

BANKING, BUSINESS, AND CONTRACT LAW

FRANK SULLIVAN, JR.***

This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court (“Supreme Court”) and Indiana Court of Appeals (“Court of Appeals”) between September 1, 2018, and August 31, 2019. This Article will not itemize every banking, business, and contract law case decided during the survey period. Instead, it will highlight cases illustrating some of the big-picture issues in these fields, as well as some practice pointers for both transaction lawyers and litigators. This Article also discusses the Indiana Supreme Court’s commercial courts initiative.¹ And this Article reports on two rather dramatic situations in which, after the close of the survey period, the Supreme Court issued significant decisions reversing opinions of the Court of Appeals in cases dealing with liquidated damages² and statutes of limitations.³

Many cases discussed in this Article are so-called not-for-publication “memorandum” decisions of the Court of Appeals. Whatever the current appellate rules may say about citing memorandum decisions,⁴ these opinions often establish new law; clarify, modify, or criticize existing law; or involve legal or factual issues of unique interest or substantial public importance. They contain critical guidance on Indiana law and cannot be ignored.

I. COMMERCIAL COURTS UPDATE

The Indiana Supreme Court established a “Commercial Court” pilot project

* Professor of Practice, Indiana University Robert H. McKinney School of Law, and Indiana University Bicentennial Professor. Justice, Indiana Supreme Court (1993-2012). LL.M., University of Virginia School of Law (2001); J.D., Indiana University Maurer School of Law (1982); A.B., Dartmouth College (1972).

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1. *See infra*, notes 5-13 and accompanying text.

2. *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208 (Ind. 2019), *rev’g* 104 N.E.3d 573 (Ind. Ct. App. 2018). *See infra* notes 148-83 and accompanying text.

3. *Blair v. EMC Mortg., LLC*, 139 N.E.3d 705 (Ind. 2020), *rev’g* 127 N.E.3d 1187 (Ind. Ct. App. 2019); *Collins Asset Grp., LLC v. Alialy*, 139 N.E.3d 712, 713 (Ind. 2020), *rev’g* 115 N.E.3d 1275 (Ind. Ct. App. 2018); *see infra* notes 270-350 and accompanying text.

4. 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.

in 2016 for a three-year time period to expire May 31, 2019.⁵ The pilot project was established in six locations and has jurisdiction over disputes involving business governance, contracts and transactions, intellectual property and non-competition agreements, and other business and commercial disputes.⁶ The Court established a “Working Group” to get the pilot project up and running and advise it as to the project’s continuation.⁷

During the survey period, the Working Group drafted a report to the Court containing its recommendations for the future of commercial courts in Indiana. The report was transmitted to the Court on November 1, 2018.⁸

The report included metrics showing that 61 percent of the filings were made in the Commercial Court in Marion County (presided over by Judge Heather Welch) and 22 percent were in Allen County (Judge Craig Bobay).⁹ Civil plenary lawsuits alleging breach of contract have been by far the most common type of case filed in commercial courts, comprising 80 percent of the statewide commercial court docket.¹⁰

The commercial courts received high levels of approval and support from the legal community, expressed both in the courtroom and at various seminars and educational programs.¹¹

The Working Group strongly recommended that the Supreme Court establish Indiana commercial courts permanently.¹²

By order dated May 16, 2019, the Indiana Supreme Court did just that, providing our state with a permanently functioning commercial court system.¹³ All six commercial court judges have worked extremely hard to bring this pilot project to fruition and deserve congratulations for their efforts.

II. LENDING AND BORROWING

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

A. A Loan Participation Agreement

*BloomBank v. United Fidelity Bank F.S.B.*¹⁴ is an unusual dispute involving

5. Order Establishing the Indiana Commercial Court Pilot Project, No. 94S00-1601-MS-31, 2016 Ind. LEXIS 29 (Jan. 20, 2016).

6. *Id.*

7. *Id.*

8. THE INDIANA COMMERCIAL COURT WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 4 (Nov. 1, 2018).

9. *Id.* at 9.

10. *Id.* at 10.

11. *Id.* at 12.

12. *Id.* at 4-12.

13. Order, No. 19S-MS-295, 2019 Ind. LEXIS 344 (May 16, 2019).

14. *BloomBank v. United Fid. Bank F.S.B.*, 113 N.E.3d 708 (Ind. Ct. App. 2018), *trans. denied*, 123 N.E.3d 129 (Ind. 2019).

a transaction called a loan participation agreement. On the eve of the Great Recession, United Fidelity Bank (“UFB”) agreed to loan \$7.7 million to Estridge Development Company (“Estridge”), secured by a mortgage on a residential development in Hamilton County owned by Estridge called “Anderson Hall.”¹⁵

BloomBank (which used to be called Bloomfield State Bank) and two other banks formed an LLC called TriCapital to participate in the transaction. Under the terms of the Loan Participation Agreement between TriCapital and UFB, TriCapital provided \$3.275 million of the total \$7.7 million loan amount to UFB in exchange for an approximately 42.5 percent interest in the profits and losses associated with the loan. BloomBank held a 40 percent interest in the TriCapital participation, for which BloomBank paid approximately \$1.3 million.¹⁶

Because UFB was the lead lender and mortgagee, the TriCapital participants had no privity of contract with Estridge, no disclosed interest in the loan, and no interest of public record in Anderson Hall; instead, they relied on UFB to provide them with timely and accurate information regarding the status of the loan and the collateral securing repayment of the loan, all as contemplated in the Participation Agreement.¹⁷

