

# BANKING, BUSINESS, AND CONTRACT LAW

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This Article describes in some detail an important statute enacted by the 2017 session of the Indiana General Assembly and surveys banking, business, and contract law decisions made by the Indiana Supreme Court and Indiana Court of Appeals between September 1, 2016, and August 31, 2017. This Article includes discussion of many so-called not-for-publication “memorandum” decisions of the court of appeals because such decisions often establish new law; clarify, modify, or criticize existing law; or involve legal or factual issues of unique interest or substantial public importance. Whatever the appellate rules are at the moment about the citation of memorandum decisions, they contain critical guidance on Indiana law and cannot be ignored.<sup>1</sup>

This Article will itemize neither every statutory change nor every such appellate case involving banking, business, and contract law decided during the survey period. Instead, it will highlight the big-picture issues in these fields as well as some practice pointers for both transactions lawyers and litigators.

## I. BUSINESS ENTITY STATUTE HARMONIZATION

On April 21, Governor Eric Holcomb signed into law an enactment of the General Assembly<sup>2</sup> that Secretary of State Connie Lawson called “the most far-reaching revision of Indiana business laws in more than two decades.”<sup>3</sup> The new act consolidates in a single place in the Indiana Code and harmonizes certain administrative provisions and provisions governing transactions that had

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1. Indiana Appellate Rule 65 provides decisions of the Indiana Court of Appeals that are not published in West’s Northeastern Reporter “shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.” IND. R. APP. P. 65.

2. Pub. L. No. 118-2017, S.E.A. No. 443 (2017).

3. *Press Release, Lawson hails new act that modernizes business laws New law simplifies business formation and creates consistent rules for business*, IN.GOV (Apr. 24, 2017), <https://calendar.in.gov/site/sos/event/sos-lawson-hails-new-act-that-modernizes-business-laws-new-law-simplifies-business-formation-and-creates-consistent-rules-for-business/> [<https://perma.cc/FMP8-LD52>].

previously been contained in five different business entity statutes. Although the new law does not bring about much substantive change, it contains an unprecedented amount of procedural simplification.

### *A. Introduction*

The Indiana General Assembly established the Indiana Business Law Survey Commission in 1988 to make recommendations for improvements to the state's corporation and other business entity statutes.<sup>4</sup> During the survey period, the Commission recommended and the Legislature enacted during its 2017 session an ambitious project to consolidate and harmonize provisions of our state's five principal current business entity statutes. I will refer to the new law as the "Harmonization Act."<sup>5</sup>

The Harmonization Act was adopted by the Legislature as Senate Bill 443 and became Public Law 118-2017. It has two principal sections:

- Section 5 Uniform Business Organizations Administrative Provisions Act, nicknamed the "HUB"<sup>6</sup>; and
- Section 6 Uniform Business Organization Transactions Act, nicknamed "META."<sup>7</sup>

The bill took existing provisions dealing with business filings, names, registered agents, foreign entities, and administrative dissolution from five different business entity statutes, reconciled them, and placed them in the HUB, a single location in the Indiana Code – essentially twenty eight chapters of the Indiana Code consolidated into six!<sup>8</sup>

The bill also took certain existing provisions dealing with business mergers, interest exchanges, conversions, and domestications from these statutes, made them identical to each other to the extent possible, and placed them in META, a single location in the Indiana Code – essentially ten chapters of the Indiana Code consolidated into four.<sup>9</sup>

Indiana's five principal business entity statutes that are the subject of the Harmonization Act were enacted at different times and all had been amended frequently.

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4. IND. CODE § 23-1-54-3, as added by Pub. L. No. 145-1988, § 9 (1988).

5. The 2018 session of the General Assembly enacted and Governor Holcomb signed into law certain amendments to the Harmonization Act, primarily making technical corrections to the act as passed in 2017. Pub. L. No. 52-2018, S.E.A. No. 180 (2018). Although adopted outside the survey period, the description and discussion of the Harmonization Act in this Article includes amendments adopted in 2018 unless specifically noted or the context otherwise requires.

6. IND. CODE § 23-0.5-1 (2017).

7. *Id.* § 23-0.6-1

8. *Id.* § 23-0.5-1. The five business entity statutes are those governing corporations (Ind. Code § 23-1-17 through 54); limited liability partnerships (Ind. Code § 23-4-1-15 and 23-4-1-44 through 52); limited partnerships (Ind. Code § 23-16); non-profit corporations (Ind. Code § 23-17); and limited liability companies (Ind. Code § 23-18).

9. *Id.* § 23-0.6-1.

The oldest of these is the Indiana Uniform Partnership Act (“UPA”), governing general partnerships.<sup>10</sup> The genesis of the UPA was the Uniform Partnership Act developed by the National Commission on Uniform State Laws (“Uniform Law Commission” or “ULC”).<sup>11</sup> Of particular significance for the Harmonization Act project was the addition to the Indiana UPA in 1995 of provisions authorizing and governing limited liability partnerships (“LLPs”).<sup>12</sup>

The landmark Indiana Business Corporation Law (“BCL”) was enacted by the legislature in 1986.<sup>13</sup> Derived from the American Bar Association’s Model Business Corporation Act, the Indiana BCL contained many substantive changes from prior Indiana corporate law, including a corporate governance provision of national significance.<sup>14</sup> Also within the ambit of the Harmonization Act are professional corporations (“PCs”), first authorized in 1983, and benefit corporations, first authorized in 2015.<sup>15</sup>

Limited partnerships (“LPs”) are authorized and governed by the Indiana Limited Partnership Act, enacted by the General Assembly in 1988 based upon the ULC’s Revised Uniform Limited Partnership Act of 1976 as amended.<sup>16</sup> Non-profit corporations (“NFPs”) are authorized and governed by article 17 of title 23 of the Indiana Code, enacted by the General Assembly in 1991 based upon the ABA’s 1988 Revised Model Nonprofit Corporation Act.<sup>17</sup>

Limited Liability Companies (“LLCs”) are authorized and governed by the Indiana Business Flexibility Act, enacted by the General Assembly in 1993 based in part upon the ABA’s 1992 Prototype Limited Liability Company Act.<sup>18</sup> Also

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10. IND. CODE § 23-4-1 (1987).

11. For information on the Uniform Law Commission, also known as The National Conference of Commissioners on Uniform State Laws, see *About Us*, UNIF. LAW COMM’N <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> [<https://perma.cc/E9FD-NZ23>] (last visited Nov. 4, 2018). The Commission is a national body in which Indiana plays an active role. It is the source of Indiana’s partnership act and limited partnership act, the Uniform Commercial Code, and dozens of other statutes adopted in Indiana. As will be discussed below, it is also the source of the HUB and META legislation.

12. Pub. L. No. 230-1995 (1995).

13. IND. CODE § 23-1-17 to -54 (1986).

14. See Edwin J. Simcox, *The Indiana Business Corporation Law: Tool for Flexibility, Simplicity and Uniformity*, 20 IND. L. REV. 119 (1987); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (rejecting dormant Commerce Clause and pre-emption challenges to the validity of IND. CODE § 23-1-42 (1986). For information on the American Bar Association’s Model Business Corporation Act, see *Corporate Laws Committee*, ABA, <https://apps.americanbar.org/dch/committee.cfm?com=cl270000> [<https://perma.cc/CU5J-6TVQ>] (last visited Nov. 4, 2018).

15. IND. CODE § 23-1.3 (2016); IND. CODE § 23-1.5 (1983).

16. IND. CODE § 23-16 (1988).

17. IND. CODE § 23-17 (2011). For information on the American Bar Association’s Revised Model Nonprofit Corporation Act, see *Nonprofit Organizations: Model Nonprofit Corporation Act Subcommittee*, ABA, <https://apps.americanbar.org/dch/committee.cfm?com=CL580012> [<https://perma.cc/J62H-DK5J>] (last visited Mar. 22, 2018).

18. IND. CODE § 23-18 (2017); AM. BAR ASSOC., WORKING GRP. ON THE PROTOTYPE LTD

within the ambit of the Harmonization Act are Series Limited Liability Companies (“Series LLCs”), authorized by the legislature in 2016: a highly-specialized form of business entity.<sup>19</sup>

In summary, Indiana has these five business entity statutes (plus the statutes covering LLPs, PCs, and Series LLCs) enacted over a period of 100 years. And, of course, these statutes’ respective contents have not remained static; each has been amended from time to time over the years.

As this century-old, five-headed system has evolved, each current entity statute has come to have its own provisions governing:<sup>20</sup>

- ▶ requirements for filings with the Secretary of State;
- ▶ names;
- ▶ registered agents;
- ▶ requirements for foreign entities to do business in Indiana; and
- ▶ administrative dissolution.

These provisions were not necessarily the same, or even consistent, from entity statute to entity statute. Indeed, some entity statutes had provisions on aspects of these subjects where other entity statutes were simply silent. The first part of the Harmonization Act project took these provisions, reconciled them, and placed them in the HUB.<sup>21</sup>

Some harmonization took place over prior years. For example, the Legislature previously placed in article 15 of title 23 certain business law provisions applicable to all business entities, rather than writing those provisions into each current entity statute.<sup>22</sup> As such, article 15 was sort of a “mini-HUB.”

Counterpart developments in the business entity law of other states prompted the Uniform Law Commission<sup>23</sup> to begin a project that would extract the provisions on filings, names, registered agents, foreign entities, and administrative dissolution from the individual entity statutes, make them identical to each other, and put them in a separate statute called Article 1 of the Uniform Business Organizations Code.<sup>24</sup> The Harmonization Act was developed using this

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LIAB. CO. ACT, PROTOTYPE LIMITED LIABILITY COMPANY ACT (1993).

19. IND. CODE § 23-18.1 (2017).

20. *See infra* note 25 and its accompanying table for the principal locations in prior law of the provisions now located in HUB. Detailed tables showing the derivation of HUB provisions from prior law are posted on the website of the Business Services Division of Indiana Secretary of State Connie Lawson at <http://in.gov/sos/business/files/HUB%20META%20Derivation%20Tables%20for%20posting%2013118.pdf> [<https://perma.cc/8Q4T-YTDV>] (last visited Nov. 4, 2018).

21. Katie S. Riles, *The Business Entity Harmonization Act in 30 Seconds or Less*, RILEY BENNETT EGLOFF, LLP (Dec. 22, 2017), <http://www.rbelaw.com/newsroom/the-business-entity-harmonization-act-in-30-seconds-or-less> (last visited Nov. 4, 2018) [<https://perma.cc/8U9U-R9PL>].

22. IND. CODE § 23-15-1 (1987) (repealed 2018).

23. *See supra* note 11.

24. *Article 1 of the Uniform Business Organizations Code (UBOC Hub) (2011) (Last Amended 2013)*, UNIF. LAW COMM’N, [http://www.uniformlaws.org/Act.aspx?title=Article%201%20of%20the%20Uniform%20Business%20Organizations%20Code%20\(UBOC%20Hub\)%20\(2011\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Article%201%20of%20the%20Uniform%20Business%20Organizations%20Code%20(UBOC%20Hub)%20(2011)%20(Last%20Amended%202013)) [<https://perma.cc/DMY5-WFWP>] (last visited Nov. 4, 2018).

ULC product as its base for the HUB article with appropriate changes.

The following table sets forth the principal location in prior law of the provisions now located in HUB.<sup>25</sup>

	HUB Location	Location in prior law –				
		Business Corps.	Limited Liability P'ships	Limited P'ships	Non-Profit Corps.	Limited Liability Cos.
Filing	23-0.5-2	23-1-18	23-4-1-45	23-16-12-5	23-17-29-1	23-18-12-1
Names	23-0.5-3	23-1-23; 23-1-49-6	23-4-1-45	23-16-2-2; 23-16-10-4	23-17-5; 23-17-26-6	23-18-2; 23-18-11-7
Registered Agents	23-0.5-4	23-1-24	23-4-1-50	23-16-2-3	23-17-6	23-18-2
Foreign Entities	23-0.5-5	23-1-49	23-4-1-49	23-16-10	23-17-26	23-18-11
Administrative Dissolution	23-0.5-6	23-1-46	None	None	23-17-23	23-18-10

The second part of the Harmonization Act project took provisions addressing mergers, interest exchanges, conversions, and domestications, reconciled them, and placed them in META.<sup>26</sup>

Prior to 2002, Indiana law authorized mergers between business corporations,<sup>27</sup> share exchanges between business corporations,<sup>28</sup> and mergers between non-profit corporations.<sup>29</sup> In 2002, the Legislature authorized mergers between and among corporations, LLPs, LPs, and LLCs,<sup>30</sup> conversions from one to another of corporations, LLPs, LPs, and LLCs, and domestications of business corporations.<sup>31</sup> In 2014, the Legislature authorized domestications of non-profit

25. See *id.* for detailed tables showing the derivation of HUB provisions from prior law.

26. See *infra* note 32 for the principal locations in prior law of the provisions now located in META; see *supra* note 20 for detailed tables showing the derivation of META provisions from prior law.

27. IND. CODE § 23-1-40-1 (1986).

28. *Id.* § 23-1-40-2 (1986).

29. *Id.* § 23-1-19-1 (1986).

30. IND. CODE § 23-1-40-8(c) (2018), as added by Pub. L. No. 178-2002, § 100 (2002) (mergers between (1) domestic corporations and (2) domestic or foreign LLPs, LPs, or LLCs); IND. CODE § 23-4-1-53(c)(3), as added by Pub. L. No. 178-2002, § 102 (mergers between (1) domestic LLPs and (2) domestic or foreign corporations, LLPs, LPs, or LLCs). *Id.* § 23-16-3-13(c), as added by Pub. L. No. 178-2002, § 104 (2002) (mergers between (1) domestic LPs and (2) domestic or foreign corporations, LLPs, LPs, or LLCs); and *id.* § 23-18-7-9(c), as added by Pub. L. No. 178-2002, § 106 (2002) (mergers between (1) domestic LLCs and (2) domestic or foreign corporations, LLPs, LPs, or LLCs).

31. *Id.* § 23-1-38.5, as added by Pub. L. No. 178-2002, § 99 (2002).

corporations.<sup>32</sup>

Prior to the Harmonization Act, the following transactions were not authorized: interest exchanges between corporations and LLPs, LPs, and LLCs; interest exchanges between and among LLPs, LPs, and LLCs; and domestications of LLPs, LPs, and LLCs.

Once again, the Uniform Law Commission had addressed this subject and the ULC's Model Entity Transactions Act, in one consolidated statute, authorizes and governs mergers, interest exchanges, conversions, and domestications, including the transactions listed in the preceding paragraph that had not previously been authorized in Indiana.<sup>33</sup> The Harmonization Act was developed using this ULC product as its base for its META article with appropriate changes.

The following table sets forth the principal location in prior law of the provisions now located in META.<sup>34</sup>

	META Location	Location in prior law –				
		Business Corps.	Limited Liability P'ships	Limited P'ships	Non-Profit Corps.	Limited Liability Cos.
Mergers between corporations	No change from prior law	23-1-40-1	NA	NA	23-17-19	NA
Mergers between entities of the same type (except mergers between corporations)	23-0.6-2	NA	23-4-1-53	23-16-3-12	NA	23-1-7-1
Cross-species mergers	23-0.6-2	23-1-40-8	23-4-1-53	23-16-3-13	NA	23-1-7-9
Share exchanges with other corporations	No change from prior law	23-1-40-2	NA	NA	NA	NA

32. *Id.* § 23-17-31, as added by Pub. L. No. 63-2014, § 27 (2014).

