jan. 20, 2016). Details on commercial courts generally and the history of their establishment in Indiana are contained in last year’s survey Article. See Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 49 IND. L. REV. 981, 981-84 (2016).

derivative actions), is eligible for assignment to a “commercial docket” if the gravamen of the case relates to any of the following:

1. Business governance issues;
2. Trade secret, non-disclosure, non-compete, and employment agreements involving a business entity;
3. Disputes as to business activities relating to contracts or transactions; and
4. Cases otherwise falling within the general intended purpose of the commercial docket.³

As to the actual procedures for and mechanics of assignment, all of the parties to an eligible case must consent to assignment of the case to the commercial docket.⁴ This is an entirely voluntary system; if a party does not want its case to be on the commercial docket, it will have it within its power to keep it off.⁵ On the other hand, if a party wants its case to be on the commercial docket, it will require the acquiescence of all other parties in the case.⁶

That having been said, it is equally important to understand that the rule is structured in such a way that most of the defaults point toward an eligible case being on the commercial docket.⁷ For example, if a party filing a case designates it for the commercial docket, it will be placed on the commercial docket unless the other parties opt out within a specified period of time.⁸

Cases are being filed and resolved in a way that serves the very best interests of our business community and the lawyers who assist it.

II. LENDING AND BORROWING

The mandate of this Article includes “banking” and the author includes within that meaning litigation between lenders and borrowers.

A. A “Dance” with the Legislature

Court decisions sometimes provoke a legislative response followed by additional court decisions—a sort of “dance” or “dialogue.”⁹ This phenomenon

3. Order Adopting Interim Commercial Court Rules for the Indiana Commercial Courts Pilot Project, No. 94S00-1601-MS-31, 2016 Ind. LEXIS 308 (Ind. Apr. 27, 2016) (IND. COMM. CT. INTERIM R. 2).

4. *Id.* (IND. COMM. CT. INTERIM R. 4).

5. *Id.* (IND. COMM. CT. INTERIM R. 4(B)).

6. *Id.* (IND. COMM. CT. INTERIM R. 4(D)(3), (E)(3), (F)(3)).

7. *Id.* (IND. COMM. CT. INTERIM R. 4 cmt. 4).

8. *Id.* (IND. COMM. CT. INTERIM R. 4(D)(2)).

9. See generally Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991) (expanding on the William B. Lockhart Lecture that Justice Abrahamson delivered at the University of Minnesota in March 1990).

materialized during the survey period in respect of *U.S. Bank, N.A. v. Miller*.¹⁰

In 2011, the Indiana Supreme Court decided *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*¹¹ In that case, Countrywide held a purchase-money first mortgage on a residence.¹² Citizens State Bank had a subordinate judgment lien on the same property that it had obtained by reducing some defaulted credit card debt to judgment.¹³ When the mortgage loan went into default, Countrywide foreclosed and took title to the property.¹⁴ It subsequently sold the property to Fannie Mae.¹⁵

The problem was that Countrywide had not joined Citizens State Bank in the foreclosure action and so Citizens State Bank's judgment lien had not been foreclosed.¹⁶ When this was discovered, Citizens State Bank took the position that its lien continued to encumber the property, i.e., Fannie Mae owned the property subject to Citizens State Bank's lien.¹⁷

The Indiana Supreme Court agreed, invoking a doctrine called "merger" which, the Court said, extinguished Countrywide's mortgage at the point in time the property was conveyed to Countrywide: the mortgage "merged" with Countrywide's title and was extinguished.¹⁸

This result, one justice said in dissent, was contrary to precedent.¹⁹ And even the majority conceded that it was contrary to the applicable rule enunciated in the Restatement of Property.²⁰ But the majority nevertheless catapulted Citizens State Bank into first position, requiring Fannie Mae to deal with the Bank's lien in order to clear its title.²¹

Here is where the "dance" with the legislature began. The real property community beat a line to the General Assembly and in its next session, the Legislature passed a statute overruling *Citizens State Bank* by abolishing the doctrine of merger.²² Henceforth, in situations like this, the property owner would be able to treat the junior lien as though the senior lien was still in place—which is what the Restatement and, the dissent had argued, precedent had dictated

10. 44 N.E.3d 730 (Ind. Ct. App. 2015), *trans. denied sub nom.* *U.S. Bank, N.A. v. Evansville*, 43 N.E.3d 1278 (Ind. 2016).

11. 949 N.E.2d 1195 (Ind. 2011).

12. *Id.* at 1196.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1197.

18. *Id.* at 1199-1202.

19. I was the dissenting justice. *See id.* at 1202 (Ind. 2011) (Sullivan, J., dissenting).

20. *Id.* at 1197 (majority opinion) (citing RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 8.5 cmt. a (1997)).

21. *Id.* at 1202.

22. Pub. L. No. 130-2012, § 7, 2012 Ind. Acts 2704-07 (codified at IND. CODE § 32-29-8-4 (2016)) (effective Mar. 19, 2012).

should have happened in *Citizens State Bank*.²³

Now the “dance” shifted back to the courts. In *U.S. Bank v. Miller*, essentially the same thing had happened as in *Citizens State Bank*.²⁴ U.S. Bank’s predecessor in interest foreclosed on a purchase-money first mortgage but neglected to serve German American Bank’s predecessor which had a subordinate lien.²⁵ U.S. Bank obtained title to the property through foreclosure and then sold the property to someone named Briones.²⁶

When German American subsequently claimed that, under the authority of *Citizens State Bank*, it had a first lien on Briones’s property, U.S. Bank and Briones argued that under the new statute, they were entitled to foreclose German American’s interest as though the U.S. Bank mortgage was still in effect.²⁷

But German American argued that the new statute was not available to U.S. Bank and Briones.²⁸ Why? Because the statute’s effective date in March, 2012, was long after the date of U.S. Bank’s transfer of title to Briones.²⁹

The Court of Appeals held the new statute, not the *Citizens State Bank* decision, controlled.³⁰ The Indiana Supreme Court denied transfer,³¹ with the three justices still on the Court who were part of the *Citizens State Bank* majority joining the unanimous vote.³²

B. Some Additional Matters of Priority

In *Amici Resources, LLC v. Alan D. Nelson Living Trust*,³³ the Court of Appeals had to sort out the relative priorities of three creditors to some real property. In late 2012, Sabine Matthies obtained a judgment against Solid Foundations Investment Properties, Inc. (“SFIP”).³⁴ The following spring, SFIP purchased the real property at issue.³⁵ The purchase was financed with a loan from the Alan D. Nelson Living Trust, secured by a mortgage.³⁶ At the same time as the purchase, Amici Resources, LLC, loaned SFIP additional funds to renovate

23. *Citizens State Bank* and its legislative override are discussed, respectively, in Roger Bernhardt, *Mortgages and Merger*, ABA PROB. & PROP. 35 (Nov./Dec. 2012), and Rory O’Bryan, *Mortgages: Legislative Preemption of Merger Doctrine*, ABA PROB. & PROP. 44 (May/June 2013).

24. See generally *U.S. Bank, N.A. v. Miller*, 44 N.E.3d 730 (Ind. Ct. App. 2015), *trans. denied sub nom. U.S. Bank, N.A. v. Evansville*, 43 N.E.3d 1278 (Ind. 2016).

25. *Id.* at 732-33.

26. *Id.* at 733.

27. *Id.* at 736.

28. *Id.* 743.

29. *Id.*

30. *Id.* at 745.

31. *U.S. Bank, N.A. v. Evansville*, 43 N.E.3d 1278 (Ind. 2016) (denying transfer).

32. See generally *id.*

33. 49 N.E.3d 1046 (Ind. Ct. App. 2016).

34. *Id.* at 1048.

35. *Id.* at 1049.

36. *Id.*

the property, secured by a second mortgage.³⁷

The legal principles involved in establishing the priorities are basic but worth repeating. First, when Matthies's judgment was recorded in the judgment docket in Marion County, it became a lien by operation of law on SFIP's real property in Marion County.³⁸ Second, Matthies's judgment "instantly" attached as a lien to the property upon its subsequent acquisition by SFIP.³⁹ Third, the mortgage granted to the Nelson Trust, because it was a "purchase-money mortgage,"⁴⁰ had priority over the Matthies judgment lien.⁴¹

This left the question of the relative priority of the Matthies judgment lien and the Amici Resources second mortgage.⁴² An argument could be made that the two liens were equal in priority, both attaching at the moment the property was purchased. But the Court of Appeals, relying on a century-old case addressing precisely that argument, held the Matthies judgment lien had priority over Amici Resources mortgage lien because the latter had "been perfected subsequent to the creation of the judgment lien."⁴³

*Samuels v. Garlick*⁴⁴ warrants brief mention. The Garlicks gave a mortgage on some residential subdivision property to a financial institution, Saxon Mortgage, Inc., to secure repayment of a loan.⁴⁵ The metes-and-bounds legal description was inaccurate in several respects, but the mortgage recited that the property was "commonly known as 8611 West 96th Street, Zionsville."⁴⁶ Three years later, the Garlicks gave a second mortgage on the same property to Samuels.⁴⁷ The legal description in this mortgage used lot numbers on a plat and recited that Lot 1 was "commonly known as 8611 West 96th Street."⁴⁸

Samuels contended that the earlier mortgage to the financial institution was invalid because it did not sufficiently describe the mortgaged property.⁴⁹ After a careful review of relevant statutes and case law, the Court of Appeals rejected Samuels's contention: "The Saxon mortgage, which is in the Garlicks' chain of title, put prospective purchasers or mortgagees on notice of an existing mortgage on property commonly known as 8611 West 96th Street, Zionsville—the same

37. *Id.*

38. *Id.* at 1053 (citing IND. CODE § 34-55-9-2 (2016); *Arend v. Etsler*, 737 N.E.2d 1173, 1175 (Ind. Ct. App. 2000)).

39. *Id.* (citing *Michaels v. Boyd*, 1 Ind. 259, 260 (1848)).

40. A purchase-money mortgage is "[a] mortgage granted by a purchaser to secure purchase money has priority over a prior judgment against the purchaser." IND. CODE § 32-29-1-4 (2016).

41. *Amici Res., LLC*, 49 N.E.3d at 1053 (citing IND. CODE § 32-29-1-4 (2016); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 & cmt. B to (1997)).

42. *Id.* at 1052-53.

43. *Id.* at 1053 (citing *Yarlott v. Brown*, 149 N.E. 921, 922 (Ind. Ct. App. 1925)).

44. 49 N.E.3d 1116 (Ind. Ct. App. 2016).

45. *Id.* at 1117.

46. *Id.*

47. *Id.*

48. *Id.* at 1118.

49. *Id.* at 1117.

address shown on Lot 1 of the . . . Plat, which is also in the Garlicks' chain of title."⁵⁰

C. A Rare Foreclosure of (Only) a Junior Lien

"The foreclosure of a junior lien upon real estate subject to prior liens and encumbrances is not a frequent occurrence, but it is not without precedent."⁵¹ In *Lake v. Butler*, the Court of Appeals upheld a sheriff's sale of real estate subject to prior liens and encumbrances conveying the second priority position of a mechanic's lien holder, but only that second priority position.⁵² It had no effect on the first priority interest—a mortgage held by Bank of New York Mellon Trust Company.⁵³

D. Hughley's High Hurdle

Black v. Deutsche Bank,⁵⁴ and *R.P. Leasing, LLC v. Chemical Bank*⁵⁵ provide useful reminders of Indiana's non-movant-friendly summary judgment standard, first enunciated by the Indiana Supreme Court in *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,⁵⁶ and then powerfully reasserted by the Court in its unanimous 2014 opinion, *Hughley v. State*.⁵⁷

In the first case, Deutsche Bank sought summary judgment in a foreclosure action, presenting the testimony of a senior loan analyst for the loan servicing company that the mortgagors were in default and had failed to cure.⁵⁸ The mortgagors responded with an affidavit that they were not in default because they had tried to pay numerous times but the bank always refused.⁵⁹ After Deutsche Bank got summary judgment, the Court of Appeals reversed, saying, "Although the Bank describes [the mortgagor's] affidavit as self-serving, our supreme court has held that 'a perfunctory and self-serving' affidavit that controverts a prima facie case for summary judgment is enough to preclude summary judgment."⁶⁰

In the second case, *R.P. Leasing*, Chemical Bank sought summary judgment

50. *Id.* at 1122.