Estridge ultimately defaulted on the loan¹⁸ and UFB foreclosed, securing a judgment of approximately \$6.8 million.¹⁹ About a year after the judgment of foreclosure was entered, USB requested a sheriff’s sale of the property.²⁰ Throughout the foreclosure process and subsequent efforts to sell the property, UFB and representatives of TriCapital were in contact with each other, though the tenor and extent of those communications were central to the litigation yet to come.²¹ Several months later, UFB itself purchased the property with a credit bid of \$2.8 million – millions less than the amount of the judgment of foreclosure.²²

At this point, the TriCapital participants bailed out, agreeing to take \$1.24 million from UFB in return for surrendering the participation interest for which they had paid \$3.275 million; BloomBank’s share of this was \$496,000.²³ This Purchase Agreement included language releasing UFB of any future liability to BloomBank.²⁴

Several years later, BloomBank sued UFB, alleging fraudulent inducement, breach of contract, and unjust enrichment.²⁵ It alleged that it had discovered, after selling its participation interest back to UFB, that UFB had actively discouraged interested parties from bidding at the sheriff’s sale in order to permit UFB to

15. *Id.* at 713.

16. *Id.*

17. *Id.* at 714.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 714-15.

22. *Id.* at 715.

23. *Id.* at 716.

24. *Id.*

25. *Id.* at 717.

purchase the property at the lowest possible price.²⁶ Thereafter, BloomBank's allegations continued, UFB transferred the property to an affiliated entity which began selling lots in the development, yielding gross proceeds of approximately \$9.5 million.²⁷

The trial court granted UFB's motion to dismiss²⁸ but the Court of Appeals reversed, holding that BloomBank adequately alleged claims for constructive fraud,²⁹ actual fraud,³⁰ and unjust enrichment.³¹ Furthermore, the Court of Appeals said that because BloomBank stated a claim for actual and constructive fraud in that UFB had fraudulently induced BloomBank to enter into the Purchase Agreement, the release in that agreement was not binding and did not bar BloomBank's breach of contract claims.³²

This was a dramatic turn of events on appeal, albeit only a reversal of the grant of a motion to dismiss. Absent settlement, this litigation still has a long way to go.

B. Mortgage Foreclosure Update

When the author began writing this survey six years ago, the courts were awash with mortgage foreclosure litigation dating to the Great Recession. Not only that, the ability of mortgagees to foreclose successfully was impeded by inadequate or improper documentation.³³ In each subsequent survey period, the author has made it his practice to review the reported mortgage foreclosure cases for trends and insights. In general, mortgagees have gotten their paperwork in order and mortgagors have rarely prevailed in their appeals from orders of foreclosure.³⁴ This was again the situation during the current survey.³⁵

26. *Id.*

27. *Id.* at 719-20.

28. *Id.* at 712.

29. *Id.* at 725.

30. *Id.*

31. *Id.* at 729.

32. *Id.* at 725. The court's authority on this point was *Tru-Cal, Inc. v. Conrad Kacsik Instrument Systems, Inc.*, 905 N.E.2d 40, 44 (Ind. Ct. App. 2009) ("The general principle that fraud in the inducement vitiates a contract applies to releases."), *trans. denied*, 113 N.E.3d at 721.

33. See Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 48 IND. L. REV. 1195, 1195 (2015).

34. See Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 52 IND. L. REV. 635, 640 (2019); 51 IND. L. REV. 945, 962 (2018); 50 IND. L. REV. 1179, 1185 (2017); 49 IND. L. REV. 981, 985 (2016).

35. During the survey period, mortgagees prevailed in all of the reported mortgage foreclosure appeals: *Marshall v. HSBC Bank USA, N. A.*, No. 18A-MF-1959, 124 N.E.3d 645, 2019 WL 1592842 (Ind. Ct. App. Apr. 15, 2019) (unpublished disposition); *Francis v. EMC Mortg., LLC*, No. 18A-MF-1493, 123 N.E.3d 712, 2019 WL 1217730 (Ind. Ct. App. Mar. 15, 2019) (unpublished disposition) (rejecting collateral attack on foreclosure); *Lindzy v. Bayview Loan Servicing*, No. 18A-MF-1045, 119 N.E.3d 231, 2018 WL 6546060 (Ind. Ct. App. Dec. 13, 2018)

But in *Gaeta v. Huntington National Bank*,³⁶ David did prevail against Goliath, at least to the extent of reversing an order of foreclosure.

Huntington loaned Gaeta approximately \$80,000 to purchase a residence in Lafayette, secured by a mortgage on the property.³⁷ Critical to this litigation is the fact that the loan was insured by the Federal Housing Administration (“FHA”) of the U.S. Department of Housing and Urban Development (“HUD”) and HUD’s regulations were incorporated into the loan documentation.³⁸ A mortgagee cannot foreclose on property securing an insured loan unless certain HUD regulations have been followed.³⁹ One such regulation is that, with certain exceptions, the “mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid.”⁴⁰

The Court of Appeals reviewed the evidence and concluded that because Huntington failed to comply with this requirement, it was precluded from foreclosing on the mortgage and the trial court’s order of foreclosure was reversed.⁴¹ The court recognized the muscularity of its holding but said that “under the FHA, mortgagee banks, like Huntington ‘are induced to make essentially risk-free mortgages by being guaranteed against loss in the event of default by the mortgagor.’”⁴² “In exchange, the mortgagee must comply with HUD-promulgated regulations, including the responsibilities [set forth in the face-to-face interview regulation].”⁴³ “[C]ompliance with these regulations is a condition precedent to foreclosure, as HUD has made very clear.”⁴⁴