33. *Entity Transactions Act, Model (2007) (Last Amended 2013)*, UNIF. LAW COMM'N, [http://www.uniformlaws.org/Act.aspx?title=Entity%20Transactions%20Act,%20Model%20\(2007\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Entity%20Transactions%20Act,%20Model%20(2007)%20(Last%20Amended%202013)) [<https://perma.cc/86A4-QRHM>] (last visited Nov. 4, 2018).

34. *See supra* note 20 for detailed tables showing the derivation of META provisions from prior law.

	META Location	Location in prior law –				
		Business Corps.	Limited Liability P’ships	Limited P’ships	Non- Profit Corps.	Limited Liability Cos.
Interest exchanges between entities of the same type (except share exchanges between corporations)	23-0.6-3	NA	None	None	NA	None
Cross-species interest exchanges	23-0.6-3	None	None	None	NA	None
Conversions	23-0.6-4	23-1-38.5-10	23-1-38.5-10; 23-4-1-54	23-1-38.5-10; 23-16-3-14	NA	23-1-38.5-10; 23-18-7-10
Domestication	23-0.6-5	23-1-38.5-4	None	None	23-17-31-1	None

### *B. Major Changes from Prior Law*

While the Harmonization Act is much more of a re-codification project than it is a change in substantive law, the very fact that harmonization of disparate provision is required means that the Harmonization Act’s HUB and META articles contains some substantive changes from prior law.

1. *Names.*—The biggest substantive change brought about by the HUB is to the business name provisions. My own view here – and some people disagree – is that the new provisions work in the way that most people thought the old law worked. In any event, the new law may make it harder for a business to get the name that it wants, but these provisions are designed to reduce the risk that existed under prior law that a business lawfully obtained a name in which another business already had rights.

Effective January 1, 2018, the name under which a domestic filing entity may be formed, the name under which a foreign entity may register to do business in Indiana, any name sought to be reserved, and any assumed business name registered – a new requirement – must be distinguishable on the records of the Secretary of State from any of the following six types of names:

- the name of an existing domestic filing entity;<sup>35</sup>
- the name of an existing domestic filing entity that has been dissolved but for which the 120-day grace period has not yet run;<sup>36</sup>
- the name of a foreign entity registered to do business in Indiana;<sup>37</sup>

35. IND. CODE § 23-0.5-3-1(a)(1).

36. *Id.* § 23-0.5-3-1(a)(2).

37. *Id.* § 23-0.5-3-1(a)(3).

- a name that has been reserved;<sup>38</sup>
- an assumed business name registered with the Secretary of State's office under former law – this is new;<sup>39</sup> and
- an assumed business name registered with the Secretary of State's office under current law.<sup>40</sup>

What is new is incorporating the assumed business name filings made in the Secretary of State's office into the name registration process.<sup>41</sup> Under prior law, the assumed business name filings were not checked when determining name availability.<sup>42</sup> If a company sought to do business in Indiana under the name of Sullivan Corporation, the Secretary of State would check to see if Sullivan Corporation was the name of an existing domestic or registered foreign corporation doing business in Indiana. But there would be no check to see if Sullivan Corporation was already a registered assumed business name. The HUB resolves this problem.

Second, there are some assumed business name filings that are made with county recorders; these rules do not affect and are not affected by those filings in any way.<sup>43</sup> That is, the Secretary of State does not check to see if a requested assumed business name is of record in a county under the HUB.

Third, there is a set of procedures to obtain consent to avoid the application of these rules, and there are a few provisions that provide exceptions to the consent procedures.<sup>44</sup> These provisions permit an entity to use a name that is not distinguishable on the records of the Secretary of State from its name without obtaining the consent of the user of that name.<sup>45</sup>

Fourth, although not authorized by prior law, as a matter of courtesy, the Secretary of State would reserve for 120 days the name of an entity that has been administratively dissolved.<sup>46</sup> This practice is now explicitly authorized.<sup>47</sup>

2. *Biennial Reports.*—Limited liability partnerships and limited partnerships are now required to file biennial reports with the Secretary of State.<sup>48</sup> Under prior law, these entities did not have to file such reports. This will be a bit of a culture change but it is very much for the better. The following hypothetical illustrates the problem under prior law.

A lawyer who is doing due diligence on whether an LLP or LP is in good standing asked the Secretary of State for a Certificate of Existence. The LLP had

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38. *Id.* § 23-0.5-3-1(a)(4).

39. *Id.* § 23-0.5-3-1(a)(5).

40. *Id.* § 23-0.5-3-1(a)(6).

41. *Id.* § 23-0.5-3-1(a)(5).

42. IND. CODE § 23-15-1 (1987) (repealed 2018).

43. IND. CODE § 23-0.5-3-4(a) through (d) (2018).

44. *Id.* § 23-0.5-3-1(d). The consent provisions were amended in Pub. L. No. 52-2018, § 6 (2018).

45. *Id.*

46. *Id.* § 23-0.5-3-1(a)(2).

47. *Id.*

48. *Id.* § 23-0.5-2-13.

filed fifteen years ago and was not required to have been heard from since. There is nothing of record to indicate whether the LLP is or is not in existence. On the basis of nothing more than information fifteen years old, the Certificate of Existence would have been issued. Secretary of State Lawson has implemented this new rule with appreciation and sensitivity for the change it represents.

3. *Administrative Dissolution.*—The HUB imposes a five-year deadline for a business entity to apply for reinstatement after having been dissolved administratively or having had its authority to do business in Indiana revoked by the Secretary of State.<sup>49</sup> The deadline for seeking reinstatement is five years from the date of administrative dissolution or revocation, even if that date pre-dated the effective date of the Harmonization Act.<sup>50</sup> A business that has been administratively dissolved or revoked for five (5) years or more may not be reinstated.<sup>51</sup> Under prior law, there was no deadline to seeking reinstatement, so this is a change of some consequence.

The HUB also contains specific requirements that must be met in order for a business entity to be reinstated.<sup>52</sup> These include obtaining a clearance from the Indiana Department of Revenue.<sup>53</sup> The Business Services Division in the office of Secretary of State Connie Lawson published helpful guidance on the new reinstatement regime.<sup>54</sup>

“Based on the recent change, the Secretary of State’s office will accept applications for reinstatement for businesses that have been administratively dissolved or revoked for more than five years for a *brief* period of time.”<sup>55</sup> The Secretary of State’s guidance on the new regime stated that “[i]f your business or your client’s business has been administratively dissolved or revoked for more than five years, please ensure that you have submitted your application for reinstatement to the Secretary of State’s office no later than July 31, 2018.”<sup>56</sup>

The guidance also “advise[s] that it takes the Department of Revenue between 4 to 6 weeks to generate the certificate of clearance that is required as part of the application for reinstatement.”<sup>57</sup> The guidance continues as follows:

Do not delay in making this request to the Department of Revenue to ensure you meet the July 31 filing deadline. This will be your final opportunity to reinstate. Attorneys and CPAs are encouraged to reach out

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49. *Id.* § 23-0.5-6-3. As enacted in 2017, the HUB provided a two-year deadline, effective January 1, 2018. This deadline was extended to five years in Pub. L. No. 52-2018 (2018).

50. *Id.*

51. *Id.*

52. *Id.* § 23-0.5-6-3.

53. *Id.* § 23-0.5-6-3(a)(5).

54. *Applications for Reinstatement*, IND. SEC’Y OF STATE, <https://www.in.gov/sos/business/files/Reinstatement%20Outreach.pdf> [<https://perma.cc/6EPF-FDKR>] (last visited Nov. 4, 2018).

55. *Id.* (emphasis in original).

56. *Id.*

57. *Id.*

to their clients and business owners are encouraged to seek legal advice regarding this decision. For businesses that have been administratively dissolved or revoked for less than five years, you will have five years from the date of administrative dissolution or revocation to file an application for reinstatement. For example, if the business was administratively dissolved on January 11, 2015, you must file an application for reinstatement by January 10, 2020. If you miss the five year deadline, you will not be able to file an application for reinstatement under the new law. You must also consider the 4-6 week processing time for certificate of clearance requests from the Department of Revenue.<sup>58</sup>

4. *Commercial Registered Agents.*—The HUB introduces the concept of a “commercial registered agent”<sup>59</sup> (“CRA”), a company in the business of serving as a registered agent, and adopts certain specialized provisions to facilitate their operation.<sup>60</sup> Although being listed as a CRA is voluntary, the availability of this status is an extremely positive development.<sup>61</sup>

Secretary of State Lawson has announced that CRAs will be provided access to a designated dashboard that will contain a list of all the businesses that are associated with that CRA.<sup>62</sup> A CRA will thus be able to manage all change filings through the dashboard including global filings that will permeate to all associated businesses, such as an address change.<sup>63</sup> This single source of information will greatly simplify management of client information for registered agents who decide to register as CRAs.<sup>64</sup>

The CRA dashboard includes search functionality to determine all the businesses that should be associated with the CRA.<sup>65</sup> Additional entities may be added to the account at any time from the dashboard.<sup>66</sup> From the dashboard, CRAs will be able to determine which represented entities owe business entity reports and file them on their behalf.<sup>67</sup> In addition, certificates of existence can be ordered for represented entities from the dashboard.<sup>68</sup>

While registering as CRAs is expected to be used primarily by professional service companies, it offers the same advantages to law firms that serve as

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58. *Id.*

59. IND. CODE § 23-0.5-1.5-4 (2018).

60. *Id.* § 23-0.5-3-4; *id.* § 23-0.5-3-8.

61. Ind. Sec’y. of State, Connie Lawson, Commercial Registered Agents (Dec. 8, 2017), available at <http://in.gov/sos/business/files/Commercial%20Registered%20Agent%20Outreach%2012.8.17.pdf> [<https://perma.cc/E6G2-VKNN>].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

registered agents.<sup>69</sup> It is conceivable that a law firm may not have a consolidated comprehensive list of all of the businesses for which it is listed as registered agent due to inconsistent filing practices over the years.<sup>70</sup> For example, a registered agent could have been listed in the firm's name, an attorney's name, or a paralegal's name.<sup>71</sup> If a law firm chooses to become a CRA, it too will have a dashboard from which to manage client information of the businesses it represents as a registered agent.<sup>72</sup>

Secretary of State Lawson and her Business Services Division deserve particular credit for creating and implementing this functionality concurrently with the effective date of the Harmonization Act.

5. *Interest Exchanges.*—The BCL has long permitted share exchanges between corporations.<sup>73</sup> In a share exchange, a corporation exchanges consideration (which could consist of shares in the corporation) for all of the shares of another corporation.<sup>74</sup> The effect of a share exchange is that: (1) the separate existence of the acquired corporation is not affected; and (2) the acquiring corporation acquires all of the shares of the acquired corporation.<sup>75</sup> The effect of a share exchange can be achieved through a triangular merger in which the acquiring corporation forms a new subsidiary and the acquired corporation is then merged into the new subsidiary.<sup>76</sup> Thus, the use of a share exchange eliminates the need for the formation of a new subsidiary and the triangular merger.

Prior law did not permit analogous interest exchanges between LLPs, between LPs, or between LLCs. Nor did it permit “cross-species” interest exchanges among corporations, LLPs, LPs, and LLCs.<sup>77</sup> An example of a cross-species interest exchange would be a transaction by which a corporation would acquire an LLC through the exchange of consideration (which could consist of shares in the corporation) for all of the equity interest in the LLC.

The META authorizes for the first time in Indiana law both interest exchanges between LLPs, between LPs, and between LLCs.<sup>78</sup> It also authorizes for the first time in Indiana law “cross-species” interest exchanges among corporations, LLPs, LPs, and LLCs.<sup>79</sup> The provisions of prior law concerning

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. IND. CODE § 23-1-40-2 (2018).

74. *Id.* § 23-1-40-2(a).

75. Model Entity Transactions Act § 301 cmt. (2013) NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS, (Aug. 19, 2015), [http://www.uniformlaws.org/shared/docs/entity\\_transactions/META\\_Final\\_2014\\_2015aug19.pdf](http://www.uniformlaws.org/shared/docs/entity_transactions/META_Final_2014_2015aug19.pdf) [<https://perma.cc/77EC-2LJL>].

76. *Id.*

77. *See generally* IND. CODE § 23-1-40-2.

78. Pub. L. No. 118-2017, S.E.A. 443 (2017).

79. *See generally* IND. CODE § 23-0.6-3 (2018).

share exchanges between corporations remain in the BCL; they are not included in META.<sup>80</sup>

6. *Domestication*.—Prior law permitted domestications for corporations and non-profit corporations but not for LLPs, LPs, or LLCs.<sup>81</sup> In a domestication, an Indiana business entity may become a business entity of the same type in another state if the domestication is authorized by the law of that state, or a business entity formed under the laws of another state may become an Indiana business if the domestication is authorized by the law of the business entity's state of formation.<sup>82</sup> The META authorizes and provides procedures for the domestication of all five types of business entities.<sup>83</sup>

### C. Some Notes and Nuances

Following are several observations related to the enactment of the Harmonization Act that I think are worthy of note.

1. *Uniform Limited Partnership Act*.—The Uniform Law Commission promulgated a 2001 version of the Uniform Limited Partnership Act (U.L.P.A.) that Indiana has never adopted.<sup>84</sup> Indiana continues to use the 1985 version of the Uniform Limited Partnership Act (sometimes called the Uniform Limited Partnership Act (1976) with 1985 Amendments).<sup>85</sup> While I believe Indiana should adopt the 2001 version, the Business Law Survey Commission considered that to be beyond the scope of the Harmonization Act project and the new act continues Indiana's current practice of following the older 1985 version of the U.L.P.A.

2. *LLC Names*.—While the Uniform Law Commission version of the HUB allows LLCs to have "Ltd." and "Co." in their names,<sup>86</sup> prior Indiana law did not. The HUB follows current Indiana law and does not permit such words in the names of LLCs.<sup>87</sup>

3. *"Piercing the Corporate Veil"*.—The Uniform Law Commission version of the HUB specifies that the law of the jurisdiction of the formation of an entity governs the liability of shareholders, partners, and members, respectively, for corporate, partnership, and LLC obligations.<sup>88</sup> This means that principles governing "piercing of the corporate veil" are subject to the internal affairs doctrine.<sup>89</sup> Several federal courts have so held but no Indiana appellate court ever

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80. *Id.* § 23-1-40-2.

81. *Id.* § 23-1-38.5-4 (2018); *id.* § 23-17-31-1.

82. *Id.* § 23-0.6-5-1.

83. *See generally id.* § 23-0.6-5.

84. *Limited Partnership Act (2001) (Last Amended 2013)*, UNIF. LAW COMM'N, [http://www.uniformlaws.org/Act.aspx?title=Limited%20Partnership%20Act%20\(2001\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Limited%20Partnership%20Act%20(2001)%20(Last%20Amended%202013)) [<https://perma.cc/G6A7-2LV9>] (last visited Nov. 4, 2018).

85. *See generally* Unif. Ltd. P'ship Act, 2001 Prefatory Note 1 (Unif. Law Comm'n2013).

