RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

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

I. ANTITRUST LITIGATION

The purpose behind Indiana's Antitrust Act (the "Act")[2] is to prevent fraud and collusion in the letting of contracts and to protect trade and commerce against unlawful restraints and monopolies.[3] Section 3 of the Act states: "A person who engages in any scheme, contract, or combination to restrain or restrict bidding for the letting of any contract for private or public work, or restricts free competition for the letting of any contract for private or public work, commits a Class A misdemeanor."[4] Section 7(a) of the Act, in turn, provides a private right of action allowing treble damages, costs, and attorney's fees to "[a]ny person whose business or property is injured by a violation of this chapter."[5] The Indiana Court of Appeals issued two published decisions during the Survey Period addressing Sections 3 and 7 of the Act—one involving claims against governmental entities and the other involving a non-union subcontractor's claims against a contractor and local union.

In *North Gibson School Corp. v. Truelock*,[6] the court held that governmental entities cannot be liable for violations of the Act.[7] Although the Act provides a cause of action for unsuccessful bidders against other bidders on a private or public contract, it does not allow an unsuccessful bidder to sue a governmental entity, even if the government entity colluded with another bidder and took

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the Survey Period: October 1, 2011, through September 30, 2012.

2. IND. CODE § 24-1-2-1 to -12 (2013).

3. Skyline Roofing & Sheet Metal Co. v. Ziolkowski Constr., Inc., 957 N.E.2d 176, 181 (Ind. Ct. App. 2011).

4. IND. CODE § 24-1-2-3 (2013).

5. *Id.* § 24-1-2-7(a).

6. 971 N.E.2d 707 (Ind. Ct. App.), *trans. denied*, 978 N.E.2d 27 (Ind. 2012).

7. *Id*. at 711.

actions prohibited by the Act.[8] Generally, governmental entities cannot be responsible for criminal acts, and because the Act is criminal in nature, the *Truelock* court, relying on *Brownsburg Community School Corp. v. Natare Corp.*, concluded that the legislature did not intend to impose such liability on governmental entities.[9] The court reasoned that "'neither the State nor any other governmental entity is subject to criminal provisions of the Indiana statutes without the legislation making that result absolutely clear[,]'" and the legislature did not make that clear under the Act.[10]

In *Skyline Roofing & Sheet Metal Co., v. Ziolkowski Construction, Inc.*,[11] the court addressed whether a roofing subcontractor stated a claim under the Act against a contractor and whether the subcontractor's antitrust claims against the union were preempted by federal labor laws.[12] In that case, Kankakee Valley School Corporation enlisted unions to help support a campaign to construct a new middle school.[13] The referendum passed, and Kankakee sought bids for the project.[14] Ziolkowski was the successful bidder and intended to use a non-union subcontractor, Skyline, for the roofing subcontract.[15] Skyline had submitted the lowest roofing bid, and Ziolkowski informed Skyline that it had used Skyline's bid to prepare its bid to Kankakee.[16] Subsequently, the union made a post-bid contribution of funds to Midland, a union roofing subcontractor, to offset the difference between Skyline's bid and Midland's bid.[17] Feeling pressure from the union, Ziolkowski awarded the roofing subcontract to Midland.[18] Skyline filed suit against Ziolkowski and the union, alleging that they colluded with Kankakee to exclude Skyline as the roofing subcontractor in violation of the Act.[19]

Ziolkowski argued that Skyline failed to state a claim under the Act because receipt of a threat is not collusive activity, and, instead, "[t]here must be some combination or collusive activity between two or more distinct entities."[20] The court disagreed, first noting that Skyline's claim alleged collusion between three entirely distinct entities—Kankakee, Ziolkowski, and the union.[21] Further, while the mere receipt of a threat does not constitute collusive activity, Skyline's amended complaint alleged that Ziolkowski did more than receive a threat—it

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8. *Id.* at 710-11.

9. *Id.* at 711 (citing Brownsburg Cmty. Sch. Corp. v. Natare Corp., 824 N.E.2d 336, 341 (Ind. 2005)).

10. *Id.* (quoting *Brownsburg Cmty. Sch. Corp.*, 824 N.E.2d at 341).

11. 957 N.E.2d 176 (Ind. Ct. App. 2011).

12. *Id*. at 181.

13. *Id.* at 180.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 180-81.

18. *Id.* at 181.

19. *Id.*

20. *Id.* at 187.

21. *Id.* at 187-88.

alleged that Ziolkowski decided to hire Midland instead of Skyline even though Skyline had the lowest bid.[22] Skyline's allegations that, after bidding had closed on the project, Midland, upon receiving funds from the union, was able to offer Ziolkowski the same bid price as Skyline, was, the court held, "a sufficient allegation of a scheme to exclude Skyline and a restraint on free competition."[23] Thus, Skyline's amended complaint sufficiently alleged a violation of Section 3 of the Act.

The union argued that Skyline's claims against it were preempted by Section 158(b)(4)(ii)(B) of the National Labor Relations Act ("NLRA"), providing in pertinent part, "It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person."[24] In resolving this issue, the court turned to *San Diego Building Trades Council v. Garmon*, holding that "[w]hen an activity is arguably subject to [Section] 7 or [Section] 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[25] The court noted, however, that

> [e]ven if conduct is arguably prohibited by Section 8 . . . a plaintiff's claim is not preempted under *Garmon* when: (1) the activity regulated is a merely peripheral concern of federal labor laws or (2) the regulated conduct touches interests so deeply rooted in local feeling and responsibility that preemption cannot be inferred absent compelling congressional direction.[26]

Skyline argued that its claims fell within both exceptions to preemption.[27] The court disagreed and reasoned that "[r]esolution of the state antitrust claim would necessarily include a determination of whether [the union] engaged in conduct to coerce Ziolkowski to hire Midland instead of Skyline," which is "precisely what Section 8(b) prohibits."[28] As such, the court rejected Skyline's claim that *Garmon's* peripheral-concern exception applied.[29] The court also disagreed that the local-interest exception applied.[30] Skyline argued that the exception applied because Indiana is uniquely concerned with making sure that

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22. *Id.* at 188.

23. *Id.*

24. *Id.* at 182 (citing 29 U.S.C. § 158(b)(4)(ii)(B) (2006)).

25. *Id.* at 182 (alterations in original) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)).

26. *Id.* at 183 (citing Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 660-61 (7th Cir. 1992)).

27. *Id.* at 183-84.

28. *Id.* at 184.

29. *Id.*

30. *Id*. at 183-84.

its contractors have an opportunity to compete freely for private and public work.[31] The court, however, reasoned that free competition was not an interest unique to Indiana and is not the type of interest for which the United States Supreme Court has prevented preemption.[32]

The court nevertheless found that Skyline could assert a claim against the union under Section 303 of the NLRA, which "allows for the recovery of damages for activity or conduct defined as an unfair labor practice under Section 8(b)(4)."[33] Section 303(b) allows a plaintiff to recover for such unfair labor practices "in any district court of the United States . . . *or in any other court having jurisdiction of the parties*."[34] The court provided Skyline the opportunity to amend its complaint to plead a federal claim under Section 303.[35]

II. PIERCING THE CORPORATE VEIL AND ALTER EGO DOCTRINE

During the Survey Period, the Indiana Court of Appeals addressed the issue of piercing the corporate veil and related theories (such as alter ego doctrine and successor liability) in several published cases. These cases shed light on the facts a court should consider in its analysis, the circumstances under which a court will find a genuine issue of material fact as to such claims, and circumstances under which a court will find that the veil cannot be pierced as a matter of law.

The general rule is that "corporate shareholders are liable for acts of the corporation only to the extent of their investment and are not personally liable for the corporation's act."[36] Corporate identity may only be disregarded when a plaintiff shows that the (1) "corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another" and (2) "that the misuse of the corporate form would constitute a fraud or promote injustice."[37] This is a highly fact-intensive inquiry and requires a careful review of the entire relationship between the parties.[38] In determining whether a party has met its burden of showing that the corporate veil should be pierced, the court will consider the following factors:

(1) undercapitalization; (2) absence of corporate records; (3) fraudulent

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31. *Id.* at 183.

32. *Id.* at 184.

33. *Id.* at 185.

34. *Id.* (quoting 29 U.S.C. § 187 (1959)).

35. *Id.*

36. CBR Event Decorators, Inc. v. Gates, 962 N.E.2d 1276, 1281 (Ind. Ct. App.), (citing Escobedo v. BHM Health Assocs., Inc., 818 N.E.2d 930, 933 (Ind. 2004)), *trans. denied*, 971 N.E.2d 669 (Ind. 2012).

37. Konrad Motor & Welder Serv., Inc. v. Magnetech Indus. Servs., Inc., 973 N.E.2d 1158, 1163 (Ind. Ct. App. 2012) (internal quotation marks omitted) (quoting *Escobedo*, 818 N.E.2d at 933). *See also* Ziese & Sons Excavating, Inc. v. Boyer Constr. Corp., 965 N.E.2d 713, 719 (Ind. Ct. App. 2012) (quoting, in part, Oliver v. Pinnacle Homes, Inc., 769 N.E.2d 1188, 1191 (Ind. Ct. App. 2002)).