While Gaeta was able to keep his residence, the Court of Appeals emphasized

(unpublished disposition); *Duncan v. U.S. ROF III Legal Title Trust 2015-1* by U.S. Bank N.A., No. 18A-MF-1254, 113 N.E.3d 818, 2018 WL 6258582 (Ind. Ct. App. Nov. 30, 2018) (unpublished disposition), *trans. denied*; *Dowell v. U.S. Bank, Nat’l Ass’n*, No. 18A-MF-832, 113 N.E.3d 815, 2018 WL 6036541 (Ind. Ct. App. Nov. 19, 2018) (unpublished disposition); *Rae v. Wilmington Sav. Fund Soc’y, FSB*, No. 37A03-1712-PL-2873, 112 N.E.3d 234, 2018 WL 5093253 (Ind. Ct. App. Oct. 19, 2018) (unpublished disposition); *Shah v. Wells Fargo Bank, N.A.*, No. 18A-MF-629, 111 N.E.3d 262, 2018 WL 4659072 (Ind. Ct. App. Sept. 25, 2018) (unpublished disposition), *trans. denied*.

36. *Gaeta v. Huntington Nat’l Bank*, No. 18A-MF-408, 129 N.E.3d 825, 2019 WL 2571993 (Ind. Ct. App. June 24, 2019) (unpublished disposition).

37. *Id.* at *1.

38. *Id.*

39. 24 C.F.R. § 203.500 (2005).

40. 24 C.F.R. § 203.604 (1996).

41. *Gaeta*, 2019 WL 2571993 at *10.

42. *Id.* at 27 (quoting *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853, 860 (Ind. Ct. App. 2010) (citing *Anderson v. U.S. Dep’t of Hous. & Urban Dev.*, 701 F.2d 112, 113–14 (10th Cir. 1983)).

43. *Id.* (citing 24 C.F.R. § 203.604 and *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853, 860 (Ind. Ct. App. 2010)).

44. *Id.* (citing *Lacy-McKinney v. Taylor Bean & Whitaker Mortg. Corp.*, 937 N.E.2d 853, 861 (Ind. Ct. App. 2010) and 24 C.F.R. § 203.500 (2005)).

that the inability of Huntington to foreclose did not relieve Gaeta of his obligation on the debt.⁴⁵ His “failure to pay the loan secured by the mortgage was clearly established.”⁴⁶ Huntington’s failure to comply with the HUD regulations did “not mean that Huntington [was] not entitled to a money judgment on the loan based on Gaeta’s failure to pay.”⁴⁷

Although not related to the outcome of the case, Gaeta is also noteworthy for its discussion of the Servicemembers Civil Relief Act (SCRA)⁴⁸ which, *inter alia*, bars a mortgagee from foreclosing on property owned by a servicemember who is on active duty or for one year after returning from active duty without prior court approval.⁴⁹ During a portion of the time that the mortgage at issue in this case was outstanding, Gaeta was on active duty in the United States Marines. It appears that Huntington was fully aware of and complied with the requirements of SCRA in all respects.⁵⁰

C. Student Loans

The relationship between student loans and bankruptcy law is a contentious one, even spilling over into the 2020 presidential campaign.⁵¹ The Court of Appeals closely examined this relationship in *National Collegiate Student Loan Trust 2006-4 v. Vance*,⁵² where a woman had co-signed a student loan promissory note for a man; he was the student, she was not.⁵³ The woman subsequently filed for bankruptcy and received a general discharge; the bankruptcy case was closed.⁵⁴

Some years after the bankruptcy, the owner of the debt sued the woman to collect.⁵⁵ She maintained that the obligation had been discharged in bankruptcy. Specifically, she argued that while certain student loans are not dischargeable, the student loan at issue in this case “was not a government loan, but a private loan” and, further, not a “qualified education loan” as defined by the IRS, and so “not the type of loan excepted from discharge in a bankruptcy case.”⁵⁶

As noted above, the Court of Appeals evaluated the woman’s claim quite

45. *Id.* at 28.

46. *Id.*

47. *Id.*

48. 50 U.S.C.A. § 3901 (2003).

49. 50 U.S.C.A. § 3953 (2018).

50. Gaeta, 2019 WL 2571993 at *3.

51. Zack Friedman, *Elizabeth Warren: Let Student Loans Be Discharged In Bankruptcy*, FORBES (May 13, 2019, 8:32 AM EDT), <https://www.forbes.com/sites/zackfriedman/2019/05/13/elizabeth-warren-student-loans-bankruptcy/#3c008fc27fdc> [perma.cc/2YQV-HBLQ].

52. *Nat’l Collegiate Student Loan Tr. 2006-4 v. Vance*, No. 18A-CC-1061, 112 N.E.3d 236, 2018 WL 5316987 (Ind. Ct. App. Oct. 29, 2018) (unpublished disposition).

53. *Id.* at *1.

54. *Id.*

55. *Id.*

56. *Id.* at 2.

carefully but concluded that the bankruptcy code provisions on dischargeability were “meant to be self-executing so that the creditor would not be required to file a complaint to determine the dischargeability of the student loan.”⁵⁷ That is, “it is the debtor who is required to file an adversary proceeding against the holder of a student loan debt in order to show that the debt should be discharged.”⁵⁸

Here, the Court of Appeals concluded, the lender established in designated evidence that, through operation of the bankruptcy code, the student loan at issue was not discharged in bankruptcy, entitling it to judgment as a matter of law on its claim to collect the debt.⁵⁹

There are two points of significance here: that the restrictions on dischargeability in bankruptcy of student loan debt are quite robust, but, notwithstanding that, the debtor’s claim still drew close scrutiny from the Court of Appeals.