86. UNIF. BUS. ORGS. CODE § 1-501(a)(2) (2013).

87. *See* IND. CODE § 23-0.5-3-2(d).

88. *See generally* UNIF. BUS. ORGS. CODE (2013).

89. UNIF. BUS. ORGS. CODE § 1-302(d).

has.<sup>90</sup> The HUB adopts this provision.<sup>91</sup>

4. *Mergers Between Corporations; Mergers Between Nonprofit Corporations; and Share Exchanges between Corporations.*—As discussed above, META does not cover mergers between corporations or mergers between nonprofit corporations. The provisions of prior law continues to govern such mergers.<sup>92</sup> On the other hand, cross-species mergers between corporations and other entities are governed by META.<sup>93</sup>

Also as discussed above, META does not cover share exchanges between corporations; the BCL continues to govern such share exchanges.<sup>94</sup> Cross-species share and interest exchanges between corporations and other entities are governed by META.<sup>95</sup>

5. *Mergers and Interest Exchanges Involving General Partnerships.*—The META authorizes and governs mergers<sup>96</sup> and interest exchanges,<sup>97</sup> including cross-species mergers and interest exchanges, to which a general partnership is a party, as well as conversions<sup>98</sup> and domestications of general partnerships.<sup>99</sup>

In a cross-species merger or interest exchange or a conversion in which the general partnership is not the surviving entity, the general partnership interests cease to exist. As a matter of general partnership law, a partner in a general partnership that is not a limited liability partnership has personal liability for the debts and obligations of the partnership.<sup>100</sup> Thus, when a general partnership interest ceases to exist because the general partnership is a party to a merger, interest exchange, or conversion in which interest in the surviving business entity enjoy limited liability, the question arises as to the extent, if any, the former general partners continue to have personal liability following the completion of the merger, interest exchange, or conversion.

Under prior law, the BCL contained four rules to determine when former

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90. Colin E. Flora, *When, How & Why of Piercing the Corporate Veil in Indiana*, 60 RES GESTAE 13, 21 (Nov. 16, 2016) (citing *Garmin Wurzburg GmbH v. Auto. Imagineering & Mfg., LLC*, No. 3:14-cv-02006-PPS-CAN, 2016 U.S. Dist. LEXIS 71106, at \*10 (N.D. Ind. June 1, 2016); *Chapel Ridge Invs., L.L.C. v. Petland Leaseholding Co.*, No. 1:13-CV-00146-PPS, 2013 U.S. Dist. LEXIS 171345, at \*4-7 (N.D. Ind. Dec. 4, 2013); *NNDYM IN, Inc. v. UV Imports, Inc.*, No. 3:09-CV-00129-TWP, 2013 U.S. Dist. LEXIS 19706, at \*9 (S.D. Ind. Feb. 14, 2013); *see also* *Secon Serv. Sys. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 412-13 (7th Cir. 1988) (applying Indiana law); *Trinity Indus. Leasing Co. v. Midwest Gas Storage, Inc.*, 33 F.Supp.3d 947, 972 (N.D. Ill. 2014) (applying Indiana choice of law)).

91. IND. CODE § 23-0.5-5-1(a)(2).

92. *See generally id.* §§ 23-1-40; *id.* § 23-17-19.

93. *See generally id.* § 23-0.6-2

94. *Id.* § 23-1-40-2.

95. *See generally id.* § 23-0.6-3.

96. *Id.*

97. *See generally id.* § 23-0.6-3.

98. *See generally id.* § 23-0.6-4.

99. *See generally id.* § 23-0.6-5.

100. *Id.* § 23-4-1-15(1).

general partners continued to have personal liability following the completion of conversion and when they did not.<sup>101</sup> These rules applied to all conversions because they were incorporated by reference into the prior LLP,<sup>102</sup> LP,<sup>103</sup> and LLC<sup>104</sup> statutes.

Under META, these four rules apply to mergers and share exchanges as well as conversions and domestications involving general partnerships.<sup>105</sup>

6. *Dissenters' Rights of Appraisal.*—The META contains language concerning dissenters' rights of appraisal for mergers, interest exchanges, conversions, and domestications. The language is derived from the Uniform Law Commission version of META.<sup>106</sup> Under prior law, the BCL had language to the same effect concerning conversions.<sup>107</sup> These rules applied to all conversions because they were incorporated by reference into the prior LLP,<sup>108</sup> LP,<sup>109</sup> and LLC<sup>110</sup> statutes.

The META does not provide any new dissenters' rights but rather makes clear that any existing rights of appraisal, domestic or foreign, will be respected in any merger, interest exchange, conversion, or domestication.<sup>111</sup>

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101. *Id.* § 23-1-38.5-15(d) (repealed 2018).

102. *Id.* § 23-4-1-54 (repealed 2018).

103. *Id.* § 23-16-3-14 (repealed 2018).

104. *Id.* § 23-18-7-10 (repealed 2018).

105. The four rules, set forth separately for mergers in IND. CODE § 23-0.6-2-6(d) (2018), for interest exchanges in IND. CODE § 23-0.6-3-6(e) (2018), for conversions in IND. CODE § 23-0.6-4-6(d) (2018), and for domestications in IND. CODE § 23-0.6-5-6(d) (2018), are to the following effect when a merger, exchange, conversion, or domestication becomes effective, the interest holder liability of a person that ceases to hold an interest in an Indiana merging, acquired, converting, or domesticating entity with respect to which the person had an interest holder liability is subject to the following rules: (a) the transaction does not discharge any owner liability under the organic law of the merging, acquired, converting, or domesticating entity to the extent that any such owner liability arose before the effective time of the transaction; (b) the interest holder does not have owner liability under the organic law of the surviving entity for any debt, obligation, or liability of the surviving entity that arises after the effective time of the transaction; (c) the provisions of the organic law of the merging, acquired, converting, or domesticating entity continue to apply to the collection or discharge of any owner liability preserved by clause (a) of the sentence, as if the merger, exchange, conversion, or domestication had not occurred and the surviving entity were still the merging, acquired, converting, or domesticating entity; and (d) the interest holder has whatever rights of contribution from other interest holders are provided by the organic law of the merging, acquired, converting, or domesticating entity with respect to any owner liability preserved by clause (a) of the sentence, as if the merger, exchange, conversion, or domestication had not occurred and the surviving entity were still the merging, acquired, converting, or domesticating entity.

106. Model Entity Transactions Act § 109 (UNIF. LAW COMM'N 2013).

107. IND. CODE § 23-1-38.5-10(i) (repealed 2018).

108. *Id.* § 23-4-1-54 (repealed 2018).

109. *Id.* § 23-16-3-14 (repealed 2018).

110. *Id.* § 23-18-7-10 (repealed 2018).

111. *Id.* § 23-0.6-1-8 (2018).

#### *D. Conclusion*

As noted at the outset of this discussion, the Harmonization Act was deemed by Indiana Secretary of State Connie Lawson to be “the most far-reaching revision of Indiana business laws in more than two decades.”<sup>112</sup> Credit for this achievement is shared by many quarters.

Governor Eric Holcomb signed the bill into law.<sup>113</sup> In the Legislature, Senator Rodric Bray authored the bill; co-authors were Senators Eric Koch, Tim Lanane, Mark Messmer, and Lonnie M. Randolph, Jr.<sup>114</sup> It was approved by the Senate Committee on Commerce and Technology, chaired by Senator Messmer, and passed in the Senate by a vote of 50-0 on February 14, 2017.<sup>115</sup> In the House of Representatives, the bill was sponsored by Rep. Martin Carbaugh and co-sponsored by Rep. Ed DeLaney.<sup>116</sup> It was approved by the House Judiciary Committee, chaired by Rep. Greg Steuerwald, and passed in the House by a vote of 96-0 on March 20, 2017.<sup>117</sup> Final passage occurred in the Senate on April 3, 2017, by a vote of 47-0.<sup>118</sup>

Also as noted above, the bill was recommended by the Indiana Business Law Survey Commission, chaired during the relevant period of time first by Richard Thrapp and later by Marci Reddick.<sup>119</sup> The draft was developed by a subcommittee of the Commission consisting of Mallory Long and Janet Malone and chaired by the author of this Article.

Staff work connected with the development of the bill, and its passage through the Legislature was provided by the Business Services Division of Indiana Secretary of State, Connie Lawson, including Rebecca Longfellow, Director of Business Services Division, and Mallory Long, Attorney and Special Counsel. Long was succeeded by Samantha Chapman as Attorney and Special Counsel for the Business Services Division following enactment of the Harmonization Act 2017, handling outreach and technical corrections.

The aforementioned Mallory Long deserves particular recognition for her timely, diligent, and high quality work on developing the draft at all stages of this project.

All of the foregoing should take great satisfaction in this substantial legislative achievement.

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112. *Press Release, supra* note 3.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Actions for Senate Bill 443*, IND. GEN. ASSEMBLY, <http://iga.in.gov/legislative/2017/bills/senate/443> [<https://perma.cc/QD53-8GHL>] (last visited Nov. 4, 2018).

118. *Id.*

119. *New law brings consistency to business rules*, BATESVILLE HERALD TRIBUNE (Apr. 27, 2017), [http://www.batesvilleheraldtribune.com/business/new-law-brings-consistency-to-business-rules/article\\_00cbfa75-9b49-57bd-b77f-5a6ace323849.html](http://www.batesvilleheraldtribune.com/business/new-law-brings-consistency-to-business-rules/article_00cbfa75-9b49-57bd-b77f-5a6ace323849.html) [<https://perma.cc/QL2P-SQLX>].

## II. LENDING AND BORROWING

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

*A. McCullough v. Citimortgage, Inc.: A Fine Final Exemplar of Justice  
Rucker’s Contribution to Indiana Jurisprudence*

In *McCullough v. CitiMortgage, Inc.*, a decision of the Indiana Supreme Court, the homeowners obtained a discharge from their debts in a Chapter 7 bankruptcy proceeding.<sup>120</sup> In foreclosing on the mortgage, the mortgagee did not seek a judgment against the homeowners themselves but only an *in rem* judgment against their property for which there was an outstanding balance.<sup>121</sup>

The court carefully explained that the bankruptcy discharge had the effect of relieving the homeowners of personal liability to their mortgagee but that the mortgage lien survived.<sup>122</sup> In doing so, the court invoked the classic statement of the rule in this regard, as enunciated by the U.S. Supreme Court in *Long v. Bullard* in 1886.<sup>123</sup>

As such, the opinion provides an excellent review of the interrelationship of the important distinction between *in rem* and *in personam* judgments.<sup>124</sup> But was that sufficient to warrant the attention of the Supreme Court in what was a very straightforward residential mortgage foreclosure case?

In May 2017, Justice Robert D. Rucker retired after a distinguished career on the Indiana Supreme Court.<sup>125</sup> This was one of his last opinions. The procedural posture of the case was that, after the trial court had ruled in favor of the bank and against the homeowners, the Court of Appeals had dismissed the appeal for failure to comply with applicable appellate rules.<sup>126</sup> The homeowners sought transfer and the court granted it.<sup>127</sup> Justice Rucker’s decision doesn’t say anything about giving the homeowners their day in appellate court, but my guess is that he wanted them to have it and persuaded his colleagues to go along with him.

And why did he want the McCulloughs to have their day in court? The second sentence of his opinion introduces them to the reader: “Lt. Henry G.L. McCullough and his wife Princess S.D. Naro-McCullough (“Homeowners”) are honorably discharged Viet Nam era military veterans.”<sup>128</sup> Justice Rucker, too, was

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120. 70 N.E.3d 820 (Ind. 2017).

121. *Id.* at 821.

122. *Id.* at 826.

123. *Id.* at 827-28 (quoting *Long v. Bullard*, 117 U.S. 617 (1886)).

124. *Id.* at 828.

125. Olivia Covington, *Rucker retires after 26 years on appellate bench*, IND. LAWYER (May 17, 2017), <https://www.theindianalawyer.com/articles/43698-rucker-retires-after-26-years-on-appellate-bench> [<https://perma.cc/QV8B-K3PX>].

126. *McCullough*, 70 N.E.3d at 822.

127. *Id.*

128. *Id.*

an honorably discharged – indeed, decorated – Viet Nam era military veteran.<sup>129</sup>

*B. Deciding Whether Property Is a “Fixture”*

A decision of the Indiana Court of Appeals, *11438 Highway 50, LLC v. Luttrell*, situates the traditional problem of deciding whether property is a fixture in a prototypical Hoosier setting: a limestone mill.<sup>130</sup>

A borrower called Indiana Stone Works, Inc., owned a limestone mill in Lawrence County.<sup>131</sup> The borrower’s repayment obligations were secured by mill property, including any fixtures.<sup>132</sup> At issue is whether an industrial crane and saw on the property were fixtures subject to the mortgage.<sup>133</sup>

What makes the case so interesting is that the outcome really turns on whether one applies an objective or subjective test to determine fixture status.

The lender argued that objectively the crane and saw must be fixtures.<sup>134</sup>

The crane is a 50 ton apparatus designed to lift large slabs of limestone; it uses a trolley to run on two sets of 10 rails that are several feet off the ground, each supported by approximately 12 legs that are bolted to the ground. The crane looks like a bridge running from one set of rails to the other with cables and hoist hanging from the bridge.<sup>135</sup>

The lender’s point is that anybody looking at this enormous piece of equipment would consider it to be “a former chattel or piece of personal property that ‘has become a part of real estate by reason of attachment thereto,’ the very definition of a “fixture” in Indiana).<sup>136</sup>

But the people on the other side of this litigation said that a fixture’s status should be judged subjectively, that is, from the intent of the parties.<sup>137</sup> Their argument was that employees of Indiana Limestone set up a completely separate business on the Indiana Limestone property and purchased the industrial crane and the saw for use in that business.<sup>138</sup> It was never intended that the industrial crane and saw be used as part of Indiana Limestone’s business and, indeed, Indiana Limestone had its own equipment and operations that did not depend in any way on this crane and saw.<sup>139</sup>

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129. *Justice Rucker inducted into Military Veterans Hall of Fame*, IND.COURT TIMES (Jan. 24, 2018), <http://indianacourts.us/times/2018/01/justice-rucker-inducted-into-military-veterans-hall-of-fame> [<https://perma.cc/TWN3-7GPG>].

130. 81 N.E.3d 261 (Ind. Ct. App.), *trans. denied*, 94 N.E.3d 701 (Ind. 2017).

131. *Id.* at 263.

132. *Id.* at 264.

133. *Id.*

134. *Id.* at 265.

135. *Id.*

136. *Id.* (citing *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 635 (Ind. 2012))

137. *Id.* at 265-66.

138. *Id.* at 266.