38. *Ziese & Sons Excavating*, 965 N.E.2d at 719.

> representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice, or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; and (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.[39]

The corporate alter ego doctrine is a subset of piercing the corporate veil.[40] "The corporate alter ego doctrine is a device by which a plaintiff tries to show that two corporations are so closely connected that the plaintiff should be able to sue one for the actions of the other."[41] Corporate form may be disregarded under this theory "where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation."[42] When a plaintiff alleges the corporate alter ego doctrine, the court considers additional factors, including whether "(1) similar corporate names were used; (2) the corporations shared common principal corporate officers, directors, and employees; (3) the business purposes of the corporations were similar; and (4) the corporations were located in the same offices and used the same telephone numbers and business cards."[43]

In *Ziese & Sons Excavating, Inc. v. Boyer Construction Corp.*,[44] the court concluded that there was a genuine issue of material fact as to alter ego status of two corporations.[45] In this case, Boyer Construction Corporation (the "Corporation") had contracted with Ziese & Sons Excavating (Ziese) to provide labor and materials on a project.[46] A few years later, James Thomas, former shareholder of the Corporation, formed Boyer Construction Group (the "Group").[47] Ziese brought suit alleging that the Corporation failed to pay for work performed on a project and that the Group was the alter ego of the Corporation, such that it was appropriate to pierce the corporate veil, and that the Group was a successor to the Corporation.[48]

Analyzing the factors set forth above, the court found that there was "a genuine issue of material fact with respect to whether [the] Group was the alter

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39. *Id.* at 720 (citing *Escobedo*, 818 N.E.2d at 933).

40. *Id.*

41. *Id.* (internal quotation marks omitted) (quoting Greater Hammond Cmty. Servs., Inc. v. Mutka, 735 N.E.2d 780, 785 (Ind. 2000)).

42. *Konrad Motor & Welder*, 973 N.E.2d at 1165 (internal quotation marks omitted) (citing Cmty. Care Ctrs., Inc. v. Hamilton, 774 N.E.2d 559, 569 (Ind. Ct. App. 2002)).

43. *Ziese & Sons Excavating*, 965 N.E.2d at 720 (citing Oliver v. Pinnacle Homes, Inc., 769 N.E.2d 1188, 1192 (Ind. Ct. App. 2002)).

44. *Id.* at 713.

45. *Id*. at 721.

46. *Id.* at 717.

47. *Id.*

48. *Id.* at 719.

ego of [the] Corporation."[49] The court noted that they had similar names; they were created to conduct the same business; the Group assumed use of the Corporation's website address, trademark and logo; the Group publically claimed ownership of the Corporation's building history and projects (including the project Ziese was working on); there was some evidence indicating that the Corporation used its funds to pay the Group's expenses on the contracts the Group purchased in the asset sale; and the Group made one payment to Ziese.[50]

The plaintiff in *Ziese* also brought a claim of successor liability against the defendants.[51] Generally, when a corporation purchases the assets of the other, the buyer does not assume the debts and liabilities of the seller.[52] The court noted the four general exceptions to this rule: "(1) an implied or express agreement to assume liabilities; (2) a fraudulent sale of assets done for the purpose of evading liability; (3) a purchase that is a de facto consolidation or merger; or (4) where the purchaser is a mere continuation of the seller."[53] This theory of liability is only applicable where the predecessor corporation no longer exists.[54]

Ziese alleged that the second and fourth exceptions applied.[55] The court considered the badges of fraud to determine whether a fraudulent sale of assets took place.[56] The

> badges include: 1) the transfer of property by a debtor during the pendency of a suit; 2) a transfer of property that renders the debtor insolvent or greatly reduces his estate; 3) a series of contemporaneous transactions which strip the debtor of all property available for execution; 4) secret or hurried transactions not in the usual mode of doing business; 5) any transaction conducted in a manner differing from customary methods; 6) a transaction whereby the debtor retains benefits over the transferred property; 7) little or no consideration in return for the transfer; and 8) a transfer of property between family members.[57]

An inference of fraudulent intent arises when the facts of a case implicate several badges of fraud, but no one badge is dispositive.[58]

The court found that a genuine issue of material fact existed as to whether the defendants engaged in a fraudulent asset sale.[59] The court noted that Group

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49. *Id.* at 721.

50. *Id.* at 719.

51. *Id.* at 721.

52. *Id.* at 722 (citing Sorenson v. Allied Prods. Corp., 706 N.E.2d 1097, 1099 (Ind. Ct. App. 1999)).

53. *Id.* (citing *Sorenson*, 706 N.E.2d at 1099).

54. *Id.*

55. *Id.*

56. *Id.* (citing Lee's Ready Mix & Trucking, Inc. v. Creech, 660 N.E.2d 1003, 1037 (Ind. Ct. App. 1996)).

57. *Id.* (quoting *Creech*, 660 N.E.2d at 1037).

58. *Id.*

59. *Id.*

assumed the Corporation's website address, trademark, and logo, even though it did not purchase them in the asset sale and, thus, did not give consideration for them.[60] Further, there was evidence that the Corporation used its accounts receivable to pay the Group's expenses, and the Group publically claimed ownership of the project at issue in the case.[61]

The fourth exception "asks whether the predecessor corporation should be deemed simply to have re-incarnated itself, largely aside of the business operations."[62] The court will consider whether there is "a continuation of shareholders, directors, and officers into the new corporate entity."[63] The court found that there were overlapping owners, officers, and directors of the two entities.[64] For example, Thomas was a shareholder of the Corporation and was the sole shareholder of the Group.[65] Thomas's two sons, who had also been shareholders of the Corporation, then took over as shareholders of the Group, and Thomas became the sole officer and director.[66] Further Boyer, who was the sole shareholder of the Corporation at the time of the asset sale, later became an officer of the Group.[67] The court concluded that "[t]hese facts g[a]ve rise to a genuine issue of material fact regarding whether Group was a mere continuation of Corporation."[68]

In *Konrad Motor & Welder Service, Inc. v. Magnetech Industrial Services, Inc.*,[69] the court, noting that it could not find any Indiana case granting judgment as a matter of law on the issue of piercing the corporate veil, reversed the trial court's grant of summary judgment on that issue.[70] The court, however, affirmed the trial court's grant of summary judgment on the issue of alter ego status.[71] This case involved a dispute between the plaintiffs and Konrad Electric, Inc. ("Konrad Electric") over work Konrad Electric had performed.[72] After Magnetech obtained a judgment in its favor against Konrad Electric that Konrad Electric could not pay, it sought to hold Konrad Electric's sole shareholder and officer, Sharon Lambrecht, and her husband and employee of the company, Konrad Lambrecht ("Konrad"), liable by piercing the corporate veil and additionally sought to hold Konrad Motor & Welder Service ("Konrad MWS")

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60. *Id.*

61. *Id.*

62. *Id.* at 723 (citing Cooper Indus., LLC v. City of South Bend, 899 N.E.2d 1274, 1290 (Ind. 2009)).

63. *Id.*

64. *Id.*

65. *Id*.

66. *Id*.

67. *Id.*

68. *Id.*

69. 973 N.E.2d 1158 (Ind. Ct. App. 2012).

70. *Id*. at 1166.

71. *Id.* at 1160-61.

72. *Id.* at 1161.

liable as an alter ego of Konrad Electric.[73]

Konrad Electric was incorporated in 1991 until it suspended activities in 2008.[74] After the plaintiff filed this lawsuit, Konrad Electric stopped taking new customers and limited its activities to completing work on existing jobs.[75] Shortly after, Sharon and her husband formed Konrad MWS.[76] Konrad became the sole shareholder and officer of Konrad MWS.[77] Konrad used a truck that had belonged to Konrad Electric and his own hand tools.[78] The two corporations shared the same business location for several years, and they were engaged in the same line of work for the same customers.[79]

In evaluating whether Magnetech could pierce the corporate veil to obtain a judgment against Konrad Electric's shareholders, the court noted the general rule that corporate shareholders are not personally liable for the debts of the corporation and that the burden on the plaintiff to prove otherwise is severe.[80] The court then examined the eight factors relevant to piercing the corporate veil.[81]

The court initially noted several facts that weighed against piercing the corporate veil: Konrad Electric held itself out as a corporation and contracted with many companies as a corporation; it had a corporate bank account and kept corporate records; the Lambrechts did not comingle their personal assets with Konrad Electric; and the company paid its obligations for seventeen years until the judgment obtained by Magnetech.[82] On the other hand, the court noted that when Konrad Electric was formed, it had limited assets; it did not hold annual shareholder meetings as required by its bylaws; after Magnetech filed the lawsuit against Konrad Electric, it stopped taking new customers and suspended its business operations; and the Lambrechts formed Konrad MWS and continued operating under the new company.[83] The court reasoned that the formation of Konrad MWS was just one factor for the trial court to consider, and there is no "bright-line rule assessing personal liability on shareholders who form alter ego corporations."[84] The court found that summary judgment was inappropriate because "the undisputed facts themselves g[a]ve rise to conflicting inferences which would alter the outcome."[85]