III. BUSINESS LAW

A. Agency Law

The law of agency produced two interesting cases during the survey period⁶⁰ – and a question on the Indiana essay portion of the February 2019 bar exam!⁶¹ A few preliminary refreshers on agency law itself:

- Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.⁶² As such, there are three requirements for an agency relationship to exist: (1) mutual agreement; (2) the agent must be acting on behalf of the principal; and (3) the agent must act subject to the principal’s control.⁶³
- An agent must have requisite authority for an agent’s acts to bind the principal. Such authority comes in several flavors.
- “Actual authority” means what it says: a principal has expressly communicated to an agent, normally through spoken words or in writing, the power to perform some act on the principal’s behalf.⁶⁴

57. *Id.*

58. *Id.*

59. *Id.* at 6.

60. *GO Props., LLC v. BER Enters., LLC*, 112 N.E.3d 200 (Ind. Ct. App. 2018); *Indy Auto Man, LLC v. Keown & Kratz, LLC*, 114 N.E.3d 32 (Ind. Ct. App. 2018).

61. Indiana Bar Exam Feb. 2019 Sample Questions and Answers 4, <https://myble.courts.in.gov/questions-answers> (last visited May 15, 2020) [perma.cc/6B4A-KVA3].

62. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

63. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. c (2006).

64. RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. b (2006). *See Koval v. Simon Telelect*,

- Where authority is express, an agent's authority is unlikely to be in dispute. But the law also binds a principal for an agent's acts based on two types of authority which are not express: "implied actual authority" and "apparent authority."
- An agent has implied actual authority when the principal's words or conduct, "reasonably interpreted, causes the agent to believe" that the agent has authority, even though the principal does not expressly confer authority.⁶⁵
- An agent has apparent authority in dealing with a third person when the principal's words or conduct, "reasonably interpreted, causes the third person to believe" that the agent has authority.⁶⁶
- The terms "implied actual authority" and "apparent authority" both depend on a reasonable interpretation of the principal's words or conduct; the difference is one of perspective. In particular, when it comes to apparent authority, it is a reasonable interpretation of the *principal's* words or conduct, not of the *agent's* words or conduct, that will be determinative. If the agent and third-party have the same knowledge base, they should draw the same conclusions. In this circumstance, implied authority and apparent authority will be one and the same. However, apparent authority can exist where implied authority does not when the agent has knowledge regarding the extent of his or her authority that the third-party lacks.

At the center of *GO Properties, LLC v. BER Enterprises, LLC*,⁶⁷ was an LLC called GO Properties that owned real estate.⁶⁸ GO Properties had two members, themselves both LLCs.⁶⁹ Each of these LLCs was a single-member LLC, with Stacy Phillips the sole member of one and Larry Oliver the sole member of the other.⁷⁰ Oliver's LLC (called Olicorp) was the designated member-manager of GO Properties and had the sole authority "to sign agreements and other instruments on behalf of Company without the signature and/or written consent of any other Member"; neither Oliver nor Phillips was authorized, as an individual, to do any business on behalf of GO Properties.⁷¹

Nevertheless, Phillips executed the documents and otherwise took all the steps necessary to convey real estate owned by GO Properties to third-party

Inc., 693 N.E.2d 1299, 1302 (Ind. 1998). (citing RESTATEMENT (SECOND) OF AGENCY § 7 (1958)). RESTATEMENT (SECOND) and RESTATEMENT (THIRD) are the same on this point. See RESTATEMENT (THIRD) OF AGENCY § 2.01, rep. note a.

65. *Id.*

66. RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006). See *Fid. Nat. Title Ins. Co. v. Mussman*, 930 N.E.2d 1160, 1165 (Ind. Ct. App. 2010).

67. *GO Props., LLC*, 112 N.E.3d at 202, *reh'g denied* (2018).

68. *Id.* at 202.

69. *Id.* at 201-02.

70. *Id.* at 202.

71. *Id.*

purchasers.⁷² GO Properties challenged the validity of the sales in this litigation.⁷³

At issue was whether Phillips had apparent authority to act on behalf of GO Properties.⁷⁴ The Court of Appeals nails the analysis – it looks to see if there was any manifestation from the agent’s principal to the third-party purchasers that Phillips had authority⁷⁵ and finds none.⁷⁶ It declared the deeds void, returning ownership of the real estate to GO Properties.⁷⁷

Exactly right.

*Indy Auto Man, LLC v. Keown & Kratz, LLC*⁷⁸ is an unhappy story sounding in legal malpractice. Indy Auto Man was a used car dealership.⁷⁹ When it needed some legal help, it was referred to a lawyer named Dustin Stohler.⁸⁰ At the time, Stohler was working out of the office of the defendant law firm.⁸¹ The evidence showed that the firm gave him rent-free office space, firm business cards and letterhead, and a firm email address.⁸² Stohler was allowed to use the firm’s conference rooms and to have his mail delivered to the firm’s office address.⁸³ He did work on some cases for the firm but also maintained separate clients.⁸⁴ He was permitted to use the firm’s billing assistant for his work on firm client files.⁸⁵ The firm also added him to its legal malpractice insurance policy. (While the firm claimed that this was only intended to cover his work on firm client files, there was no writing in the record supporting that claim.)⁸⁶

Stohler turned out to be woefully negligent in his performance on behalf of Indy Auto Man, resulting in a \$60,000 default judgment being entered against it.⁸⁷

Indy Auto Man brought a legal malpractice action against the law firm and,

72. *Id.* at 201-02.

73. *Id.* at 201.

74. *Id.* at 204.