139. *Id.*

On the authority of two older Appellate Court decisions which said that “the intention to make [personal property] a permanent accession must affirmatively appear”<sup>140</sup> and “the intention which controls is to be inferred from all the circumstances of the annexation,”<sup>141</sup> the trial court found that the industrial crane and the saw were not fixtures and the Court of Appeals affirmed.<sup>142</sup> The Indiana Supreme Court declined jurisdiction.<sup>143</sup>

### *C. Was a Hearing Really Required?*

After the homeowners in *Yeager v. Deutsche Bank National Trust Co.* defaulted on their mortgage loan, the bank filed for and obtained a judgment and decree of foreclosure.<sup>144</sup> The bank then went back to court and requested a provisional order requiring the homeowners to make payments on the note and the mortgage.<sup>145</sup> The trial court issued the provisional order in the amount and on the terms the bank requested.<sup>146</sup>

On appeal, a majority of the Court of Appeals panel held that the trial court had been required to hold a hearing before entering the provisional order.<sup>147</sup> It reasoned that a statute applying to mortgage foreclosure actions says that a court may consider the “debtor’s ability to pay” when determining the monthly payment.<sup>148</sup> “While the statute does not expressly require a hearing, it is implicit that the court have the necessary information on which to base its determination, including the debtor’s current financial information.”<sup>149</sup> The court reversed and remanded for a hearing.<sup>150</sup>

Judge Mathias dissented.<sup>151</sup> He read the statute as to say that the trial court is permitted to consider a debtor’s ability to pay but is not required to do so, so long as the payments ordered do not exceed the debtor’s monthly mortgage obligation at issue.<sup>152</sup> Judge Mathias’s position seems to be more faithful to the plain language of the statute.

### *D. Residential Mortgage Foreclosures: Annual Update*

In my annual survey two years ago, I reported that mortgagors had had some

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140. *Id.* (quoting *Citizens Bank of Greenfield v. Mergenthaler Linotype Co.*, 25 N.E.2d 444, 448 (Ind. 1940)).

141. *Id.* (quoting *Peed v. Bennett*, 52 N.E.2d 629, 631 (Ind. App. 1944)).

142. *Id.* at 267.

143. 11438 Highway 50, LLC v. Luttrell, 94 N.E.3d 701 (Ind. 2017).

144. 64 N.E.3d 908, 909 (Ind. Ct. App. 2016).

145. *Id.*

146. *Id.*

147. *Id.* at 909-11.

148. *Id.* at 910 (quoting IND. CODE § 32-30-10.5-8.6 (2011)).

149. *Id.* at 911.

150. *Id.*

151. *Id.* at 911-12 (Mathias, J., dissenting).

152. *Id.*

success in the Court of Appeals during the prior year reversing trial court judgments in favor of financial institution mortgagees.<sup>153</sup> Last year, I reported that there had not been much success on the part of mortgagors against financial institution mortgagees.<sup>154</sup> This year, I did not find any cases where the Court of Appeals reversed a trial court entry of a judgment of foreclosure against a residential mortgagor.<sup>155</sup>

#### *E. Credit Card Lending – and Beyond*

In the wake of the financial crisis, there was widespread publicity about mortgage foreclosure proceedings that failed because the mortgagees did not have their paperwork in order.<sup>156</sup> Perhaps the promissory note could not be found or some other critical evidence of indebtedness had disappeared in the endless trail of assignments. My sense is that real estate lenders have pretty much gotten their act together on this.

On the other hand, last year saw two credit card lenders whose efforts to collect failed because they did not have their paperwork in order.<sup>157</sup> The same thing happened again this year in *Williams v. Unifund CCR, LLC*.<sup>158</sup> And during the survey period, the New York Times predicted that lenders are in for a difficult time collecting on student loans for exactly the same reason – missing paperwork.<sup>159</sup>

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153. Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 49 IND. L. REV. 981, 985-87 (2016).

154. Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 50 IND. L. REV. 1179, 1185 & n.69 (2017).

155. See generally *McCullough v. CitiMortgage, Inc.*, 70 N.E.3d 820 (Ind. 2017); *Enfield v. The Farmers & Merchants State Bank*, 79 N.E.3d 1007 (Ind. Ct. App. 2017) (mem.), *trans. denied sub nom.*, *Enfield v. Farmers & Merchants State Bank*, 89 N.E.3d 404 (Ind. 2017); *Francis v. EMC Mortg., LLC*, 83 N.E.3d 1276 (Ind. Ct. App. 2017) (mem.), *trans. denied*, 89 N.E.3d 406 (Ind. 2017); *Mylet v. Santander Bank*, 86 N.E.3d 451 (Ind. Ct. App. 2017) (mem.); *Durham v. JP Morgan Chase Bank*, 87 N.E.3d 1157 (Ind. Ct. App. 2017) (mem.); *Foor v. PennyMac Loan Servs., LLC*, 87 N.E.3d 1158 (Ind. Ct. App. 2017) (mem.); *Scuefield v. Penny Mac Corp.*, 87 N.E.3d 57 (Ind. Ct. App. 2017); *U.S. Bank Tr. Nat'l Ass'n v. Modesitt*, 86 N.E.3d 459 (Ind. Ct. App. 2017) (mem.) (granting a mortgagee's request that the trial court be ordered to reconsider and clarify the trial court's purported dismissal of the mortgagee's foreclosure action.); *Platt v. CitiMortgage, Inc.*, 63 N.E.3d 34 (Ind. Ct. App. 2016) (mem.); *Matly v. Citimortgage, Inc.*, 68 N.E.3d 1129 (Ind. Ct. App. 2016) (mem.).

156. See, e.g., Gretchen Morgenson, *Flawed Paperwork Aggravates a Foreclosure Crisis*, N.Y. TIMES (Oct. 3, 2010), <https://www.nytimes.com/2010/10/04/business/04mortgage.html> [<https://perma.cc/J2AZ-WR2S>].

157. Sullivan, *supra* note 154, at 1187.

158. 70 N.E.3d 375 (Ind. Ct. App. 2017).

159. Stacy Cowley & Jessica Silver-Greenberg, *As Paperwork Goes Missing, Private Student Loan Debts May Be Wiped Away*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/business/dealbook/student-loan-debt-collection.html> [<https://perma.cc/Z2NH-HMGT>].

## III. BUSINESS LAW

A. *The TP Orthodontics Saga Continues*

*Kesling v. Kesling*<sup>160</sup> is one of those cases that just keeps on giving. In fact, I wrote about an earlier iteration of this litigation in this survey two years ago.<sup>161</sup> *Kesling* is a dispute among the sibling shareholders of a closely held corporation called TP Orthodontics, Inc.<sup>162</sup> Andrew owns fifty-one percent of the voting stock; Christopher, Adam, and Emily own eleven percent; and other investors own thirty-eight percent.<sup>163</sup> Andrew is on one side of the fight and Christopher, Adam, and Emily on the other.<sup>164</sup> I will call Christopher, Adam, and Emily the “Sibling Group.”

This litigation began when the Sibling Group – both directly and derivatively on behalf of the corporation – alleged that wrongdoing by Andrew had caused a significant decrease in the shareholder value of the corporation.<sup>165</sup> The corporation itself intervened and its Board of Directors formed a special litigation committee to investigate the derivative claims.<sup>166</sup> The special litigation committee concluded that it was in the corporation’s best interest to pursue only a few of these derivative claims.<sup>167</sup>

Armed with the report of the special litigation committee, the board of directors took the position that it was the proper party to prosecute the derivative claims on the corporation’s behalf.<sup>168</sup> So the first issue in the case was whether the board or the Sibling Group was the proper party to prosecute the derivative claims.

The trial court held that the board was the proper party and the Court of Appeals agreed.<sup>169</sup> Writing for the court, Judge Crone cited to the BCL and its official comments for the proposition that the Board of Directors has the authority to pursue derivative litigation on behalf of the Corporation.<sup>170</sup> And although expressing understanding, if not sympathy, for the argument against relegating the Sibling Group to the sidelines, Judge Crone, correctly in my view, points to

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160. 83 N.E.3d 111 (Ind. Ct. App. 2017), *trans. denied by an evenly divided vote*, 95 N.E.3d 1294 (Ind. 2018) (Rush, C.J., and Goff, J., voted to grant transfer; David and Massa, JJ., voted to deny transfer; Slaughter, J., did not participate).

161. Sullivan, *supra* note 153, at 992-93.

162. *Kesling*, 83 N.E.3d at 113.

163. *Id.* at 113-14.

164. *Id.* at 113.

165. TP Orthodontics, Inc. v. Kesling, 15 N.E.3d 985, 988 (Ind. 2014).

166. *Id.* The earlier litigation considered the right of the Sibling Group to inspect an unredacted copy of the special litigation committee’s report.

167. *Id.* at 989.

168. *Kesling*, 83 N.E.3d at 114.

169. *Id.* at 122.

170. *Id.* at 120-22.

the fiduciary obligation that the board has to pursue the litigation solely in the interests of the corporation without any favor to Andrew.<sup>171</sup>

The Sibling Group also made an argument that it should be permitted to pursue a direct action against Andrew even if it could not maintain a derivative action.<sup>172</sup> This is the second issue in the case.

The general rule in Indiana is that shareholders “may not maintain actions in their own names to redress an injury to the corporation,” even if the injury has the effect of impairing the value of their stock.<sup>173</sup> This is a very firm principle of corporate law. But there is an exception to this principle, and it was enunciated by the Indiana Supreme Court in an opinion I authored called *Barth v. Barth* in 1995.<sup>174</sup>

*Barth* says that shareholders can pursue a direct action if doing so will not “(i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.”<sup>175</sup>

The trial court assessed the situation and found that these criteria could not be satisfied.<sup>176</sup> Once again, the Court of Appeals affirmed.<sup>177</sup> Judge Crone looked with some care at each of the three factors and found that they had not been satisfied.<sup>178</sup> Of significance to the court was the third, “not interfere with a fair distribution of recovery among all interested persons,” where the court said, “it is undisputed that there are six shareholders (other than Andrew) whose interests would not be protected if the Sibling Shareholders were allowed to proceed and recover damages from Andrew directly and individually.”<sup>179</sup>

Judge Barnes dissented, going through an equally careful analysis of the three *Barth* factors, and finding that their requirements were satisfied.<sup>180</sup> As to the third point that the majority found compelling, Judge Barnes wrote,

[T]here is no indication that permitting a direct action will interfere with a fair distribution of recovery among all interested persons. The five “unaligned” shareholders do not and have not expressed any interest in this matter, and the Sibling Shareholders have executed sworn affidavits promising to return any money recovered to TPO.<sup>181</sup>

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171. *Id.*

172. *Id.* at 116.

173. *Barth v. Barth*, 659 N.E.2d 559, 560 (Ind. 1995).

174. *Id.* at 562.

175. *Id.* (adopting A.L.I., Principles of Corporate Governance § 7.01(d)).

176. *Kesling*, 83 N.E.3d at 117-19.

177. *Id.* at 122.

178. *Id.* at 115.

179. *Id.* at 119.

180. *Id.* at 122-24 (Barnes, J., dissenting).

181. *Id.* I very much enjoyed reading this opinion in which Judge Crone and Judge Barnes (both from South Bend, as am I; they have both been good friends of mine for 40 years) debated the proper application of an opinion I wrote 20 years ago!

*B. The T.K.O. Graphix Saga Returns as Well*

Smith v. Taulman<sup>182</sup> is the latest iteration of another case discussed in an earlier survey.<sup>183</sup> T.K.O. Graphix, a closely held business, had suffered financially during Great Recession.<sup>184</sup> Michael Kent Smith was a minority shareholder in the business.<sup>185</sup> As the company sold additional equity to remain solvent, Smith's ownership in the company was diluted, and eventually his employment was terminated.<sup>186</sup> In 2011, Smith "filed a lawsuit against the company's majority owner, Thomas L. Taulman, II . . . and four of the company's employees, alleging fraud and breach of fiduciary duty."<sup>187</sup> When the Court of Appeals reviewed that case in 2014, it ruled against Smith on three issues but reversed the trial court's entry of summary judgment on two of Smith's claims, finding that additional discovery was needed.<sup>188</sup>

"In 2015, [Smith] filed a second lawsuit, alleging additional breaches of fiduciary duty by Taulman and the four employees."<sup>189</sup> The trial court consolidated the two cases and then granted summary judgment against Smith.<sup>190</sup> Smith again appealed, arguing that the trial judge should have recused herself,<sup>191</sup> that his two actions should not have been consolidated,<sup>192</sup> and that summary judgment should not have been granted against him.<sup>193</sup> This time, the Court of Appeals affirmed in all respects.<sup>194</sup>

IV. CONTRACT LAW

*A. Contract Language Interpretation*

My first job out of law school in 1982 was in the business department at Barnes & Thornburg, which was chaired by Robert H. Reynolds, a very distinguished Indianapolis lawyer indeed. A fair amount of my work was drafting and negotiating contracts. Bob would always tell us, "Litigation is no damn good." This was not an attempt on his part to denigrate the firm's litigation

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182. No. 32A01-1605-PL-1013, 2017 WL 491186 at \*1 (Ind. Ct. App. Feb. 7, 2017), *trans. denied*, 89 N.E.3d 405 (Ind. 2017).

183. Sullivan, *supra* note 153, at 991-92.

184. *Smith*, 2017 WL 491186 at \*1.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Smith v. Taulman*, 20 N.E.3d 555, 573 (Ind. Ct. App. 2014).

189. *Smith*, 2017 WL 491186 at \*1.

190. *Id.* at \*5.

191. *Id.* at \*5-6.

192. *Id.* at \*6-7.

193. *Id.* at \*7-10.

194. *Id.* at \*11.

department or suggest that a transactions practice was better than a litigation practice. Rather, at least as I understood it, he was trying to teach us to make contracts as clear as could be prior to signing so as to minimize the potential of disagreement over the meaning of terms in the future. Why? Because “litigation is no damn good.”

Yet no matter how hard lawyers try, the prospect always exists that disagreements will arise over how to interpret the terms of contracts and judges are called upon to resolve them.

Because the problem of contract interpretation arises with so much frequency, Indiana courts have developed a disciplined approach to addressing it:

- “Indiana courts recognize the freedom of parties to enter into contracts and . . . presume that contracts represent the freely bargained agreement of the parties.”<sup>195</sup> “This reflects the principle that it is in the best interest of the public not to restrict unnecessarily persons’ freedom of contract.”<sup>196</sup>
- “The ultimate goal of any contract interpretation is to determine the intent of the parties at the time that they made the agreement.”<sup>197</sup>
- “[C]onstruction of the terms of a written contract is a pure question of law for the court, reviewed de novo.”<sup>198</sup>
- A court will begin its interpretation of a contract “with the plain language of the agreement, reading it in context and, whenever possible, construing it so as to render each word, phrase, and term meaningful, unambiguous, and harmonious with the whole.”<sup>199</sup>
- “[W]here the language of a written instrument is unambiguous . . . the parties’ intent is to be determined by reviewing the language contained within the ‘four corners’ of that written instrument.”<sup>200</sup> “[E]xtrinsic evidence is not admissible to add to, vary or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction.”<sup>201</sup>
- “A contract is ambiguous if a reasonable person would find the contract

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195. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995); *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971).

196. *Fresh Cut, Inc.*, 650 N.E.2d at 1129; *Raymundo v. Hammond Clinic Ass’n*, 449 N.E.2d 276, 279 (Ind. 1983).

197. *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 813 (Ind. 2012).

198. *Harrison v. Thomas*, 761 N.E.2d 816, 818 (Ind. 2002).

199. *Citimortgage*, 975 N.E.2d at 813.

200. *Ryan v. TCI Architects/Eng’rs/Contractors, Inc.*, 72 N.E.3d 908, 917 (Ind. 2017).