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73. *Id.*
74. *Id*.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1161-62.
80. *Id.* at 1163.
81. *Id.* at 1163-64.
82. *Id.* at 1164.
83. *Id.*
84. *Id.* at 1164 n.1.
85. *Id.* at 1164. The court noted, however, that if Konrad Electric's corporate veil was pierced, Konrad could be individually liable even though he was not a shareholder. *Id*

The court next addressed the alter ego doctrine.[86] Upon applying the alter ego factors, the court noted the significant similarities between Konrad MWS and Konrad Electric: they had very similar names; they shared a common employee, Konrad; Konrad Electric's shares and ownership were in Sharon's name, and Konrad MWS's shares were in her husband's name; they both viewed the corporations as family businesses with the same purpose; and the companies conducted the same business out of the same office.[87] Importantly, the court noted the timing in which the events took place. Suit was filed against Konrad Electric in March 2005, at a time when the company "was very profitable."[88] In February 2006, while the lawsuit was still pending, Konrad Electric ceased business and formed Konrad MWS, subsequently refusing to pay the Magnetech judgment.[89] Given these facts, the court held that the only reasonable inference was that "Konrad MWS [was] the alter ego of Konrad Electric."[90]

In *CBR Event Decorators, Inc. v. Gates*,[91] the court found that the lack of causal connection between the shareholders' misuse of corporate form and the alleged fraud or injustice committed precluded shareholder liability. In this case, MCS Decorators, Inc. ("MCS") borrowed significant amounts of money from Todd Gates, and, after it was unable to pay back the loans, Gates obtained a judgment to foreclose on his security interest in MCS's assets.[92] Several investors began negotiating with Gates for the purchase of MCS's assets.[93] The parties agreed on the terms of the purchase, and the investors formed CBR Event Decorators, Inc. ("CBR").[94] The investors (who became shareholders of CBR) then discovered "that MCS's status with regard to [its] clients had been misrepresented, and the company's relationship with certain clients was damaged."[95] As a result, the investors sought "to delay the transaction[] [and] renegotiate the contract."[96] The parties never renegotiated the contract, and Gates subsequently liquidated MCS's assets.[97] Following the failed transaction, CBR did not commence any business.[98]

Gates brought suit against CBR, "claiming breach of contract and arguing that the corporate veil of CBR should be pierced to allow the imposition of personal liability on [its] shareholders."[99] Gates alleged that CBR had committed

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86. *Id.* at 1165.
87. *Id.* at 1165-66.
88. *Id.* at 1165.
89. *Id.* at 1166.
90. *Id.*
91. 962 N.E.2d 1276 (Ind. Ct. App.), *trans. denied*, 971 N.E.2d 669 (Ind. 2012).
92. *Id.* at 1278-79.
93. *Id.* at 1279.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1280.
98. *Id.*
99. *Id.*

fraud because it had represented, under the purchase agreement, that there were no representations, warranties, or understandings other than those set forth in the purchase agreement but then subsequently claimed that Gates had made certain oral promises.[100] The trial court found that each of the eight factors for piercing the corporate veil were present and, as a result, concluded that the veil could be pierced.[101]

On appeal, the court emphasized that the plaintiff must show "a causal connection between [the shareholder's] misuse of the corporate form and [the alleged] fraud."[102] In other words, the alleged fraud or injustice "must be caused by, or result from, misuse of the corporate form."[103] The alleged fraud in that case, the court explained, had "no nexus to the corporate form."[104] The court contrasted this with statements pertaining to the status of a corporation, such as a corporation's solvency, age, reputation or the identity of its directors, which would have the required nexus. In this case, though, Gates was informed during the negotiations that the investors were going to form CBR for the sole purpose of purchasing the assets and was not misled as to its status.[105] Further, the court noted that there had been no finding by the trial court that the shareholders had contemplated forming a corporation for the purpose of later withdrawing funds and hiding behind the shield of limited liability.[106] As such, the court concluded that the trial court erred in piercing the corporate veil.[107]

III. LIMITED PARTNERSHIP

The court in *In re Rueth Development Co.*[108] addressed issues arising from the application of a dissolution by a general partner in a limited partnership.[109] The case discusses fiduciary obligations between the partners, the grounds for judicial dissolution of the limited partnership, and the right to bring a derivative action on behalf of the limited partnership.

Rueth Development Company Limited Partnership ("RDC") was an Indiana

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100. *Id.* at 1283.

101. *Id.* at 1280-81.

102. *Id.* at 1282-84.

103. *Id.* at 1283 & n.2 ("It is only when the shareholders disregard the separateness of the corporate identify *and when the act of disregard causes the injustice or inequity or constitutes the fraud* that the corporate veil may be pierced." (citing NLRB v. Greater Kan. City Roofing, 2 F.3d 1047, 1053 (10th Cir. 1993))).

104. *Id.* at 1283.

105. *Id.*

106. *Id.* at 1284.

107. *Id.*

108. 976 N.E.2d 42 (Ind. Ct. App. 2012), *trans. denied*, 981 N.E.2d 58 (Ind. 2013).

109. A limited partnership, which is governed by the Indiana Revised Uniform Limited Partnership Act ("IRULPA"), IND. CODE § 23-16-1-1 to -12-6 (2013), is "a partnership where one or more persons are general partners and one or more persons are limited partners." *In Re Rueth Dev.,* 976 N.E.2d at 52.

limited partnership formed to engage in the land development business.[110] RDC had two general partners, Harold and Helen, who were siblings, and nine limited partners, including Helen's children, Herbert, Timothy, and Robert, and Harold's children, Hal and Thomas.[111] RDC owned and operated Superior Lumber Company ("Superior Lumber"), a lumber yard and supplier of construction materials.[112] "RDC paid Thomas and Robert to manage Superior Lumber."[113] Thomas, Herbert, Timothy, and Robert were also the sole shareholders, officers, and directors of H & H Rueth, Inc. ("H & H"), a general contractor.[114] H & H routinely bought supplies from Supplier Lumber and "carried notably high account balances on its purchases."[115] It also carried high account balances with purchases of lots from RDC.[116]

A conflict arose between Harold and Helen involving H & H's transactions with Superior Lumber and RDC.[117] Harold informed H & H and Superior Lumber that he expected H & H's outstanding balances to be paid.[118] H & H, however, obtained instructions from Helen that it could continue purchasing lots from RDC without payment of its current or outstanding balances.[119] As a result of this conflict, Harold filed for dissolution of the limited partnership and alleged that Helen, Thomas, Robert, Herbert, and Timothy breached their fiduciary duties.[120]

Thereafter, Helen died and her interest in RDC was transferred to Herbert and Robert, who then became general partners.[121] Harold died shortly thereafter and, under the partnership agreement, "Thomas and Hal had a right to succeed him as general partners."[122] Thomas sent written notice of his intent to become a general partner.[123] The Appellants (Thomas, Robert, and Herbert) then filed a Stipulation of Dismissal with Prejudice indicating that Thomas alone succeeded Harold as general partner and could exercise his votes.[124] Because Herbert, Robert and Thomas were in agreement on the management of RDS, the court dismissed the dissolution proceedings with prejudice.[125] Following dismissal, however, Hal

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110. *Id.* at 45-46.
111. *Id.* at 46.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 47.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

elected to become general partner of RDC.[126] Hal, along with other limited partners (the Appellees), sought to vacate dismissal of the dissolution proceedings.[127] The trial court vacated the dismissal under Indiana Trial Rule 60(B)(3) and found that the Appellants breached their fiduciary duties to RDC by procuring a dismissal of the dissolution action without the consent of all partners and deemed such conduct constructive fraud.[128] The court allowed the Appellees to pursue the litigation as a derivative action on behalf of RDC, to require an accounting, and pursue dissolution.[129]

The court in *In re Rueth* first addressed whether the trial court properly concluded that Appellants breached their fiduciary duties and engaged in constructive fraud.[130] The court noted that "general partners owe each other and the partnership fiduciary duties until final termination of the partnership."[131] The fiduciary relationship "requires each partner to exercise good faith and fair dealing in partnership transactions and toward co-partners" and "prohibits a partner from taking any personal advantage touching the business aspects or property rights of the partnership."[132]

Given these fiduciary duties owed between general partners, the court concluded that the trial court did not err in finding that Appellants had improperly sought dismissal without obtaining the consent of all RDC partners.[133] The court stated that, because the Appellees had established a breach of fiduciary duty, Appellants had the burden to show that no duty to speak or misrepresentation existed, that Appellees did not rely on such duty or misrepresentation, or that there was no resulting injury.[134] The court concluded that they did not meet that burden and thus, the trial court did not abuse its discretion in finding that they committed constructive fraud as a basis for granting relief under Rule 60(B)(3).[135]