75. *Id.* at 204 (citing *Rogers v. Sigma Chi Int’l Fraternity*, 9 N.E.3d 755, 764 (Ind. Ct. App. 2014) (“Apparent authority is the authority that a third person reasonably believes an agent to possess because of some manifestation from the agent’s principal.”) and *Pepkowski v. Life of Ind. Ins. Co.*, 535 N.E.2d 1164, 1166 (Ind. 1989) (“To find that a person had apparent authority to act for the principal, it is essential that there be some form of communication, direct or indirect, by the principal, which instills a reasonable belief in the mind of the third party.”)).

76. *GO Props.*, 112 N.E.3d 200 at 204-05.

77. *Id.* at 205.

78. *Indy Auto Man, LLC v. Keown & Kratz, LLC*, 114 N.E.3d 32, 33 (Ind. Ct. App. 2018), *trans. denied*, 123 N.E.3d 140 (Ind. 2019).

79. *Id.* at 33.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 33-34

84. *Id.* at 33.

85. *Id.* at 34.

86. *Id.*

87. *Id.*

while the trial court granted the firm's motion for summary judgment,⁸⁸ the Court of Appeals reversed, holding that factual issues as to whether Stohler was acting as the firm's apparent agent precluded summary judgment.⁸⁹

Once again, the author submits that the Court of Appeals gets it just right: “[a]t the very least, there is a question of fact as to whether [Indy Auto Man] had a reasonable belief that Stohler was acting as the firm's agent based on the firm's manifestations. It is clear that this evidence must be weighed and evaluated by a trier of fact.”⁹⁰

The decisions of the Court of Appeals in both these cases were written by Judge John G. Baker, clearly a bear on agency law.

B. Fiduciary Duties of (not to) Minority Shareholders

The Court of Appeals remanded for further fact-finding in *Elway Company, LLP v. Champlain Capital Partners, L.P.*,⁹¹ a long-running contract dispute between Champlain Capital Partners, L.P. (“Champlain”) and members of the Elrod family (the “Elrods”), majority and minority shareholders, respectively, in James K. Elrod Corporation, Inc. (“JKE”), a construction company.

The details of the original, i.e., pre-remand, contract dispute are discussed below as part of the survey of contract law.⁹² One issue in the contract dispute implicates an aspect of the important business law principle of the fiduciary duty of shareholders to each other in closely held business organizations.

Following the bankruptcy of JKE, Champlain sued the Elrods for breach of a bilateral contract between them, requiring each to provide collateral for surety bonds needed by JKE for its construction projects.⁹³ Among Champlain's claims was that the Elrods had breached the contract's implied covenants of good faith and fair dealing in two respects; first, that the Elrods had failed to provide the collateral for the surety bonds that Champlain alleged was required by their agreement; and, second, that the Elrods had been disloyal to Champlain by forming a new corporation while JKE was collapsing to take over JKE's business.⁹⁴ The rationale upon which the trial court found in favor of the Elrods on these breach of contract claims and the Court of Appeals affirmed is discussed

88. *Id.* at 33, 34.

89. *Id.* at 35-36 (noting the following facts, *inter alia*, were manifestations made by the firm upon which third parties relied: the firm provided Stohler with rent-free office space and allowed him to use the firm's mailing address; the firm provided Stohler with business cards and letterhead; the lawyer who referred IAM to Stohler believed Stohler worked for the firm; and the court system was sending mail to the Firm on behalf of Stohler).

90. *Id.* at 36.

91. *Elway Co., LLP v. Champlain Capital Partners, L.P.*, 114 N.E.3d 1, 3 (Ind. Ct. App. 2018), *reh'g denied* (2019).

92. *Champlain Capital Partners, L.P. v. Elway Co., LLP*, 58 N.E.3d 180, 201 (Ind. Ct. App. 2016). *See infra*, notes 227-248 and accompanying text.

93. *Id.* at 188.

94. *Id.* at 201.

below.⁹⁵

To the author's surprise Champlain's breach of good faith and fair dealing claim was not accompanied by a claim of breach of fiduciary duty alleging that the Elrods breached their fiduciary duty of loyalty to their fellow shareholder Champlain.

The author surmises that Champlain did not bring suit on a fiduciary duty theory because the agreement between Champlain and the Elrods was expressly governed by Delaware law and Delaware has a longstanding principle that "a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."⁹⁶

Under Indiana law, does a minority shareholder have a fiduciary duty to a majority shareholder?

The Indiana Supreme Court has not answered this question explicitly, but the language of one leading case and the facts of a second both suggest that the answer is yes.

In one of its pronouncements on fiduciary duty, *Barth v. Barth*, the Court said, "shareholders in a close corporation stand in a fiduciary relationship to each other, and as such, must deal fairly, honestly, and openly with the corporation and with their fellow shareholders."⁹⁷ This language is broad enough to encompass a duty running from the minority to the majority but the context was a lawsuit by a minority shareholder against a majority. However, another aspect of *Barth* is the Court's approving citation to *Donahue v. Rodd Electrotpe Co. of New England*,⁹⁸ a leading case on fiduciary duty. *Donahue* is from Massachusetts and its progeny includes several cases holding that minority shareholders owe fiduciary duties.⁹⁹

In *G & N Aircraft, Inc. v. Boehm*,¹⁰⁰ a (34-percent) minority shareholder (Boehm) in a corporation, G & N Aircraft, Inc. ("G & N"), claimed breach of fiduciary duty on the part of the (59-1/3-percent) majority shareholder (Goldsmith). The Court held that Goldsmith was indeed guilty, in part for actions taken *before* Goldsmith acquired majority control of G & N.¹⁰¹ Originally, Goldsmith himself had been a minority shareholder with a 26-percent interest.¹⁰² He undertook to increase his shareholdings, thereby relegating Boehm's 34-percent holding from a plurality to a minority.¹⁰³ These actions breached

95. See *infra* note 245 and accompanying text.

96. Carr v. New Enter. Assocs., Inc., No. 2017-0381-AGB, 2018 WL 1472336, at *11 n.73 (Del. Ch. Mar. 26, 2018) (unpublished disposition) (quoting *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987)).