51. *Lake v. Bulter*, No. 18A04-1503-PL-129, 2016 WL 277736, at *1 (Ind. Ct. App. Jan. 22, 2016) (citing *Vadevender v. Moore*, 146 Ind. 44 (1896)) (unpublished disposition).

52. *Id.* at *2.

53. *Id.*

54. No. 29A02-1503-MF-149, 2016 WL 126720, at * 1 (Ind. Ct. App. Jan. 12, 2016) (unpublished disposition), *trans denied*, 48 N.E.3d 316 (Ind. 2016).

55. 47 N.E.3d 1211 (Ind. Ct. App. 2015).

56. 644 N.E.2d 118, 123 (Ind. 1994) ("Indiana does not adhere to *Celotex* [*v. Catrett*, 477 U.S. 317 (1986)] and the federal [summary judgment] methodology.").

57. 15 N.E.3d 1000, 1003 (Ind. 2014) (holding "summary judgment [may] be precluded by as little as a non-movant's mere designation of a self-serving affidavit" (internal quotations and citation omitted)).

58. *Black*, 2016 WL 126720, at *3.

59. *Id.*

60. *Id.* (quoting *Hughley*, 15 N.E.3d at 1004).

to collect the balance due on a promissory note and foreclose a mortgage on property in Indiana.⁶¹ The bank had earlier foreclosed on another of mortgagor's properties in Michigan, acquiring the property by means of a "credit bid"⁶² of \$500,000.⁶³ While the parties agreed that the calculation of the balance due on the note was to be reduced by the fair market value of the Michigan property, the mortgagor maintained that there were genuine issues of material fact as to whether the value exceeded \$500,000.⁶⁴

The mortgagor submitted the affidavit of its managing member stating that he owned the Michigan property and that he believed the value of the property at the time of sale was more than \$500,000. Under the *Hughley* standard, the Court of Appeals said this was "sufficient, though minimally so, to raise a factual issue to be resolved at trial, and thus to defeat the . . . summary judgment motion."⁶⁵ The Court thus denied Chemical Bank summary judgment.⁶⁶

E. Mortgagors' Comeback Short-lived

In last year's survey Article, I reported that mortgagors had had some success in the Court of Appeals during the prior year in reversing trial court judgments in favor of financial institution mortgagees.⁶⁷

Things pretty much reverted to normal during this past year; there is not much to report in the way of successes on the part of mortgagors against financial institution mortgagees.⁶⁸ (I counted fifteen Court of Appeals opinions in favor of financial institution mortgagees in foreclosure cases.⁶⁹) But there is one case

61. R.P. Leasing, LLC v. Chem. Bank, 47 N.E.3d 1211, 1213-14 (Ind. Ct. App. 2015).

62.

"A 'credit bid' refers to a situation in which a judgment creditor (e.g., a bank holding the mortgage) is the purchaser at its own foreclosure sale and bids the judgment instead of cash. Such a bid is as effective as payment in actual money would have been, and the amount of the judgment must be reduced by the amount of the credit bid."

Id. at 1213 n.1 (citations omitted).

63. *Id.* at 1214.

64. *Id.* at 1213-14.

65. *Id.* at 1216 (quoting *Hughley*, 15 N.E.3d at 1004).

66. *Id.* at 1217-18.

67. See Sullivan, *supra* note 2, at 985-87.

68. One success was *Edler v. Regions Bank*, No. 53A01-1512-MF-2264, 2016 WL 3941057 (Ind. Ct. App. July 21, 2016).

69. Scarr v. JPMorgan Chase Bank Nat. Ass'n, No. 21A01-1411-MF-466, 2015 WL 5427722 (Ind. Ct. App. Sept. 15, 2015) (unpublished disposition), *trans. denied*, 49 N.E.3d 107 (Ind. 2016); Hutchens v. BAC Home Loans Servicing, LP, No. 29A02-1503-MF-190, 2015 WL 5618843 (Ind. Ct. App. Sept. 24, 2015) (unpublished disposition); Ansari v. Bank of N.Y. Mellon, No. 29A02-1412-MF-821, 2015 WL 5618829 (Ind. Ct. App. Sept. 24, 2015) (unpublished disposition); McEntee v. Wells Fargo Bank, N.A., No. 75A03-1502-MF-51, 2015 WL 6736534 (Ind. Ct. App. Nov. 4, 2015) (unpublished disposition); Pennington v. U.S. Bank Nat. Ass'n, No. 55A01-1503-MF-114, 2015 WL 7575101 (Ind. Ct. App. Nov. 25, 2015) (unpublished disposition), *trans. denied*,

discussed in last year's Article that returned to the Court of Appeals after remand—*Lewallen Revocable Trust v. Fifth Third Mortgage*⁷⁰—and once again, the mortgagor prevailed.

The case involves some real estate owned by a family subject to a Fifth Third mortgage.⁷¹ A family trust owned fifty percent of the property; the only child, a son, owned the other half.⁷² At some point, Fifth Third refinanced the loan.⁷³ When the bank rounded up the signatures on the new mortgage, it failed to obtain the signature of the son.⁷⁴ The note and mortgage went into default and the bank ultimately foreclosed on the mortgage in 2011.⁷⁵ In last year's case, the Court of Appeals held the failure to secure the son's signature on the new mortgage rendered the mortgage void with respect to the son's one-half interest in the property.⁷⁶

Apparently undaunted by or misreading the decision rendered by the Court of Appeals, the bank returned to the trial court a month later and asked the trial court for a decree of foreclosure covering the son's interest, and the trial court granted the request.⁷⁷

Back the case came to the Court of Appeals, and the Court of Appeals rather sternly held that the "trial court's post-appeal order is barred by the 'law of the case' doctrine, under which an appellate court determination of a legal issue is binding on the trial court and on the Court of Appeals in any subsequent appeal

46 N.E.3d 446 (Ind. 2016); *Turner v. Nationstar Mortg., LLC*, 45 N.E.3d 1257 (Ind. Ct. App. 2015); *Fish v. 2444 Acquisitions, LLC*, 46 N.E.3d 1261 (Ind. Ct. App. 2015), *trans. denied sub nom. Fish v. 2444 Acquisitions*, 46 N.E.3d 1240 (Ind. 2016); *Mattingly v. Nationstar Mortg., LLC*, No. 30A01-1505-MF-402, 2016 WL 614654 (Ind. Ct. App. Feb. 16, 2016) (unpublished disposition); *Roland v. Nationstar Mortg. LLC*, No. 29A04-1508-MF-1241, 2016 WL 634148 (Ind. Ct. App. Feb. 17, 2016) (unpublished disposition); *Rasaki v. Union Sav. Bank*, No. 29A02-1506-MF-663, 2016 WL 1122113 (Ind. Ct. App. Mar. 22, 2016) (unpublished disposition); *Williamson v. U.S. Bank Nat. Ass'n*, 55 N.E.3d 906 (Ind. Ct. App. 2016); *Rybicki v. U.S. Bank Nat. Ass'n*, No. 45A04-1509-MF-1341, 2016 WL 2944238 (Ind. Ct. App. May 20, 2016) (unpublished disposition); *Kuhn v. MidFirst Bank*, No. 49A02-1512-MF-2097, 2016 WL 3092557 (Ind. Ct. App. June 2, 2016) (unpublished disposition); *Plaut v. Wells Fargo Bank, N.A.*, No. 90A05-1509-MF-1390, 2016 WL 3277263 (Ind. Ct. App. June 15, 2016) (unpublished disposition); *Rasaki v. Union Sav. Bank*, No. 29A04-1510-MF-1779, 2016 WL 3369539 (Ind. Ct. App. June 16, 2016) (unpublished disposition).

70. No. 15A01-1409-MF-396, 2015 WL 3500462 (Ind. Ct. App. June 2, 2015) (unpublished disposition).

71. *Id.* at *1.

72. *Id.*

73. *Id.* at *8.

74. *Id.* at *2.

75. *Id.*

76. *Id.* at *9.

77. *Lewallen Revocable Tr. v. Fifth Third Mortg. Co.*, No. 15A01-1511-MF-2049, 2016 WL 3030917, at *2 (Ind. Ct. App. May 27, 2016) (unpublished disposition).

in the same case and involving substantially the same facts.”⁷⁸ (The language of the Court of Appeals was actually a little tougher than that.)

F. Credit Card Lending

Except for *Lewallen*, mortgage lenders widely prevailed at the Court of Appeals this year. On the other hand, two out of three credit card lending cases went the borrowers’ way.⁷⁹ In both, the Court of Appeals reversed summary judgment in favor of the lenders, finding the lenders’ loan documentation to have been insufficient to support summary judgment.⁸⁰

III. BUSINESS LAW

A. Legislative Developments

The Indiana General Assembly established the Indiana Business Law Survey Commission in 1988 to recommend improvements to the state’s corporation and other business entity statutes.⁸¹ During the survey period, the Commission recommended and the Legislature enacted, during its 2016 session, a new statute authorizing “Series Limited Liability Companies.” The Commission also recommended for consideration during the Legislature’s 2017 session an ambitious project to consolidate and harmonize provisions of our state’s five principal current business entity statutes. This legislation was enacted following the conclusion of the survey period.

1. Series LLCs.—During the 2016 Indiana General Assembly, the legislature enacted a new article in Title 23—the title of the Indiana Code authorizing the various business entities permitted in Indiana.⁸² This new article took effect January 1, 2017, and authorizes “series LLCs.”

With its enactment, Indiana became the fifteenth state to authorize series LLCs.⁸³ It is a sufficiently new concept that the Uniform Law Commission—the principal national organization that drafts uniform state statutes like the Uniform Commercial Code—has not yet finished drafting a uniform series LLC act.⁸⁴

78. *Id.*

79. *Menendez v. CACH, LLC*, No. 29A02-1511-CC-2026, 2016 WL 4442487 (Ind. Ct. App. Aug. 23, 2016) (unpublished disposition); *Reef v. Asset Acceptance, LLC*, 43 N.E.3d 652 (Ind. Ct. App. 2015).

80. *See generally Menendez*, 2016 WL 4442487; *Reef*, 43 N.E.3d 652.

81. IND. CODE § 23-1-54-3 (2016). I was elected Vice-Chair of the Commission in September 2016.

82. Pub. L. No. 170-2016, § 19, 2016 Ind. Acts 1713-17 (codified at IND. CODE § 23-18.1 (2016)) (effective Jan. 1, 2017).

83. *See* J. Leigh Griffith & Alberto R. Gonzales, *Series LLCs Part 1—Current Status, Multi-State Issues and Potential Uniform Limited Liability Company Protected Series Act*, TAXES THE TAXMAG., at 67 (Oct. 2016), http://www.wallerlaw.com/~waller/portalsresource/lookup/wosid/cp-base-4-131006/media.name=MAG_10-16_Griffith-Gonzales.pdf [<https://perma.cc/4LKL-PDHG>].