The Appellants next argued that the trial court did not have jurisdiction over RDC's affairs because a majority of the general partners were in agreement. In resolving this issue against the Appellants, the court cited to Indiana Code section 23-16-9-2, which provides that a partner may file for dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement."[136] Further, Indiana Code section 23-4-1-32, made applicable to limited partnerships by Indiana Code section 23-16-12-3, provides that the trial court must decree dissolution if "[a] partner willfully or persistently commits a breach of the partnership agreement, or otherwise acts in matters

126. *Id.* at 48.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 52.
131. *Id.* at 53 (citing Ruse v. Bleeke, 914 N.E.2d 1, 11 (Ind. Ct. App. 2009)).
132. *Id.* (citing *Ruse*, 914 N.E.2d at 11).
133. *Id.*
134. *Id.*
135. *Id.* at 54.
136. *Id.* (citing IND. CODE § 23-16-9-2 (2013)).

relating to the partnership business so that it is not reasonably practicable to carry on the business in partnership with that partner."[137] Thus, the court disagreed that dissolution is limited solely to management deadlock and, based on the above statutory sections, held that "a breach of fiduciary duty may also make it impracticable to carry on the business of the partnership."[138] The court further found that a limited partner could seek dissolution, citing to Indiana Code section 23-16-4-3(b)(6)(A).[139] As such, the court concluded that the Appellees could continue RDC's judicial dissolution proceedings.[140]

Appellants also argued that the trial court should not have permitted the Appellees to continue the proceedings as a derivative action under Indiana Code section 23-16-11-1.[141] The appellate court agreed, reasoning that Hal, "as a general partner, could not bring a derivative action."[142] Although limited partners can bring derivative actions, the court noted that they must bring a separate cause of action for such a claim and must meet certain pleading requirements that the Appellees had not met.[143] The court also concluded that the limited partners stepped in to assert Harold's dissolution claim, which was not derivative in nature.[144] Harold sought RDC's dissolution, winding up of its affairs, and a demand for accounting and did not assert a derivative action under Indiana Code section 23-16-11-1.[145] As such, the Appellees could not seek a derivative action, but they could seek judicial dissolution.[146]

IV. TRUSTEE AND SHAREHOLDER LITIGATION

The court in *Kesling v. Kesling*,[147] held that a shareholder did not extinguish his ownership of corporate voting stock by placing the stock into a revocable trust, of which he was the settlor, initial trustee, and beneficiary.[148] In that case, the court addressed a dispute involving the shares of TP Orthodontics, Inc. ("TPO"), a closely held corporation.[149] To protect the family business, the shareholders of TPO had agreed to restrict the ability to transfer shares to non-

137. *Id.* at 55 (citing IND. CODE § 23-4-1-32(1)(d) (2013)).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 56 ("A partner in a limited liability partnership is not a proper party to a proceeding by or against the limited liability partnership, the object of which is to recovery any debts, obligations, or liabilities or, or chargeable to, the partnership, unless the partner is personally liable." (internal quotation marks omitted) (quoting IND. CODE §§ 23-4-1-15(5) (2013))).

143. *Id.* (citing IND. CODE § 23-16-11-4 (2013)).

144. *Id.*

145. *Id.* at 56-57.

146. *Id.* at 57.

147. 967 N.E.2d 66 (Ind. Ct. App.), *trans. denied,* 974 N.E.2d 476 (Ind. 2012).

148. *Id.* at 82, 86.

149. *Id.* at 68.

shareholders.[150] The 1993 TPO Shareholder Agreement provided that the shareholders had a right to purchase any voting or non-voting shares offered for transfer to a non-shareholder.[151]

In 1999, the shareholders adopted a unanimous resolution concerning transfer of shares to a revocable trust.[152] That resolution provided:

> Any shareholder requesting transfer of his or her shares into a trust must . . . establish that the income of the trust will be paid solely to a shareholder and that, upon the death of the shareholder, the Trust will distribute the shares to the estate of the shareholder, subject to any stock purchase Agreement in effect at that time. Presently, the stock purchase Agreement gives the Corporation the first right to purchase all or part of the shares prior to any distribution to a new shareholder.[153]

In March of 2001, one of the shareholders, Andrew, formed a trust and transferred his shares in TPO to the trust.[154] He was the settlor, beneficiary, and trustee of the trust.[155] The trust provided that in the event of Andrew's death, the assets were to be allocated to his wife and children.[156] Thereafter, in June 2004, Andrew purchased a majority of the shares in TPO from his father, Peter.[157] The Stock Purchase Agreement provided that either the "Buyer or any *voting trustee* designated by Buyer shall be entitled to all rights to vote the shares."[158] In the event of Andrew's death, the shares were subject to disposition as set forth in the trust.[159]

Peter requested that the court rescind the Stock Purchase Agreement.[160] The district court found that after Andrew transferred his stock to the trust in 2001, he was no longer a shareholder of TPO.[161] The court further found that Peter's June 2004 sale of stock to Andrew "was premised upon the fact that Andrew was an existing shareholder of TPO."[162] Thus, the court rescinded the Stock Purchase Agreement based on the parties' mutual mistake.[163]

The appellate court reversed.[164] The question the court had to resolve was "whether the settler, who places shares of stock into a revocable inter vivos trust

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150. *Id*.
151. *Id.*
152. *Id.* at 69.
153. *Id.* at 69-70.
154. *Id.* at 70.
155. *Id.*
156. *Id.*
157. *Id.* at 73.
158. *Id.*
159. *Id.*
160. *Id.* at 75.
161. *Id.* at 76.
162. *Id.*
163. *Id.*
164. *Id*. at 87.

and names himself as trustee and as a beneficiary, retains his shareholder status."[165] The court noted that this issue has not been resolved, but the Indiana Supreme Court in *Marshall County Tax Awareness* found that an individual could assert property rights in property held in a revocable trust.[166] Based on the unique circumstances in *Kesling*, the court held that in naming himself as trustee and beneficiary for life to the revocable trust, Andrew was a shareholder of TPO even after he assigned his shares to the trust.[167] Citing to *Marshall County*, the court noted that Andrew was the beneficial and record owner of the TPO shares and was entitled to vote the shares.[168] The court also reasoned that the assets in the trust were reachable by Andrew's potential creditors.[169]

Further, the court noted that the IRS has repeatedly "ruled that the trust and the settler are a single entity" and that settlors with the ability to control the assets of their revocable trust possess an ownership interest and bear the tax consequences.[170] The court also explained that the trust did not deprive Andrew of control of his property, and at any point, he could revoke the trust.[171] In addition, the court reasoned that "to the extent Indiana law provides that the equitable interest in property held in trust is vested in the trust beneficiaries," Andrew was the named beneficiary for life.[172] For these reasons, the court concluded that Andrew was a shareholder at the time of the stock sale, and, thus, no basis existed to rescind the June 2004 sale of stock.[173]

V. BUSINESS TORTS

A. Misappropriation of Trade Secrets

During the Survey Period, Indiana courts addressed significant misappropriation of trade secret issues in two decisions. In *Loparex, LLC v. MPI Release Technologies, LLC*,[174] the Indiana Supreme Court, answering a certified question from the U.S. District Court for the Southern District of Indiana, held that an employer's suit against a former employee to protect trade secrets, whether successful or not, could not be a basis for recovery under Indiana's

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165. *Id.* at 79.

166. *Id.* (citing Marshall Cnty. Tax Awareness Cmty. v. Quivey, 780 N.E.2d 380, 383 (Ind. 2002)).

167. *Id.* at 83.

168. *Id.*

169. *Id.* at 83-84 (citing IND. CODE § 30-4-3-2(b) (2013)).

170. *Id.* at 85 (citing Howard M. Zaritsky, *Revocable Inter Vivos Trust*, 860 Tax Management Portfolio (BNA), A-57 (2003)).

171. *Id.* at 86.

172. *Id.*

173. *Id.*

174. 964 N.E.2d 806 (Ind. 2012).