201. *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006) (citation omitted). “Extrinsic evidence is evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement.” *CWE Concrete Const., Inc. v. First Nat’l Bank*, 814 N.E.2d 720, 724 (Ind. Ct. App. 2004) (citing BLACK’S LAW DICTIONARY 578 (7th ed. 1999), *trans. denied*, 831 N.E.2d 739 (Ind. 2005)).

subject to more than one interpretation.”<sup>202</sup> If a court finds ambiguous terms or provisions in the contract, the court “will construe them to determine and give effect to the intent of the parties at the time they entered into the contract.”<sup>203</sup> Courts may properly consider all relevant extrinsic evidence to resolve the ambiguity.<sup>204</sup>

- The principle of *contra proferentem*: an ambiguous contract will be “construed against the party who furnished and drafted the agreement.”<sup>205</sup>
- Despite the very strong presumption of enforceability of contracts that represent the freely bargained agreement of the parties, courts have refused to enforce private agreements on public policy grounds in three types of situations: (i) “agreements that contravene statute”; (ii) agreements that “clearly tend to injure the public in some way”; and (iii) agreements that are “otherwise contrary to the declared public policy of Indiana.”<sup>206</sup> The proper method of determining enforceability in such circumstances requires balancing: “(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.” In a case involving “highly sophisticated parties” where “the parties’ [had] relatively equal bargaining power and freedom to contract and . . . any other significant extenuating circumstances [were absent],” the court held that “any forfeiture that would be suffered . . . if the bargain were not enforced would be undeserved.”<sup>207</sup>

During the survey period, there were at least a half-dozen such contract interpretation questions faced by the Court of Appeals, and it is impressive how consistent the panels of the court were in their disciplined approach to answering those questions.

1. *Should language in a contract releasing a law firm from malpractice*

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202. *Citimortgage*, 975 N.E.2d at 813.

203. *Id.*

204. *Baker*, 843 N.E.2d at 535. Prior to 2006, Indiana courts drew a distinction between patent and latent ambiguities, holding “extrinsic evidence – both circumstantial and direct evidence of intention – . . . admissible to establish the existence of a latent ambiguity and also to resolve it,” but refusing “to admit extrinsic evidence to aid in the resolution of a patent ambiguity.” *Id.* at 534–35. In 2006, the Indiana Supreme Court abandoned the latent/patent distinction and held that “where an instrument is ambiguous, all relevant extrinsic evidence may properly be considered in resolving the ambiguity.” *Id.* at 535.

205. *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1077 (Ind. 2017); *Rahn v. Sch. City of Gary*, 25 N.E.2d 441, 442 (Ind. 1940).

206. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1130 (Ind. 1995).

207. *Cont’l Basketball Ass’n, Inc. v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 140–41 (Ind. 1996).

*liability be interpreted to apply to future acts or only past acts?*<sup>208</sup>

Barnes & Thornburg, LLP (“Barnes”), represented Dr. Anthony Miller and some companies Miller owned in protracted litigation with a former employee, Dr. Thomas Vogel.<sup>209</sup> The work included drafting various potential settlement agreements.<sup>210</sup> During the course of this work, Barnes and Miller entered into an agreement in which Barnes agreed to accept an approximately one-fourth reduction in the fees owed it by Miller in return for Miller releasing Barnes from any liability in connection with the Vogel matter.<sup>211</sup>

The precise language of the release was as follows:

The Miller Parties [Miller and his companies] hereby release and forever discharge [Barnes], and all predecessor and successor firms, including without limitation their respective present and past partners, associates and employees, from any and all claims, of any nature, known or unknown, which the Miller Parties now have, have had, or may later claim to have arising from or related to any aspect of [Barnes]’s representation of the Miller Parties relating in any way to the [Vogel matter].

. . . .

The Miller Parties may in the future discover facts different from or in addition to those which they now know or believe to be true with respect to the matters that are the subject of this Agreement, and the Miller Parties agree that this Agreement shall remain in effect in all respects, notwithstanding the discovery or existence of different or additional facts.<sup>212</sup>

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208. See generally *Cent. Ind. Podiatry, P.C. v. Barnes & Thornburg, LLP*, 62 N.E.3d 440 (Ind. Ct. App. 2016), *opinion vacated on reh’g*, 71 N.E.3d 92 (Ind. Ct. App. 2017), *trans. denied sub nom.*, 88 N.E.3d 1079 (Ind. 2017). In its original opinion in this case, the Court of Appeals first rejected Miller’s claim that Barnes had fraudulently procured Miller’s agreement to a release of liability in return for a fee reduction. *Id.* at 448–49. It then rejected Miller’s contract construction argument. This Article discusses only the latter. In its subsequent opinion on rehearing, the court vacated the reasoning in its earlier fraud holding but reached the same result on other grounds. *Cent. Ind. Podiatry, P.C.*, 71 N.E.3d at 96. The rehearing opinion did not address the contract construction issue.

209. *Cent. Ind. Podiatry, P.C.*, 62 N.E.3d at 441–42.

210. *Id.* at 443.

211. *Id.* at 443–44.

212. *Id.* at 448–49.

IND. PROF. CONDUCT R. 1.8(h) prohibits a lawyer from (1) making:

an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement; or (2) settl[ing] a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

In a subsequent malpractice suit against Barnes for legal services performed after execution of the release, Miller contended that the release was “not prospective in nature,” and thus Barnes could be found liable for negligence occurring after the release was signed.<sup>213</sup> Thus, the court was called upon to determine whether the foregoing language released the law firm from liability for professional negligence occurring after the date of the release.<sup>214</sup>

The court began its contract interpretation analysis by reciting the standard

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The release explicitly cites Rule 1(h), indicates that Miller has been advised to seek separate counsel, and provides that in connection with the release, Barnes was “representing only its own interests in negotiating and preparing” the release and was “not representing or protecting the interests of the Miller Parties.” *Cent. Ind. Podiatry, P.C.*, 62 N.E.3d at 445. The court also affirmatively recites evidence that Miller was independently represented in this regard by James A. Knauer of Kroger, Gardis & Regas, LLP.

In a concurring opinion, Judge Crone “question[s] the wisdom of allowing attorneys to prospectively insulate themselves from liability for future acts of legal malpractice.” *Id.* at 449 (Crone, J., concurring). He says that prior to 1987, the ethics rules binding Indiana lawyers prohibited such agreements, *Id.* (citing Indiana Disciplinary Rule 6–102 (repealed Dec. 31, 1986)), but that “[a] sea change occurred when the Indiana Supreme Court adopted” Rule 1.8(h), described above, effective January 1, 1987.

Judge Crone makes some strong policy arguments against the Rule and I encourage the reader to consider them. But I take issue with Judge Crone in two respects.

First, Judge Crone says that “[a]s far as I am aware, no explanation was offered for this change in policy.” *Id.* at 450 (Crone, J., concurring). The new rule was part of an entire re-write of the Indiana rules of lawyer discipline, mimicking (as had been the case in the past) model rules adopted by the American Bar Association. There was extensive commentary at the time of their adoption of the justification for the change. *See, e.g.*, CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 60-69 (1987). Having participated as a member of the Supreme Court in a subsequent re-write of the rules under the same circumstances in 2004 (effective Jan. 1, 2005), I can say with a high degree of certainty that the 1987 changes were based upon the same rationale as the new model rules, namely that enunciated by the ABA.

Second, Judge Crone says that “[u]ntil and unless our supreme court abolishes this practice, Hoosiers seeking competent and diligent legal representation may be left to fend for themselves against lawyers who wish to avoid liability for future acts of malpractice.” *Cent. Ind. Podiatry, P.C.*, 62 N.E.3d at 450-51 (Crone, J., concurring). Respectfully, saying that the rule leaves Hoosiers to “fend for themselves” ignores the very explicit requirement of the rule that the client be “independently represented in making the agreement.” IND. PROF. COND. R. 1.8(h). As the Supreme Court itself says, “many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement.” *Id.*, cmt. 14. For this reason, the court says, “agreement[s] prospectively limiting the lawyer’s liability for malpractice [are prohibited] unless the client is independently represented.” *Id.*

213. *Cent. Ind. Podiatry, P.C.*, 62 N.E.3d at 449.

214. *Id.*

“four corners” rule of contract interpretation, “[i]f the language is clear and unambiguous, we give that language its plain and ordinary meaning and enforce the contract according to its terms.”<sup>215</sup> The court then shifted its emphasis to the necessity of reading the contract “as a whole when trying to ascertain the parties’ intent.”<sup>216</sup> Miller had argued that the words “known and unknown” in the release indicated the claims covered “must refer to accrued claims as it is not possible to ‘know something’ (or not know something) that has not yet happened.”<sup>217</sup> But the court said that it must “make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless, . . . accept[ing] an interpretation of the contract that harmonizes its provisions, as opposed to one that causes the provisions to conflict.”<sup>218</sup>

Adopting this approach, that court found Miller’s argument was inconsistent with other contract language, specifically that Miller had released Barnes from claims “arising from or related to any aspect of [Barnes’s] representation of the Miller Parties relating in any way” to the Vogel matter and that the release was to be in effect “notwithstanding the discovery or existence of different or additional facts.”<sup>219</sup>

2. *Should language in a real estate sales contract providing a 180 day “due diligence period” be interpreted as part of a seller’s covenant or a buyer’s performance contingency?*<sup>220</sup>

Cheng Song, an East Coast businessman, responded to an online advertisement to sell ten acres of land adjacent to the Porter County airport.<sup>221</sup> The advertisement stated that “the land was zoned I-2 Industrial and that it was suitable for warehousing and other light industrial uses.”<sup>222</sup> The land was owned by Thomas and Theresa Iatarola; they were represented by commercial real estate broker Robert Macmahon.<sup>223</sup>

Song hoped to start an imported tool business in Northwest Indiana and needed property suitable for industrial warehousing.<sup>224</sup> Although the court’s decision does not say that either Macmahon or Thomas Iatarola explicitly told Song that the property was zoned for industrial use, in an internet advertisement that has Macmahon’s handwriting on it, the property’s type is described as “Industrial For Sale,” and the property overview states that the land is “in an established industrial area.”<sup>225</sup>

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215. *Id.* at 448.

216. *Id.*

217. *Id.* at 449.

218. *Id.* at 448.

219. *Id.* at 449.

220. *Song v. Iatarola*, 76 N.E.3d 926 (Ind. Ct. App. 2017), *on reh’g*, No. 64A03-1609-PL-2094, 2017 WL 2871909 (Ind. Ct. App. July 6, 2017).

221. *Id.* at 930-31.

222. *Id.* at 930.

223. *Id.*

224. *Id.* at 930-31.

225. *Id.* at 931.

After a period of negotiation,<sup>226</sup> Song and Thomas Iatarola signed a contract entitled “Purchase Agreement Commercial-Industrial Real Estate” covering a different part of the Iatarolas’ land than that originally advertised.<sup>227</sup> The contract required \$150,000 in earnest money. And it contained the following provision:

Closing date will be predicated on the Seller’s ability to vacate and exit the subject property. A maximum of 180 days (“Due Diligence Period”) from the day of acceptance of this contract, has been agreed by both parties. When the seller advises the Buyer in writing, that the exit is complete, the Buyer will have 30 days, from that date, to close.<sup>228</sup>

The contract was signed on March 21, 2011, and Song thereupon deposited the \$150,000 earnest money in the bank.<sup>229</sup> On August 7, Song and Thomas Iatarola “met on the property for a final inspection, and [Iatarola] told Song that the property was zoned Agricultural.”<sup>230</sup> Song consulted counsel.<sup>231</sup> On August 12, Song’s attorney advised that the “Porter County zoning regulations did not permit the use of warehousing for industrial purposes on agriculturally-zoned property.”<sup>232</sup> When the Iatarolas refused Song’s proposal to amend the contract to compensate for the expense of changing from agricultural to industrial zoning, Song terminated the contract within the 180-day due diligence period described above “and demanded the return of his \$150,000 earnest money deposit.”<sup>233</sup> “The Iatarolas refused to return Song’s escrow deposit.”<sup>234</sup>

At issue was the proper interpretation of the clause in the contract quoted above that sets forth a “180-day due diligence period.”<sup>235</sup> The Iatarolas argued that this meant that they had to use due diligence to vacate the premises within 180 days.<sup>236</sup> Song contended that a due diligence period existed for his benefit to investigate facts regarding the suitability of the property for his purpose.<sup>237</sup> Thus, the court was called upon to determine whether the foregoing language constituted a covenant on the part of the sellers to vacate the premises with due diligence or provided a contingency for the benefit of the buyers to inspect the premises with due diligence.<sup>238</sup>

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226. *Id.* During these negotiations, the parties signed a contract entitled “Purchase Agreement Commercial-Industrial Real Estate” for Song to purchase the ten acres, but Song exercised a contingency right to terminate the contract. *Id.* This termination is not at issue in this case.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 932.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 933.

236. *Id.*

237. *Id.*

238. *Id.*

The court began its contract interpretation analysis by explicitly citing the “four corners” rule of contract construction: “When the language of the contract is unambiguous, the parties’ intent is determined from the four corners of the document.”<sup>239</sup> On the other hand, the court said, “If a contract is ambiguous, the court may consider extrinsic evidence, and the construction of the contract becomes a matter for the trier of fact.”<sup>240</sup>

The court found the provision at issue here to be ambiguous.<sup>241</sup> The contract did not “state the purpose of the due diligence period.”<sup>242</sup> As the Iatarolas contended, “its placement in a paragraph about the Iatarolas’ ability to vacate the property and the timing of the closing date implie[d] that the due diligence period was related to their ability to vacate the property.”<sup>243</sup> But as Song contended, such an interpretation would be “at odds with the law and how the term is generally applied in real estate transactions.”<sup>244</sup>

At this point, the court turned to the contract interpretation doctrine of *contra proferentem*: where “there is ambiguity in a contract, it is construed against its drafter.”<sup>245</sup> Without further analysis, the court interpreted the provision in favor of Song on grounds that the Iatarolas drafted the contract.<sup>246</sup>

Further discussion is necessitated by the fact that the Iatarolas petitioned for rehearing, contending that it was Song, not they, who drafted the due diligence clause.<sup>247</sup> The court mulled over the evidence in the record in this regard and then declared that it did “not change the outcome of the appeal.”<sup>248</sup> During the summary judgment stage and in their appeal, the court said, the Iatarolas had “failed to establish that no genuine issue of material fact existed about whether Song independently drafted the addendum such that its interpretation should be construed against him.”<sup>249</sup>

This is not an altogether satisfying result. It is true that the Iatarolas sought summary judgment on grounds that the due diligence clause should be construed in their favor.<sup>250</sup> I agree with the court that the evidence cited in the rehearing opinion does not establish that the Iatarolas were entitled to summary judgment on grounds that Song drafted the clause. But in the original opinion, the court said that the clause was to be construed against the Iatarolas because they had drafted

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239. *Id.* at 933 (citing *Winterton, LLC v. Winterton Inv’rs, LLC*, 900 N.E.2d 754, 759 (Ind. Ct. App. 2009)).

240. *Id.*

241. *Id.* at 934.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* (citing *MPACT Const. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 910 (Ind. 2004)).

246. *Id.*

247. *Id.*

248. *Song v. Iatarola*, 83 N.E.3d 80, 81 (Ind. Ct. App. 2017) (on reh’g).