97. *Barth v. Barth*, 659 N.E.2d 559, 561 (Ind. 1995). The author wrote *Barth*.

98. *Donahue v. Rodd Electrotpe Co. of New England*, 328 N.E.2d 505, 515 (Mass. 1975).

99. See *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1, 3, 6 (1st Cir. 1997); *Zimmerman v. Bogoff*, 524 N.E.2d 849, 853 (Mass. 1988); *Smith v. Atl. Properties, Inc.*, 422 N.E.2d 798 (Mass. 1981).

100. *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 232 (Ind. 2001).

101. *Id.* at 242.

102. *Id.* at 232.

103. *Id.* at 242.

Goldsmith's fiduciary duty to Boehm "because they were steps in a plan ultimately designed to use Goldsmith's position with G & N not for any proper business purpose of G & N, but rather to squeeze Boehm out."¹⁰⁴

To this authority can be added the early and influential decision of the Court of Appeals, *Hartung v. Architects Hartung/Odle/Burke, Inc.*, which held that "the shareholders in a close corporation, also referred to as an 'incorporated partnership', stand in a fiduciary relationship to each other."¹⁰⁵ *Hartung* imposed liability on a 33-1/3-percent shareholder.¹⁰⁶

Finally, Federal District Court Chief Judge Larry J. McKinney gave the question a careful look in a diversity case and found that under Indiana law, a majority shareholder could sue a minority shareholder for breach of fiduciary duty.¹⁰⁷

Several years ago, two scholars wrote:

It is reasonable to assume that because the fiduciary duty arises out of the corporation's nature, those jurisdictions that have imposed the duty on majority shareholders in those closely held corporations that are "close corporations" would apply the same duty to any other shareholders in such corporations when the facts justifying that result are presented.¹⁰⁸

The author submits that this passage is an appropriate characterization of Indiana law, i.e., that under Indiana law a minority shareholder has a fiduciary duty to a majority shareholder *when the facts justifying that result are presented*.

The facts justify that result when no shareholder holds a majority interest. Those were the facts of *Hartung*¹⁰⁹ and, indeed, of the most famous fiduciary duty case of all time, *Meinhard v. Salmon*.¹¹⁰ But when a shareholder in a majority or control position asserts a breach of fiduciary duty claim against a minority

104. *Id.*

105. *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 301 N.E.2d 240, 243 (Ind. Ct. App. 1973).

106. *Id.* at 245. In another case, the Court of Appeals also affirmed a trial court's finding that a minority shareholder in a corporation had breached his fiduciary duty to the majority by maintaining a landlord-tenant relationship with the corporation. *Ferguson ex rel. Dependable Sandblast & Deburring Corp. v. Candler*, No. 49A04-0802-CV-73, 893 N.E.2d 781, 2008 WL 4069607 at *8 (Ind. Ct. App., Sept. 4, 2008) (unpublished disposition) (citing *Architects Hartung/Odle/Burke, Inc.*, 301 N.E.2d 240, 244-245 (1973)); *see also* *Ferguson ex rel. Dependable Sandblast & Deburring Corp. v. Candler*, No. 49A05-0905-CV-285, 919 N.E.2d 616, 2009 WL 5124990 at *5 (Ind. Ct. App. Dec. 29, 2009) (unpublished disposition) ("The [majority shareholders'] recourse for such action was to take the appropriate action against Ferguson, the minority shareholder, by seeking injunctive relief, and/or damages for Ferguson's breach of fiduciary duty.").

107. *Landeen v. PhoneBILLit, Inc.*, 519 F. Supp. 2d 844, 860-61 (S.D. Ind. 2007).

108. James M. Van Vliet, Jr. & Mark D. Snider, *The Evolving Fiduciary Duty Solution for Shareholders in a Closely Held Corporation Trap*, 18 N. ILL. U. L. REV. 239, 251 (1998).

109. *Hartung*, 301 N.E.2d at 240.

110. 164 N.E. 545 (N.Y. 1928).

shareholder, the rationale for the Delaware rule might well be examined first.¹¹¹

In addition, where a dispute arises from a contract between the majority and minority shareholders, (perhaps) as in *Elway Company, LLP*,¹¹² a claim in contract for breach of covenants of good faith and fair dealing may be a better path. This is the law even in Massachusetts:

The existence of a contract does not relieve stockholders of the high fiduciary duty owed to one another in all their mutual dealings, but where the parties have defined in a contract the scope of their rights and duties in a particular area, good faith action in compliance with that agreement will not implicate a fiduciary duty. . . . Although a shareholder in a close corporation always owes a fiduciary duty to fellow shareholders, good faith compliance with the terms of an agreement entered into by the shareholders satisfies that fiduciary duty. A claim for breach of fiduciary duty may arise only where the agreement does not entirely govern the shareholder's actions.¹¹³

IV. CONTRACT LAW – PART I

The principles of freedom of contract and private ordering provide the foundation for Indiana contract law.¹¹⁴ But as the next three subsections of this survey show, these principles are not immutable.