Blacklisting Statute.[175] In *HDNet, LLC v. North American Boxing Council*,[176] the Indiana Court of Appeals held that Indiana Uniform Trade Secrets Act ("IUTSA") preempted claims of idea misappropriation and civil conversion.[177]

In *Loparex*, the court answered the following certified question: "whether a lawsuit to protect alleged trade secrets, brought by an employer against a former employee, falls within the framework of blacklisting prohibitions."[178] Indiana's Blacklisting Statute states in relevant part:

> If any . . . company . . . shall authorize, allow or permit any of its . . . agents to black-list any discharged employees or attempt by words or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with any other person, or company, said company shall be liable to such employee in such sum as will fully compensate him . . . .[179]

The court first pointed to a number of recent cases of the Indiana Court of Appeals—*Baker v. Tremco Inc.*[180] and *Burk v. Heritage Food Service Equipment, Inc.*[181]—holding that the Blacklisting Statute "is not violated when an employer attempts to enforce a noncompetition agreement against the former employee."[182] The court noted, however, that the United States District Court for the Southern District of Indiana held contrary in *Bridgestone/Firestone Inc. v. Lockhart*,[183] a decision predating both *Baker* and *Burk.*

The Indiana Supreme Court disagreed with the reasoning in *Lockhart*.[184] Applying statutory construction, the court concluded that "a lawsuit—successful or not—to protect trade secrets or seeking to enforce a noncompetition agreement does not, on its own, fall within" the scope of the Blacklisting Statute.[185]

In *HDNet, LLC*,[186] HDNet ("HD") and North American Boxing Council ("NABC") entered into preliminary negotiations involving HD's broadcast of mixed martial arts ("MMA") events and the future development of weekly broadcasts of a MMA fight series.[187] During those discussions, NABC proposed how it and HD could develop a "'unique branded fight series for [HD]' that was significantly different from the 'single entity' model then in use by the major

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175. *Id.* at 809.
176. 972 N.E.2d 920 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 322 (Ind. 2012).
177. *Id.* at 927.
178. *Loparex, LLC*, 964 N.E.2d at 822.
179. *Id.* at 819 (citing IND. CODE § 22-5-3-2 (2013)).
180. *Id.* at 823 (citing 890 N.E.2d 73 (Ind. Ct. App. 2008)).
181. *Id.* at 822-23 (citing 737 N.E.2d 803 (Ind. Ct. App. 2000)).
182. *Id.* at 822.
183. *Id.* at 823-24 (citing 5 F. Supp. 2d 667 (S.D. Ind. 1998)).
184. *Id.* at 824.
185. *Id.*
186. 972 N.E.2d 920 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 322 (Ind. 2012).
187. *Id.* at 921.

players in the MMA industry."[188] NABC considered this information to be protectable as a commercial idea.[189] The parties never consummated a deal, and, later, NABC discovered that HD had used its idea to set up HD Fights.[190] NABC brought claims for idea misappropriation and civil conversion.[191]

The IUTSA is based on the Uniform Trade Secret Act ("UTSA").[192] In finding that the IUTSA preempted the plaintiff's claims, the court noted the general purpose behind enactment of the UTSA:

> To create a uniform business environment [with] more certain standards for protection of commercially valuable information, and to preserve a single tort action under state law for misappropriation of trade secret as defined in the statute and thus to eliminate other tort causes of action founded on allegations of misappropriation of information. If the UTSA's preemption provision only preempted claims of misappropriation of information that meets the statutory definition of a "trade secret," the provision's purpose would be undermined. In every instance where a plaintiff could not meet the statutory requirements of the Uniform Act, the court would be forced to re-analyze the claim under the various common law theories. Such a result would undermine the uniformity and clarity that motivated the creation and passage of the Uniform Act.[193]

The court further noted that the IUTSA "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of this chapter among states enacting the provisions of this chapter" and "displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law."[194]

NABC argued that the preemption provision in the IUTSA only applied to "trade secrets," and its claim of idea misappropriation did not pertain to a "trade secret" as the statute uses that term.[195] The court disagreed and reasoned that such a plain reading of the statute disregards the very purpose of the UTSA to make uniform the laws of the adopting states.[196] The Indiana court joined the majority of courts holding that "UTSA's preemption provision 'abolishes all free standing alternative causes of action for theft or misuse of confidential, proprietary, or otherwise secret information falling short of trade secret status (e.g., idea

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188. *Id.* (alteration in original).

189. *Id.*

190. *Id.*

191. *Id.* at 922.

192. *Id.* at 923.

193. *Id.* at 923 (quoting Firetrace USA, LLC v. Jesclard, 800 F. Supp. 2d 1042, 1048–49 (D. Ariz. 2010)).

194. *Id.* (quoting IND. CODE § 24-2-3-1(b)-(c) (2013)).

195. *Id.* at 924.

196. *Id.*

misappropriation, information piracy, theft or commercial information, etc.).'"[197]

NABC next argued that its civil conversion claim was not preempted because it is derivative of criminal law, pointing to *AGS Capital Corp., Inc. v. Product Action International, LLC*,[198] where the court held that the IUTSA did not preempt a civil RICO claim relating to the theft of trade secrets.[199] The court in *HD* disagreed and reasoned that the *AGS Capital* court "emphasized that the civil RICO statute was part of a conscious one-two punch adopted by the legislature," to address corruption and criminal activity; "[a]lthough the civil and criminal RICO statutes were codified in different locations in the Indiana Code, they were enacted as part of the same public law."[200] The court reasoned that this "is not true of the Crime Victim's Relief Act ('the Act'), which contains Indiana Code section 34-24-3-1, the statute that defines civil conversion."[201] The Act, the court explained, is not "part of the same statutory scheme as criminal conversion" and, thus, is not derivative in the same sense as the RICO statutory scheme.[202] Accordingly, the court held that the criminal law exception to IUTSA's preemption provision did not save NABC's civil conversion claim.[203]

B. Actual Fraud

The court in *Ohio Farmers Insurance Co. v. Indiana Drywall & Acoustics, Inc.*,[204] found that the plaintiff had established each of the elements of actual fraud[205] where the defendant had promised to pay the plaintiff contract monies under a subcontract if it released its mechanic's lien but then failed to make the promised payment.[206] In that case, Nestel was a contractor on a project and hired Indiana Drywall to perform subcontract work.[207] After Indiana Drywall performed its work, Indiana Drywall claimed that it was entitled to an additional payment of $148,633; Nestel disputed that any additional payments were owed.[208]

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197. *Id.* at 924-25 (quoting BlueEarth Biofuels, LLC v. Hawaiian Elec. Co., 235 P.3d 310, 319 (Haw. 2010)).

198. *Id.* at 926 (citing 884 N.E.2d 294, 306, 308 (Ind. Ct. App. 2008)).

199. *Id.*

200. *Id.* (citing *AGS Capital*, 884 N.E.2d at 308).

201. *Id.* at 927.

202. *Id.*

203. *Id.*

204. 970 N.E.2d 674 (Ind. Ct. App.), *granting trans. and vacating opinion*, 976 N.E.2d 1234 (Ind. 2012), *reinstating opinion,* 981 N.E.2d 548 (Ind. 2013).

205. The elements of actual fraud are: "(1) a material misrepresentation of past or existing facts; (2) made with knowledge or reckless ignorance of falsity; (3) which caused the complainant to rely on the misrepresentation to the complainant's detriment." *Id.* at 684 (citing Plumley v. Stanelle, 311 N.E.2d 626, 630 (Ind. Ct. App. 1974)).

206. *Id.*

207. *Id.* at 677-78.

208. *Id.* at 678.

As a result, Indiana Drywall filed a mechanic's lien for that amount.[209] Thereafter, Nestel agreed to pay the outstanding balance if Indiana Drywall waived its lien.[210] Indiana Drywall signed a conditional release and waiver stating that it agreed to waive the lien in consideration for $148,633, "the payment of which has been promised."[211] Nestel never made the payment and Indiana Drywall brought a claim of fraud.[212]

Both parties moved for summary judgment, and the court denied the motions on the fraud count.[213] The matter proceeded to a jury trial.[214] Both parties moved for judgment on the evidence, which the trial court denied.[215] The jury returned a verdict in favor of Indiana Drywall and Nestel appealed.[216]

The appellate court found that the evidence showed that Nestel never intended to pay the outstanding balance owed to Indiana Drywall.[217] Nestel had represented to Indiana Drywall that, once it signed the release and waived its rights under the lien, Indiana Drywall would be paid immediately.[218] The court found that Nestel's statement "amount[ed] to a material misrepresentation of existing facts, made with knowledge of its falsity."[219] The evidence also showed that Indiana Drywall relied on the misrepresentations to its own detriment when it signed the release.[220] In light of these facts, the court found that the fraud claim was properly before the jury.[221]

C. Anti-SLAPP

In *Brandom v. Coupled Products, LLC*,[222] an employer brought a defamation action against a labor union official, and the union official sought to dismiss under Indiana's anti-SLAPP statute.[223] The court of appeals found that the

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209. *Id.*
210. *Id.* at 678-79.
211. *Id.* at 680.
212. *Id*.
213. *Id*.
214. *Id.*
215. *Id.* at 681.
216. *Id.*
217. *Id*. at 686.
218. *Id.*
219. *Id.* at 685.
220. *Id.* at 686.
221. *Id.*
222. 975 N.E.2d 382 (Ind. Ct. App. 2012).
223. *Id.* at 384. "SLAPPs," or Strategic Lawsuits Against Public Participation, under Indiana Code sections 34-7-7-1 to -10, are "meritless suits aimed at silencing a plaintiff's opponents, or at least at diverting their resources." *Id.* at 385 (quoting Hamilton v. Prewett, 860 N.E.2d 1234, 1241-42 (Ind. Ct. App. 2007)) (internal quotation marks omitted). The intent of the anti-SLAPP statute is "to reduce the number of lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Id.* The

statements were undertaken in connection with a public issue in furtherance of the official's right to free speech, as required to fall within the statute. However, because a genuine issue of material fact existed as to whether the union official believed she was being factual or whether she entertained serious doubts as to the truth of the statements, the court found that the trial court properly denied the motion to dismiss.[224]

In this case, Brandom was an employee of Coupled Products.[225] A union represented Coupled's employees, and Brandom was the chairperson of the union's bargaining committee.[226] Coupled had proposed plans to move certain equipment from Ohio to Indiana and, in response, Brandom made several statements to the local newspaper that Coupled alleged were false and defamatory.[227] Coupled sued Brandom for defamation; Brandom moved to dismiss pursuant to the anti-SLAPP statute on the basis that the statements were made in furtherance of her right to free speech in connection with an issue of public interest.[228]

The court agreed that Brandom's speech was related to an issue of public interest.[229] Speech is a matter of public concern if it addresses "any matter of political, social, or other concern to the community."[230] The court quoted a California appellate court decision defining the meaning of "public interest":

> [C]ourts have broadly construed "public interest" to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. . . . [A]n issue of public interest . . . is *any issue in which the public is interested*. In other words, the issue need not be "significant" to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.
>
> [There are] three non-exclusive and sometimes overlapping categories of statements that have been given anti-SLAPP protection. The first category comprises cases where the statement or activity precipitating the underlying cause of action was "a person or entity in the public eye."