84. *See* Limited Liability Company Protected Series Act, NAT’L CONF. COMMISSIONERS ON

A series LLC structure permits a limited liability company to segregate within the entity both assets and ownership, protecting them from general creditors or creditors of other series. Whereas a traditional parent-subsidary relationship has always been able to accomplish this, one of the characteristics of a business entity is that, except as limited by contract, owners and creditors have undifferentiated rights to all assets. A series LLC, to repeat, permits an LLC to segregate its assets and ownership by one or more of what are called “series.”

A family of mutual funds is an analog. A mutual fund family, usually organized as a business trust, will often have a “series” of funds within the family, each with its own assets and each with its own owners. They are not subsidiaries; they are all part of the same trust; yet their assets and owners are segregated from each other. For example, such a mutual fund might be a single trust composed of seventeen portfolios, each with separate series shares. An investor might purchase shares in the “Conservative Balanced Portfolio” which would give the investor rights with respect to the assets in that portfolio—the stocks and bonds in that mutual fund—but not with respect to the assets of any of the other sixteen portfolios.

The expectation is that the series LLC will be a fairly specialized business entity without too many users. But its adoption demonstrates that Indiana is on the cutting edge of states making novel business structures available to entrepreneurs, enabling them to organize their innovative enterprises here.

2. *Business Entity Statute Harmonization.*—The 2016 session of the General Assembly featured series LLC. The 2017 session featured the business entity harmonization project.⁸⁵ Because the 2017 session is outside the survey period, this project is only summarized here and will be discussed in detail in next year’s survey.

Indiana has separate statutes governing corporations,⁸⁶ limited liability partnerships,⁸⁷ limited partnerships,⁸⁸ nonprofit corporations,⁸⁹ and limited liability companies.⁹⁰ Yet the administrative provisions of these statutes have much in common, as do provisions governing mergers, share or interest exchanges, conversions, and domestications of these entities. But because these common provisions were enacted at different times and in different statutes, they often differ from one another.

For example, existing law:

- Permits corporations, LLPs, LPs, and LLCs to renew name reservations

UNIFORM ST. LAWS (June 7, 2016) (draft), http://www.uniformlaws.org/shared/docs/series%20of%20unincorporated%20business%20entities/2016AM_LLCProtectedSeries_Draft.pdf [<https://perma.cc/Q7WP-LCWV>].

85. Pub. L. No. 118-2017, 2017 Ind. Acts 813 (eff. Jan. 1, 2018).

86. IND. CODE §§ 23-1-17 to 23-1-54 (2016).

87. *Id.* §§ 23-4-1-44 to 23-1-53.

88. *Id.* § 23-16.

89. *Id.* § 23-17.

90. *Id.* § 23-18.

but not NFPs.⁹¹

- Gives corporations, LPs, NFP's, and LLCs a long list of safe harbors from triggering the foreign registration requirements—but does not do the same for LLPs.⁹²
- Provides for corporations, LLPs, LPs, and LLCs to merge⁹³ or convert⁹⁴ into another such entity—but not to exchange ownership interests with another such entity.⁹⁵

Additional inconsistencies abound. The Indiana Business Law Survey Commission strove to resolve those inconsistencies through its business entity harmonization project. This effort integrates provisions on business filings, names, registered agents, foreign entities, and administrative dissolution from the five current entity statutes,⁹⁶ and gives them in a single home in the Indiana Code.⁹⁷ A second part of the project likewise integrates and consolidates provisions governing business mergers, interest exchanges, conversions, and domestications.⁹⁸ The project drew much of its structure and language from two model uniform acts.⁹⁹ The provisions of existing law affected by these changes are repealed.

This is a very exciting development as it streamlines existing law greatly, gives much greater flexibility to entrepreneurs and their lawyers in organizing their affairs and transactions, and eliminates dozens upon dozens of traps for the unwary.

The harmonization project was adopted by the Legislature and signed into law by Governor Eric Holcomb¹⁰⁰ after the conclusion of the survey period. Its provisions will be described in greater detail in next year's survey.

91. *See id.* §§ 23-1-23-2(a), 23-4-1-45.3(b), 23-1-16-2-2(a), 23-17-5-2(a), 23-18-2-9(a).

92. *See id.* §§ 23-1-49-1(a), 23-16-10-2(a), 23-17-26-1(b), 23-18-11-2(b).

93. *See id.* §§ 23-1-40-8(c), 23-4-53(c), 23-1-16-3-12(a), 23-16-3-13(c), 23-18-7-1(a), 23-18-7-9(c).

94. *See id.* §§ 23-1-38.5-10(a)-(h), 24-4-1-54, 23-16-3-14, 23-18-7-10.

95. *See id.* §§ 23-1-40-2.

96. *See supra* Part III.A.2.

97. Pub. L. No. 118-2017, § 5, 2017 Ind. Acts 813, 820-67 (codified at IND. CODE § 23-0.5) (effective Jan. 1, 2018).

98. *Id.* § 6, 2017 Ind. Acts 813, 867-96 (codified at IND. CODE § 23-0.6) (effective Jan. 1, 2018).

99. Article 1 of the Uniform Business Organizations Code (UBOC Hub) (2011), NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS (Aug. 19, 2015), http://www.uniformlaws.org/shared/docs/harmonization_of_business_entity_acts/HUB_Final_2014_2015aug19.pdf [<https://perma.cc/3E5J-EQB8>]; Model Entity Transactions Act (2007), NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS, (Aug. 19, 2015), http://www.uniformlaws.org/shared/docs/entity_transactions/META_Final_2014_2015aug19.pdf [<https://perma.cc/77EC-2LJL>].

100. *See* Pub. L. No. 118-2017, 2017 Ind. Acts 813-974.

B. The Centrality of the UCC Operating Agreement

Cappas v. ThruPort Intermodal, LLC,¹⁰¹ drives home the centrality of operating agreements in the governance of limited liability companies. Cappas was both a member and a creditor of an LLC.¹⁰² With his apparent agreement and participation, the members met and voted to allow Cappas to withdraw as a partner.¹⁰³ Cappas apparently had a change of heart and argued in this litigation that his withdrawal had not been effective—that he was still a member of the LLC.¹⁰⁴

The default rule under Indiana’s LLC act is that a member may not withdraw from a limited liability company before the dissolution and winding up of the LLC.¹⁰⁵ But this rule is subject to the express terms of the operating agreement.¹⁰⁶ The Court of Appeals took a very careful look at the operating agreement and the minutes of the members’ meeting and concluded that Cappas’s withdrawal was consistent with the provisions of the operating agreement.¹⁰⁷

C. Owner’s Limited Liability Waived by Contract

The bedrock principle of limited liability shields business owners from personal liability for the debts and obligations of their businesses.¹⁰⁸ A claimant trying to get around that principle and recover from an owner personally will typically employ the “piercing the corporate veil” exception.¹⁰⁹ *Yellow Book Sales & Distribution Co. v. JB McCoy Masonry Inc.*,¹¹⁰ is a sobering reminder that the protections of the bedrock principle of limited liability can also be lost by contract—in this case, where the owner did not read the small print of a form contract.¹¹¹

Yellow Book presented a customer with a one-sheet, fill-in-the-blanks form contract to buy a year of advertising in certain phonebooks.¹¹² The signature block in the contract called for the “customer name,” after which was written “JB

101. No. 45A03-1508-PL-1242, 2016 WL 614751 (Ind. Ct. App. Feb. 16, 2016) (unpublished disposition).

102. *See id.* at *1.

103. *Id.*

104. *Id.* at *2.

105. IND. CODE § 23-18-6-6.1 (2016).

106. *Id.*

107. *Cappas*, 2016 WL 614751, *5.

108. *See* IND. CODE §§ 23-1-26-3 (2016) (shareholders of corporations); *Id.* § 23-18-3-3 (limited liability companies); *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994); *Country Contrs., Inc. v. A Westside Storage of Indianapolis, Inc.*, 4 N.E.3d 677, 687 (Ind. Ct. App. 2014). I was the author of *Aronson*.

109. *See Aronson*, 644 N.E.2d at 867; *Longhi v. Mazzoni*, 914 N.E.2d 834, 839 (Ind. Ct. App. 2009); *Country Contrs., Inc.*, 4 N.E.3d at 687.

110. 47 N.E.3d 388 (Ind. Ct. App. 2015).

111. *See generally id.*

112. *Id.* at 389.

McCoy Masonry, Inc.”¹¹³ On the next line was written “Robin J. Brooks, Owner.”¹¹⁴ Immediately after the signature line, in caps and bold, the contract said, “Authorized Signature Individually and for the Customer.”¹¹⁵ Following that language, the words “Read paragraph 15F on the reverse hereof” were written in non-bold text and as a parenthetical.¹¹⁶ Paragraph 15F included these provisions:

*The signer agrees that he/she has the authority and is signing this agreement . . . in his/her individual capacity[.] . . . By his/her execution of this agreement, the signer personally and individually undertakes and assumes, jointly and severally with the Customer, the full performance of this agreement, including payment of amounts due hereunder.”*¹¹⁷

The Court of Appeals held that by signing the form contract, Brooks had contracted away her statutory right to limited liability.¹¹⁸

D. Agency: Liability in Contract for the Acts of an Agent

A business will be bound to a contract purportedly made on its behalf by a person who is the entity’s agent, defined as a person having express, apparent, or implied authority to act on the entity’s behalf. As *B&R Oil Co. v. Stoler*¹¹⁹ shows, the question of a lawyer’s agency is a critical one when it comes to settlement negotiations. The case involved a dispute between two affiliated oil and gas distributors on one side and eighteen of their gas station tenants on the other side.¹²⁰ The tenants maintained that during face-to-face negotiations in late 2014, both sides agreed to the terms of settlement of pending litigation.¹²¹ The distributors took the position that none of the representatives of the distributors at the negotiations had authority to bind the companies.¹²² I will deal with the agency issue here and the contract formation issue later in this Article.

The distributors were represented at the negotiation by three individuals: outside counsel; an executive of the companies; and their in-house counsel.¹²³ With respect to outside counsel, “the sole act of retaining an attorney does not

113. *Id.* at 390.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 389-90.

118. *Id.* at 394. The trial court had found Brooks not personally liable under the contract. *Id.* at 392 n.6.

119. No. 71A03-1503-PL-114, 2016 WL 276722 (Ind. Ct. App. Jan. 21, 2016) (unpublished disposition), *trans. denied*, 54 N.E.3d 372 (Ind. 2016).

120. *Id.* at *1.

121. *Id.*

122. *Id.* The distributors also contended that no enforceable oral agreement was reached on that date because the parties did not reach an agreement on all material terms. *Id.* at *8. This issue is discussed *infra* Part IV.B.3.

123. *Id.* at *2.

give the attorney the implied or the apparent authority to settle or compromise a claim in an out of court proceeding.”¹²⁴ Specifically, retention in and of itself neither confers the implied authority to settle a claim, nor is it a manifestation by the client to third parties such that the attorney is clothed with the apparent authority to settle.¹²⁵

Nevertheless, the trial court concluded, and the Court of Appeals affirmed, the three individuals here enjoyed at least apparent authority if not actual authority to bind the distributors.¹²⁶ “Apparent authority refers to a third party’s reasonable belief that the principal has authorized the acts of its agent; it arises from the principal’s indirect or direct manifestations to a third party and not from the representations or acts of the agent.”¹²⁷ The trial court and Court of Appeals’ analysis on the element of principal’s manifestations was solid: When the distributors sent only these three individuals to a mediation where the parties were required to have representatives with settlement authority, the tenants could reasonably have believed that the distributors had authorized the acts of the individuals.¹²⁸

E. Liability in Tort for the Acts of an Agent

The liability of an employer for the torts of an employee is an important theme in agency law. The Court of Appeals gave it clear and careful explication in *Ansari v. Sirius Satellite Radio*.¹²⁹ An employee of Sirius Satellite Radio sent, during his work hours, numerous hostile communications by text and email to Ansari from his personal cellphone.¹³⁰ The employee and Ansari had had a minor child together and, at the time of the communications, were engaged in ongoing custody litigation.¹³¹

Ansari sued Sirius, seeking to hold Sirius liable for the employee’s ongoing harassment based on a theory of respondeat superior.¹³² But the Court of Appeals held, because there was no connection between the employee’s conduct and his employment, the continued harassment fell outside the scope of his employment, precluding respondeat superior.¹³³

The key determination in such cases is whether the employee’s conduct falls within the scope of employment, and *Ansari* does a good job applying the

124. *Id.* at *7 (quoting *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1301 (Ind. 1998)).