A. Freedom of Contract Meets a Statute

Rainbow Realty Group, Inc. v. Carter was one of the year's most publicized decisions.¹¹⁵ Rainbow Realty signed a contract denominated "Agreement (Rent-to-Own)" with a couple, Katrina Carter and Quentin Lintner, in respect of an uninhabitable house. In it, the couple agreed to make 24 "rental payments" of \$549 due on the first of the month, for which they could be evicted for not paying on time. If the couple made those payments, the parties would execute a separate "Conditional Sales Contract (Land Sale)" with monthly payments in the same amount for 28 years. The Agreement recited that it was the parties' intent was to consummate a sale of the house over 30 years with monthly payments of \$549,

111. *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

112. 114 N.E.3d 1 (Ind. Ct. App. 2018).

113. *Merriam v. Demoulas Super Markets, Inc.*, 985 N.E.2d 388, 394–95 (Mass. 2013).

114. *See* IND. CONST. art. I, § 24 ("No . . . law impairing the obligation of contracts, shall ever be passed."); *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995) ("Indiana courts recognize the freedom of parties to enter into contracts and, indeed, presume that contracts represent the freely bargained agreement of the parties. This reflects the principle that it is in the best interest of the public not to restrict unnecessarily persons' freedom of contract.") (citations omitted).

115. 131 N.E.3d 168 (Ind. 2019), *rev'g* 112 N.E.3d 716 (Ind. Ct. App. 2018). *See* Katie Stancombe, *Supreme Court grants partial victory for would-be buyers in Rainbow Realty dispute*, THE IND. LAWYER (Sept. 13, 2019), <https://www.theindianalawyer.com/articles/supreme-court-grants-partial-victory-for-would-be-buyers-in-rainbow-realty-dispute> [perma.cc/Z4V9-PGQZ].

reflecting an interest rate of 16.3 percent. The couple was responsible for all repairs although, as noted, the house was uninhabitable.¹¹⁶ The Agreement did not provide that it would end with a reversion of the property to Rainbow.¹¹⁷

Almost from the beginning, the couple failed to make consistent payments and Rainbow filed suit to terminate the Agreement, seeking not only immediate possession but also damages and attorney's fees.¹¹⁸

These "Rent-to-Own" contracts have a nasty odor.¹¹⁹ The reason is that they allow lenders to circumvent the foreclosure process. A purchaser who defaults on a conventional mortgage or land-sale contract has the protections of the foreclosure process (including the right of redemption). But in rent-to-own, upon default during the rental phase (two years in this case), the lender simply goes to small claims court and evicts.

In preliminary skirmishing, Judge James Osborn granted the couple's (represented by Indiana Legal Services) motion for partial summary judgment on the basis that the Agreement was an unlawful and unenforceable lease under the Indiana Landlord-Tenant Act. Following a trial on the remaining issues, Judge Osborn entered judgment in favor of the couple, awarding them \$4,000 in damages and \$3,000 in attorney fees.¹²⁰

On appeal, the case turned on whether the Agreement was a land sale contract¹²¹ – this was Rainbow's argument – or, as the couple maintained, a lease subject to the Indiana Landlord-Tenant Act and its warranty of habitability.¹²² The Court of Appeals concluded that, under binding Indiana precedent, a lease is required to have both a definite term and a reversion to the lessor.¹²³ The lease-to-own arrangement had neither.¹²⁴ Judgment for the couple was reversed.¹²⁵ The couple sought transfer to the Supreme Court where the following amicus weighed in against the decision of the Court of Appeals:

- Neighborhood Christian Legal Clinic;
- Attorney General Curtis Hill;
- City of Indianapolis;
- Fair Housing Center of Central Indiana;
- Indiana Association for Community Economic Development whose d/b/a is "Prosperity Indiana;" and

116. *Id.* at 171-72.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 172.

121. The "land sale contract" will be defined and discussed in connection with the Skendzel and Deason cases in the next subsection of this Article; *see infra* note 129 and note 137, respectively.

122. *Rainbow Realty Grp., Inc.*, 131 N.E.3d at 173-77.

123. *Id.*

124. *Id.*

125. *Id.* at 179.

- Notre Dame Clinical Law Center and National Consumer Law Center.¹²⁶

The Indiana Supreme Court reversed in a unanimous opinion, holding that the parties' "rent-to-buy" agreement was not a land-sale contract but a rental agreement subject to Indiana's residential landlord-tenant statutes, including the obligation to deliver the premises in a "safe, clean, and habitable condition."¹²⁷

What about freedom of contract and private ordering? The Supreme Court explained that in this case, the legislature had interdicted enforcement of the parties' freely bargained agreement, denying Rainbow Realty of the relief to which it would otherwise be entitled:

If this case were simply about the parties' freedom of contract, [Katrina and Quentin] would have no legal recourse. [Rainbow Realty] disclaimed the warranty of habitability, informed [Katrina and Quentin] that the [h]ouse required significant renovation, and forbade them from taking up residence there before it was habitable. [Katrina and Quentin] agreed to these terms but soon thereafter violated them. Were it not for the governing [residential landlord-tenant statutes], [Rainbow Realty] would be entitled to relief against [Katrina and Quentin] for having breached their Agreement. But the [s]tatutes are not about vindicating parties' freely bargained agreements. They are, rather, about protecting people from their own choices when the subject is residential property and their contract bears enough markers of a residential lease. Unless a statute is unconstitutional, the legislature is entitled to enact its policy choices. The disputed statutes at issue here reflect those choices.¹²⁸

126. *See id.* at 170.

127. *See id.* at 176 (citing IND. CODE § 32-31-8-5(1)). The Supreme Court's analysis proceeded in two steps. First, the Court concluded that the Agreement was not a land-sale contract. This step was necessary because a "contract for sale" is expressly exempt from the Landlord-Tenant Act. The Court said that while most of the transaction's terms and formal structure suggested this was a sale, purported form and assigned label did not control its legal status. If the transaction was really a sale, the couple would have become homeowners at the time the contract was signed and would not have been subject to residential eviction in a small-claims court. But the Agreement required a separate contract to effectuate a sale; no equity accrued or accumulated during the first 24 months; and if the couple failed to make payments, they were subject to eviction and forfeiture of all payments made. *Id.* at 173-74.

