

RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

MICHAEL A. DORELLI*
JONATHAN B. TURPIN**

Between October 1, 2012 and September 30, 2013,¹ Indiana courts rendered a number of significant decisions impacting businesses and business owners, officers, directors and shareholders. In addition, Indiana's Business Flexibility Act underwent several significant changes. Developments of interest to business litigators, corporate transactional lawyers, business owners, and in-house counsel are discussed herein.

I. CHANGES TO INDIANA'S BUSINESS FLEXIBILITY ACT

Indiana's Business Flexibility Act, House Enrolled Act 1394, also known as P.L. 40-2013 (the "Act"), became effective July 1, 2013 (the 2013 Amendments).² The Act made significant changes to the statutory scheme of LLCs, including changes affecting estate planning for LLC members.³

A. Freedom of Contract

The 2013 Amendments added a broad statement that Indiana policy "is to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements of limited liability companies."⁴ This statement makes the underlying philosophy of the Act clear that the contract is to be respected when interpreting the statute.

B. Purpose of LLC

With the new amendments, section 6 of the Act now explicitly states that LLCs may be used not only for business purposes but also for personal and nonprofit purposes.⁵ Prior to this change, there had been some confusion as to whether an LLC could be organized for these purposes. Under the 2013 Amendments, it is now clear that the LLC can be created and operated for a charitable or other nonprofit purpose or formed for a personal purpose, such as

* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1998, *magna cum laude*, Indiana University Robert H. McKinney School of Law. The views expressed herein are solely those of the author.

** Law Clerk, Hoover Hull LLP, Indianapolis, Indiana, B.A., 2010, Miami University; J.D. Candidate, 2014, Indiana University Maurer School of Law.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period: October 1, 2012, through September 30, 2013.

2. IND. CODE § 23-18-4-13 (2013).

3. *Id.*

4. *Id.*

5. *Id.* § 23-18-2-1.

holding non-income producing property.⁶

C. *LLC Officers*

Indiana law previously authorized member-managed or manager-managed companies exclusively.⁷ In a member-managed LLC, the members have apparent authority to bind the company.⁸ In a manager-managed LLC, the members appoint managers who have that authority.⁹ The revisions to the Act, however, now expressly provide for the creation of officers of the LLC if provided for in a written operating agreement.¹⁰ The operating agreement must specify the “title, powers, duties, and term of office (either perpetual or for a specific term) for each officer and the means by which each officer is to be appointed, elected, or reelected.”¹¹

The officer has only those powers and duties specified in the written operating agreement.¹² The officers will be agents of the LLC, may bind the LLC through acts within the officer’s apparent authority, and notice of business matters provided to an officer will be deemed notice to the LLC.¹³ The revisions allow the members of an LLC to establish officers who have the apparent authority to bind the company, while the members also retain that authority.¹⁴ However, authority to manage the LLC is still reserved to members or managers unless otherwise provided in the operating agreement.¹⁵

D. *Contractual Limitation or Elimination of Fiduciary Duties*

The Act now expressly allows members to “[m]odify, increase, decrease, limit, or eliminate the duties (including fiduciary duties) . . . of a member or manager” in the operating agreement.¹⁶

E. *Third Party Approval Rights*

The 2013 Amendments provide that the Operating Agreement may designate “one (1) or more persons who are not members or managers [to] have the right

6. *Id.*

7. John Millspaugh & Alan Becker, *Changes to Indiana Business Flexibility Act Likely to Impact LLCs Significantly*, BOSE CORPORATE AND M&A BLOG (May 17, 2013), <http://corporate.blog.boselaw.com/2013/05/17/changes-to-indiana-business-flexibility-act-likely-to-significantly-impact-llcs/>.

8. *Id.*

9. *Id.*

10. *Id.*

11. IND. CODE § 23-18-4-4 (2013).

12. *Id.* § 23-18-3-2.5(1).

13. *Id.* § 23-18-3-2.5(2)-(4).

14. Millspaugh & Becker, *supra* note 7.

15. IND. CODE §§ 23-18-3-2.5, 23-18-4-4 (2013).

16. *Id.* § 23-18-4-4.

to approve or disapprove any one (1) or more specified actions with respect to the limited liability company, including: (A) voluntary dissolution; (B) merger; or (C) amending the written operating agreement.”¹⁷ Under this new subsection, the LLC can now give approval, disapproval, or veto rights to persons who are not members.¹⁸

F. Estate Planning

Amendments to section 10 of the Act now expressly permit an LLC interest to be held as “joint tenancy with right of survivorship,” and permit LLC interests to be designated as “transfer on death property” (TOD) with a designated beneficiary of the interest on the death of the member.¹⁹ In both instances, the survivor/beneficiary following the death of a member automatically receives the interest of the deceased member without probate.²⁰ Unlike joint tenancy, under the TOD provisions, the beneficiary does not own any interest in the property until the death of the original owner.²¹

A joint tenant or TOD beneficiary who receives the member interest after the death of the other joint tenant or owner will be an “assignee,” not a member, until admitted as a member, unless a joint-tenant co-owner of a member interest was already a member.²² Specifically, the statute provides that “[e]ach surviving [TOD] beneficiary has the status of an assignee of all or a fractional or percentage portion of the entire member interest owned by the deceased owner, . . . consistent with the [TOD] beneficiary designation, until that [TOD] beneficiary is admitted as a member of the limited liability company.”²³ Further, “[e]ach surviving joint tenant has that status of an assignee of all or a fractional or percentage portion of the entire member interest, . . . until the surviving joint tenant is admitted as a member of the limited liability company unless the surviving joint tenant was already a member . . . before the death of each other joint tenant.”²⁴

The Act also clarifies that all transfer restrictions, redemption provisions, and similar provisions contained in an LLC’s operating agreement will apply to the interest held by the survivor/beneficiary.²⁵

G. Unanimous Approval for LLC Dissolution

The Act now requires unanimous member approval of dissolution for LLCs formed after June 30, 2013, unless a lower approval threshold is specified in the

17. *Id.* § 23-18-4-4(a)(4).

18. *Id.*

19. *Id.* § 23-18-6-2.5.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* § 23-18-6-2.5(b)(1).

24. *Id.* § 23-18-6-2.5(c)(1).

25. *Id.* § 23-18-6-2.5(b)(2), (c)(2).

operating agreement.²⁶ The 2013 Amendments were made to address gift and estate tax valuation problems under section 2704(b) of the Internal Revenue Code.²⁷

H. Other Changes

There were certain technical changes to the Act, including changes to the filing provisions affecting merger in Indiana Code section 23-18-7-4.²⁸ The change applies to mergers between two or more LLCs or between LLCs and other types of business entities.²⁹ It confirms that the “plan of merger” does not need to be included in the articles of merger that are filed with the Secretary of State.³⁰ Only those parts of the plan of merger that provide specific changes to the articles of organization of the surviving LLC need to be included.³¹ Additional technical changes were made to Indiana Code section 23-18-12-1 addressing signature requirements for biennial reports.³²

II. CORPORATE OFFICER DOCTRINE, SUCCESSOR LIABILITY, AND PIERCING THE CORPORATE VEIL

In *Reed v. Reid*,³³ the Indiana Supreme Court addressed the corporate officer doctrine that applies to violations under the Indiana Environmental Act, successor liability, and piercing of the corporate veil.³⁴ Under the corporate officer doctrine, “an individual associated with a corporation may be personally liable . . . for that corporation’s violations of the [the] Act, whether or not the traditional doctrine of piercing the corporate veil would produce personal liability.”³⁵ The court explained that an individual is liable under this doctrine in the following circumstances:

- (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities;
- (2) there must be a nexus between the individual’s position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and
- (3) the individual’s actions or inactions facilitated the violations.³⁶

26. *Id.* § 23-18-9-1.1.

27. 26 U.S.C. § 2704(b) (1996).

28. *Id.* § 23-18-7-4.