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statute provides a defense in a civil action against a person where the act or omission complained of is "(1) an act or omission of that person in furtherance of the person's right of petition or free speech under the [federal or state constitution] in connection with a public issue; and (2) an act or omission taken in good faith and with a reasonable basis in law and fact." *Id.* (quoting IND. CODE § 34-7-7-5 (2013)).

224. *Id.* at 391.

225. *Id.* at 385.

226. *Id.*

227. *Id.* at 386.

228. *Id.* at 384.

229. *Id.* at 385.

230. *Id.* at 386 (quoting Love v. Rehfus, 946 N.E.2d 1, 10 (Ind. 2011)) (internal quotation marks omitted).

> The second category comprises cases where the statement or activity precipitating the underlying cause of action "involved conduct that could affect large numbers of people beyond the direct participants." And the third category comprises cases where the statement or activity precipitating the claim involved "a topic of widespread, public interest." Courts have adopted these categories as a useful framework for analyzing whether a statement implicates an issue of public interest and thus qualifies for anti-SLAPP protection.[231]

Adopting the above, the court found that the statements all involved negotiations between Coupled and the union concerning a move of some of Coupled's business and that the "economic impact of the move made the issue one of public interest."[232] The court concluded that Brandom's communications could affect large numbers of people beyond the direct participants and involved a topic of widespread, public interest.[233]

Under the anti-SLAPP statute, however, the act or omission complained of must also have been "taken in good faith and with a reasonable basis in law and fact."[234] The court stated that "bad faith" appears to require "a statement the speaker knew was false or entertained serious doubts as to its truth."[235] A statement motivated by self-interest is not made in bad faith if the speaker '"genuinely believed that he was being factual and also believed that it would be best for his community' to pursue the subject matter of the statement."[236] "Actual malice exists when the defendant publishes a defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[237] Actual malice "is a subjective standard that requires one challenging the speech . . . to prove by clear and convincing evidence that the speaker 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of . . . probable falsity.'"[238]

Evidence showed that Brandom might not have genuinely believed she was being factual in her statements in light of what she knew at the time.[239] Thus, the

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231. *Id.* at 386-87 (internal citations omitted) (quoting Cross v. Cooper, 127 Cal. Rptr. 3d 903, 912-14 (2011)), *as modified on denial of reh'g, review denied* (Oct. 12, 2011).

232. *Id.* at 387.

233. *Id.*

234. *Id.* at 385 (quoting IND. CODE § 34-7-7-5 (2013)). The court declined to decide whether the bad faith or actual malice standard applied because there were genuine issues of material fact under either standard. *Id.* at 388 n.4.

235. *Id.* at 389 (internal quotation marks and ellipses omitted) (citing Nexus Grp., Inc. v. Heritage Appraisal Serv., 924 N.E.2d 119, 122 (Ind. Ct. App. 2011)).

236. *Id.*

237. *Id.* (quoting Shepard v. Schurz Commc'ns, Inc., 847 N.E.2d 219, 224-25 (Ind. Ct. App. 2006)).

238. *Id.* at 390 (second alteration in original) (quoting Love v. Rehfus, 946 N.E.2d 1, 14-15 (Ind. 2011)).

239. *Id.*

court found genuine issues of material fact as to whether Brandom knew her statements were false, entertained serious doubts as to their truth, or made the statements with reckless disregard of whether they were false. As a result, the court denied her motion.[240]

VI. CONTRACT FORMATION

A. Meeting of the Minds

In *East Porter County School Corp. v. Gough, Inc.*,[241] the court held that, where a contractor bidding on a school construction project made a clerical error in its bid to the school, there was no meeting of the minds regarding the bid amount and the bid could not be enforced.[242] In this case, Gough submitted a bid to the school to complete certain construction work with a base bid amount of $2,997,000.[243] Soon after submitting its bid, Gough called the school to withdraw it, informing the school that the bid was based on a mistake.[244] Gough was the low bidder, and the school refused to allow Gough to withdraw the bid.[245] Gough filed a complaint for declaratory judgment against the school, seeking to rescind its bid and the release of its bond.[246]

The court agreed with Gough.[247] The court pointed out that in *Board of School Commissioners of City of Indianapolis v. Bender*, Bender had miscalculated his bid before submitting it on the project.[248] The next day, Bender realized his miscalculation and informed the school board that he could not enter into a contract for this bid amount.[249] The *Bender* court found that Bender's error was an excusable mistake because Bender did not agree to enter into a contract

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240. *Id.* During the Survey Period, Indiana courts also addressed several key defamation cases that are outside the scope of this Survey Article. *See, e.g.,* Haegert v. McMullan, 953 N.E.2d 1223 (Ind. Ct. App. 2011) (holding that a university professor was entitled to qualified privilege for alleged defamatory statements made against another professor concerning complaints of harassment); *In re* Indiana Newspapers Inc., 963 N.E.2d 534 (Ind. Ct. App. 2012) (holding that a plaintiff bringing a defamation claim and seeking to obtain the identify of an anonymous commenter from a non-party news organization must first produce prima facie evidence of every element of his defamation claim that does not depend on the commenter's identity before the news organization is compelled to disclose that identity), *aff'd on reh'g*, 980 N.E.2d 852 (Ind. Ct. App. 2013).

241. 965 N.E.2d 684 (Ind. Ct. App. 2012).

242. *Id.* at 692.

243. *Id.* at 685.

244. *Id.*

245. *Id.*

246. *Id.* at 686.

247. *Id.* at 691-92.

248. 965 N.E.2d at 689 (citing Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland, 811 N.E.2d 425, 434 (Ind. Ct. App. 2004)).

249. *Id.*

for the bid amount, and there was no meeting of the minds between the parties.[250] The *Gough* court found *Bender* distinguishable from a more recent bid "mistake" case—*Mid-States General & Mechanical Contracting Corp. v. Town of Goodland*—because, unlike *Bender*, Mid-States did not argue that it made miscalculations in preparing its bid, but instead argued that it reasonably interpreted the bid documents but erred because the documents were ambiguous.[251] The court in *Mid-States* concluded that the bid documents were not ambiguous and that Mid-States's interpretation was unreasonable.[252] The *Mid-States* court stated the general rule that "[b]id errors that result from clear cut clerical or arithmetic errors or a misreading of the specifications are the kind of excusable mistake that allows relief."[253] On the other hand, mistakes of judgment do not qualify for such relief.[254]

The *Gough* court found that Gough was working on his bid numbers in the hours immediately preceding the bid opening, and the numbers were continuously updated as subcontractors' bids were received.[255] The final total in the summary bid sheet prepared by Gough was $3,331,763, and Gough determined that it could get the bid below $3,300,000 for "psychological reasons."[256] Through mistake, though, Gough ended up with a bid number of $2,997,000 (cutting roughly $300,000 from the bid instead of $30,000).[257] Based on these facts, the court found, as in *Bender*, that the mistake was a clerical error, not a mistake of judgment; Gough "did not agree to enter into a contract to furnish material and do the work according to the plans and specifications for the amount designated by his bid."[258] As a result, there was no meeting of the minds and instead, the school would obtain an unconscionable advantage by the mistake or error.[259] The *Gough* court also took into consideration that Gough informed the school of the mistake immediately following the bid meeting, and, thus, the school did not rely upon Gough's erroneous bid amount.[260]

B. Privity of Contract

In *State of Indiana Military Department v. Continental Electric Co.*,[261] the court held that a subcontractor could not recover from the state on a construction

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250. *Id.* (citing Bd. of Sch. Comm'rs v. Bender, 72 N.E. 154, 157 (Ind. App. 1904)).

251. *Id.* (citing *Mid-States*, 811 N.E.2d at 434).

252. *Id.*

253. *Id.* (alteration in original) (footnote omitted) (quoting Mid-States, 811 N.E.2d at 434).

254. *Id.*

255. *Id.*

256. *Id.* at 689.

257. *Id.* at 689-90.