125. *Id.* (citing *Koval*, 693 N.E.2d at 1301).

126. *Id.*

127. *Id.* at *6 (quoting *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210 (Ind. 2000) (internal citations omitted)).

128. *Id.* at *7.

129. No. 29A05-1509-PL-1435, 2016 WL 3060134 (Ind. Ct. App. May 31, 2016) (unpublished disposition).

130. *Id.* at *1.

131. *Id.*

132. *Id.*

133. *Id.* at *4.

relevant factors here.¹³⁴ Another good case in this regard, though older, is *Hurlow v. Managing Partners, Inc.*,¹³⁵ where the Court set forth a useful two-prong test for determining scope of employment: (1) if an employee's act furthered the employer's business interest to an appreciable extent, or (2) if an employee's authorized acts and unauthorized acts are so closely associated that the employee can be said to have acted within the scope of his employment.¹³⁶

IV. CONTRACT LAW

A. *State v. International Business Machines Corp.*

The biggest contract case of the year was *State v. IBM*.¹³⁷ The underlying contract was an agreement between the Indiana Family and Social Services Administration ("FSSA") and technology behemoth IBM to automate the State's system for administering welfare benefits over ten years at a cost of \$1.3 billion.¹³⁸ Not quite three years after execution, FSSA terminated the contract for cause, citing, *inter alia*, IBM's "numerous and repeated quality and timeliness failures."¹³⁹ By this time, IBM had been paid \$437 million.¹⁴⁰ The State sued for \$170 million in damages; IBM counterclaimed for \$52 million.¹⁴¹

By the time the Indiana Supreme Court handed down its decision on March 22, 2016, almost six years had elapsed since the lawsuit was filed on May 13, 2010, and more than nine years since the underlying contract was signed on December 27, 2006.¹⁴² Over that time, the issue in the case had crystallized to whether IBM's breach of the contract was "material."¹⁴³ When the Court took up the issue, four very experienced lower court judges had split 2-2 on the issue: Marion Superior Court Judge David J. Dreyer¹⁴⁴ and Indiana Court of Appeals Judge Ezra H. Friedlander¹⁴⁵ concluded IBM had not materially breached the contract; Indiana Court of Appeals Judges Nancy Harris Vaidik and John G.

134. *See id.*

135. 755 N.E.2d 1158 (Ind. Ct. App. 2001).

136. *Id.* at 1163.

137. 51 N.E.3d 150 (Ind. 2016).

138. The Court explained that FSSA sought to replace its current system with one "based on a 'remote eligibility' model [that] . . . would allow Indiana citizens to apply for welfare benefits 'via web and call center' without the need for face-to-face meetings with a case worker, and eligibility determinations would be done on a centralized, statewide basis rather than in local county welfare offices." *Id.* at 153.

139. *Id.* at 157.

140. *Id.* at 167.

141. *Id.* at 157.

142. *Id.* at 153.

143. *Id.* at 158-61.

144. *State v. IBM*, No. 49D10-1005-PL-021451, Judgment at 47 (Ind. Super. July 18, 2012).

145. *State v. IBM*, 4 N.E.3d 696, 747 (Ind. Ct. App. 2014) (Friedlander, J., dissenting), *aff'd.*, 51 N.E.3d 150 (Ind. 2016).

Baker concluded it had.¹⁴⁶

One of the many interesting things about this case is that the trial court and Court of Appeals majority applied essentially the same method of analysis to the materiality question but reached different results. Then, the Indiana Supreme Court applied a different method of analysis but reached the same result as the Court of Appeals majority.¹⁴⁷

The difference in analysis turned on the availability of common law factors to assess the materiality of a contract breach. Under the common law, Indiana courts generally apply factors articulated in Restatement (Second) of Contracts § 241.¹⁴⁸ The trial court applied these factors and found no material breach on IBM's part.¹⁴⁹ The Court of Appeals majority applied these factors and found material breach.¹⁵⁰

The Indiana Supreme Court recognized that this is the general approach used to determine the materiality of a breach but held "where a contract itself provides the standard for what constitutes a material breach, this is the standard that governs. The common law standard only applies in the absence of a contractual provision regarding what constitutes a material breach."¹⁵¹

Standing alone, this seems an unremarkable proposition, consistent in all respects with conventional notions of freedom of contract and private ordering: The defaults of the common law give way to the express written agreement of the parties.

So did the plain language of the contract between FSSA and IBM provide for evaluating the materiality of a breach? Yes, said the Supreme Court, the contract

provides the standard for what constitutes a material breach. Specifically, the [contract] provides that a breach is material if it is "material considering this Agreement as a whole." It further provides that a series of breaches, none of which individually constitutes a breach of the Agreement, may nevertheless "collectively constitute a breach of this Agreement which is material when considering this Agreement as a whole. . . ."¹⁵²

The Court then applied this standard to the trial court's judgment and found its conclusion that IBM did not materially breach the contract to be erroneous for five principal reasons:

- The contract listed the State's satisfaction with IBM's performance as a performance measure and the evidence showed that the State's

146. *Id.* (majority opinion).

147. *Compare id.*, with *State v. IBM*, 51 N.E.3d 150 (Ind. 2016).

148. *Frazier v. Mellowitz*, 804 N.E.2d 796, 803 (Ind. Ct. App. 2004) (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)).

149. *State of Indiana v. IBM*, No. 49D10-1005-PL-021451, Judgment at 38, 47 (Ind. Super. July 18, 2012).

150. *IBM*, 4 N.E.3d at 715-16.

151. *State v. IBM*, 51 N.E.3d 150, 161 (Ind. 2016).

152. *Id.* at 159 (quotations are from the contract) (internal citations omitted).

dissatisfaction was reasonable in light of IBM's own admissions.¹⁵³ Because this performance measure was part of the contract, "considering the Agreement as a whole" mandated that it be considered.¹⁵⁴ The trial court was wrong not to do so.¹⁵⁵

- The contract provided for liquidated damages in the event that IBM failed to achieve certain timeliness metrics.¹⁵⁶ The trial court held IBM's payment of these damages constituted an alternative means of performance and, as such, IBM's failure to meet these timeliness metrics was not a material breach.¹⁵⁷ But the Court said that the liquidated damages provision did not limit any applicable state termination rights.¹⁵⁸ Considering the Agreement as a whole, payment of liquidated damages did not excuse IBM's breach.¹⁵⁹
- The trial court found the Great Recession, certain natural disasters, and an unanticipated surge in applications for a particular welfare program excused IBM's performance.¹⁶⁰ The Supreme Court disagreed.¹⁶¹ As to the economy and natural disasters, IBM had force majeure clauses available to it but did not invoke them.¹⁶² As to the increased volume in the welfare program, IBM's compensation had been increased to cover the additional work.¹⁶³
- The contract was conceived to create a "remote eligibility" system to replace the existing "face-to-face" system.¹⁶⁴ The trial court found the State's motive for terminating the contract was its determination to abandon the commitment to remote eligibility and replace it with a hybrid system.¹⁶⁵ This might have been the case, the Supreme Court said, but the State's motive for terminating the contract was irrelevant—"only the written terms of the contract matter."¹⁶⁶
- The trial court itemized ten benefits that the State received as a consequence of the work done by IBM and utilized them its materiality assessment.¹⁶⁷ The Supreme Court said, however, that the standard of considering the contract as a whole "does not involve consideration of

153. *Id.* at 163.

154. *Id.*

155. *Id.*

156. *Id.* at 163-64.

157. *Id.* at 164.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 165.

164. *See supra* note 138.

165. *IBM*, 51 N.E.3d at 166.

166. *Id.*

167. *Id.* at 166-67.

the benefits received by the State,”¹⁶⁸ and found that such benefits could not be considered because “benefits received by the State” do not ameliorate a material breach.¹⁶⁹

The bottom line for the Supreme Court was that “numerous and repeated failures on the part of IBM . . . collectively constitute[d] a breach of the [contract].”¹⁷⁰ Consideration of IBM’s payment of liquidated damages, the effect of the economic downturn, flooding, or unanticipated volume, the State’s motive in terminating, or the benefits received by the State were impermissible under the contract’s standard for measuring materiality: considering the contract “as a whole.”¹⁷¹ The breach was material and the State was entitled to damages.¹⁷²

I am not so sure. The Court is certainly correct, I think, in holding the defaults of the common law give way to the express written agreement of the parties. But the Court seems to read the standard of considering the “contract as a whole” as *narrowing* what the trial court can consider. I think the more straightforward reading of a “consider as a whole” standard is to *expand* the field of possible considerations—including, not excluding, that failure to achieve timeliness metrics had been liquidated; that extraordinary events had impeded performance; that the State changed its mind on what it originally wanted; and that the State received significant benefits.

B. Interpreting and Enforcing Particular Types of Contracts

1. *Employment Contracts.*—During last year’s survey period, the Indiana Court of Appeals had decided two employment contract cases, one in favor of the employer and the other in favor of the employee; in both cases reversing the decisions of the trial court.¹⁷³ To make matters more intriguing, the Indiana Supreme Court had granted transfer in both cases. During the survey period, the Court of Appeals was reversed in both, reinstating the decisions of the trial court judges.

In *Hewitt v. Westfield Washington Schools*,¹⁷⁴ an elementary school principal, also employed as a teacher, had been fired.¹⁷⁵ The principal prevailed in the Court of Appeals on his breach of contract action, on grounds that he was entitled to, but had not received, the protections of the teacher termination statute.¹⁷⁶ But the Supreme Court disagreed, finding he was not entitled to the protections of the

168. *Id.* at 166.

169. *Id.* at 167.

170. *Id.*

171. *Id.* at 168.

172. *Id.*

173. See Sullivan, *supra* note 2, at 995-96.

174. 46 N.E.3d 425 (Ind. 2015).

175. *Id.* at 427.

176. *Hewitt v. Westfield Washington Sch. Corp.*, 24 N.E.3d 459, 467-68 (Ind. Ct. App. 2014), *rev’d*, 46 N.E.3d 425 (Ind. 2015).

statute¹⁷⁷ and that he had received the procedural due process to which he was entitled, which was limited in any event.¹⁷⁸ Employer won.¹⁷⁹

In *AM General LLC v. Armour*,¹⁸⁰ an employer had attempted to satisfy its obligation to its retired president under the long-term incentive plan portion of his employment agreement not with cash—but with a promissory note!¹⁸¹ The Court of Appeals found there were genuine issues of fact as to whether cash payments were required,¹⁸² but the Supreme Court disagreed and found satisfying the obligations of the employment contract with anything other than cash constituted a breach.¹⁸³ Employee won.¹⁸⁴

The most important employment contract case of the year was the widely-reported *Gregg Appliances, Inc. v. Underwood*,¹⁸⁵ in which senior management employees staked claim to a portion of the \$40 million death benefit from a life insurance policy following the 2012 passing of the company's CEO.¹⁸⁶ The claim was based on a compensation plan that awarded bonuses to specified executives if the company's annual "EBITDA" was \$112,300,000 or more.¹⁸⁷ EBITDA is a term commonly understood to mean "earnings before interest, taxes, depreciation, and amortization," but the precise meaning of EBITDA was the central issue in the case.¹⁸⁸ If the \$40 million in insurance proceeds was included, EBITDA equaled \$143,552,000 and the employees were entitled to \$25,000 bonuses; if not, EBITDA fell below the \$112,300,000 floor and the employees were entitled to no bonuses at all.¹⁸⁹

At the trial court, the company argued that while its incentive plan used the term EBITDA, what it really intended was EBITDA adjusted to deduct the life insurance proceeds.¹⁹⁰ The trial court found no ambiguity and granted summary judgment for the employees.¹⁹¹

177. *Hewitt*, 46 N.E.3d at 431.