29. *Id.*

30. *Id.*

31. *Id.* § 23-18-7-4(a)(3).

32. *Id.* § 23-18-12-1.

33. 980 N.E.2d 277 (Ind. 2012).

34. *See generally id.*

35. *Id.* at 298 (quoting *Comm’r, Ind. Dep’t of Env’tl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 558 (Ind. 2011)).

36. *Id.*

In *Reed*, North Vernon Drop Forge (Forge) had been depositing solid waste on David Reed's (Reed) auction barn site.³⁷ Reed sued for damages.³⁸ Forge had previously entered an Agreed Order with the Indiana Department of Environmental Management (IDEM) acknowledging that it allowed the disposal of solid waste on Reed's auction barn site.³⁹ Reed had to hire an environmental consulting company to remediate his property according to IDEM's instructions.⁴⁰ Reed filed a complaint against Forge, several of its employees, and Edward Reid (Edward), Forge's sole or controlling shareholder.⁴¹

The court found that Edward was in a position of responsibility to influence corporate policies or activities, but noted that his position as sole or controlling shareholder was insufficient alone to establish individual liability under the responsible corporate officer doctrine.⁴² However, the evidence also revealed that Edward hired key Forge employees, he was regularly apprised of Forge operations, he was involved in the decision to take the Forge waste to the auction barn, and he took responsibility with IDEM for Forge's environmental violations at the auction barn site.⁴³ Accordingly, the court found that he "was directly involved in at least some corporate activities."⁴⁴ Based on these facts, the court held, as a matter of law, that Edward was liable to the same extent as Forge under the responsible corporate officer doctrine.⁴⁵

Reed also alleged that Jennings Manufacturing Company, Inc. (Jennings) incurred Forge's "liability as its successor under the doctrines of *de facto* merger and mere continuation."⁴⁶ Generally, "[w]hen a corporation purchases another corporation's assets, the buyer typically does not assume the seller's debts and liabilities."⁴⁷ However, the law recognizes an exception under the doctrines of *de facto* merger and mere continuation.⁴⁸ "A *de facto* merger occurs where a transaction is essentially a merger in all but name."⁴⁹

The court in *Reed* analyzed the following factors when making this determination: "the 'continuity of the predecessor corporation's business enterprise as to management, location, and business lines; prompt liquidation of the seller corporation; and assumption of the debts of the seller necessary to the

37. *Id.* at 283.

38. *Id.*

39. *Id.*

40. *Id.* at 284.

41. *Id.*

42. *Id.* at 298.

43. *Id.*

44. *Id.* at 299.

45. *Id.*

46. *Id.*

47. *Id.* (citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1233 (Ind. 1994)).

48. *Id.* (citing *Cooper Indus., LLC, v. City of South Bend*, 899 N.E.2d 1274, 1288 (Ind. 2009)).

49. *Id.*

ongoing operation of the business.”⁵⁰ Under the “mere continuation exception,” the court “asks whether the processor corporation should be deemed simply to have re-incarnated itself, largely aside of the business operations.”⁵¹ The court will look at “whether there is a continuation of shareholders, directors, and officers into the new corporate entity.”⁵²

The *Reed* court found there was a genuine issue of material fact regarding whether the sale of Forge assets to Jennings created a *de facto* merger of the two, or whether Jennings was just a mere continuation of Forge.⁵³ Forge ceased operations in April 2006 and Jennings was incorporated in October 2006.⁵⁴ Jennings operated at the same location as Forge, used the same telephone number, the same person oversaw operations at both locations, and the same individual—based on substantial evidence—appeared to own both Forge and Jennings.⁵⁵ There was confusion, however, as to who the officers of the corporations were and who owned the property.⁵⁶ Further, no written agreement regarding the purchase or use of Forge’s assets existed between forge and Jennings.⁵⁷ Accordingly, given the evidence, the court found a genuine issue of material fact as to Jennings’ successor liability.

The court next analyzed whether Edward and other Edward entities could be personally liable through the doctrine of piercing the corporate veil.⁵⁸ “As a general rule, shareholders are not personally liable for the acts of a corporation, and a corporation is not liable for the acts of related corporations.”⁵⁹ However, “[w]hen a corporation is functioning as an alter ego or a mere instrumentality of an individual or another corporation, it may be appropriate to disregard the corporate form and pierce the veil.”⁶⁰

This is a highly fact-driven inquiry and no fact is dispositive alone.⁶¹ However, when making this determination, the court will consider the following:

- (1) undercapitalization of the corporation,
- (2) the absence of corporate records,
- (3) fraudulent representations 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)

50. *Id.*

51. *Id.* (quoting *Ziese & Sons Excavating, Inc. v. Boyer Constr. Corp.*, 965 N.E.2d 713, 722-23 (Ind. Ct. App. 2012)).

52. *Id.*

53. *Id.* at 300-01.

54. *Id.* at 300.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 301.

59. *Id.* (citing *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994), *reh’g denied* (May 18, 1995); *Greater Hammond Cmty. Servs., Inc v. Mutka*, 735 N.E.2d 780, 784 (Ind. 2000)).

60. *Id.* (citing *Mutka*, 735 N.E.2d at 784).

61. *Id.*

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.⁶²

Additionally, when a plaintiff attempts to hold one corporation liable for another closely-related corporation's debt by seeking to pierce the corporate veil, the aforementioned factors are not exclusive.⁶³

Additional factors to be considered include whether: "(1) similar corporate names were used; (2) the corporations shared common principal corporate officers, directors, and employees; (3) the business purposes of the [organizations] were similar; and (4) the corporations were located in the same offices and used the same telephone numbers and business cards."⁶⁴

The court may also pierce the veil in pursuit of affiliated corporate entities "when they are not operated separately, but rather are managed as 'one enterprise through their interrelationship to cause illegality, fraud, or injustice or to permit one economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.'"⁶⁵ Factors to consider in making this determination include "the intermingling of business transactions, functions, property, employees, funds, records, and corporate names in dealing with the public."⁶⁶

Reed presented evidence that Forge was consistently undercapitalized, that Forge's assets were commingled with Edward's personal assets and with assets of the sister corporations, and that Forge failed to observe corporate formalities.⁶⁷ Evidence in the record also revealed that Edward personally made undocumented loans in excess of \$1.4 million to his other entities, that he personally paid the operating costs of Jennings, and that his companies all shared employees.⁶⁸ One sister company also paid obligations of Forge, Jennings and the other company; the sister corporations shared officers and directors; and the companies failed to observe corporate formalities.⁶⁹

Given the above facts, the court held that "substantial evidence" showed that the "sister corporations were mere instrumentalities or alter egos of Edward and each other."⁷⁰ But the court found that "whether equity demands that the corporate veil should be pierced in this case to prevent fraud or injustice

62. *Id.* at 301-02 (internal citations and quotations omitted).

63. *Id.*

64. *Id.* (quoting *Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1192 (Ind. Ct. App. 2002)).

65. *Id.*

66. *Id.*

67. *Id.* at 302.