249. *Id.*

250. *Song*, 76 N.E.3d at 930.

it.<sup>251</sup> The evidence in the rehearing opinion seems quite clear that the parties negotiated the language of the clause; that neither was solely responsible for it.<sup>252</sup> For this reason, I think that the court should have acknowledged on rehearing that the basis of its original interpretation of clause in favor of Song – *contra proferentem* – was incorrect.

Interpreting contract language is a question of law. When the question here could not be decided on the basis of *contra proferentem*, I think the court had a duty to interpret the clause anew. This is not to say that the court's original interpretation of the clause in favor of Song was incorrect – there seem to be ample grounds for doing so – only that it could not be based on *contra proferentem*.

I want to offer as a proposition for future discussion that the use of the *contra proferentem* doctrine is generally not appropriate in interpreting the meaning of a specific contract provision where the language of the contract as a whole has been actively negotiated by the parties. It is one thing when a prospective insured has been presented with a non-negotiable application<sup>253</sup> or a prospective tenant has been presented with a non-negotiable lease<sup>254</sup>; *contra proferentem* is appropriately deployed in such circumstances. However, between parties actively negotiating terms, it is likely that each will bring some of its own language to the contract. It is further likely that some of the language brought by one party or the other or both will become part of the contract without change – not because of uneven bargaining power or the other concerns that animate *contra proferentem* but because, in the give-and-take of the negotiating process, one agrees to the other's proposals in return for the other's agreement to one's own. It invades the bedrock principles of freedom of contract and private ordering for a court to dictate that any particular term in an actively negotiated contract should be construed in a particular way solely because of its provenance in the drafting process.<sup>255</sup>

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251. *Id.* at 934.

252. *Song*, 83 N.E.3d at 81.

253. *See, e.g.*, *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996).

254. *See, e.g.*, *Vertucci v. NHP Mgmt. Co.*, 701 N.E.2d 604, 606 (Ind. Ct. App. 1998).

255. The rule of *contra proferentem* is contained in § 206 of Restatement (Second) of Contracts (1981). The Reporter's Note to § 206 observes that the rule "has less force when the other party has taken an active role in the drafting process, or is particularly knowledgeable," citing *Centennial Ent., Inc. v. Mansfield Dev. Co.*, 568 P.2d 50 (Colo. 1977); *Crestview Bowl, Inc. v. Womer Constr. Co.*, 225 Kan. 335, 592 P.2d 74 (1979); and *Graziano v. Tortora Agency, Inc.*, 78 Misc.2d 1094, 359 N.Y.S.2d 489 (Civ. Ct. 1974). A more recent case is *Prudential Ins. Co. of Am. v. Prusky*, 473 F. Supp. 2d 629, 639 (E.D. Pa. 2007) (not applying *contra proferentem* because the non-drafting parties "are sophisticated investors and there is evidence of the parties' negotiations and intentions in entering the contract"). *See also* Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 504 (2010) ("[M]any courts will not construe ambiguous language against the drafter of the contract where both parties are sophisticated. One example of the extensive use of this exception arises in the interpretation of insurance contracts, where the 'sophisticated policyholder' doctrine has emerged.") (footnotes

3. *Should language in an auto insurance contract providing coverage for “injuries arising out of the use of an owned vehicle” be interpreted to provide or deny coverage for personal injuries inflicted by the insured in a fight outside the vehicle where the insured used the vehicle to chase down the victim who was fleeing the scene of an accident?*<sup>256</sup>

Drake Matovich was minding his own business, sitting in his truck in a Meijer parking lot in Mishawaka, when another driver, Robert Curtis, bumped into him.<sup>257</sup> Curtis drove off without stopping and Matovich pursued him.<sup>258</sup> They eventually got out of their vehicles, faced-off, exchanged a few F-bombs, and in the ensuing altercation, Curtis collapsed and died.<sup>259</sup> Good grief, right?

Curtis’s Estate and Matovich settled; the Estate then attempted to recover the settlement amount from GEICO, Matovich’s auto insurance carrier.<sup>260</sup> The GEICO policy’s liability provision stated that the insurer agreed to pay damages for which Matovich became legally obligated to pay because of bodily injury “arising out of the ownership, maintenance, or use of the owned auto.”<sup>261</sup>

At issue was the proper interpretation of the language in the contract quoted above that provides coverage for bodily injury “arising out of the . . . use of the owned auto.”<sup>262</sup> The Estate argued that Matovich used his truck to chase Curtis and cut him off from fleeing the scene of an accident after Curtis bumped Matovich’s truck in the parking lot and drove away, that this type of use was foreseeable, and that this type of use was not excluded by the policy.<sup>263</sup> The insurance company maintained that Matovich was not “using” his vehicle at the time of the altercation with Curtis; the altercation “merely happened to occur near the covered vehicle.”<sup>264</sup>

The court began its contract interpretation analysis by reciting that insurance policies are subject to the same rules of construction as are other contracts, including the “four corners” rule that when the language of a contract is clear and unambiguous, the court will assign to the language its plain and ordinary meaning.<sup>265</sup> The court then turned to precedent, observing that Indiana has a narrower construction of the “arising out of the . . . use” phrase than that of other

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omitted).

256. *See generally* Estate of Curtis by Brade v. Geico Gen. Ins. Co., 71 N.E.3d 1157 (Ind. Ct. App. 2017).

257. *Id.* at 1159.

258. *Id.*

259. *Id.*

260. *Id.* In the settlement, Matovich assigned to the Estate any claims he had against GEICO. *Id.*

261. *Id.* at 1160.

262. *Id.*

263. Brief of Appellant at 12, *Estate of Curtis by Brade*, 71 N.E.3 1157.

264. *Estate of Curtis by Brade*, 71 N.E.3d at 1162.

265. *Id.* at 1160 (quoting *Sheehan Constr. Co. v. Cont’l Cas. Co.*, 935 N.E.2d 160, 169 (Ind. 2010)).

states'.<sup>266</sup> In Indiana, an accident arises out of the use of a vehicle only if such use is the incident's "efficient and predominating cause."<sup>267</sup> The court then briefly recited the facts of five specific appellate decisions implicating this provision, in each of which coverage was held not to exist.<sup>268</sup> The court also distinguished a case finding coverage proffered by the Estate.<sup>269</sup>

Following this authority, the court concluded that, as a matter of law, Matovich was not "using" his vehicle "at the time of the altercation with Curtis" and the policy did not provide coverage.<sup>270</sup>

4. *Should language in a property tax escrow contract requiring the mortgagor to pay an amount "sufficient to pay all property taxes payable or estimated by the mortgagee to be payable" be interpreted to allow the mortgagor or the mortgagee to determine the amount payable?*<sup>271</sup>

Wyckford SK Realty, LLC ("Wyckford") borrowed \$8.1 million from a bank, secured by a mortgage on real estate.<sup>272</sup> Included in the loan papers was an escrow agreement that required, among other things, a monthly escrow payment for property taxes.<sup>273</sup> Here was the exact language: "[O]n the first day of each calendar month, [Wyckford] shall pay [the Bank] (a) one-twelfth of the amount that would be sufficient to pay all Taxes payable or estimated by [the Bank] to be payable, during the next ensuing (12) twelve months[.]"<sup>274</sup>

Wyckford appealed an increase in the assessed valuation of its property which had resulted in a substantial increase in the amount of property taxes due.<sup>275</sup> A statute gives such a taxpayer the option of not paying the taxes attributable to the increase until the appeal is finally adjudicated.<sup>276</sup> During the pendency of the tax appeal, Wyckford failed to provide funds sufficient to cover the monthly payments and the bank eventually filed a mortgage foreclosure action.<sup>277</sup>

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266. *Id.* at 1160-61 (citing *Shelter Mut. Ins. Co. v. Barron*, 615 N.E.2d 503, 506 (Ind. Ct. App. 1993)).

267. *Id.* at 1160 (quoting *Ind. Lumbermens Mut. Ins. Co. v. Statesmen Ins. Co.*, 291 N.E.2d 897, 899 (Ind. 1973)).

268. *Id.* at 1161 (citing *Moons v. Keith*, 758 N.E.2d 960, 964 (Ind. Ct. App. 2001); *Sizemore v. Erie Ins. Exch.*, 789 N.E.2d 1037, 1040 (Ind. Ct. App. 2003); *Barron*, 615 N.E.2d at 506; *State Farm Mut. Ins. Co. v. Spotten*, 610 N.E.2d 299, 302 (Ind. Ct. App. 1993); and *Miller v. Loman*, 518 N.E.2d 486, 492-93 (Ind. Ct. App. 1987)).

269. *Id.* at 1161-62 (discussing *Argonaut Ins. Co. v. Jones*, 953 N.E.2d 608 (Ind. Ct. App. 2011)).

270. *Id.* at 1162.

271. *Wyckford SK Realty, LLC v. JPMCC 2006-CIBC14-7777 Wyckford Ct LLC*, No. 49A04-1605-MF-1159, 2017 WL 164379 at \* 1 (Ind. Ct. App. Jan. 17, 2017).

272. *Id.*

273. *Id.*

274. *Id.* at \*2.

275. *Id.* at \*1.

276. *Id.* at \*4 (discussing IND. CODE § 6-1.1-15-10).

277. *Id.* at \*1.

At issue was the proper interpretation of the property tax escrow covenant set forth above.<sup>278</sup> Wyckford interpreted this language to give it the option to pay into the escrow account only the (reduced) amount that it was obligated to pay by operation of that statute.<sup>279</sup> The bank, on the other hand, directed Wyckford to make payments based on the higher assessed value.<sup>280</sup> It interpreted this language to require Wyckford to pay based on the bank's estimate of the amount payable.<sup>281</sup>

The court began its contract interpretation analysis with some general observations about construction of a written contract before quoting the principle that “the language of a contract [must be interpreted] so as not to render any words, phrases, or terms ineffective or meaningless.”<sup>282</sup> Applying this principle, the court found that the “language at issue clearly gives *the Bank* the option to require Wyckford to pay an amount it estimates to be payable.”<sup>283</sup> That “language would be rendered meaningless,” the court continued, if the language were interpreted to give Wyckford the option to pay at a reduced rate.<sup>284</sup> “If the Bank’s estimate had no ‘teeth,’ the language allowing it to make the estimate would be surplusage,” the court concluded in construing the language in favor of the bank.<sup>285</sup>

*5. Should language in a contract requiring a trucker to pay the trucker’s own fuel costs and permitting a trucking company to provide truckers “advances” be interpreted, when the trucker uses a trucking company-provided credit card to buy fuel, to require the trucker to pay the at-the-pump price or the discounted price enjoyed by the trucking company?*<sup>286</sup>

Celadon Trucking Services, Inc., “both directly employs company drivers, who drive company-owned trucks, and independent contractors, who drive their own trucks.”<sup>287</sup> Celadon’s contract with the independent contractors required the contractors to pay their own fuel charges.<sup>288</sup> The contract stated that these truckers had “sole and complete responsibility for . . . [p]aying all operating costs and expenses incidental to the operation of the Equipment including, but not limited to fuel.”<sup>289</sup>

Celadon provided these truckers with special credit cards and directed them

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278. *Id.* at \*2.

279. *Id.* at \*4.

280. *Id.* at \*1.

281. *Id.* at \*4.

282. *Id.* (quoting *Bowen v. Monroe Guar. Ins. Co.*, 758 N.E.2d 976, 980 (Ind. Ct. App. 2001)).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1077 (Ind. 2017).

287. *Id.* at 837.

288. *Id.*

289. *Id.* at 838.

to purchase fuel from Pilot Flying J gas stations wherever possible.<sup>290</sup> When these credit cards were used, they reflected the cost of fuel at its market price.<sup>291</sup> Pilot Flying J had an arrangement with Celadon under which Celadon would pay for the fuel at a substantial discount.<sup>292</sup> The contract said nothing one way or the other about the credit cards and their use.<sup>293</sup> The contract did say that “Celadon will continue to advance monies to the Contractor from time to time as requested by the Contractor and approved by Celadon.”<sup>294</sup>

A class consisting of independent contractors sued Celadon, seeking to “recover the difference between the amount Celadon deducted from independent contractors’ compensation for fuel charges at Pilot Flying J’s and the lower amount Celadon actually paid Pilot Flying J for that fuel.”<sup>295</sup>

At issue was the proper interpretation of the contract language set forth above.<sup>296</sup> Celadon interpreted the contract to deduct the pump price for fuel from a contractor’s compensation, not the discounted price.<sup>297</sup> The truckers interpreted the contract in just the opposite way; they maintained that they were entitled to have the discounted price, not the pump price, deducted from their compensation.<sup>298</sup>

The court began its contract interpretation analysis by setting forth the “four corners” tenant, “If contract language is unambiguous, this court may not look to extrinsic evidence to expand, vary, or explain the instrument but must determine the parties’ intent from the four corners of the instrument.”<sup>299</sup> Celadon took the position that the contract was unambiguous in its favor, arguing that when a trucker purchased fuel using the credit card, that constituted an “advance” under the contract of an amount equal to the at-the-pump price at the time the purchase was made, entitling Celadon to deduct an equal amount from a trucker’s compensation.<sup>300</sup> The truckers took the opposite position: that “the accurate measure of the deductions under the contract was the amount Celadon actually paid to Pilot Flying J for the fuel purchases, not the at-the-pump price.”<sup>301</sup>

Writing for the court, Judge Michael P. Barnes concluded “that the contract was ambiguous with respect to how much Celadon was permitted to deduct from

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290. *Id.* at 837.

291. *Id.*

292. *Id.*

293. *Id.* at 838.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 841.

298. *See generally id.*

299. *Id.* at 839 (citing *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)).

300. *Id.* at 840.

301. *Id.*

a trucker's compensation for fuel purchases."<sup>302</sup> He gave several reasons.<sup>303</sup> First, although both parties' reading of the contract turned on the word "advance," the court said, there was no express definition in the contract for the word "advance."<sup>304</sup> Second, the credit cards provided the drivers and their use were not mentioned in the contract.<sup>305</sup> Third, there was no explanation in the contract of the proper method for calculating fuel costs; the contract neither equated fuel "costs and expenses" with the actual costs paid by Celadon nor with the pump price displayed to truckers at Pilot Flying J's.<sup>306</sup> The dispute turned on the difference between the pump price and what Celadon actually paid, Judge Barnes said, "and the contract [was] entirely silent on how to address that difference."<sup>307</sup>

Having held the language of the contract to be ambiguous, the court then turned to construing the contract terms "to determine and give effect to the intent of the parties when they entered into the contract."<sup>308</sup>

The court's first step in construing the terms was to "consult sources reflecting the ordinary meaning of its terms at the time the contract was executed."<sup>309</sup> It did so by consulting a dictionary where "advance" was defined as "1. The furnishing of money or goods before any consideration is received in return. 2. The money or goods furnished."<sup>310</sup> Considering that under this definition, an "advance" applies to either "money or goods," the court reasoned that what Celadon "advanced" to truckers when they used their credit cards at Pilot Flying J's "was the actual fuel itself—not the specific pump price of the fuel."<sup>311</sup> The cost of those goods to Celadon was not the pump price but the discounted price, the court said, and so only the discounted price could be deducted from the truckers' compensation.<sup>312</sup>

In reaching this conclusion, Judge Barnes also deployed two rules of contract interpretation.<sup>313</sup>

First, Judge Barnes invoked the rule of *contra proferentem* – that an ambiguous contract should be construed against the party who furnished and drafted the agreement.<sup>314</sup> Here the contract had been drafted by Celadon and the

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302. *Id.* at 841.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 839 (citing *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)).