258. *Id.* at 691 (citing Bd. Of Sch. Comm'rs of City of Indianapolis v. Bender, 72 N.E. 154, 157 (Ind. App. 1904)).

259. *Id.*

260. *Id.*

261. 971 N.E. 2d 133 (Ind. Ct. App.), *trans. denied*, 978 N.E.2d 21 (Ind. 2012).

project under breach of contract because there was lack of privity between the parties, nor could the subcontractor show that it was entitled to relief under the theory of unjust enrichment.[262]

In this case, the state solicited bids for a construction project.[263] The Larson-Danielson Construction Company ("Larson") submitted a bid that included Continental Electric's subcontract bid in its total.[264] Continental Electric provided a bid amount for "Alternate 2."[265] Because there was some confusion as to what was included within Alternate 2, prior to execution of the contract between the state and Larson and the subcontract between Larson and Continental Electric, the architect on the project clarified the agreement and stated, "As discussed in the prebid meeting, the base bid shall include installation, final connections, startup and testing of the owner purchased generator. Alternate 2 shall include the generator only."[266] Thereafter, Larson entered into a contract with the state (the main contract), and Continental Electric entered into a subcontract with Larson.[267]

Continental Electric had not understood that its base bid would include *any* items associated with the generator at the time of its bid.[268] The architect explained that the wiring outside the area marked Alternate 2 was part of the base bid, and if Continental Electric disagreed, Larson needed to file a proposed change order.[269] Larson, however, agreed with the architect's interpretation of the bid documents and, thus, did not submit a change order.[270] Instead of seeking mediation or arbitration under the terms of its subcontract with Larson, Continental Electric requested Larson to forward a claim to the Contracting Officer pursuant to the procedures set forth in Larson's contract with the state.[271] Larson did and the Contracting Officer agreed that Alternate 2 did not include the wiring.[272] Larson did not appeal the decision to the Governor, as was allowed under the main contract, but Continental Electric did.[273] The appeal was dismissed on the basis that Continental Electric had no right to appeal to the Governor in accordance with the main contract.[274]

Continental Electric filed suit against the state for breach of contract and unjust enrichment.[275] The trial court held a bench trial and entered judgment in

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262. *Id*. at 142-43, 145-46.
263. *Id.* at 135.
264. *Id.*
265. *Id.*
266. *Id.* at 136.
267. *Id.*
268. *Id.*
269. *Id.* at 137.
270. *Id.* at 137-38.
271. *Id.* at 139.
272. *Id.*
273. *Id.*
274. *Id.* at 140.
275. *Id.*

favor of Continental Electric.[276] The appellate court reversed, rejecting Continental Electric's breach of contract claim on the basis of lack of privity: "The evidence demonstrates that [the State] was not a party to any contract with Continental Electric, had no agreements to do anything with Continental Electric, and there was never any meeting of the minds between contracting parties that would permit a recovery by Continental Electric against [the State]."[277] The court concluded that "if Continental Electric had any claim for breach of contract, it was against Larson, with whom it had a contract, not [the State]."[278]

The court further reasoned that, although Article Six of the subcontract provided that the subcontractor was bound by the dispute resolution procedures in the main contract, the State had not agreed that Continental Electric had rights to appeal to the Governor.[279] The court viewed this provision as meaning that "Larson would decide whether it would appeal to the Governor if Continental Electric raised any issues with Larson that might need to be addressed by [the State]."[280] The court found no agreement that the State would entertain appeals directly from subcontractors.[281]

The court rejected Continental Electric's unjust enrichment claim because "Continental Electric unquestionably knew the scope of the required work before it signed a contract."[282] The court further explained that it was Larson, not the State, which directed Continental Electric to proceed with the work under the contract; the State had no expectation that it would be required to pay Continental Electric or Larson any additional amount for the wiring.[283] The court found that the State did not commit any wrong; it expected Larson to install the wiring and paid Larson in full on the contract.[284]

VII. CONTRACT INTERPRETATION

In *Hunt Construction Group, Inc. v. Garrett*,[285] the Indiana Supreme Court held that a manager on a construction project did not have a contractual duty of care for jobsite safety of subcontractor employees and did not voluntarily assume such a duty.[286] In this case, Hunt Construction Group, Inc. ("Hunt") entered into a contract with the Indiana Stadium and Convention Building Authority ("Stadium Authority") to act as the construction manager for the building of

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276. *Id.* at 141.
277. *Id.* at 142.
278. *Id.*
279. *Id.* at 143.
280. *Id.*
281. *Id.*
282. *Id.* at 145-46.
283. *Id.* at 146.
284. *Id.*
285. 964 N.E.2d 222 (Ind. 2012).
286. *Id.* at 231.

Lucas Oil Stadium.[287] During the project, an employee of a concrete subcontractor was injured and sought damages from Hunt.[288]

In addressing whether the construction manager owed the employee a legal duty of care for jobsite-employee safety, the court answered the following questions: "whether (1) such a duty was imposed upon the construction manager by a contract to which it was a party; and (2) the construction manager assumed such a duty, either gratuitously or voluntarily."[289] The court relied on a decision by the Indiana Court of Appeals, *Plan-Tec, Inc. v. Wiggins*, which addressed these same questions, and held that

> (1) where the construction management contract did not impose any obligation on the construction manager for jobsite-employee safety and contracts with project contractors provided that jobsite safety was the responsibility of the contractors and not the construction manager, the construction manager had no duty of care for jobsite-employee safety; but (2) where the construction manager took specific actions related to employee safety, there was an issue of fact as to whether it had assumed a legal duty of care for employee safety.[290]

The *Garrett* court began with the contract and found that, unlike the *Plan-Tec* construction–manager contract, Hunt's contract imposed responsibilities on Hunt related to safety.[291] But the court found that none of those safety provisions imposed upon Hunt "any specific legal duty to or responsibility for the safety of all employees at the construction site."[292] In fact, Hunt's contract expressly stated that its construction-management services were to be "rendered solely for the benefit of the [Stadium Authority] and not for the benefit of the Contractors, the Architect, or other parties performing Work or services with respect to the Project."[293]

The contract also provided that Hunt was not "assuming the safety obligations and responsibilities of the individual Contractors," and Hunt was not to have "control over or charge of or be responsible for . . . safety precautions and programs in connection with the Work of each of the Contractors, since these are the Contractor's responsibilities."[294] The contract further stated that the contractor on the project was "'the controlling employer responsible for [its own] safety programs and precautions,' and that Hunt's responsibility to review, monitor, and coordinate these programs did 'not extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors, their agents

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287. *Id.* at 224.

288. *Id.*

289. *Id.* at 226.

290. *Id.* (citing Plan-Tec, Inc. v. Wiggins, 443 N.E.2d 1212, 1220 (Ind. Ct. App. 1983)).

291. *Id.* at 227.

292. *Id.*

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

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

or employees.'"[295] Based on the above contract language, the court held that Hunt did not undertake a contractual duty to ensure the safety of the plaintiff on the jobsite.[296]

Despite not having a contractual duty, the court next considered whether Hunt had assumed a duty, either gratuitously or voluntarily.[297] The court distinguished this case from *Plan-Tec*, where the court found a question of fact as to whether the construction manager had assumed such a duty.[298] The court noted that in *Plan-Tec*, the construction documents stated that the individual contractors were responsible for safety, and that Plan-Tec was not, but then after the project began, the construction manager explicitly agreed to take on certain supervisory responsibilities beyond those in its contract.[299]

The *Garrett* court held that "for a construction manager not otherwise obligated by contract to provide jobsite safety to assume a legal duty of care for jobsite-employee safety, the construction manager must undertake specific supervisory responsibilities *beyond* those set forth in the original construction documents."[300] The court found no evidence that Hunt had done that in this case and, instead, found that the actions Hunt took were required under its contract.[301] As such, the court found that Hunt had not assumed a duty to the plaintiff through its actions or conduct.[302]

VIII. ECONOMIC LOSS DOCTRINE

In *Thalheimer v. Halum*,[303] the court held that the economic loss doctrine did not preclude homeowners from bringing a negligence action against an installer.[304] In this case, the plaintiffs hired the defendant to remove carpet and tiles in their home and to install new tiles.[305] The homeowners were dissatisfied with some of the work and brought this suit, alleging breach of contract, negligence, and violation of an implied warranty of habitability.[306] The installer argued that he could not be liable for negligence under the economic loss doctrine; the plaintiff responded that the economic loss doctrine did not apply because the trial court entered findings that their son had sustained physical injury (scuffing his feet and falling down due to the unevenness of the tile floor installed

295. *Id.* (internal quotation marks omitted).
296. *Id.* at 228.
297. *Id.*
298. *Id.* at 230 (citing Plan-Tec, Inc. v. Wiggins, 443 N.E.2d 1212, 1220 (Ind. Ct. App. 1983)).
299. *Id.*
300. *Id.* (emphasis added).
301. *Id.*
302. *Id.* at 231.
303. 973 N.E. 2d 1145 (Ind. Ct. App. 2012).
304. *Id.* at 1152.
305. *Id.* at 1147.
306. *Id.* at 1147-48.