68. *Id.*

69. *Id.*

70. *Id.* at 303.

require[d] weighing the evidence,” and it is for the fact finder to decide “whether the separate corporate identities of Edward’s companies may be disregarded so that liability may be imposed on Edward personally, Jennings Manufacturing, and/or Reid Machinery.”⁷¹ As such, the court affirmed the trial court’s denial of David’s motion for summary judgment on this issue.⁷²

III. APPARENT AUTHORITY: LIMITED LIABILITY COMPANY AND LIMITED PARTNERSHIP

In *Cain Family Farm, L.P. v. Schrader Real Estate & Auction Co.*,⁷³ the court addressed issues of apparent authority under corporate law.⁷⁴ In that case, the Cain Family Farm, L.P. (the LP) held title to approximately 400 acres of property (the Sylvan Lake property), consisting of seventeen tracts.⁷⁵ Being the sole general partner of the LP, the LLC had the sole exclusive control of the management and operation of the LP.⁷⁶ The LLC was managed by four Cain siblings: Candace, Melanie, John and Patricia.⁷⁷ The LLC entered into an exclusive contract for the sale of the Sylvan Lake property with Schrader Real Estate & Auction Company (Schrader).⁷⁸ Candace signed the auction contract as a member of the LLC with the consent of her siblings.⁷⁹

Drerup, a member of Antlers Ridge, approached Candace about purchasing a portion of the property prior to the auction, but Candace informed him that his price was too low and any sale had to be approved by four siblings.⁸⁰ Prior to the auction, “the Cain siblings agreed to a minimum price for Tracts 2 through 17 of \$2,250,000.”⁸¹ They agreed that if the bids did not meet this price, they would not sell the tracts.⁸²

At the auction, Drerup made the highest bids on certain Tracts 2 through 4 and 6 through 17 for a total purchase price of \$1.35 million.⁸³ Schrader prepared, and Candace and Drerup signed, a purchase agreement for Antlers Ridge.⁸⁴ Candace executed the purchase agreement in the name of the LLC, in its capacity as the general partner of the LP.⁸⁵

71. *Id.*

72. *Id.*

73. 991 N.E.2d 971 (Ind. Ct. App. 2013).

74. *See generally id.*

75. *Id.* at 973.

76. *Id.*

77. *Id.*

78. *Id.* at 974.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 975.

84. *Id.*

85. *Id.*

After the sale, the LP and LLC demanded that the sale be rescinded and brought suit to quiet title.⁸⁶ The plaintiffs argued that Candace did not have the apparent or inherent authority to bind the LLC and, by extension, the LP, to the purchase agreement.⁸⁷ The court disagreed.⁸⁸

The court explained that “[a]pparent authority is the authority that a third person reasonably believes an agent to possess because of some manifestation from the agent’s principal.”⁸⁹ “The necessary manifestation is one made by the principal to a third party, who in turn is instilled with a reasonable belief that another individual is an agent of the principal.”⁹⁰ The principal must either directly or indirectly instill “a reasonable belief in the mind of the third party” of the agents; “[s]tatements or manifestations made by the agent are not sufficient to create an apparent agency relationship.”⁹¹ For example, “the placing of the agent in a position to perform acts or make representations which appear reasonable to a third person is a sufficient manifestation to endow the agent with apparent authority.”⁹²

The court found that Drerup knew that Candace and her siblings were present at the auction, had met in private, and had rejected the bid on Tract 5.⁹³ Drerup was not aware that the siblings had rejected the other bids.⁹⁴ In fact, Schrader, the Cains’ exclusive agent under the auction contract, announced to the audience that all but Tract 5 would sell that day.⁹⁵ The court held that the Cain siblings, “by their conduct and through their agent, Schrader, . . . indirectly communicated to Drerup and Antlers Ridge that they had accepted the remaining bids at the close of the auction.”⁹⁶ Candace had previously communicated to Drerup that the consent of all the Cain siblings was required to sell the property.⁹⁷ The court found that

Because the Cain siblings attended the auction and did not indicate to Drerup that they had rejected the Antlers Ridge bids, and because Schrader, [Plaintiff’s] exclusive agent for the sale, presented the Purchase Agreement for Candace’s and Drerup’s signatures, Drerup reasonably believed that Candace had obtained the consent of her siblings and was authorized to sign the Purchase Agreement.⁹⁸

86. *Id.*

87. *Id.* at 977.

88. *Id.*

89. *Id.* (citing *Pepkowski v. Life of Ind. Ins. Co.*, 535 N.E.2d 1164, 1166 (Ind. 1989)).

90. *Id.* (citing *Pepkowski*, 535 N.E.2d at 1166-67).

91. *Id.*

92. *Id.* (quoting *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 677 (Ind. 2001)).

93. *Id.*

94. *Id.*

95. *Id.* at 977-78.

96. *Id.* at 978.

97. *Id.*

98. *Id.* (internal footnote omitted).

The court, therefore, concluded that Candace had apparent authority to execute the purchase agreement as a matter of law.⁹⁹

The court also found, however, that Candace had authority to act under Indiana Code section 23-18-3-1.1(b), which states:

Except as provided in subsection (c) or the articles of organization, each member is an agent of the limited liability company for the purpose of the limited liability company's business or affairs, and *the act of any member, including the execution in the name of the limited liability company of an instrument for apparently carrying on in the usual way the business or affairs of the limited liability company, binds the limited liability company, unless:*

(1) the acting member does not have authority to act for the limited liability company in the particular matter; and

(2) the person with whom the member is dealing has knowledge of the fact that the member does not have the authority to act.¹⁰⁰

The Plaintiffs argued that subsection (d) applied, which states:

An act of a manager or member that is not apparently for the carrying on in the usual way the business of the limited liability company does not bind the limited liability company unless authorized in accordance with a written operating agreement or by the unanimous consent of all members at any time.¹⁰¹

They asserted that Candace's action were "*not* apparently for the carrying on in the usual way the business of the [LLC]."¹⁰²

The court in *Cain* noted that no other court has interpreted or applied this statutory language, and thus, it was an issue of first impression.¹⁰³ The Plaintiffs argued that they were not in the business of selling real estate and that Candace was not carrying on the usual way the business of the LLC at the time she executed the purchase agreement.¹⁰⁴ The court disagreed, reasoning LLC's business was to act as the general partner of the LP, which owned the real estate.¹⁰⁵ "The Limited Partnership Agreement gave the LLC 'the full and exclusive power' to manage and operate the [LP's] affairs, including the power to 'buy and sell real or personal property.'"¹⁰⁶ Thus, the court found that Candace "apparently carr[ied] on in the usual way the business" of the LLC at the time she

99. *Id.*

100. IND. CODE § 23-18-3-1.1(b) (2013) (emphasis added).

101. *Id.* § 23-18-3-1.1(d).

102. *Cain Family Farm, L.P.*, 991 N.E.2d at 980.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

signed the purchase agreement.¹⁰⁷

IV. MERGERS, SUBSIDIES, AND UNEMPLOYMENT EXPERIENCE ACCOUNTS

In *Boulder Acquisition Corp. v. Unemployment Insurance Appeals of Indiana Department of Workforce Development*¹⁰⁸ the court evaluated whether a company became the successive employer of subsidiaries that were acquired in a merger with the former parent company.¹⁰⁹ There, Boulder Acquisition Corporation (BAC) merged with Affiliated Computer Services, Inc. (ACS).¹¹⁰ As part of the deal, BAC acquired equity interests in ACS subsidiaries.¹¹¹ In reaction to the merger, the Indiana Department of Workforce Development combined the unemployment insurance experience accounts of BAC, ACS, and the subsidiaries.¹¹² These accounts are credited by employers' tax contributions and charged when an employee receives unemployment benefits.

Because Indiana Code section 22-4-10-6(a) provides that an employer is a successor employer when it "acquires the organization, trade, or business, or substantially all the assets of another employer . . . or all or a portion of the employer's trade or business."¹¹³ The Department reasoned that BAC was a successor employer.¹¹⁴ However, the court distinguished between the acquisition of an equity interest in a separate legal entity and the acquisition of the organization, trade, business, assets, trade, or business. The court held that "[b]ecause subsidiary companies are separate legal entities from their parent companies, acquiring equity ownership in a subsidiary, without more, does not constitute acquiring the organization, trade, or business, or substantially all of the assets, of such a subsidiary."¹¹⁵

V. JUDICIAL DISSOLUTION OF CORPORATION

The court in *Enders v. Enders*,¹¹⁶ addressed judicial dissolution of a corporation.¹¹⁷ In that case, Randall and his brother Timothy inherited equal shares in Enders & Longway Builders, Incorporated (the Company).¹¹⁸ The brothers signed a buy-sell agreement that limited their ability to transfer their shares and provided that upon death of one brother, the surviving brothers

107. *Id.*

108. 976 N.E.2d 1282 (Ind. Ct. App. 2012).