178. *Id.* at 433.

179. *Id.* at 435.

180. 46 N.E.3d 436 (Ind. 2015).

181. *Id.* at 437-38.

182. *AM Gen., LLC v. Armour*, 27 N.E.3d 817, 821 (Ind. Ct. App.), *rev'd*, 46 N.E.3d 436 (Ind. 2015).

183. *AM Gen., LLC*, 46 N.E.3d at 442.

184. *Id.*

185. 57 N.E.3d 831 (Ind. Ct. App. 2016), *trans. granted, opinion vacated*, 49S02-1701-PL-25, 49A04-1509-PL-1434, 2017 WL 363177 (Ind. Jan. 19, 2017).

186. *Id.* at 832.

187. *Id.*

188. *See generally id.*

189. *Id.* at 833.

190. *Id.* at 835.

191. Court's Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Cross-Motion for Summary Judgment on Behalf of the Certified Class at 14-15, *Underwood v. Gregg Appliances, Inc.*, No. 49D05-1302-PL-007683 (Ind. Super. July 17, 2015) ("The plain and ordinary meaning of the acronym EBITDA is Earnings Before Interest, Taxes,

Just as it was a relatively simple matter for the trial court to decide in favor of the employees, so too was it relatively simple for the Court of Appeals to reverse. It was “clear” to the Court of Appeals that the life insurance proceeds should not be included within the meaning of EBITDA.¹⁹² First and foremost, the entire executive compensation arrangement demonstrated an intent to “reward company-wide profitability, and not to reward senior management for the death of key personnel.”¹⁹³ Second, and of equal consequence, there was evidence in the past that EBITDA had been adjusted for items that are one time in nature—even when those adjustments resulted in higher bonuses.¹⁹⁴ To the Court of Appeals, EBITDA, as used in the incentive compensation plan, could not have been meant to “include a one-time event in the form of insurance proceeds that did not reflect the company’s performance.”¹⁹⁵ The company was entitled to summary judgment.¹⁹⁶

But the case did not end there. In January, 2017, after the end of the survey period, the Indiana Supreme Court assumed jurisdiction over the case.¹⁹⁷ Per Court rule, the decision of the Court of Appeals is vacated and the case stands before the Supreme Court as though on direct appeal from the trial court.¹⁹⁸ The Court held oral argument on the case on February 23, 2017.¹⁹⁹ In early March 2017, the company declared bankruptcy.²⁰⁰

Three additional employment contract cases—*Ritchie v. Community Howard Regional Health*,²⁰¹ *Warren v. Board of School Trustees of Springs Valley Community School Corp.*,²⁰² and *Sheets v. Birky*²⁰³—illustrate the wide range of legal issues that arise when employment is terminated. While extended treatment of these non-contract issues is beyond the scope of this survey, the fact that they can easily arise warrants giving them brief attention.

Depreciation, and Amortization. The fact that HHGREGG intended EBITDA to refer to adjusted EDITDA is of no consequence. Reasonably intelligent persons reading the acronym would not differ as to its meaning. Thus, the term EBITDA is not ambiguous.”).

192. *Gregg Appliances*, 57 N.E.3d at 834.

193. *Id.* (internal quotation marks and citation omitted).

194. *Id.*

195. *Id.* at 835.

196. *Id.* (internal quotation marks and citation omitted).

197. *Gregg Appliances Inc. v. Underwood*, 49S02-1701-PL-25, 49A04-1509-PL-1434, 2017 WL 363177 (Ind. Jan. 19, 2017).

198. IND. R. APP. P. 58(A).

199. *Oral Arguments Online*, courts.IN.gov, <http://mycourts.in.gov/arguments/default.aspx?id=2053&view=detail> [<https://perma.cc/236G-JC7V>] (last visited May 11, 2017).

200. *hhgregg, Inc.*, Current Report (Form 8-K) (Mar. 6, 2017), <https://www.sec.gov/Archives/edgar/data/1396279/000139627917000023/a8-kshell3617.htm> [<https://perma.cc/X5BV-SMQP>].

The Supreme Court had not issued any decision in the case as of June 24, 2017.

201. 51 N.E.3d 1212 (Ind. Ct. App. 2016), *reh'g denied*, (July 13, 2016).

202. 49 N.E.3d 559 (Ind. Ct. App. 2015), *reh'g denied*, (Apr. 15, 2016).

203. 54 N.E.3d 1064 (Ind. Ct. App. 2016).

On appellate review in *Ritchie v. Community Howard Regional Health*²⁰⁴ was a civil procedure issue: whether a cardiologist was entitled to a preliminary injunction to prevent the Medical Executive Committee of Community Howard Regional Health, Inc. from suspending his medical staff privileges.²⁰⁵ Although the physician presented strong evidence that his performance was not substandard as alleged, the Court of Appeals found the Indiana Peer Review Act,²⁰⁶ which severely limits the availability of injunctive relief, to apply.²⁰⁷ “Absent malice, the peer review committee is the legislature’s choice for dealing with these issues. Courts are ill-equipped to conduct an independent review of patient care absent evidence from expert witnesses on the standard of care and any countervailing evidence in opposition thereto.”²⁰⁸

There are several interesting takeaways in *Warren v. Board of School Trustees of Springs Valley Community School Corp.*,²⁰⁹ a case involving the termination of a public school elementary teacher.²¹⁰ First, the Court of Appeals held a determination in an unemployment compensation proceeding that the teacher was discharged for cause was not entitled to collateral estoppel effect in this litigation, which challenged the legality of the termination itself.²¹¹ Second, the Court of Appeals held the school board had violated the Open Door Law²¹² when conducting the meeting announcing the teacher’s termination.²¹³ The school board had announced that it would meet in executive session at 5:00 PM, followed by a public meeting at 7:00 PM or as soon thereafter as the executive session ended.²¹⁴ However, the executive session continued until after 2:00 AM the following morning, at which time the board held a very brief public meeting, announcing the teacher’s termination, all without notifying the teacher, her lawyer, or her union representative, all of whom were in the building.²¹⁵ The Court of Appeals held this violated the Open Door Law because the school board had “convened the meeting at a time unreasonably departing from the time stated

204. *Ritchie*, 51 N.E.3d 1212.

205. *Id.* at 1214.

206. IND. CODE §§ 34-30-15-1 to -23 (2016).

207. *Ritchie*, 51 N.E.3d at 1217.

208. *Id.* at 1220.

209. 49 N.E.3d 559 (Ind. Ct. App. 2015), *reh’g denied*, (Apr. 15, 2016).

210. *Id.* at 562.

211. *Id.* at 559 (citing IND. CODE § 22-4-17-12(h) (2016)) (“This statute clearly precludes the use of unemployment proceedings in subsequent civil suits.”). The court’s finding here is particularly noteworthy since the Court of Appeals itself affirmed the unemployment compensation determination in a separate case. *See Warren v. Review Bd. of Ind. Dep’t of Workforce Dev.*, No. 93A02-1311-EX-949, 2014 WL 1390567 (Ind. Ct. App. May 7, 2014).

212. The Open Door Law requires “all meetings of the governing bodies of public agencies . . . be open at all times for the purpose of permitting members of the public to observe and record them.” IND. CODE § 5-14-1.5-3(a) (2016).

213. *Warren*, 49 N.E.3d at 568-69.

214. *Id.* at 567.

215. *Id.*

in the notice.”²¹⁶

Despite prevailing on these issues, the teacher failed to persuade the Court of Appeals to overturn the trial court’s grant of summary judgment to the school board on her breach of contract and defamation claims.²¹⁷

The issues in *Sheets v. Birky*²¹⁸ all sound in tort. The discharged employee, the CEO of a credit union, had suffered a cerebral hemorrhage but eventually returned to work.²¹⁹ Shortly thereafter, a subordinate reported to a company telephone hotline, questioning the CEO’s cognitive abilities and fitness to perform his responsibilities.²²⁰ About seven months later, the CEO was discharged.²²¹

The CEO alleged defamation per se on the part of the reporting employee, vicarious liability for the defamation on the part of the credit union, and a variety of torts on the part of a consulting firm that assisted the credit union in monitoring the hotline and dealing with the CEO’s medical condition.²²² The charges against the consulting firm are outside the scope of the survey, but the prospect of a defamation claim following termination of an employee is sufficiently common to warrant attention.²²³

Making defamatory statements can be actionable but isn’t necessarily defamation per se. Why does it matter? Damages are presumed in an action for defamation per se but must be proven otherwise.²²⁴ As such, the standard for proving defamation per se is higher.²²⁵ In particular, if words become defamatory only when understood in the context of extrinsic evidence, they are not defamatory per se.²²⁶ Here, the Court of Appeals agreed with the trial court that the employee’s hotline report regarding the CEO’s fitness “did not impute occupational misconduct without resort to extrinsic evidence[,]” and so did not constitute defamation per se.²²⁷

2. *Construction, Remodeling, and Landscaping Contracts.*—Four disputes over construction, remodeling, or landscaping contracts during the survey period are worthy of attention.

216. *Id.* (citing IND. CODE § 5-14-1.5-5(h) (2016), which provides “[n]otice has not been [properly] given . . . if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting”).

217. *Id.* at 566.

218. 54 N.E.3d 1064 (Ind. Ct. App. 2016).

219. *Id.* at 1067.

220. *Id.* at 1067-68.

221. *Id.* at 1068.

222. *Id.*

223. *See id.*

224. *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184, 186 (Ind. 2010).

225. *See Sheets*, 54 N.E.3d at 1070.

226. *Dugan*, 929 N.E.2d at 186.

227. *Sheets*, 54 N.E.3d at 1071.

Ambrose v. Dalton Construction, Inc.,²²⁸ involved a dispute between homeowners and a construction company over a contract to build an in-ground swimming pool.²²⁹ As the pool neared completion, the homeowners became dissatisfied and ordered the contractor to demolish the pool and start over.²³⁰ When the contractor refused, the homeowners withheld payment.²³¹ The trial court awarded the contractor payment in full plus costs and attorney fees, as authorized by the Indiana Mechanic's Lien Act.²³² The Court of Appeals affirmed and added appellate attorney fees.²³³

In *Rusnak v. Brent Wagner Architects*,²³⁴ a construction company sued the Rusnaks for payment on a contract to build a new house.²³⁵ The Rusnaks defended on grounds of shoddy workmanship and filed a third party complaint against their architect.²³⁶ Their contract with the architect included the architect's agreement to "act as the Owner's representative and provide administration of the Contract between the Owner and Contractor[,] . . . includ[ing] visiting the site, . . . [and] rejecting nonconforming Work[.]"²³⁷

The architect sought summary judgment, contending that because its contract with the Rusnaks contained an exculpatory clause, the architect could not be held liable for the contractor's inferior workmanship.²³⁸ The Court of Appeals rejected the architect's contention.²³⁹

[T]he clause relieving [the architect] of liability for the contractor's *performance* of the work does not excuse [the architect] from meeting its own obligation to *reject* work it knows fails to conform to the contract documents, plans, and specifications. If the exculpatory clause were interpreted to mean that [the architect] cannot be held accountable for failing to reject non-conforming work because the work itself is the

228. 44 N.E.3d 707 (Ind. Ct. App. 2015), *as clarified on reh'g*, 51 N.E.3d 320 (Ind. Ct. App. 2016), *trans. denied*, 50 N.E.3d 147 (Ind. 2016).