by the defendant) as a result of the installer's negligence.[307]

The court, quoting *Gunkel v. Renovations, Inc.,* explained that

> the economic loss doctrine provides that where a contract exists, that "contract is the only available remedy where the loss is solely economic in nature, as where the only claim of loss relates to the [service or] product's failure to live up to expectations, and in the absence of damage to other property or person."[308]

Thus,

> damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damages to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected.[309]

The plaintiff, therefore, was not precluded from bringing an action in negligence for personal injuries simply because a contract existed between the parties.[310]

IX. INDEMNIFICATION PROVISIONS

In *L.H. Controls, Inc. v. Customer Conveyor, Inc.*,[311] the court held that the indemnity provision between an electrical subcontractor and contractor was ambiguous because it did not specifically state that it covered first-party claims.[312] In that case, Honda contracted with CCI to install conveyor systems.[313] CCI subcontracted certain portions of the electrical work to LH.[314] LH failed to timely complete its work, causing CCI to incur considerable expenses.[315] The court ultimately found that LH had breached its contract with CCI and the parties' indemnification provision required that LH pay CCI's attorney fees.[316]

The indemnification provision provided that

> [LH] shall indemnify and hold harmless [CCI] . . . from and against all claims . . . losses, and expenses of any nature, including but not limited to attorneys' fees (collectively "Costs"), arising out of, or claimed to have arisen out of, resulting from or otherwise relating to the performance of the Contract, or the failure to perform, in accordance with

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307. *Id.* at 1151.

308. *Id.* (alteration in original) (quoting Gunkel v. Renovations, Inc., 822 N.E.2d 150, 152 (Ind. 2005)).

309. *Id.* at 1152 (quoting *Gunkel*, 822 N.E.2d at 153).

310. *Id.*

311. 974 N.E.2d 1031 (Ind. Ct. App. 2012).

312. *Id.* at 1047.

313. *Id.* at 1035.

314. *Id.*

315. *Id.* at 1036.

316. *Id.* at 1041.

> the Contract Documents, by the Contractor or any Subcontractor or Supplier . . . or any way related to the Work, Materials or Services provided hereunder, including but not limited to, any and all Costs arising out of or claimed to have arisen out of or resulting from injuries or damage to property, loss of use of property, or the injuries or death to persons.[317]

LH argued that the indemnity provision did not require it to indemnify CCI for first-party claims (i.e., claims between LH and CCI), but instead, applied to claims between CCI and a third party.[318]

The court noted that "indemnification clauses are strictly construed and the intent to indemnify must be stated in clear and unequivocal terms,"[319] and concluded that the indemnity provision was ambiguous as to whether it covered first-party claims.[320] The court explained that "[t]he general legal understanding of indemnity clauses is that they cover 'the risk of harm sustained by *third persons* that might be caused by either the indemnitor or the indemnitee.'"[321] Although there is no absolute prohibition against one party agreeing to indemnify the other party for claims arising between them, the provision must be clear in that respect.[322] For example, a provision that expressly states it applies to "any and all Causes of Action . . . asserted *by any parties and non-parties to this Agreement*" is sufficient to require indemnification for first-party claims.[323] The court found no such language in the provision between LH and CCI.[324] The court held that "because the indemnity provision does not clearly and unambiguously state that it applies to first-party claims, such as the LH-CCI dispute, it is appropriate to hold that the provision applies only to third-party claims, in accordance with the traditional legal understanding of indemnity provisions."[325]

X. LIQUIDATED DAMAGES PROVISIONS

In Dean V. Kruse Foundation, Inc., v. Gates,[326] the court held that an earnest money forfeiture clause in a purchase agreement involving an auction of commercial real estate was an unenforceable penalty, not a liquidated damages provision.[327] The purchase agreement stated, in pertinent part:

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317. *Id.* at 1047 (first and second alteration in original).

318. *Id.*

319. *Id.* (quoting Fresh Cut, Inc. v. Fazli, 650 N.E.2d 1126, 1132 (Ind. 1995)).

320. *Id.*

321. *Id.* (quoting Indianapolis City Market Corp. v. MAV, Inc., 915 N.E.2d 1013, 1023 (Ind. Ct. App. 2009)).

322. *Id.* at 1048.

323. *Id.* (citing Sequo Coatings Corp. v. N. Ind. Commuter Transp. Dist., 796 N.E.2d 1216, 1229 (Ind. Ct. App. 2003)).

324. *Id.*

325. *Id.*

326. 973 N.E.2d 583 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1017 (Ind. 2013).

327. *Id.* at 596.

> [Buyer] agrees to pay therefore the sum of Four Million Dollars ($4,000,000) on the following terms: Cash At Closing Plus 5% Buyers Premium[.] One Hundred Thousand Dollars ($100,000) of said purchase price is hereby deposited as earnest money with [Sellers] . . . . However, if the buyer fails to complete the purchase within a reasonable time due to no fault of the seller, *then the earnest money deposited is forfeited, and seller may sue for specific performance*.[328]

The buyer breached the agreement and the seller sought to obtain damages in excess of $100,000, contending that the $100,000 constituted an unenforceable penalty.[329] The buyer argued that the provision was a liquidated damages clause, and buyer's damages were limited to $100,000.[330]

The appellate court noted that liquidated damages clauses "are generally enforceable where the nature of the agreement is such that damages for breach would be uncertain, difficult, or impossible to ascertain."[331] On the other hand, contractual provisions constituting penalties are not enforceable.[332] "The distinction between a penalty provision and one for liquidated damages is that a penalty is imposed to secure performance of the contract and liquidated damages are to be paid in lieu of performance."[333] The court explained,

> To determine whether a stipulated sum payable upon breach of contract constitutes liquidated damages or a penalty, the facts, the intention of the parties, and the reasonableness of the stipulation under the circumstances of the case are all to be considered. The use of the words "damages," "penalty," "forfeiture," and "liquidated damages" are not conclusive, but should be considered in connection with other provisions in the contract to determine the nature of the provisions.[334]

The purchase agreement provided that the earnest money was part of the purchase price, forfeitable upon breach.[335] The court found that this provision indicated an intent to penalize the purchaser for a breach rather than compensate the seller for the breach.[336] The court reasoned that it was partial payment of the purchase price, suggesting that the earnest money was not paid in lieu of performance, "but rather as compulsion for the purchaser to complete his purchase of the property."[337] The court also found instructive that the provision was not labeled as liquidated damages and provided a remedy for specific

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328. *Id.* at 587 (emphasis added).
329. *Id.* at 590.
330. *Id.* at 589.
331. *Id.* at 591 (citing Rogers v. Lockard, 767 N.E.2d 982, 991 (Ind. Ct. App. 2002)).
332. *Id.*
333. *Id.* (citing Gershin v. Demming, 685 N.E.2d 1125, 1128 (Ind. Ct. App. 1997)).
334. *Id.* at 591-92 (citations omitted).
335. *Id.* at 592.
336. *Id.* at 593.
337. *Id.*

performance, "suggesting that there [was] no ability for the purchaser to simply 'walk away' in the event of his breach."[338]

The court also stated that unlike other cases addressing such clauses, this case did not involve a residential real estate purchase between individuals but involved an auction of commercial real estate to the highest bidder.[339] Both parties to the purchase agreement were sophisticated individuals with extensive experience in such transactions.[340] All bidders were informed of the required earnest money amount and it was used to prequalify bidders for participation in the auction.[341] These facts, the court found, suggested that the provision was not a "reasonable forecast of the damages to be paid in lieu of performance."[342]

The court then addressed the proportionality between the loss and the $100,000[343] and noted that, if the sum is not greatly disproportionate to the loss, it will be accepted as a liquidated damages clause and not as a penalty.[344] The earnest money in that case represented 2.5% of the purchase price, and the trial court concluded that this was not grossly excessive or unjust.[345] The court of appeals disagreed, reasoning that the amount of the earnest money deposit was known to bidders beforehand, and neither the parties nor other bidders would know what proportion the earnest money would bear to the ultimate bid price.[346] The court next determined whether the damages in the event of breach were uncertain.[347] The court of appeals again disagreed with the trial court that damages were uncertain because different market values had been provided for the property.[348] The court of appeals found sufficient evidence for the trial court to determine the fair market value of the property at the time of breach and thus, concluded that damages were reasonably certain.[349] Accordingly, the court concluded that the provision at issue could not be enforced as a liquidated damages provision.[350]

CONCLUSION

As set forth herein, Indiana courts rendered a number of significant business decisions that will impact business litigators and corporate transactional lawyers, as well as business owners and in-house counsel. In particular, the courts

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338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* at 594.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*

rendered significant decisions concerning the scope of Indiana's Antitrust Act, circumstances where a party can pierce the corporate veil, and issues arising from limited partnerships and revocable trusts in the corporate shareholder context. The courts also addressed a number of key business tort cases concerning misappropriation of trade secrets, actual fraud, and anti-SLAPP litigation. Finally, the courts resolved several important contract cases that provide guidance to litigators and business owners on contract formation and interpretation.