109. *See generally id.*

110. *Id.* at 1284.

111. *Id.*

112. *Id.* at 1284-85.

113. *Id.* at 1288.

114. *Id.*

115. *Id.*

116. 991 N.E.2d 154 (Ind. Ct. App. 2013).

117. *See generally id.*

118. *Id.* at 155.

automatically received the deceased's shares.¹¹⁹ Timothy stopped actively working for the Company due to a disability. When Randall became terminally ill in 2012 and could no longer work for the Company, he approached Timothy about dissolving the Company because it was no longer profitable.¹²⁰ Timothy would not agree to dissolution.

Randall filed a petition for a judicial dissolution, stating "that the directors and shareholders were deadlocked in the management of corporate affairs. The trial court granted the dissolution effective the date of the hearing."¹²¹ Timothy appealed the ruling, claiming that there was insufficient evidence for the trial court to dissolve the corporation pursuant to Indiana Code section 23-1-47-1.¹²² That code section provides for judicial dissolution in the following circumstances:

(A) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; or (B) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two (2) consecutive annual meeting dates, to elect successors to directors whose terms have expired.¹²³

The Company's accountant testified that he recommended for several years that the brothers dissolve the corporation, explaining there was no reason "to keep the complexity of the corporation when Randall was performing all the labor and services for the Company."¹²⁴ Timothy would not agree to dissolve the corporation.¹²⁵ Thus, the court found that there was deadlock in the management of the Company.¹²⁶ The accountant also testified that the corporation's business affairs could not be conducted to the shareholders and directors' advantage due to the existing deadlock among shareholders.¹²⁷ The court found that the evidence established that the corporation was no longer profitable due to Timothy's disability and Randall's terminal illness, and that the trial court did not err in ordering the dissolution of the corporation.¹²⁸

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 159.

123. *Id.* (citing IND. CODE § 23-1-47-1 (2013)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

VI. CONTRACT

A. Indefinite Price Term

In *Allen v. Clarian Health Partners, Inc.*,¹²⁹ the court addressed the plaintiff's argument that the contract at issue was too indefinite regarding price to be enforceable.¹³⁰ In *Allen*, a putative class filed an action "against a hospital alleging breach of contract and seeking a declaration that rates the hospital billed were unreasonable and unenforceable."¹³¹ The trial court granted the hospital's motion to dismiss, and the Indiana Court of Appeals reversed.¹³² The defendant sought transfer to the Indiana Supreme Court.¹³³

The plaintiff in *Allen* was an uninsured patient of the hospital who signed a form contract which the hospital had drafted.¹³⁴ The plaintiff agreed to pay all charges associated with her treatment.¹³⁵ Although the contract did not provide a specified amount for services rendered, it did provide that the patient "guarantees payment of the account."¹³⁶ After providing medical treatment to the plaintiff, the hospital billed its "chargemaster" rates for medical services and supplies.¹³⁷ The appellate court reversed, concluding, among other things, that because "the contract did not contain a price term[,] the reasonable value of services should be implied, and the issue of reasonableness" should be resolved by the finder of fact.¹³⁸ The Indiana Supreme Court disagreed and affirmed the trial court's ruling.¹³⁹

The plaintiff argued that the contract lacked the material term of price, and because no price term was present, a "reasonable price" was imputed to the contract.¹⁴⁰ The court agreed that "if a contract is uncertain as to a material term such as price then Indiana courts may impute a reasonable price."¹⁴¹ To be valid and enforceable, a contract must be reasonably definite and certain.¹⁴² "Only reasonable certainty is necessary."¹⁴³

The court explained "[a] contract need not declare a specific dollar amount

129. 980 N.E.2d 306 (Ind. 2012).

130. *See generally id.*

131. *Id.* at 307.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 308.

139. *Id.*

140. *Id.* at 309.

141. *Id.* (citing *Coleman v. Chapman*, 220 N.E.2d 285, 288 (1966)).

142. *Id.* (citing *Conwell v. Gray Loon Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 813 (Ind. 2009)).

143. *Id.* (quotations omitted).

for goods or services in order to be enforceable.”¹⁴⁴ The court further stated that “[i]n the context of contracts providing for health care services precision concerning price is close to impossible.”¹⁴⁵ The court further concluded:

We align ourselves with those courts that have recognized the uniqueness of the market for health care services delivered by hospitals, and hold that [the plaintiff’s] agreement to pay “the account” in the context of [the hospital’s] contract to provide medical services is not indefinite and refers to [the hospital’s] chargemaster.¹⁴⁶

As such, the court could not impute a “reasonable” price term into the contract.¹⁴⁷

B. Contract Interpretation

1. *Applying Contracts as Written.*—The case of *King v. King*¹⁴⁸ involved a dispute among siblings (Kay, George and Bob) concerning the ownership of several corporations and partnerships.¹⁴⁹ Kay and George often fought about who would control their father’s multimillion dollar estate after his death.¹⁵⁰ A few weeks prior to their father’s death, George shot Kay and Christopher (Kay’s minor son) multiple times and was convicted of attempted murder.¹⁵¹ Kay and Christopher subsequently filed a complaint on behalf of themselves and certain companies against George and Bob and five corporations, seeking “a determination on the ownership of certain Receivership Entities, dissolution of the Receivership Entities, and the appointment of a Receiver to manage the dissolution, winding up and accounting of the Entities.”¹⁵²

The court appointed the Receiver and directed him to take control of the business operations and its assets.¹⁵³ To pay outstanding tax liabilities, the Receiver drew on Crown’s assets because this company had more liquid assets available than the other Receivership Entities.¹⁵⁴ To account for his use of Crown’s assets, he credited “an account receivable in favor of Crown with corresponding payables charged to the Receivership or the Receivership Entities.”¹⁵⁵

In 2005, the siblings entered into a Term Sheet for settlement, which represented a partial agreement on the outlines of asset distribution and provided

144. *Id.* at 310 (citing *Conwell*, 906 N.E.2d at 813).

145. *Id.*

146. *Id.* at 311.

147. *Id.*

148. 982 N.E.2d 1026 (Ind. Ct. App. 2013).

149. *See generally id.*

150. *Id.* at 1028.

151. *Id.*

152. *Id.* at 1029.

153. *Id.*

154. *Id.*

155. *Id.*

that George would be entitled to the assets or equity interest in Crown.¹⁵⁶ It stated that further agreements would be set forth in greater detail in a separate liquidation agreement and that if the parties could not agree upon the liquidation agreement, the dispute would be submitted to the Receivership Court for a final determination.¹⁵⁷ The siblings failed to enter into the liquidation agreement and thus, the trial court ordered the Receiver to eliminate all inter-company accounts prior to making the transfers contemplated by the Term Sheet and ordered the parties to enter into a definitive Settlement Agreement in accordance with the court's findings.¹⁵⁸

The siblings still could not reach an agreement to divide the assets, and so, the Receiver submitted his plan for distribution to the trial court.¹⁵⁹ In his plan, the Receiver attempted (as best he could) to follow the Term Sheet.¹⁶⁰ The trial court approved the Receiver's plan of distribution.¹⁶¹ George objected and after the trial court denied his objections, he appealed.¹⁶²

George argued on appeal that the plan improperly failed to restore assets to Crown.¹⁶³ The court noted that the Term Sheet itself failed to address Crown's account receivables.¹⁶⁴ With respect to Crown, the Term Sheet merely stated that "[t]he assets and/or equity interest of [Crown] shall be conveyed by the Receiver to [George], *free and clear of any claims that were asserted or could have been asserted by any plaintiffs or any defendants in the King Receivership Litigation*, subject only to claims for any unpaid taxes and the claims of third-party creditors."¹⁶⁵ The court reasoned that "[g]iven the level of detail embodied in the Term Sheet, the absence of a clear expression by the parties to repay the accounts receivable which had been expressly created by the Receiver during the Receivership and which existed during the execution of the Term Sheet, is evidence of intent that no such offset was bargained for."¹⁶⁶ The court also found that the Term Sheet's language rejected George's argument.¹⁶⁷ The court stated that the "Term Sheet establishes that Crown has to be conveyed free and clear of claims that can be asserted by any plaintiff or defendant," and that "[t]he account receivable is a claim asserted by George in the Receivership litigation," and thus, not a part of Crown's conveyance.¹⁶⁸

156. *Id.*

157. *Id.* at 1030.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1031.