229. *Id.* at 710.

230. *Id.* at 711.

231. *Id.*

232. *Id.* at 712. The Indiana Mechanic's Lien Act provides that a lienholder who prevails is entitled to recover "reasonable attorney's fees." IND. CODE § 32-28-3-14(a) (2016).

233. *Ambrose*, 44 N.E.3d at 715-16. The mechanic's lien statute also encompasses attorney's fees associated with appellate proceedings. IND. CODE § 32-28-3-14(a) (2016). Attorney's fees under the mechanic's lien statute were also approved in *Boyer Construction Group Corp. v. Walker Construction Co.*, 44 N.E.3d 119 (Ind. Ct. App. 2015).

234. 55 N.E.3d 834 (Ind. Ct. App.), *trans. denied*, 59 N.E.3d 251 (Ind. 2016).

235. *Id.* at 836.

236. *Id.*

237. *Id.* (emphasis omitted). According to the court, these provisions are included in "AIA Document B155 Standard Form of Agreement Between Owner and Architect for a Small Project." *Id.*

238. *Id.* at 841.

239. *Id.*

province of the contractor, then [the architect's] clearly stated responsibility to reject non-conforming work is essentially meaningless.²⁴⁰

*Warfield v. Dorey*²⁴¹ involved a contractor identified by an insurance company to repair roof damage suffered by an insured homeowner during a hailstorm.²⁴² The contractor and the adult daughter of the insured negotiated a contract covering the roof and several other items not covered by insurance.²⁴³ When the contractor was not paid after completing the work, he sued on the contract.²⁴⁴

The trial court granted summary judgment for the contractor but the Court of Appeals reversed.²⁴⁵ The Court of Appeals focused on the homeowner's claim that the agreement with the contractor was void because it violated the Indiana Home Improvement Contracts Act (HICA).²⁴⁶ The record was clear that the contractor had not complied in many respects with the requirements of the statute.²⁴⁷ But although the homeowner claimed to the contrary, the Court of Appeals emphasized the statute does not void contracts that violate its requirements.²⁴⁸ Rather, the statute leaves it to the trial court to determine whether voiding the contract was an appropriate remedy.²⁴⁹

The court then applied the balancing test regularly used by Indiana courts to determine if a contract violates public policy.²⁵⁰ Here, the Court of Appeals concluded the contract did violate public policy because the contractor was not licensed at the time he solicited the roofing work and because the contractor failed to apply for the required building permit.²⁵¹ Said differently, the court concluded the appropriate remedy for intentionally misleading a customer that the contractor was licensed and providing work according to code was to declare the contract void.²⁵²

Several interesting things happened in *Kaetzel v. Woods*,²⁵³ an opinion that

240. *Id.*

241. 55 N.E.3d 887 (Ind. Ct. App. 2016), *reh'g denied*, (July 22, 2016).

242. *Id.* at 889.

243. *Id.*

244. *Id.* at 889-90.

245. *Id.* at 895.

246. *Id.* at 891. The Indiana Home Improvement Contracts Act is codified at IND. CODE § 24-5-0.5 (2016).

247. *Id.* at 891.

248. *Id.* at 892.

249. *Id.* at 893.

250. *Id.* These factors were first compiled in *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1130 (Ind. 1995). I was the author of *Fresh Cut*.

251. *Warfield*, 55 N.E.3d at 894.

252. *Id.*

253. No. 62A01-1507-CC-837, 2016 WL 3639917 (Ind. Ct. App. July 8, 2016) (unpublished disposition).

demonstrates how incredibly valuable not-for-publication of opinions can be.

Kaetzel is a dispute between homeowners and a contractor hired to construct a new house.²⁵⁴ First, although the parties proffered a short term sheet as their contract, the trial court found there had been no “meeting of the minds” and, as such, no contract was formed.²⁵⁵ The court then resolved the contractor’s claim that it had been underpaid as one of quantum meruit.²⁵⁶ After working through that analysis, the court found the contractor had been overpaid by approximately \$10,000 for work on the house but was due approximately \$6000 for some extra work not related to the construction of the house.²⁵⁷ None of these determinations were appealed.²⁵⁸

Second, after two non-party subcontractors testified as to work they had performed at the contractor’s direction, the trial court concluded the homeowners owed these subcontractors approximately \$15,000.²⁵⁹ Although finding the evidence supported these awards, the Court of Appeals reversed on grounds that the subcontractors were not parties to this lawsuit.²⁶⁰

Third, the trial court awarded the homeowners approximately \$39,000 on their counterclaim against the contractor for shoddy workmanship.²⁶¹ But on what grounds? Not breach of contract; remember that the trial court had held there was no contract and that holding had not been appealed. Rather, the homeowners contended the contractor breached implied warranties against certain construction defects that the Indiana New Home Construction Warranties Act (NHWCA)²⁶² imposes on a builder in favor of the first occupant of a newly constructed residence.²⁶³ The Court of Appeals reversed the \$39,000 award, despite it having been within the evidence, because the NHWCA only protects an initial home buyer “who executes a contract with the builder.”²⁶⁴ In the absence of a written contract, the homeowners did not enjoy the statutory implied warranties.²⁶⁵

Taken together, *Ambrose*, *Rusnak*, *Warfield*, and *Kaetzel* represent an impressive body of work. Although each of the cases starts out looking for all the world like common law contract disputes, three of them turn in part on the application of a statute—the Mechanic’s Lien Act (*Ambrose*),²⁶⁶ Home

254. *Id.* at *1.

255. *Id.* at *2.

256. *Id.*

257. *Id.*

258. *Id.* at *3.

259. *Id.* at *4-5.

260. *Id.* at *5.

261. *Id.* at *3.

262. IND. CODE § 32-27-2-1 to -11(2016).

263. *Kaetzel*, 2016 WL 3639917, at *3.

264. *Id.*

265. *Id.* at *3-4 (citing IND. CODE §§ 32-27-2-2, 32-27-3-1(6) (2016)).

266. See generally 44 N.E.3d 707 (Ind. Ct. App. 2015), as clarified on reh’g, 51 N.E.3d 320 (Ind. Ct. App. 2016), trans. denied, 50 N.E.3d 147 (Ind. 2016).

Improvement Contracts Act (*Warfield*),²⁶⁷ and the New Home Construction Warranties Act (*Kaetzel*).²⁶⁸ This is a good reminder that even when we think we know what the common law answer to a particular legal question is, there is often a statute lurking out there that controls the law in the area.

3. *Releases and Settlement Agreements.*—Perhaps it is not surprising in an era when fewer and fewer cases are going to trial that disputes would break out over releases and settlement agreements. By my count, there were a half dozen such cases decided by the Court of Appeals this year—and a couple more dealing with arbitration clauses.

I trust you see the irony. Parties attempt to avoid litigation but end up in the courtroom anyway—litigating whether their settlement agreement had been honored or even litigating *whether they had settled at all*.

*B&R Oil Co. v. Stoler*²⁶⁹ is the most important of these cases. Some weeks after a negotiation between two affiliated oil and gas distributors on one side and eighteen of their gas station tenants on the other side, the distributors repudiated the purported agreement on two grounds.²⁷⁰ First, they claimed their negotiators did not have authority to settle.²⁷¹ This issue is discussed earlier in this Article.²⁷² Second, they maintained that even if there had been the requisite authority to settle, any oral agreement that was reached was not enforceable because the parties did not reach an agreement on all material terms.²⁷³

The law is clear that:

Parties may make an enforceable contract which obligates them to execute a subsequent final written agreement. However, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. In other words, the document is understood to be a mere memorial of the agreement already reached and may not contain a material term that is not already agreed on.²⁷⁴

The evidence showed that the parties continued to negotiate after the conclusion of the mediation concerning language releasing the distributors from future liability to the tenants.²⁷⁵ Yet the Court of Appeals held—and this is really the key holding—the “fact that the parties did not immediately agree on the language of [their written agreement] does not conclusively establish that the

267. See generally 55 N.E.3d 887 (Ind. Ct. App. 2016), *reh'g denied*, (July 22, 2016).

268. See generally No. 62A01-1507-CC-837, 2016 WL 3639917 (Ind. Ct. App. July 8, 2016) (unpublished disposition).

269. No. 71A03-1503-PL-114, 2016 WL 276722 (Ind. Ct. App. Jan. 21, 2016) (unpublished disposition), *trans. denied*, 54 N.E.3d 372 (Ind. 2016).

270. *Id.* at *1.

271. *Id.*

272. See *supra* Part III.D.

273. *B&R Oil Co.*, 2016 WL 276722, at *8.

274. *Id.* at *8-9 (quoting *Sands v. Helen HCI, LLC*, 945 N.E.2d 176, 180 (Ind. Ct. App. 2011)).

275. *Id.* at *9.

parties did not reach an agreement on all material terms at the . . . mediation.”²⁷⁶ Rather, the court said, “[O]ngoing negotiations may simply indicate that the parties initially disagreed as to whether the proposed draft agreement accurately captured the material terms of the settlement reached at the mediation.”²⁷⁷

In this case, the tenants’ release was among the most material terms in the agreement.²⁷⁸ But the trial court had concluded the tenants’ release was not the subject of the post-mediation negotiations.²⁷⁹ Rather, the distributors tried to add some language releasing themselves of future liability to the tenants, an issue that had not been raised before and which, the trial court held, was not material.²⁸⁰ The Court of Appeals affirmed the trial court’s factual determination that the parties reached an agreement with respect to the tenants’ release at the mediation.²⁸¹

*Ellison v. Town of Yorktown*²⁸² and *Jonas v. State Farm Life Insurance Co.*²⁸³ are more straightforward exemplars of courts being called up to decide whether a settlement agreement was enforceable. *Ellison* involved the settlement of eminent domain litigation,²⁸⁴ *Jonas* a dispute over a life insurance policy with a large death benefit.²⁸⁵ In both, the trial court found the settlement agreements were enforceable and the Court of Appeals affirmed.²⁸⁶ The cases are worth mentioning for two reasons. First, they are good reminders that settlement agreements are contracts and subject to standard principles of contract interpretation.²⁸⁷ Second, they contain a good review of core principles of contract interpretation: “offer and acceptance”,²⁸⁸ “consideration”,²⁸⁹ and “mutual assent” or “meeting of the minds.”²⁹⁰

Jonas has an interesting twist. At issue was whether the settlement agreement was not enforceable because it did not comply with the Indiana Alternate Dispute Resolution (ADR) Rules in two respects: it was neither in writing nor signed by the parties;²⁹¹ and because its enforceability turned on communications during negotiations required to be kept confidential.²⁹² But the dispute being settled was

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at *10.

281. *Id.* at *9-10.

282. 47 N.E.3d 610 (Ind. Ct. App. 2015).

283. 52 N.E.3d 861 (Ind. Ct. App.), *trans. denied*, 59 N.E.3d 251 (Ind. 2016).

284. *See generally* 47 N.E.3d 610.

285. *See generally* 52 N.E.3d 861.

286. *See Ellison*, 47 N.E.3d at 621; *Jonas*, 52 N.E.3d 861.

287. *See Ellison*, 47 N.E.3d at 617; *Jonas*, 52 N.E.3d at 868.

288. *Ellison*, 47 N.E.3d at 617.

289. *Id.* at 619.

290. *Id.*; *Jonas*, 52 N.E.3d at 868.