309. *Id.* at 842 (citing *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008)).

310. *Id.* (quoting BLACK'S LAW DICTIONARY63 (10th ed. 2009)).

311. *Id.*

312. *Id.*

313. *Id.* at 839, 843.

314. *Id.* at 839 (citing *CWE Concrete Const., Inc. v. First Nat'l Bank*, 814 N.E.2d 720, 724 (Ind. Ct. App. 2004)).

court used the rule to bolster its reading of “advance” as applying to the actual fuel and not the purchase of the fuel.<sup>315</sup>

Second, Judge Barnes applied the rule that a contract is to be interpreted as a whole.<sup>316</sup> He points to several provisions in the contract that are consistent with his reading of “advance”, e.g., that the contract “does not permit Celadon to seek reimbursement for more than Celadon’s costs.”<sup>317</sup>

6. *Should language in a contract requiring an owner of undeveloped lots to pay a development company “a 7% management fee of the sales price on each lot sold” be interpreted to require the development company to “manage” the subdivision in order to be entitled to a fee upon the sale of a lot?*<sup>318</sup>

Willow Properties, LLC (“Willow”), was formed to develop a residential subdivision in Zionsville.<sup>319</sup> Sanders Development Group, Inc. (“Sanders”), had substantial experience in developing residential subdivisions and signed an agreement with Willow containing the following proviso: that Willow would pay Sanders “a 7% management fee of the sales price on each Willow lot sale, to be paid at the time of closing.”<sup>320</sup>

Seven years later, five lots remained unsold.<sup>321</sup> One lot was sold the next year; no seven percent management fee was paid.<sup>322</sup> During the following year, Willow purported to terminate its contract with Sanders.<sup>323</sup> Later that year, the remaining four lots sold; again no seven percent management fee was paid.<sup>324</sup>

At issue was the proper interpretation of the contract language concerning the “7% management fee” set forth above.<sup>325</sup> Sanders interpreted the contract to require that the seven percent management fee be paid to it for the sale of the last five lots.<sup>326</sup> Willow interpreted the contract to require Sanders to “manage” the subdivision in order to be entitled to a management fee.<sup>327</sup>

The court began its contract interpretation analysis by setting forth the “four corners” tenant, “If contract language is unambiguous, this court may not look to extrinsic evidence to expand, vary, or explain the instrument but must determine

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315. *Id.* See discussion *supra* accompanying footnotes 253-55 for the author’s views on applying the *contra proferentem* canon.

316. *Id.* at 843; see RESTATEMENT (SECOND) CONTRACTS § 202(2) (1981) (“A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.”)

317. *Id.*

318. Sanders Dev. Grp., Inc. v. Willow Props., LLC, No. 06A04-1604-PL-941, 2017 WL 1033696, at \*1 (Ind. Ct. App. 2017) (mem.).

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at \*3.

the parties' intent from the four corners of the instrument."<sup>328</sup> Willow argued that the term "management" was unambiguous and under the plain terms of the contract, Sanders agreed to manage the subdivision.<sup>329</sup> Sanders argued that the term "management" was ambiguous, and therefore, the parties' intent must be established by extrinsic evidence.<sup>330</sup>

The court's first move was to consult a dictionary for the meaning of management.<sup>331</sup> Finding the term's plain meaning easily understood, the court nevertheless concluded that within the contract at issue, it was ambiguous because the contract did not make clear what Sanders "was tasked with managing under the contract."<sup>332</sup> While the court inferred from the use of the term "management fee" that the contract required Sanders to manage something, the contract did not establish that Willow hired Sanders to manage the subdivision.<sup>333</sup> In the end, the court concluded that the duties that Sanders was required to perform in exchange for its fee of seven percent of the sales price of each lot was within the fact-finder's purview to determine.<sup>334</sup>

### *B. Arbitration, Arbitration Everywhere*

The presence of arbitration clauses in contracts is ubiquitous – and controversial. A highly-publicized skirmish took place on the national stage during the survey period.

On July 10, 2017, the Consumer Financial Protection Bureau ("CFPB") "issued a final rule titled Arbitration Agreements to regulate pre-dispute arbitration agreements in contracts for specified consumer financial products and services."<sup>335</sup> The rule "prohibited providers from using a pre-dispute arbitration agreement to block consumer class actions in court and would have required providers to include a provision reflecting this limitation in arbitration agreements they entered into."<sup>336</sup> The rule took effect on September 18, 2017, a few days after the end of the survey period.<sup>337</sup>

Under the terms of the Congressional Review Act, a statute originally passed by Congress during the Clinton administration, Congress can review and invalidate rules promulgated by the executive branch by passing a "a joint resolution of disapproval" within the time periods and in the manner prescribed

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328. *Id.* at \* 2 (citing *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 72 (Ind. Ct. App. 2014)).

329. *Id.* at \*3.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. Bureau of Consumer Fin. Prot., *Arbitration Agreements*, FED. REGISTER (Nov. 22, 2017), <https://www.federalregister.gov/d/2017-25324/p-7> [<https://perma.cc/9JW8-UK7J>].

336. *Id.*

337. *Id.*

by the act.<sup>338</sup> Congress passed such a joint resolution with respect to the CFPB Arbitration Agreements rule, and President Donald J. Trump signed the resolution into law on November 1, 2017.<sup>339</sup> Under the joint resolution and by operation of the Congressional Review Act, the force and effect of the Arbitration Agreements rule was nullified.<sup>340</sup>

The CFPB rule, though undone by Congress and the White House, reflects unease with the pervasiveness of arbitration. During the survey period, a decision of the Indiana Court of Appeals, *Riley v. AAA Automotive, LLC*,<sup>341</sup> also reflects unease in this regard. But before discussing *Riley*, I will use another arbitration case, *Kleinman v. Fifth Third Securities, Inc.*,<sup>342</sup> to set the stage.

Afsaneh and Elliot Kleinman opened an investment account with Fifth Third Securities, Inc., signing both an “Account Application” and a “Brokerage Account Customer Agreement.”<sup>343</sup> The application had a bold-faced provision just above the signature line that the “account [was] governed by a pre-dispute arbitration clause” and a cross-reference to the clause in the agreement.<sup>344</sup> The agreement contained a broad provision in which the Kleinmans and Fifth Third both agreed that any “controversies” between them would “be determined by arbitration.”<sup>345</sup>

The Kleinmans later sued Fifth Third, alleging that they had received bad investment advice.<sup>346</sup> Rejecting the Kleinmans’ arguments, the court found that Fifth Third had satisfied its burden of proving that the Kleinmans had agreed to arbitrate and that the agreement covered the dispute at issue.<sup>347</sup> As such, court affirmed the trial court’s determination that the lawsuit be dismissed and the Kleinmans compelled to arbitrate.<sup>348</sup>

This case is a good reminder that the party seeking to compel arbitration has the burden of showing that the parties entered into an arbitration agreement and that the dispute at issue is covered by the agreement.<sup>349</sup>

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338. 5 U.S.C. § 801 et seq (1996).

339. Pub. L. No. 115-74 (H.J. Res. 111) (2017). The U.S. House of Representative passed the resolution on July 25, 2017. The U.S. House of Representatives passed the resolution on October 24, 2017, after Vice President Michael R. Pence broke a 50-50 tie vote in favor of the resolution. President Donald J. Trump signed the joint resolution into law on November 1, 2017.

340. Philip A. Wallach & Nicholas W. Zeppos, *How powerful is the Congressional Review Act?*, BROOKINGS (Apr. 4, 2017), <https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/> [https://perma.cc/A5HK-A6HL].

341. 67 N.E.3d 1131 (Ind. Ct. App. 2017).

342. *Kleinman v. Fifth Third Sec., Inc.*, No. 49A02-1603-CC-624, 2016 WL 7189993, at \*1 (Ind. Ct. App. 2016) (mem.).

343. *Id.* at \*2.

344. *Id.* at \*3.

345. *Id.*

346. *Id.* at \*1.

347. *Id.* at \*5.

348. *Id.* at \*9.

349. *Id.* at \* 2 (citing *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770,

It is also a good reminder of something else. In *Kleinman*, the proponent of arbitration argued that Indiana “recognizes a strong policy favoring the enforcement of arbitration agreements.”<sup>350</sup> Although true, the court said the argument was not particularly relevant here where the issue was primarily whether an agreement to arbitrate the dispute even existed.<sup>351</sup> In other words, however strong the policy in favor of enforcing arbitration agreements might be, there is no policy favoring finding the existence of an arbitration agreement in the first place.

The enforceability-existence distinction played out in *Riley v. AAA Automotive, LLC*.<sup>352</sup> *Riley* is worth some study because it reflects what appears to me to be some careful tempering by the Court of Appeals of a trial court’s undue exuberance over the use of alternate dispute resolution.

Paul and Michelle Riley purchased a vehicle from AAA Automotive, LLC d/b/a 3A Automotive (“3A”).<sup>353</sup> The Rileys neither complied with their payment obligations nor returned the vehicle.<sup>354</sup> After 3A sued for replevin, the Rileys returned the vehicle but also counterclaimed for damages on a variety of theories.<sup>355</sup>

Soon thereafter, the trial court ordered mediation, saying that the parties stipulated to Douglas McMillan as mediator.<sup>356</sup> When mediation efforts failed, the trial court entered a new order, directing “the parties to complete arbitration with Douglas C. McMillan.”<sup>357</sup> The trial court thereafter approved McMillan’s arbitration award, consisting largely of attorney fees to be paid by the Rileys.<sup>358</sup>

On appeal, the court cited the statutory limitations on vacating an arbitration award, noting the narrowness of the scope of judicial review.<sup>359</sup> But it found a threshold matter needed attention first: “[B]efore a court compels arbitration, it must first resolve any claims concerning the validity of the contract containing the arbitration clause.”<sup>360</sup> The trial court had made no findings concerning the contract nor had the arbitration order made any reference to an arbitration clause.<sup>361</sup>

What is really interesting about this case is that even though the Rileys acknowledge that they did not oppose arbitration after mediation failed, the court

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774–75 (Ind. Ct. App. 2011)).

350. *Id.* at \*5 n.1 (citing *Koors v. Steffen*, 916 N.E.2d 212, 215 (Ind. Ct. App. 2009)).

351. *Id.*

352. 67 N.E.3d 1131, 1136 (Ind. Ct. App. 2017).

353. *Id.* at 1132-33.

354. *Id.* at 1133.

355. *Id.*

356. *Id.* at 1134.

357. *Id.*

358. *Id.* at 1135.

359. *Id.* at 1135-36 (citing Indiana’s Uniform Arbitration Act, IND. CODE § 34-57-2).

360. *Id.* at 1136 (quoting *Int’l Creative Mgmt. Inc. v. D & R Entm’t Co., Inc.*, 670 N.E.2d 1305, 1311 (Ind. Ct. App. 1996)).

361. *Id.*

refused to enforce the arbitration award: “the arbitration proceedings were for naught, and the judgment on the arbitration award must be vacated.”<sup>362</sup>

I think the key to understanding the court’s position is the following sentence: “There is no evidence of an arbitration agreement in the record and, hence, no evidence that there was a meeting of the minds concerning the scope and terms of the arbitration.”<sup>363</sup> It is beyond the authority of the trial court to order arbitration, the court seems to be saying, unless there is evidence in the record that there was a meeting of the minds concerning the scope and terms of arbitration. It is not enough simply to convert a failed mediation to an arbitration without, to repeat, a meeting of the minds concerning the arbitration’s scope and terms.<sup>364</sup>

And the court lays down several markers for the future:

As a cautionary note, alternative dispute resolution has reached full bloom since it was first recognized by our Indiana Supreme Court. Nevertheless, absent a contract, our courts are to remain open—pursuant to Article 1, Section 12 of the Indiana Constitution—and participation in alternative dispute resolution is still voluntary. While we encourage voluntary settlement and resolution, we do so only after full disclosure of the nature of the alternative dispute method selected and its consequences to the litigants. It is incumbent upon the mediator or arbitrator to document the agreement to mediate or arbitrate in the Chronological Case Summary . . . . And, moreover, where an individual has been selected first as a mediator, we question the propriety of that individual continuing to participate as an arbitrator, when he or she has first participated with the same litigants in a failed mediation.<sup>365</sup>

### *C. Guarantors a/k/a Sureties*

As a condition to extending credit, creditors often require third party personal guaranties, collateral from third parties, or both. Such a third party is sometimes called a “guarantor,” sometimes a “surety”; the meaning of the two words is indistinguishable.<sup>366</sup>

Two cases during the survey period provide important reminders of two dimensions of guaranties and suretyship: first, a person supplying a creditor with collateral to secure the debt of another stands in relation of surety to the debtor;<sup>367</sup> and second, “a surety is a favorite of the law” with many available defenses.<sup>368</sup>

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362. *Id.* at 1137.

363. *Id.*

364. *Id.*

365. *Id.* at 1137 n.6.

366. *Farmers Loan & Tr. Co. v. Letsinger*, 652 N.E.2d 63, 66 (Ind. 1995).

367. *Owen Cty. State Bank v. Guard*, 26 N.E.2d 395, 398-99 (Ind. 1940); *First Fed. Bank of Midwest v. Greenwalt*, 42 N.E.3d 89, 94 (Ind. Ct. App. 2015).

368. *Greenfield Lumber & Ice Co. v. Parker*, 65 N.E. 747, 747 (Ind. 1902); *Greenwalt*, 42

In *Enfield v. The Farmers & Merchants State Bank*, Marvin Enfield conveyed his farm to his son, Richard Enfield, for \$236,500.<sup>369</sup> Richard Enfield borrowed \$236,500 from Farmers & Merchants State Bank to purchase the farm of Marvin Enfield, his father, subject to a life estate in the father's favor.<sup>370</sup> Both father and son executed in favor of the bank a mortgage on the property to secure the \$236,500 loan and any "additional loans from the [b]ank to any of the individuals who signed the mortgage."<sup>371</sup> Richard then borrowed an additional approximately \$67,500 for new farm equipment, also secured by the mortgage.<sup>372</sup>

When Richard defaulted on the loans, the bank foreclosed first on the farm equipment and then the mortgage.<sup>373</sup> The court and the parties assumed that Marvin was in the position of a surety, effectively having pledged his life estate in the farm as collateral for Richard's loans.<sup>374</sup> As a surety, Marvin argued, he should be discharged of his obligation because of a "material alteration" in the underlying obligation of Richard to the bank.<sup>375</sup>

It is a well-established principle of suretyship law that a surety is discharged by a "material alteration" in the underlying obligation between debtor and creditor without the consent of the surety.<sup>376</sup> A recent decision of the Court of Appeals defined "material alteration" as follows:

Alteration of the contract giving rise to discharge of a surety entails either a change in the physical document itself or a change in the contract between the creditor and the principal debtor which creates a different duty of performance on the part of the principal debtor than that which the surety guaranteed.<sup>377</sup>

Marvin contended a material alteration had occurred that he had been unaware of and did not agree to the extension of the additional \$67,500 credit to Richard.<sup>378</sup> But the court held to the contrary: "[T]here [had] been no renewal, modification, or extension of [the \$236,500 loan] since its execution. Marvin's

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N.E.3d at 94; *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246, 1254 (Ind. Ct. App. 2007); *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 586 (Ind. Ct. App. 2001).