164. *Id.*

165. *Id.* at 1033.

166. *Id.*

167. *Id.*

168. *Id.*

2. *Interpreting Undefined Concepts.*—In *Singleton v. Fifth Third Bank*,¹⁶⁹ the court held that a party satisfied a requirement that he “make payments” when he initiated a wire transfer on the due date.¹⁷⁰ In *Singleton*, the appellant, Singleton, faced foreclosure of his mortgages when Fifth Third filed against him.¹⁷¹ In order to avoid foreclosure, Singleton entered into a forbearance agreement with the bank.¹⁷² The agreement provided for fixed payments on specific dates.¹⁷³ On the date that the penultimate payment was due, Singleton initiated a wire transfer from his bank in the late afternoon and the payment was not received until the next day.¹⁷⁴ The trial court held that because the agreement required only that the payments be “paid by” the due date, Singleton had fulfilled his obligation.¹⁷⁵

The following month, the situation repeated itself: Singleton wired his payment late on the due date, and the payment was not received until the following day.¹⁷⁶ Again, the parties returned to the trial court and reiterated their prior arguments.¹⁷⁷ The trial court held that because Singleton had chosen to replicate the previous problem, Fifth Third was entitled to prevail.¹⁷⁸

On appeal, the court returned to the trial court’s original reasoning and held that the act of initiating the transfer was sufficient to constitute making payment.¹⁷⁹ Because the agreement was silent regarding the required method of transfer and the method of determining when a payment was made, the court of appeals refused to read into the agreement any requirement that the other party *receive* the payment on that date.¹⁸⁰ The court of appeals reversed the trial court’s ruling in favor of Fifth Third.

C. Indemnification Language

In *Flaherty & Collins, Inc. v. BBR-Vision I, L.P.*,¹⁸¹ the court addressed the issue of whether the parties’ indemnification agreement required the defendant to pay the plaintiff’s attorney fees arising from the plaintiff’s first-party action against the defendant.¹⁸² The basis for the plaintiff’s claim was the indemnification agreement in the parties’ management agreement, which provided:

169. 977 N.E.2d 958 (Ind. Ct. App. 2012).

170. *See generally id.*

171. *Id.* at 960.

172. *Id.*

173. *Id.*

174. *Id.* at 961.

175. *Id.* at 962.

176. *Id.* at 963.

177. *Id.* at 964.

178. *Id.* at 965.

179. *Id.* at 970.

180. *Id.*

181. 990 N.E.2d 958 (Ind. Ct. App.), *trans. denied*, 990 N.E.2d 958 (Ind. 2013).

182. *Id.* at 967.

[Defendant] shall indemnify and defend [Plaintiff] against and hold [Plaintiff] harmless from any and all losses, costs, damages, liabilities and expenses, including, *without limitation*, loss or recapture of tax credits and reasonable [attorney] fees, *arising directly or indirectly out of (i) any intentional or material breach by [Defendant] of this Agreement . . . , (ii) any negligence, willful misconduct or illegal acts of [Defendant], or any of its officers, partners, directors, agents, or employees, in connection with this Agreement . . .*¹⁸³

The court initially noted that “indemnification clauses are strictly construed and the intent to indemnify must be stated in clear and unequivocal terms.”¹⁸⁴ The general rule is that such clauses “cover ‘the risk of harm sustained by *third persons* that might be caused by either the indemnitor or indemnitee.”¹⁸⁵ However such indemnification is permitted where the plain language of the provision requires first-party indemnification.¹⁸⁶

The plaintiff pointed to the following language in the indemnification clause as supporting its claim for attorney fees: “*without limitation . . . arising directly or indirectly out of (i) any intentional or material breach by [Defendant] of this Agreement.*”¹⁸⁷ However, the court found that this language appeared “to be an attempt to ensure that all types of third-party damages be paid by [defendant] upon its breach of the management agreement.”¹⁸⁸ The court did not find that the agreement stated “the intent to indemnify against first-party actions in clear and unequivocal terms.”¹⁸⁹ The court noted that the agreement did not explicitly or implicitly refer to such actions, and thus, did “not create an exception to the general rule that an indemnity clause creates liability to pay only for third-party actions.”¹⁹⁰

D. Implied Contracts Between a University and Its Students

In *Chang v. Purdue University*,¹⁹¹ the court evaluated, *inter alia*, whether a university’s failure to precisely adhere to the implied contract that exists with its students is an actionable breach of contract.¹⁹² Chang brought her suit after she was dismissed from the nursing program at Indiana University-Purdue University

183. *Id.* (emphasis added).

184. *Id.*

185. *Id.* (citing *L.H. Controls, Inc. v. Custom Conveyor, Inc.*, 974 N.E.2d 1031, 1046 (Ind. Ct. App. 2012)) (emphasis added).

186. *Id.* (citing *Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist.*, 768 N.E.2d 1216, 1229 (Ind. Ct. App. 2003), *denying motion to certify* (2002)).

187. *Id.* at 967-68.

188. *Id.* at 968.

189. *Id.*

190. *Id.*

191. 985 N.E.2d 35 (Ind. Ct. App. 2013), *trans. denied*, 985 N.E.2d 35 (Ind. 2014).

192. *See generally id.*

at Fort Wayne (IPFW) for unprofessional conduct.¹⁹³ Chang argued that IPFW violated her due process rights by not following all of the procedures outlined in the Purdue Code and the IPFW code.¹⁹⁴

The court first noted that it is generally accepted that a contract is formed between students and a university by the “catalogues, bulletins, circulars, and regulations that are made available to its students.”¹⁹⁵ However, courts use extreme restraint before applying rigid contract rules to the academic community.¹⁹⁶ “Absent a showing of bad faith on the part of the university or a professor, the court will not interfere.”¹⁹⁷ “Bad faith in this context ‘is not simply bad judgment or negligence[, r]ather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.’”¹⁹⁸ Thus, the court interpreted its sole function to be determining “whether the educational institution acted illegally, arbitrarily, capriciously, or in bad faith.”¹⁹⁹

Ultimately, the court found that Chang had been given notice of her hearing and the opportunity to present her side of the story, of which she availed herself.²⁰⁰ Three times, Chang had the opportunity to appeal and present her version.²⁰¹ Three times her dismissal was upheld.²⁰² In light of these proceedings, the court held that there was insufficient evidence to establish that Chang’s dismissal was “arbitrary, capricious, or made in bad faith.”²⁰³ Further, because Chang had a meaningful post-deprivation remedy, civil rights claims could not be brought against the individuals responsible for her dismissal.²⁰⁴

Additionally, the court held that Chang failed to meet the Indiana Torts Claims Act notice requirements.²⁰⁵ The court noted that substantial compliance might be found in some instances where a claimant has failed to fully comply with the requirements.²⁰⁶ But, in cases where the claimant has failed even to attempt to comply, substantial compliance cannot be found.²⁰⁷

Because the court held that Chang failed to comply with the notice requirements, and because the University violated neither the contract nor Chang’s due process rights, the lower court’s judgment was affirmed.²⁰⁸

193. *Id.* at 44.

194. *Id.*

195. *Id.* at 46.

196. *Id.*

197. *Id.* at 47 (internal quotations and citations omitted).

198. *Id.* (internal quotations and citations omitted).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 48.

204. *Id.* at 49.

205. *Id.* at 54.

206. *Id.*

207. *Id.*

208. *Id.* at 55.