291. IND. ALTERNATIVE DISPUTE RESOLUTION Rule 2.7(E)(2).

292. IND. ALTERNATIVE DISPUTE RESOLUTION Rule 2.11.

pending in *federal* court.²⁹³ The Indiana ADR Rules did not apply to the settlement negotiations in this case, the court held, because there was no pending case in Indiana state court at the time of the negotiations.²⁹⁴

What about the federal case? At the time of the settlement negotiations, Jonas had appealed a district court decision to the Seventh Circuit.²⁹⁵ Jonas argued in the case discussed here that State Farm should not be able to enforce the settlement agreement because it had not raised the issue of the settlement agreement to the Seventh Circuit.²⁹⁶ But State Farm could not move to dismiss the Seventh Circuit case because it was not the appellant.²⁹⁷ Nor was there any jurisdictional basis for filing an enforcement action in federal court.²⁹⁸ And, the Court of Appeals found State Farm did not take any action in the federal litigation that was inconsistent with its right to enforce the settlement agreement in state court.²⁹⁹

*Smith v. Bowling*³⁰⁰ is an example of where parties agree they reached an enforceable settlement agreement but dispute whether it had been complied with.³⁰¹ The underlying litigation was between two partners in a residential construction business and concerned an alleged breach of fiduciary duty.³⁰² The mediated settlement agreement required a partnership accounting.³⁰³ The accountant had great difficulty given the poor state of partnership financial records and accounting systems but finally produced an accounting.³⁰⁴ One of the partners challenged the accounting as not meeting the requirements of the settlement agreement.³⁰⁵ The Court of Appeals treated the matter as one of standard contract interpretation³⁰⁶ and affirmed the trial court's conclusion that the accounting had been prepared in accordance with the provisions of the mediated settlement agreement.³⁰⁷

4. *Insurance Contracts*.—Only one insurance contract case warrants discussion in this year's survey. *Founders Insurance Co. v. May*³⁰⁸ resurrects a

293. *Jonas*, 52 N.E.3d at 865.

294. *Id.* at 869.

295. *Id.* at 865.

296. *Id.* at 869.

297. *Id.* at 870.

298. *Id.*

299. *Id.* at 871.

300. No. 03A01-1511-CC-2103, 2016 WL 3639931, (Ind. Ct. App. July 8, 2016) (unpublished disposition).

301. *See generally id.*

302. *Id.* at *1.

303. *Id.*

304. *Id.* at *1-2.

305. *Id.* at *1.

306. *Id.* at *5 (citing *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1133 (Ind.1995)).

307. *Id.* at *6.

308. 44 N.E.3d 56 (Ind. Ct. App. 2015), *trans. denied*, 43 N.E.3d 1279 (Ind. 2016).

decades-old debate³⁰⁹ over whether Indiana's mandate that drivers must carry minimum levels of liability insurance, including uninsured and underinsured motorist coverage,³¹⁰ exists for the purpose of providing financial protection to drivers or providing auto accident victims with a source and means of recovery. Where the victim is himself or herself a driver, the debate is not squarely joined because if the victim cannot collect on the tortfeasor's insurance, the victim has his or her own uninsured motorist coverage.³¹¹

In *Founders Insurance Co.*, the tortfeasor, driving without a license and without the knowledge or permission of the owner, struck and killed a bicyclist.³¹² The insurance company argued that the language of the policy excluded coverage in such circumstances—which it clearly did.³¹³ But the victim did not have a car and did not have insurance.³¹⁴ The estate argued that to deny coverage contravened the public policy embodied in the legislative mandate of providing compensation to accident victims.³¹⁵

A majority of the Court of Appeals ruled in favor of the insurance company, grounding its decision in the importance of predictability.³¹⁶ To rule to the contrary, the court said, would make the enforceability of the insurance contract turn on the status of an accident victim.³¹⁷ In dissent, Judge Melissa S. May called the decision “harsh and unfair” because it provided “protection for *drivers* injured in motor vehicle accidents but . . . no remedy for pedestrians, bicyclists, or other persons who need not or cannot prove financial responsibility.”³¹⁸

Although the issue had been percolating for many years,³¹⁹ the Supreme Court declined to take up the case, voting 3-2 to deny transfer.³²⁰

309. *Cf.* *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 672 (Ind. 1997); *Pekin Ins. Co. v. Super*, 912 F. Supp. 409, 412 (S.D. Ind. 1995); *Motorists Mut. Ins. Co. v. Morris*, 654 N.E.2d 861 (Ind. Ct. App. 1995); *Transamerica Ins. Co. v. Henry*, 563 N.E.2d 1265, 1268 (Ind. 1990); *Am. Underwriters Grp., Inc. v. Williamson*, 496 N.E.2d 807, 810 (Ind. Ct. App. 1986).

310. The Indiana Financial Responsibility Act (IND. CODE §§ 9-25-4-1 to -12 (2016)).

311. *See, e.g., Colonial Penn Ins. Co.*, 690 N.E.2d at 672 (“Even if we agree . . . that the purpose underlying the Financial Responsibility Act is to provide a source of minimum compensation for accident victims, that goal is satisfied here because the third parties in this case had uninsured motorist coverage.”).

312. *Id.* at 57.

313. *Id.* at 58. Under the terms of the policy, the insurer had no obligation to extend coverage because the driver did not have a valid driver's license at the time of the accident nor did the driver have a reasonable belief that she was entitled to use the truck on that date. *Id.*

314. *Id.* at 57.

315. *Id.* at 59.

316. *Id.* at 64.

317. *Id.* at 63-64.

318. *Id.* at 65 (May, J., dissenting).

319. *See supra* note 309.

320. *Founders Ins. Co. v. May*, 43 N.E.3d 1279 (Ind. 2016) (David, J., Massa, J., and Slaughter, J., voting to deny transfer; Rush, C.J., and Rucker, J., voting to grant transfer).

C. Interpreting Particular Contract Clauses

1. *Non-Competition Covenants*.—One of the things that I learned during the past year from one of my students is that covenants not to compete are void as a matter of statutory law in California³²¹ and that that policy is thought to be part of the reason for the Silicon Valley technology boom.³²² The student, Jordan Kyle, wrote a paper arguing that Indiana would be better off—would better promote entrepreneurship and innovation—if it, too, would declare covenants not to compete unenforceable.³²³

It was a good paper but Jordan Kyle is swimming upstream against a strong current of Indiana law. In both of the following covenant-not-to-compete cases, the court enforced the covenant:

- In *Duermit v. Odyssey Healthcare, Inc.*,³²⁴ after employment of the executive director of a hospice care provider was terminated, the executive solicited and received appointment to a similar position in Indianapolis with a competitor.³²⁵ The Court of Appeals affirmed a preliminary injunction that prohibited the executive from engaging in any competitive business or activity within fifty miles of Indianapolis, raiding the hospice’s employees, and using or disclosing the hospice’s referral sources and proprietary and trade-secret information.³²⁶
- In *Janowiak v. Watcon, Inc.*,³²⁷ a field engineer at a water treatment services and related products company terminated his employment contract and began selling similar products and services for a competitor in the same area.³²⁸ The Court of Appeals affirmed the preliminary injunction barring the engineer for a period of two years from soliciting orders from customers of his prior employer and from divulging any of his prior employer’s confidential information.³²⁹ In the exercise of “blue pencil” authority, the court did not enforce a provision of the employment contract that prohibited the engineer from going to work for

321. Jordan Kyle, *Indiana’s Ineffective Covenants Not to Compete: Improving Innovation by Following California Law and Utilizing Current Massachusetts Ideology to Grow Jobs in the Hoosier State* 13 (2016) (unpublished manuscript on file with the author).

322. *Id.* at 13-14.

323. *Id.* at 18-21. For a recent lengthy discussion of this issue in the popular press, see Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES (May 13, 2017) <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html> [<https://perma.cc/C6XA-N429>].

324. No. 29A02-1503-PL-146, 2015 WL 9590759 (Ind. Ct. App. Dec. 31, 2015) (unpublished disposition).

325. *Id.* at *1.

326. *Id.* at *13.

327. No. 71A04-1512-PL-2154, 2016 WL 4245426, (Ind. Ct. App. Aug. 11, 2016) (unpublished disposition).

328. *Id.* at *1.

329. *Id.* at *10.

a competitor.³³⁰

2. *Arbitration Clauses.*—The growing ubiquity of arbitration clauses is the subject of frequent attention, even in the popular press.³³¹ *Allied Professionals Insurance Co. v. Neff Realty, LLC*,³³² where a trial court denied an insurer's request to enforce a policy's arbitration clause against a claimant, provides a good lesson on some basic principles.³³³

Whether parties have agreed to arbitrate is a matter of contract interpretation, subject to standard rules of contract construction.³³⁴ In *Allied Professionals*, there was an explicit arbitration clause, so determining the existence of an agreement to arbitrate was not at issue.³³⁵ Rather, the claimant argued that the insurer had waived its right to arbitrate the dispute because its demand to arbitrate was untimely.³³⁶ This line of argument was a non-starter because the policy contract itself "unambiguously reserved questions of arbitrability for the arbitrator."³³⁷

Here is the key point. When an arbitration clause delegates determinations of arbitrability to the arbitrator, courts treat the delegation as valid and leave any challenge to the validity of the arbitration agreement as a whole for the arbitrator.³³⁸ And even in the absence of a delegation clause, courts presume that arbitrators should resolve disputes about procedural preconditions for arbitration, including waiver, delay, or a like defense.³³⁹

There is some *dicta* in *Allied Professionals* that appears with frequency in the

330. *Id.*

331. See e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [<https://perma.cc/R64B-VZGZ>].

332. No. 49A02-1601-PL-29, 2016 WL 3615773 (Ind. Ct. App. July 6, 2016) (unpublished disposition), *trans. denied*, 62 N.E.3d 1201 (Ind. 2016). In a second case involving an arbitration clause during the survey period, *Madison County Board of Commissioners v. American Federation of State County & Municipal Employees Local 3609*, 45 N.E.3d 868 (Ind. Ct. App. 2015), transfer denied, 45 N.E.3d 1211 (Ind. 2016), a county challenged an arbitrator's decision made pursuant to the arbitration clause of a public employee collective bargaining agreement as beyond the scope of the arbitrator's authority. The Court of Appeals analyzed the claim using the Indiana Uniform Arbitration Act, Indiana Code section 34-57-2, and held that the county had established no basis for correcting or vacating the arbitrator's award. *Madison Cty. Bd. of Comm'rs*, 45 N.E.3d at 876.

333. *Allied Prof'ls Ins. Co.*, 2016 WL 3615773, at *1.

334. MPACT Const. Grp., LLC v. Superior Concrete Constructors, Inc., 802 N.E.2d 901, 906 (Ind. 2004) (citing AGCO Corp. v. Anglin, 216 F.3d 589, 593 (7th Cir. 2000)). I was the author of this opinion.

335. *Allied Prof'ls Ins. Co.*, 2016 WL 3615773, at *1.

336. *Id.* at *2.

337. *Id.* The Arbitration Clause states that "[a]ny questions as to arbitrability of any dispute or claim shall be decided by the arbitrator." *Id.* at *1.

338. *Id.* at *2 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70-73 (2010)).