369. *Enfield v. The Farmers & Merchants State Bank*, No. 76A05-1603-MF-579, 2017 WL 511863 at \*2 (Ind. Ct. App. Feb. 8 2017).

370. *Id.*

371. *Id.*

372. *Id.* at \*3.

373. *Id.*

374. *Id.* at \*6.

375. *Id.* at \*7.

376. *Id.* at \*6-7 (quoting *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246, 1254 (Ind. Ct. App. 2007)).

377. *Id.* at \*3 (quoting *First Fed. Bank of Midwest v. Greenwalt*, 42 N.E.3d 89, 95 (Ind. Ct. App. 2015) (quoting *White v. Household Fin. Corp.*, 302 N.E.2d 828, 832 n.3 (Ind. Ct. App. 1973))).

378. *Id.* at \*7.

obligations as surety remain the same as when the mortgage was executed.”<sup>379</sup> Turning to the \$67,500 loan, the court said that “the mortgage clearly indicated it could serve as security for additional obligations beyond [the \$236,500 loan] . . . . Thus, by signing the mortgage, Marvin . . . consented to the mortgage securing additional loans such as [the \$67,500 loan].”<sup>380</sup>

The court spent some time contrasting its holding in this case with its 2015 decision, *First Federal Bank of Midwest v. Greenwalt*.<sup>381</sup> In *Greenwalt*, a bank had extended an interest-only revolving line of credit to a corporate borrower.<sup>382</sup> The loan had been secured by a mortgage on two parcels of real estate, signed by the owner and his wife.<sup>383</sup> The mortgage was expressly limited to the revolving line of credit and any renewals or replacements and provided that “[t]he lien of this Mortgage shall not exceed at any one time \$300,000.00.”<sup>384</sup> Shortly after the mortgage was executed, the owner and his wife divorced.<sup>385</sup> As part of the divorce settlement, each was awarded one of the mortgaged properties.<sup>386</sup>

Over the course of eleven years, the bank renewed the note and extended additional credit beyond \$300,000 without wife’s knowledge or consent.<sup>387</sup> Eventually, the original interest-only revolving line of credit was converted into a closed line of credit that required the corporate borrower to make payments of principal together with accrued interest.<sup>388</sup> In 2011, the owner filed bankruptcy.<sup>389</sup>

After liquidating the collateral in the bankruptcy estate and applying it to the debt, the bank sought to foreclose its interest in wife’s parcel of real estate pursuant to the mortgage.<sup>390</sup> The court held that the bank’s conversion of the original note from an interest-only line of credit to a term note with installment payments of principal and interest constituted a material alteration of the agreement between the bank and the corporate borrower, in that it “created a different duty of performance on the part of” the corporate borrower.<sup>391</sup> This alteration was such that the court deemed the contract was no longer the obligation to which the wife, as surety, agreed.<sup>392</sup>

“Greenwalt [did] not stand for the proposition asserted by Marvin,” the court said.<sup>393</sup> Greenwalt “expressly did not hold that additional extensions of credit over

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379. *Id.* at \*12.

380. *Id.* at \*12-13.

381. 42 N.E.3d at 94.

382. *Id.* at 90.

383. *Id.*

384. *Id.* at 91.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 92.

389. *Id.*

390. *Id.*

391. *Id.* at 95.

392. *Id.* at 96.

393. *Enfield v. The Farmers & Merchants State Bank*, No. 76A05-1603-MF-579, 2017 WL

the maximum loan amount was a material alteration.”<sup>394</sup>

Unlike *Enfield*, the guarantor prevailed, at least for the time being, in *First Financial Bank, N.A. v. Johnson*.<sup>395</sup>

Craig Johnson guaranteed a promissory note evidencing a loan from a bank to Raceway Market Land, LLC, and Meridian Marketplace, LLC.<sup>396</sup> In a foreclosure proceeding, First Financial Bank, N.A. (“First Financial”), a second lienholder, sought to enforce Johnson’s guarantee.<sup>397</sup> The trial court entered judgment for Johnson and the appellate court affirmed.<sup>398</sup>

Johnson’s guaranty was subject to demand for payment and First Financial did not dispute that it had not made a demand for payment.<sup>399</sup> The courts’ rulings for Johnson were based on First Financial’s failure to comply with the terms of the guaranty.<sup>400</sup>

First Financial made two arguments that proved unavailing.<sup>401</sup> First, it pointed to language in the guaranty providing that the guarantor waived “any . . . demand . . . of any kind.”<sup>402</sup> The court held this provision constituted a waiver of the guarantor’s right to require a creditor to make demand against a debtor prior to enforcing the guaranty, not of the guaranty’s demand retirement.<sup>403</sup> Second, First Financial contended that the lawsuit itself constituted the required demand.<sup>404</sup> The court rejected this contention out of hand, saying that that demand for payment was a condition that had to have been met prior to filing suit.<sup>405</sup>

It is hard for me to understand why First Financial did not simply make the requisite demand for payment once Johnson raised this defense; the court’s ruling does not discharge his obligations. But the case certainly illustrates just how favored a guarantor can be.

#### *D. Covenants not to Compete*

It has been a decade since the Indiana Supreme Court’s last pronouncement on the subject of covenants, *Central Indiana Podiatry, P.C. v. Krueger*.<sup>406</sup> Was the court signaling a move toward heightened skepticism of non-competes?

While the court did enforce a covenant not to compete in a podiatrist’s

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511863, at \*11 (Ind. Ct. App. Feb. 8 2017).

394. *Id.*

395. No. 49A02-1605-MF-1097, 2017 WL 1929743, at \*1 (Ind. Ct. App. 2017) (mem).

396. *Id.*

397. *Id.* at \*2.

398. *Id.* at \*1.

399. *Id.* at \*4.

400. *Id.*

401. *Id.* at \*5-8.

402. *Id.* at \*5.

403. *Id.* at \*6-7.

404. *Id.* at \*8.

405. *Id.*

406. Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723 (Ind. 2008).

employment agreement in the end, it did so only after (1) declaring that public policy arguments against enforcing covenants not to compete by health care providers had “some force”;<sup>407</sup> (2) citing four of its decisions going back to 1955 in declaring that it had “long held that noncompetition covenants in employment contracts are in restraint of trade and disfavored by the law”;<sup>408</sup> and (3) blue penciling the geographic scope of the covenant at issue from approximately forty counties to only three because “noncompetition agreements justified by the employer’s development of patient relationships must be limited to the area in which the physician has had patient contact.”<sup>409</sup>

The thought that *Krueger* might auger a new age of reluctance to enforce non-competes was reinforced by the (unavailing) tough dissent in *Krueger* by Chief Justice Shepard and Justice Dickson, decrying its “voiding [of] a contract by which two relatively sophisticated parties ordered their commercial relationship”<sup>410</sup> and by the same two justices’ lament eighteen months later over the court’s failure to take jurisdiction in a case where the courts below had refused to enforce a non-compete (again in the health care provider context).<sup>411</sup>

Rather than prophesizing the demise of non-competes, the view of the Shepard and Dickson dissents seems to have prevailed. That was the case in last year’s survey period and it held true again this year.<sup>412</sup>

For example, in *Hannum Wagle & Cline Engineering, Inc. v. American Consulting, Inc.*, the Court of Appeals affirmed the trial court’s enforcement of several covenants.<sup>413</sup> The case involved three former employees, one of whom was a shareholder in an architectural and engineering firm, American Consulting, Inc., d/b/a American Structurepoint, Inc. (“ASI”), who left ASI to work for a competitor, Hannum Wagle & Cline Engineering, Inc., d/b/a HWC Engineering, Inc. (“HWC”).<sup>414</sup> The shareholder-employee was party to an agreement with ASI that contained non-competition and non-solicitation restrictive covenants; the other two employees were parties to agreements with ASI that restricted them from soliciting or recruiting former coworkers.<sup>415</sup>

The trial court granted ASI’s request for a preliminary injunction against HWC and the three employees, and the Court of Appeals affirmed.<sup>416</sup> The court’s decision covers many issues; I will limit my discussion to one.

While the appellate court recited *Krueger*’s “restraint of trade and not favored by the law” language quote above, it was willing to give broad reach to the

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407. *Id.* at 727.

408. *Id.* at 728-29.

409. *Id.* at 730.

410. *Id.* at 734 (Shepard, C.J., dissenting).

411. *Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*, 918 N.E.2d 604 (Ind. 2009) (Shepard, C.J., dissenting from the denial of transfer).

412. Sullivan, Jr., *supra* note 154, at 1208-09.

413. 64 N.E.3d 863, 884 (Ind. Ct. App. 2016).

414. *Id.* at 867.

415. *Id.* at 868-69.

416. *Id.* at 884.

shareholder-employee's non-compete.<sup>417</sup> Specifically, the employee had agreed not to solicit or communicate with any of ASI's customers "for the purpose of selling, providing, attempting to sell or provide, or assisting any person or entity in the sale or provision of," any competing products or services.<sup>418</sup> The court held that this prohibition extended to meeting with ASI customers for or at "breakfasts, lunches, dinners, charitable functions, golf outings, trips, sporting events, conferences, networking events, receptions, and political functions . . . because the activities build trust and goodwill. By building trust with clients and prospective clients, it is ASI's and HWC's goal to obtain future projects."<sup>419</sup>

In a telling concurring opinion, Judge Baker expressed discomfort at prohibiting the employee from soliciting or communicating with ASI customers.<sup>420</sup> "To tell a person who works in sales that he may not even communicate with past or potential clients is to take away his proverbial bread and butter," Judge Baker wrote.<sup>421</sup> "Under these circumstances," he said, "I believe only the narrowest of restrictive covenants should be enforceable, and I do not believe that [the] clause [prohibiting soliciting or communicating with ASI customers] qualifies. With the current state of caselaw, however, I am compelled to concur fully with the majority opinion."<sup>422</sup>

A second example harkens back to last year's survey in which I reported on *Janowiak v. Watcon, Inc.*, where the Court of Appeals affirmed a preliminary injunction barring engineer Michael Janowiak, who had terminated his employment contract with Watcon, Inc. ("Watcon"), from selling similar products and services for Watcon's competitor, Momar, Inc. ("Momar"), in the same area in violation of the contract.<sup>423</sup> In this year's survey, the court affirmed a counterpart order enjoining Momar from aiding Janowiak in soliciting customers of Watcon; "from accepting orders from Watcon customers whose business Momar had previously solicited with aid from Janowiak; and from using or divulging any of Watcon's confidential information."<sup>424</sup> In doing so, the court found that the evidence supported the trial court's findings and clearly established that Watcon not only suffered economic losses but also losses to the company's goodwill.<sup>425</sup>

A third case, *Angie's List, Inc. v. Myers*, is not inconsistent with the first two, even though the court refused the request of Angie's List, Inc. ("Angie's List")

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417. *Id.* at 877.

418. *Id.* at 869.

419. *Id.* at 877. The employee said his "attendance and involvement was not intended to secure work and was only to 'build friendships.'" *Id.*

420. *Id.* at 885 (Baker, J. concurring).

421. *Id.*

422. *Id.*

423. *Janowiak v. Watcon, Inc.*, No. 71A04-1512-PL-2154, 2016 WL 4245426, at \*1 (Ind. Ct. App. Aug. 11 2016), discussed in Sullivan, Jr., *supra* note 154, at 1208-09.

424. *Momar, Inc. v. Watcon, Inc.*, No. 71A03-1603-PL-621, 2016 WL 6584341, at \*1 (Ind. Ct. App. Nov. 3 2016) (mem.).

425. *Id.* at \*15-16.

that three former employees be enjoined from working for a competitor.<sup>426</sup> None of the three employees ever signed non-competition agreements with Angie's List and, as a matter of injunction law, the court found no error with the trial court's determination that the potential harm to the employees of not working and earning income "outweighed the threatened injury to Angie's List."<sup>427</sup>

However, the court did find that because the employees' contracts contained covenants "not to take company documents and not to solicit employees away from the company," Angie's List's was entitled to injunctive relief on these matters.<sup>428</sup>

At the time of their employment, the employees signed contracts in which they agreed not to share confidential information with others who might obtain economic value from the information and to "return all proprietary information in [their] possession upon leaving the Company."<sup>429</sup> The trial court had refused to enjoin such behavior on several grounds, including that it was neither prohibited by the Indiana Trade Secrets Act,<sup>430</sup> nor the subject of any prohibition from Angie's List at an exit interview or otherwise.<sup>431</sup> But the appellate court found such reasons irrelevant in the face of the contractual non-disclosure obligations.<sup>432</sup> The court held to the same effect regarding the employees' covenants not to solicit employees away from Angie's List.<sup>433</sup>

A fourth case involving a covenant not to compete given in connection with the sale of a business, *Foncannon Tax & Financial Services, LLC v. Stephen C. Gubler, P.C.*, is discussed in the margin.<sup>434</sup>

The bottom line on non-competes is that Indiana trial and appellate courts

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426. No. 29A02-1605-PL-1061, 2016 WL 7493406, at \*2 (Ind. Ct. App. Dec. 29 2016) (mem.).

427. *Id.* at \*8.

428. *Id.* at \*13.

429. *Id.* at \*3.

430. IND. CODE § 24-2-3 (2018).

431. *Angie's List, Inc.*, 2016 WL 7493406, at \*8-10.

432. *Id.* at \*11.

433. *Id.* at \*12.

434. No. 82A05-1606-CC-1263, 2017 WL 1349334, at \*1 (Ind. Ct. App. Apr. 12 2017) (mem.). The law has always been much more willing to enforce covenants not to compete given in connection with the sale of a business, *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005) (quoting *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 28 (Mass. App. 1986)), and so the trial court's unwillingness to do so in *Foncannon*, 2017 WL 1349334, at \*1, is surprising. But so were the facts. Deciding to retire, Stephen Gubler sold his accounting practice to *Foncannon Tax & Financial Services, LLC* ("Foncannon"), in a transaction that included a covenant not to compete. *Id.* Gubler later attracted some highly favorable publicity for providing tax services to elderly clients in return for their donating what would have been his fees to charity. *Id.* at \*5. *Foncannon* was not amused and sued to enforce the non-compete. *Id.* The trial court refused, finding the non-compete to have expired. *Id.* at \*3. The Court of Appeals was not so sure and remanded for fact-finding on whether the original length of the non-compete had been extended by agreement of the parties. *Id.* at \*12.

continue to enforce them robustly as a matter of freedom of contract and private ordering. Though there was some language suggesting heightened skepticism of non-competes in both the majority and dissenting opinions in the Indiana Supreme Court's last pronouncement on the subject, that was ten years ago and there has been a complete turnover in the membership of that court. Nevertheless, it may be time to re-think this policy as Indianapolis grows in prominence as a technology center. Covenants not to compete are void as a matter of statutory law in California,<sup>435</sup> and that policy is thought to be part of the reason for the Silicon Valley technology boom.<sup>436</sup> It is the argument of one of my students, Jordan Kyle, that Indiana would be better off – and would better promote entrepreneurship and innovation – if it, too, would declare covenants not to compete unenforceable.<sup>437</sup>

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

436. *Id.* at 13-14.

437. *Id.* at 18-21. For a recent lengthy discussion of this issue in the popular press, see Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html> [<https://perma.cc/C6XAN429>].