E. Exculpatory Clauses and Public Policy

In *Geller v. Kinney*,²⁰⁹ the court evaluated whether an exculpatory clause in a contract was sufficient to shield a leasing agent from liability for breaching his or her statutory duties and obligations to the landlord.²¹⁰

In *Geller*, the trial court found that the leasing agent breached his or her obligations by failing to disclose adverse material facts or risks regarding potential tenants.²¹¹ However, the parties' agreement exempted the leasing agent from liability for "any error in judgment" and for "any good faith act or omission in its performance . . . of any of its duties or obligations."²¹² Therefore, the trial court held that the exculpatory clause shielded the leasing agent from liability.²¹³

The court of appeals agreed with the trial court's conclusion, but differed in its rationale: the exculpatory clause was sufficient as long as it was not contrary to public policy.²¹⁴ Whether or not a contract is unenforceable as a matter of public policy depends on consideration of five factors:

- (i) the nature of the subject matter of the contract; (ii) the strength of the public policy underlying the statute; (iii) the likelihood that refusal to enforce the bargain or term will further that policy; (iv) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (v) the parties' relative bargaining power and freedom to contract.²¹⁵

The court held that the exculpatory clause was not unenforceable as a matter of public policy because though there is a strong public policy at play in the statute, it does not prohibit exculpatory clauses.²¹⁶ Further, the exculpatory clause at issue here was limited to "error[s] in judgment" and "'good faith' breaches."²¹⁷ Thus, the court held that the leasing agent was entitled to judgment.²¹⁸

F. Sufficiency of Consideration

In *Pistalo v. Progressive Casualty Insurance Co.*,²¹⁹ the court evaluated whether the waiver of a right to collect an uncollectable judgment constitutes sufficient consideration for an assignment of rights.²²⁰ Slavojka Pistalo had been

209. *Geller v. Kinney*, 980 N.E.2d 390 (Ind. Ct. App. 2012).

210. *See generally id.*

211. *Id.* at 396.

212. *Id.* at 395.

213. *Id.* at 396.

214. *Id.* at 397.

215. *Id.* at 397-98.

216. *Id.* at 398.

217. *Id.*

218. *Id.*

219. 983 N.E.2d 152 (Ind. Ct. App. 2012), *trans. denied*, 986, N.E.2d 820 (Ind. 2013).

220. *See generally id.*

previously injured in an automobile accident that was the fault of Iris Wilks.²²¹ After Wilks' death, a trial court found that she was liable for Pistalo's injuries.²²² The damages added up to more than \$300,000, however Wilks' insurance policy with Progressive had a policy limit of \$100,000.²²³

Pistalo believed that Progressive had failed to negotiate in good faith prior to trial.²²⁴ Based on this belief, she sought and received an assignment of the Wilks Estate's rights against Progressive in exchange for agreeing to forgo executing her judgment against the estate.²²⁵ Progressive argued that the latter was insufficient consideration because the estate had no assets against which the judgment could have been pursued.²²⁶ However, the court held that a right to execute a judgment constitutes sufficient consideration regardless of its collectability.²²⁷ Thus, the assignment was supported by valid consideration and Pistalo could pursue the claim against Progressive.²²⁸

G. Mitigation of Damages

Returning to *Geller v. Kinney*,²²⁹ the court also evaluated whether a landlord could recover the full value of a breached lease despite having sold the property after the termination of the lease but before the expiration of the lease term.²³⁰ In awarding damages to the Gellers for the breach of the lease, the trial court declined to grant damages beyond the time at which the Gellers sold the property.²³¹ Thus, they were able to recover only the value of the lease for the period in which they owned the property rather than the full value of the breached lease.²³² Before the court of appeals, the Gellers argued that under the lease agreement they were not required to mitigate their damages and they were entitled to collect the full value of the lease regardless of whether or not they mitigated their damages.²³³

The court pointed out that the Gellers' arguments ignored the fact that the duty to mitigate is "a common law duty independent of the contract terms."²³⁴ The court held that unless expressly disclaimed, the applicable law in force at the

221. *Id.* at 155.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 160.

226. *Id.*

227. *Id.*

228. *Id.*

229. 980 N.E.2d 390, 398 (Ind. Ct. App. 2012).

230. *See generally id.*

231. *Id.* at 395.

232. *Id.*

233. *Id.* at 399.

234. *Id.*

time of the agreement is impliedly made a part of that agreement.²³⁵ Because the agreement did not expressly negate the common law duty to mitigate, the Gellers were not relieved of the duty, and “the breaching party [was therefore] entitled to set off the amount of the damages mitigated.”²³⁶ Therefore, the trial court’s judgment was affirmed.²³⁷

H. Liquidated Damages

In *Weinreb v. Fannie Mae*,²³⁸ the court addressed the effect of non-recourse carve-out provisions and prepayment premiums for the first time in Indiana.²³⁹ Non-recourse carve-out provisions “transform what is otherwise a non-recourse loan into a full recourse loan, ‘enabling the creditor to look beyond simply the mortgaged property for repayment of the loan.’”²⁴⁰ Prepayment premiums attempt to account for the lost interest payments that a lender suffers when a loan is prepaid.²⁴¹

In the instant case, Weinreb purchased an investment property in Indianapolis via his LLC, and he financed the purchase with a commercial loan through Fannie Mae.²⁴² Ultimately, Fannie Mae declared the note to be in default due to the failure to release mechanic’s liens and make monthly installments.²⁴³ In the mortgage, the non-recourse carve-out provisions gave Fannie Mae the ability to accelerate the loan in the event of a default by Weinreb, and the prepayment premiums provision purported to be “an estimate ‘of the damages [Fannie Mae] will incur because of a prepayment.’”²⁴⁴

At the trial court, Fannie Mae was awarded summary judgment in the amount of nearly \$8 million, including the prepayment premium.²⁴⁵ The court of appeals first held that the non-recourse carve-out provisions were not liquidated damages provisions because they only defined the situations in which full repayment of “all of the Indebtedness” became due.²⁴⁶ Thus, because they only permit the lender to recover the damages that have actually been sustained and define the conditions in which personal liability will result, they are neither penalty nor liquidated-damages provision.²⁴⁷

The court further held that the prepayment premium constituted a liquidated

235. *Id.*

236. *Id.*

237. *Id.* at 400.

238. 993 N.E.2d 223 (Ind. Ct. App.), *trans. denied*, 998 N.E.2d 213 (Ind. 2013).

239. *See generally id.*

240. *Id.* at 233 (internal quotation omitted).

241. *Id.*

242. *Id.* at 226.

243. *Id.*

244. *Id.* at 228.

245. *Id.*

246. *Id.* at 233.

247. *Id.*

damages provision because it was a forecast of damages that would result from a prepayment rather than a penalty intended to secure performance.²⁴⁸ Though the premium amounted to twenty-five percent of the outstanding principal, the court held that this was not sufficiently disproportionate to render it unenforceable.²⁴⁹ While an enforcing party must demonstrate proportionality, the relevant comparison is between the prepayment premium and “the projected loss at the time of contracting.”²⁵⁰ Because the prepayment of the loan occurred so early in the loan period, the lender was deprived of a substantial amount of interest, and therefore the prepayment premium was not grossly disproportionate to the loss suffered.²⁵¹

VII. EQUITABLE REMEDIES

In *Kohl’s Indiana, L.P. v. Owens*,²⁵² the court held that Kohl’s could not recover against a county Plan Commission on the basis of contribution where that commission had not accepted any common duty.²⁵³ Nor could they recover against the Board of Commissioners for the cost of completing a building project under a theory of unjust enrichment where the agreement between the parties was controlled by an express contract.²⁵⁴

In 2004, the Plan Commission approved an application for the construction of a new Kohl’s store.²⁵⁵ In 2005, the Board of Commissioners entered into an agreement with Kohl’s in which Kohl’s agreed to improve and reconstruct a road.²⁵⁶ After the original developer, Owens, failed to complete the project, Kohl’s completed it.²⁵⁷

After completing the project, Kohl’s brought suit against the Plan Commission and the Board of Commissioners.²⁵⁸ Against both defendants, Kohl’s brought claims under the doctrine of contribution, and claims under the doctrine of implied contract or unjust enrichment (*quantum meruit*).²⁵⁹ After the trial court entered summary judgment for the defendants, Kohl’s appealed.