339. *Id.*

arbitration cases that I do not think is quite right.³⁴⁰ The Court of Appeals says, “[I]n construing arbitration agreements, all doubts are to be resolved in favor of arbitration.”³⁴¹ It cites an Indiana Supreme Court opinion, *MPACT Construction Group, LLC v. Superior Concrete Constructors, Inc.*,³⁴² as authority for this proposition, but here is what *MPACT* actually says on the subject:

[I]mposing on parties a policy favoring arbitration before determining whether they agreed to arbitrate could frustrate the parties’ intent and their freedom to contract. The [United States] Supreme Court has made this clear—“arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”

Additionally, courts have regularly distinguished the treatment given questions of the existence of an agreement to arbitrate and questions of the scope of an agreed-to arbitration clause. . . . Using the policy favoring arbitration to decide whether the parties did in fact agree to arbitrate does not answer the question but rather avoids having to decide it. Only after it has been determined that the parties agreed to arbitrate their disputes does the policy favoring arbitration play an important role.³⁴³

3. *Options to Renew Leases.*—Last year’s survey examined two cases in which commercial tenants held over but never indicated to their landlords that they were exercising the renewal options provided in the leases.³⁴⁴ Both vacated before the end of what would have been the end of the renewal terms.³⁴⁵ The landlords took the position that the tenants had, by the mere fact of holding over, exercised the renewal options and were liable for rent for the balance of the renewal term.³⁴⁶

The cases were *Pearman v. Jackson*³⁴⁷ and *Norris Ave. Professional Building Partnership v. Coordinated Health, LLC*.³⁴⁸ Both cases recognize the renewal notice requirement is a condition precedent to tenants’ exercise of the option term, but because the condition exists for the benefit of the landlords, the landlords have the right to waive compliance.³⁴⁹ The question, then, was whether the landlords had waived compliance by allowing the tenants to hold over and

340. See, e.g., *Nat’l Wine & Spirits, Inc. v. Ernst & Young, LLP*, 976 N.E.2d 699, 706 (Ind. 2012) (dicta).

341. *Allied Prof’ls Ins. Co.*, 2016 WL 3615773, at *1.

342. 802 N.E.2d 901, 905 (Ind. 2004).

343. *Id.* at 906 (citations omitted) (quoting *AT&T Techs. v. Commc’ns. Workers of Am.*, 475 U.S. 643, 648 (1986)).

344. See Sullivan, *supra* note 2, at 997-98.

345. See *id.*

346. See *id.*

347. 25 N.E.3d 772 (Ind. Ct. App. 2015).

348. 28 N.E.3d 296 (Ind. Ct. App.), *trans. denied*, 34 N.E.3d 684 (Ind. 2015).

349. See generally *Pearman*, 25 N.E.3d 772; *Norris Ave.*, 28 N.E.3d 296.

accepting rent.³⁵⁰ In *Pearman*, the court held the tenants' rent payments and continued occupation standing alone was insufficient to establish waiver.³⁵¹ But in *Norris*, the court held the landlord had waived the tenant's obligation to give notice by accepting tenant's increased rent payments—the fact that tenant paid increased rent being a critical distinction between the two cases.³⁵²

Randy Faulkner & Associates, Inc. v. Restoration Church, Inc.,³⁵³ presented the same facts but opposite contentions. The tenant, a church, had held over from year to year without ever providing the landlord with the renewal notice required by the lease.³⁵⁴ When the landlord ousted the tenants, the tenant sued for breach of contract on the theory that the landlord had waived the renewal notice requirement when the landlord accepted the church's untimely notices of the church's intent to renew and the church's annual rent payments.³⁵⁵

The Court of Appeals held for the landlord.³⁵⁶ It found that the church failed to notify the landlord that it intended to renew the lease.³⁵⁷ Instead, the church merely held over and paid the same rent it had been paying.³⁵⁸ “As a matter of law, the trial court erred when it concluded that that evidence demonstrated [landlord's] waiver of the condition precedent.”³⁵⁹ The court's decision lines up nicely with *Pearman* and *Norris*.

4. *Closing Requirements.*—Two cases provide reminders of the importance of contract terms as to the closing of deals.

The closing requirements of a stock purchase agreement were at issue in *Raheem v. Pinnacle Healthcare, LLC*.³⁶⁰ After agreeing to two extensions of the closing, the parties were unable to reach agreement on a third and the closing did not take place.³⁶¹ The seller sued for breach of contract but the trial court granted summary judgment in favor of the buyer, finding the seller “did not perform the conditions that had to be fulfilled” before the buyer was required to close.³⁶²

In a muscular opinion,³⁶³ the Court of Appeals not only reversed but ordered

350. See generally *Pearman*, 25 N.E.3d 772; *Norris Ave.*, 28 N.E.3d 296.

351. 25 N.E.3d at 779.

352. 28 N.E.3d at 303.

353. 60 N.E.3d 274 (Ind. Ct. App.), *reaff'd and reh'g granted*, 62 N.E.3d 1204 (Ind. Ct. App. 2016).

354. *Id.* at 279.

355. *Id.* at 280.

356. *Id.* at 283-84.

357. *Id.* at 281.

358. *Id.*

359. *Id.* (citing *Carsten v. Eickhoff*, 323 N.E.2d 664, 667 (1975)).

360. No. 45A04-1508-PL-1080, 2016 WL 614634 (Ind. Ct. App. Feb. 16, 2016) (unpublished disposition).

361. *Id.* at *1.

362. *Id.* at *2.

363. Before ordering summary judgment for the appellant, the court quoted *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014), discussed *supra* in Part II.D. *Id.*

summary judgment in favor of the *seller* on the issue of breach.³⁶⁴ “The closing did not happen,” the court said as a matter of law, because the buyer “was not prepared to close.”³⁶⁵ The case was remanded for a determination of seller’s damages.³⁶⁶

Perhaps a little practice pointer here. The closing was scheduled for December 31, 2012.³⁶⁷ The Court of Appeals opinion recites, complete with pinpoint citations to the record:

No closing occurred on December 31, 2012, though Dr. Raheem made “multiple efforts” to track down Pinnacle employees on and before that date. [Record] at 573-74. He sat in his office for four hours on December 31 trying to find a Pinnacle principal to “ask him why we are not closing.” *Id.* at 574.³⁶⁸

If your client is ready and willing to close and may want to treat the other side’s failure to close as a breach, go ahead and show up at the place designated for closing with all of the closing and other documents in hand, notwithstanding the fact that the other side is not at all likely to attend.

A little more complicated is *2007 E. Meadows, LP v. RCM Phoenix Partners, LLC*.³⁶⁹ The closing of an agreement to sell a housing complex in Indianapolis required that the owner-seller’s lender approve the buyer’s assumption of the owner’s mortgage.³⁷⁰ This was not thought to be a problem because the loan was secured by both the property and housing assistance payments from the U.S. Department of Housing and Urban Development (“HUD”).³⁷¹ In addition, various representations, warranties, and covenants made by the seller were required to be true.³⁷²

The closing was delayed several times by the failure of the lender to approve the mortgage assumption and during this period of delay, the Indianapolis Housing Authority began an enforcement action against the owner arising out of an incident in the complex in which a child was killed.³⁷³ On the scheduled closing date, the buyer asked the owner for another extension of the closing date.³⁷⁴ The owner declined.³⁷⁵ Later that day, the buyer announced that although it was “ready, willing, and able” to close, it was not going to do so, giving the

364. *Id.* at *3.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* at *1 (citations are to the record).

369. No. 49A05-1407-PL-300, 2016 WL 239040 (Ind. Ct. App. Jan. 20, 2016) (unpublished disposition), *trans. denied*, 57 N.E.3d 816 (Ind. 2016).

370. *Id.* at *1.

371. *Id.*

372. *Id.* at *4.

373. *Id.* at *2.

374. *Id.*

375. *Id.*

enforcement action as the reason.³⁷⁶

The trial court concluded the lender had not approved the assumption of the mortgage and, as a result, the buyer was unable to close.³⁷⁷ The Court of Appeals affirmed, deeming the buyer's "recitation of the facts . . . , at best, selective."³⁷⁸

V. CONCLUSION: WHEN CONTRACT BREACHERS BECOME CRIMINALS

In two cases during the survey period, victims of contract breaches persuaded the Court of Appeals that they were in fact the victims of crime. At issue here is the Crime Victims Relief Act ("CVRA")³⁷⁹—an act that provides treble damages to a person who "suffers a pecuniary loss as a result of a violation of [a criminal statute]."³⁸⁰

Cases dating back to the 1980s hold an actual criminal conviction is not required for recovery under this act³⁸¹ and a claimant "merely must prove each element of the underlying crime by a preponderance of the evidence."³⁸² In two cases during the survey period, the Court of Appeals approved CVRA damages against defendants who look to me like ordinary contract breachers, not criminals.

In *Auto Liquidation Center, Inc. v. Chaca*,³⁸³ an auto dealership repossessed a financed car when not entitled to do so due to a bookkeeping error.³⁸⁴ Such wrongful repossession entitles a debtor to damages under Article 9 of the UCC.³⁸⁵ The debtor, however, relied on the CVRA instead.³⁸⁶ A jury found the dealer was guilty of the crime of criminal conversion by a preponderance of the evidence, and the Court of Appeals affirmed.³⁸⁷

In *Staggs v. Buxbaum*,³⁸⁸ a widow did not disclose problems with her home's sewage disposal system and basement water problems on her seller's real estate disclosure form.³⁸⁹ The purchaser of the home—who had inspected the home inspected before purchasing it without discovering any sewage disposal or basement water problem—sued.³⁹⁰ The purchaser's claim was not for breach of

376. *Id.*

377. *Id.* at *3.

378. *Id.* at *4.

379. IND. CODE § 34-24-3-1 (2016).

380. *Id.*

381. *See, e.g.*, *Wysocki v. Johnson*, 18 N.E.3d 600, 606 (Ind. 2014); *Klinker v. First Merchants Bank, N.A.*, 964 N.E.2d 190, 193 (Ind. 2012); *White v. Ind. Realty Assocs. II*, 555 N.E.2d 454, 456 (Ind. 1990).

382. *Wysocki*, 18 N.E.3d at 606.

383. 47 N.E.3d 650 (Ind. Ct. App. 2015).

384. *Id.* at 652.

385. IND. CODE § 26-1-9.1-625 (2016).

386. *Chaca*, 47 N.E.3d at 656.

387. *Id.*

388. 60 N.E.2d 238 (Ind. Ct. App.), *trans. denied*, 62 N.E.3d 1201 (Ind. 2016).

389. *Id.* at 240.

390. *Id.*

warranty in the sales contract. Rather, the purchaser sought treble damages under the CVRA on the theory that the seller had committed the crime of fraud in completing the real estate disclosure form.³⁹¹ The trial court imposed CVRA liability and awarded treble damages.³⁹² The Court of Appeals affirmed.³⁹³

Transfer was not sought in *Auto Liquidation Center, Inc.* and was denied in *Staggs*.³⁹⁴ In fact, the Indiana Supreme Court has addressed this general area at least three times in the last five years,³⁹⁵ so there is solid precedent that CVRA liability does not require a conviction and that preponderance of the evidence is the standard of proof. But I think it is worth examining whether this precedent is sound. The Legislature requires proof by “clear and convincing evidence,” rather than a preponderance of the evidence, before punitive damages are available.³⁹⁶ And, as noted, the Legislature has provided specified damages for violations of statutes like Article 9 of the UCC.³⁹⁷ Is it inconsistent with the policies those enactments reflect to impose treble damages on contract breachers who are shown by a mere preponderance of the evidence to have done no more than violate a criminal statute?

391. *Id.*

392. *Id.* at 241.

393. *Id.* at 249.

394. 62 N.E.3d 1201 (Ind. 2016).

395. *Wysocki v. Johnson*, 18 N.E.3d 600, 606 (Ind. 2014); *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 334 (Ind. 2013); *Klinker v. First Merchants Bank, N.A.*, 964 N.E.2d 190, 193 (Ind. 2012). I was the author of *Klinker*.

396. IND. CODE § 34-51-3-2 (2016). *But see* *Andrews v. Mor/Ryde Int’l, Inc.*, 10 N.E.3d 502, 505 (Ind. 2014) (describing treble damages under CVRA not subject to proof by “clear and convincing evidence” as required by the Punitive Damages Act because recovery under the Punitive Damages Act “is regarded as distinct from recovery of common law punitive damages”).

397. IND. CODE § 26-1-9.1-625 (2016).