A. Contribution

The court held that the Plan Commission had not accepted a common obligation to complete the project simply because they had required, and been the

248. *Id.* at 234.

249. *Id.*

250. *Id.*

251. *Id.*

252. 979 N.E.2d 159 (Ind. Ct. App. 2012).

253. *Id.* at 166.

254. *Id.* at 167-68.

255. *Id.* at 162.

256. *Id.*

257. *Id.*

258. *Id.* at 163.

259. *Id.*

beneficiary of, letters of credit taken out by the developer who failed to complete the project.²⁶⁰ Because the Plan Commission did not have a common duty with Kohl's, they could not be liable to Kohl's for contribution.²⁶¹

Further, the court held that because there was an agreement between Kohl's and the Board of Commissioners, which stated that Kohl's had the obligation of reconstructing and improving the road, the doctrine of contribution could not be used to find an obligation on the part of the Board of Commissioners.²⁶²

B. Unjust Enrichment

Kohl's could not sustain an argument for unjust enrichment against the Plan Commission because there was no evidence of a benefit conferred upon the Plan Commission with their express or implied consent.²⁶³ "When the rights of the parties are controlled by an express contract, recovery cannot be based on a theory implied in law."²⁶⁴ Thus, because the relationship between the Board of Commissioners and Kohl's was controlled by an express contract, this recovery was not available to Kohls.²⁶⁵

VIII. DEFENSES

A. Good Faith Purchaser

In *Brinkley v. Haluska*,²⁶⁶ the court evaluated whether a purchaser of a car on eBay was a good faith purchaser for value when there was a lawsuit regarding the vehicle in progress at the time of the sale.²⁶⁷ There, the purchaser, Gindelberger, purchased the disputed vehicle on eBay from Haluska, who was not the rightful owner of the vehicle.²⁶⁸ Because a defrauding buyer has voidable but not void title, the only question was whether Gindelberger was a good faith purchaser for value and could therefore obtain good title.²⁶⁹

The court defined good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing."²⁷⁰ The court acknowledged that, in the real estate context, a buyer is presumed to have notice of all properly recorded instruments in the chain of title and lis pendens notices give a buyer

260. *Id.* at 164.

261. *Id.*

262. *Id.* at 165.

263. *Id.* at 168.

264. *Id.*

265. *Id.*

266. 982 N.E.2d 1019 (Ind. Ct. App. 2012), *reh'g denied* (Feb. 12, 2013), *trans. denied*, 987 N.E.2d 522 (Ind. 2013).

267. *Id.* at 1023.

268. *Id.* at 1021.

269. *Id.* at 1022.

270. *Id.* (quoting IND. CODE § 26-1-1-201 (2007)).

notice of pending litigation.²⁷¹ In the absence of case law however, the court declined to recognize any presumption of notice for vehicles and pointed out that there is no such thing as a *lis pendens* notice for vehicles.²⁷² Further, the court held that the buyer had no obligation to “get to know” the seller.²⁷³ Thus, the trial court properly granted summary judgment to Gindelberger on the grounds that he was a good faith purchaser for value and the court of appeals affirmed.²⁷⁴

B. Caveat Emptor

In *Johnson v. Wysocki*,²⁷⁵ the Indiana Supreme Court evaluated whether Indiana’s Residential Real Estate Sales Disclosure Act abrogated the common law doctrine of *caveat emptor* for real estate purchases where a seller knowingly makes a fraudulent misrepresentation in statutorily required disclosures.²⁷⁶

The sellers, Mr. and Mrs. Johnson, sold their property to the Wysockis, and to do so, executed a Disclosure form stating that there were no building code violations, permit violations, foundational or structural problems, moisture problems, or leaks in the roof.²⁷⁷ The buyers then ordered an inspection, which identified no problems, and the sale went through.²⁷⁸ After taking possession, the buyers began to notice problems.²⁷⁹ Among other things, the roof leaked, the pool was improperly wired, and the patio’s structure was unsound.²⁸⁰

After a bench trial, the trial court awarded the buyers damages for the cost of repairing all of the problems.²⁸¹ However, the court of appeals reversed the judgment on the grounds that the buyers had not shown that the sellers had actual knowledge of the defects.²⁸²

The court cited back to the 19th century for the proposition that the law of Indiana has long been “the purchaser has no right to rely upon the representations of a vendor as to the quality of the property, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities.”²⁸³ Further, the Disclosure Act explicitly states that the disclosure forms do not create a warranty by the owner, that the disclosure forms do not substitute for inspections, and that the owner is not liable for errors or omissions

271. *Id.* at 1023.

272. *Id.*

273. *Id.*

274. *Id.* at 1026.

275. 990 N.E.2d 456 (Ind. 2013), *trans. granted* 11 N.E.3d 923 (Ind. 2014).

276. *Id.* at 459.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 459-60.

281. *Id.* at 460.

282. *Id.*

283. *Id.* at 461 (quoting *Cagney v. Cuson*, 77 Ind. 494, 497 (1881)).

outside of his actual knowledge or based on the knowledge of another.²⁸⁴

Nonetheless, the court held that the Act clearly contemplated seller liability for knowing errors or omissions in the disclosures.²⁸⁵ Rather than create new liability for sellers, this approach is in keeping with the common law, which already held that sellers could be liable for fraudulent misrepresentations when a buyer makes an inquiry.²⁸⁶ The Act merely “relieved the buyer of needing to initiate a specific inquiry in order to get honest disclosure about significant features of a purchase.”²⁸⁷ Thus, the court held that “the seller may be liable for fraudulent misrepresentations made on the Disclosure Form when he or she had actual knowledge that the representation was false at the time he or she completed the form.”²⁸⁸ The court then remanded the case to the trial court for consideration of whether the sellers had actual knowledge.²⁸⁹

IX. TRIAL AND APPELLATE PROCEDURE

A. *Res Judicata and Collateral Estoppel*

Also in *Weinreb*,²⁹⁰ the court of appeals evaluated whether the doctrines of *res judicata* and collateral estoppel preclude a litigant from contesting his own liability when judgment has been rendered in a prior claim involving the same claim against an LLC of which the litigant is one of six or seven members.²⁹¹ There, *Weinreb* had been erroneously named in the initial complaint, but removed from the case by the trial court.²⁹² At that time, the trial court stated that claims against *Weinreb* could be pursued at a later date.²⁹³ However, Fannie Mae attempted to prevent *Weinreb* from contesting his own liability for the foreclosure based on the note and his guaranty.²⁹⁴

The court of appeals stated that four factors must be present in order to find claim preclusion:

- (1) the former judgment must have been rendered by a court of competent jurisdiction;
- (2) the former judgment must have been rendered on the merits;
- (3) the matter now in issue was, or could have been, determined in the prior action; and
- (4) the controversy adjudicated in the former action must have been between parties to the present suit or their

284. *Id.* at 461-62.

285. *Id.* at 463.

286. *Id.* at 465.

287. *Id.*

288. *Id.* at 466.

289. *Id.* at 467.

290. *See generally* *Weinreb v. Fannie Mae*, 993 N.E.2d 223 (Ind. Ct. App.), *trans. denied*, 998 N.E.2d 223 (Ind. 2013).

291. *See generally id.*

292. *Id.* at 228.

293. *Id.*

294. *Id.*

privies.²⁹⁵

Though the court acknowledged that claim preclusion might sometimes apply against an owner of a closely held corporation based on a prior action against the corporation, the court noted that Weinreb did not sign the note in question and did not negotiate the financing.²⁹⁶ Thus there was not sufficient evidence to find that Weinreb was a party to the prior proceeding.²⁹⁷ Further, because Weinreb was explicitly excluded from the prior action, the court concluded that Fannie Mae had not established privity either.²⁹⁸

Finally and for the same reasons, the court held that claim preclusion also did not apply against Weinreb because he did not have a full and fair opportunity to litigate the enforceability of the note or his guaranty.²⁹⁹

B. Venue Selection

In *City of Carmel ex rel. Redevelopment Commission v. Crider & Crider, Inc.*,³⁰⁰ the court of appeals addressed the applicability of a venue selection clause to a case brought by a third-party with no contractual relationship to the party moving for transfer.³⁰¹ There, the appellant, the City of Carmel had hired a contractor to perform limestone and concrete work, and the city and the contractor signed a contract that designated Hamilton County as the preferred venue for litigation.³⁰² The contractor in turn hired a subcontractor, but without reducing the agreement to writing.³⁰³ Ultimately, the subcontractor sued both the contractor and the City, and the contractor filed a cross-claim against the City.³⁰⁴

The court acknowledged that a third-party is ordinarily not bound by agreements that they are not party to.³⁰⁵ However, in the instant case, because the contractor brought a cross-claim against the City, because Hamilton County was the appropriate venue for any litigation between the contractor and the city, and because the original complaint and the cross-claim were “inextricably intertwined” and needed to be decided together, the trial court abused its discretion by failing to transfer the matter to Hamilton County.³⁰⁶

295. *Id.* at 229.

296. *Id.*

297. *Id.* at 230.

298. *Id.*

299. *Id.* at 231.

300. 988 N.E.2d 808 (Ind. Ct. App.), *trans. denied*, 993 N.E.2d 1150 (Ind. 2013).

301. *See generally id.*

302. *Id.* at 809.

303. *Id.*

304. *Id.*

305. *Id.* at 810-11.

306. *Id.* at 811.

C. Relief from Agreed Judgment

In *Wagler v. West Boggs Sewer District, Inc.*,³⁰⁷ the court of appeals addressed whether a party was entitled to relief from an agreed judgment under Indiana Rules of Trial Procedure 60(B) on the grounds that the agreed judgment violated their religious liberty and multiple contractual doctrines.³⁰⁸

The Wagler family belongs to an Old Order Amish community in Loogootee, Indiana, and as such, holds themselves apart from society.³⁰⁹ The West Boggs Sewer District is a not-for-profit utility, which sought, pursuant to statute, to require the Waglers to connect to the sewer system. Ultimately, the Waglers refused to do so and West Boggs brought suit.³¹⁰ Eventually, the Waglers' attorney reached an agreement with West Boggs, and the court issued an agreed entry and judgment.³¹¹

Unfortunately, the Waglers failed to comply with the terms of the agreement (i.e., that they connect to the sewer system), and West Boggs again sought relief from the court.³¹² At that time, the Waglers, with new counsel, filed motions to set aside the judgment pursuant to Indiana Rules of Trial Procedure 60(B)(8), which the trial court denied.³¹³

The court of appeals began by noting that the Waglers' briefing was far below the court's standards and failed in many areas to present cogent arguments.³¹⁴ Nonetheless, the court undertook to evaluate the merits of their arguments.³¹⁵

The court held that it is a well-known premise that a trial court may not materially modify an agreed judgment after it has been entered.³¹⁶ Despite this, the court evaluated whether exceptional circumstances might exist in the instant case that would justify exceptional relief.³¹⁷ The court held that arguments of duress, unconscionability, and impossibility were all without merit because the Waglers agreed to the judgments while represented by counsel and they did not articulate a basis upon which their religious beliefs could render the judgment unconscionable or impossible.³¹⁸ Further, the Waglers could not sustain an argument that they did not receive consideration for their agreement because they did in fact receive a benefit: West Boggs agreed to maintain parts of the system

307. 980 N.E.2d 363 (Ind. Ct. App. 2013).

308. IND. R. OF TRIAL P. 60(B) (2014).

309. *Wagle*, 980 N.E.2d at 368.

310. *Id.* at 367-68.

311. *Id.* at 368.

312. *Id.*

313. *Id.*

314. *Id.* at 375.

315. *Id.*

316. *Id.* at 376.

317. *Id.* at 377.

318. *Id.* at 378-79.

and the Waglers avoided having to go to court.³¹⁹ In light of the foregoing reasoning, the court held that the Waglers were not entitled to relief under Indiana Rules of Trial Procedure 60(B)(8) and affirmed the trial court's holding.³²⁰

X. ABANDONMENT OF PARTNERSHIP AGREEMENTS

In *Estate of Kappel v. Kappel*,³²¹ the court found that two brothers who had entered into a partnership agreement abandoned their 1973 partnership agreement.³²² In that case, Nathaniel and William were each fifty percent owners of Kappel Brothers.³²³ In the partnership agreement, the brothers agreed not to sell their interest to any third party, and, upon the death of a partner, the surviving partner "shall purchase the deceased party's entire interest in the partnership business"; the purchase price was to be determined by a stipulated value.³²⁴ They agreed that "[w]ithin 30 days following the end of each fiscal year of the partnership, the parties shall stipulate the value of said partnership business, and shall endorse such value on Schedule A attached hereto."³²⁵ In the event the brothers failed to stipulate to a value, the partnership agreement provided a default procedure for determining the value.³²⁶ Each party also agreed to "apply the proceeds of the insurance policy owned by him to purchase the partnership interest of the deceased party."³²⁷

In 1993, Nathaniel executed his Last Will and Testament and stated his intention to leave his interest in the partnership, and the proceeds of his life insurance policy, to his children.³²⁸ In 1996, William and Nathaniel purchased life insurance policies on the other's life in the amount of \$750 thousand.³²⁹ Nathaniel died in 2004.³³⁰ This suit ensued when Nathaniel's estate and William disagreed as to who was entitled to Nathaniel's life insurance proceeds.³³¹ The policy was paid to William in accordance with the terms of that policy contract, but the estate claimed that William was required to tender that amount to Nathaniel's estate under the terms of the 1973 partnership agreement.³³²

The probate court found that "[a]s of 2004, the brothers had abandoned the original partnership agreement, having conducted their business in a manner

319. *Id.* at 379.

320. *Id.* at 385.

321. 979 N.E.2d 642 (Ind. Ct. App. 2012).

322. *Id.* at 653.

323. *Id.* at 646.

324. *Id.*

325. *Id.* at 647.

326. *Id.*

327. *Id.*

328. *Id.* at 648.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 652.

inconsistent with maintaining the agreement, for example, bringing in a new partner and failing to observe the formalities (valuation and listing of insurance policies) contemplated by the agreement.”³³³ Thus, the probate court held that the \$750,000 proceeds from the life insurance policy were not property of the estate.³³⁴ The appellate court affirmed.³³⁵

The court explained that “[t]he abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted.”³³⁶ The court continued that “[a]bandonment may be inferred from the conduct of the parties, and a contract will be treated as abandoned when one party acts inconsistently with the existence of the contract, and the other party acquiesces.”³³⁷ The court of appeals held that, because the brothers did not create and maintain a schedule to list insurance policies under the 1973 agreement, did not annually update the partnership valuation, and welcomed a third party in the partnership, they had abandoned the partnership agreement.³³⁸ The court found it irrelevant that there may have been evidence showing that the intent of Nathaniel and William in purchasing the 1996 life insurance policies was for the purpose of complying with the buy-sell provisions of the 1973 partnership agreement; the probate court was entitled to weigh the conflicting evidence in finding an intent to abandon.³³⁹

333. *Id.* at 650.

334. *Id.*

335. *Id.* at 652.

336. *Id.* (internal quotation marks omitted) (quoting *Baker v. Estate of Seat*, 611 N.E.2d 149, 152 (Ind. Ct. App. 1993)).

337. *Id.*

338. *Id.* at 653.

339. *Id.*