Having held the transaction was not exempt from the Landlord-Tenant Act as a "contract for sale", the Court's second step was to analyze whether it was subject to the Act because it met the Act's requirement of applying to a "dwelling unit[] . . . let for rent under a rental agreement". *Id.* citing Ind. Code § 32-31-8-1(a). After a close parsing of the statute's language, the Court concluded that the house was a "dwelling unit" and the Agreement was a "rental agreement." As such, the Court concluded, both statutory requirements are satisfied. *Id.* at 176.

128. *Id.* at 177.

B. Freedom of Contract Meets Equity

*Skendzel v. Marshall*¹²⁹ is a bold decision from a half-century ago in which the Indiana Supreme Court imported the common law of mortgages into land sale contracts. The purchaser and seller of some residential real estate had entered into a land sale contract in 1958 with a total purchase price \$36,000, payable in annual installments of \$2,500 each.¹³⁰ After seven years, the purchaser ceased making payments; \$15,000 remained to be paid on the original contract price.¹³¹

A key characteristic of the standard land sale contract at the time, and present in the *Skendzel* contract, was a forfeiture and liquidated damages provision specifying that upon default, all payments made to that point would be forfeited and considered liquidated or stipulated damages and that the contract would terminate.¹³² In other words, the property would be returned to the seller and buyer would be left with nothing, notwithstanding how much the buyer might have paid toward the house. In *Skendzel*, as noted, this was more than half the purchase price.¹³³

This was too much for the Indiana Supreme Court. In an opinion written by Justice Donald Hunter, the Court declared forfeiture-and-return-of-possession clauses unenforceable.¹³⁴ Although land sale contracts clearly and unambiguously contained forfeiture-and-return-of-possession clauses, “[t]he Court, in effect, views a conditional land contract as a sale with a security interest in the form of legal title reserved by the vendor. Conceptually, therefore, the retention of the title by the vendor is the same as reserving a lien or mortgage. Realistically, vendor-vendee should be viewed as mortgagee-mortgagor.”¹³⁵

129. 301 N.E.2d 641 (Ind. 1973). The author was introduced to *Skendzel* as a law student in Professor Ann Gellis’s “Real Estate Finance” course at the Indiana University Maurer School of Law.

130. *Id.* at 643.

131. *Id.*

132. *Id.* at 651 (Prentice, J., concurring).

133. *Id.* at 645.

134. *Id.* at 650. Justice Hunter is responsible for some of the most memorable decisions and prose in Indiana law – including *Skendzel*. See, e.g., *Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722 (Ind. 1982) (certitude required in expert opinions); *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976) (availability of punitive damages in a breach of contract action); *Petition of Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974) (Hunter, J., concurring) (recognizing right of married woman to use her family name); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (recognizing exception to employment-at-will doctrine); *Haas v. S. Bend Cmty. Sch. Corp.*, 289 N.E.2d 495 (Ind. 1972) (invalidating IHSA restrictions on female athletes); *Ashton v. Anderson*, 279 N.E.2d 210 (Ind. 1972) (limiting classes of criminal convictions that can be used for impeachment); *Gaddis v. State*, 251 N.E.2d 658, 662 (Ind. 1969) (reversing criminal conviction because of the “uncredible dubiousity” of the evidence). For biographical information on Justice Hunter, see Sarah M. Frank, *Donald H. Hunter*, in *JUSTICES OF THE INDIANA SUPREME COURT* 375 (Ind. Hist. Socy. Press 2010).

135. *Id.* at 646.

Ever since, land sales contract in Indiana have been treated the same as conventional mortgage financings. Said Justice Hunter: “To conceive of the relationship in different terms is to pay homage to form over substance.”¹³⁶

*Deason v. Bill R. McWhorter and Heather McWhorter Trust*¹³⁷ illustrates that having a financing characterized as a mortgage is a door that swings both ways. *Skendzel* was viewed as a great victory for consumer rights because the land sale contract purchaser’s payments were treated as equity. But swinging the other way, treating the contract as a mortgage leaves the purchaser open to a deficiency judgment if the value of the property is not sufficient to cover the debt.

The Deasons entered a land sales contract with the McWhorter Trust to buy real estate with a purchase price of \$490,000.¹³⁸ Although the Deasons made all payments when due over the course of several years, they were unable to make a balloon payment and vacated the premises.¹³⁹ The Trust took possession almost immediately with Bill McWhorter, the trustee, residing on the property.¹⁴⁰

At the time of the Deasons’ breach, they had paid only about 4 percent of the total purchase price.¹⁴¹ After the breach, neither party attempted to perform further under the contract.¹⁴² Three years after the Deasons’ breach, the Trust sought foreclosure and a deficiency judgment.¹⁴³ The asserted deficiency was substantial (\$153,000) and the trial court entered a personal judgment against the Deasons in that amount.¹⁴⁴

The Court of Appeals looked to *Powers v. Ford*¹⁴⁵ which held that once a land contract seller has taken possession of the subject property pursuant to a forfeiture, the seller has elected forfeiture as the remedy and is no longer entitled to seek foreclosure and a deficiency judgment.¹⁴⁶ Here, the Trust had elected to pursue a forfeiture at the time of the breach which cancelled the contract; pursuant to *Powers*, it was no longer entitled to seek a foreclosure and a deficiency judgment.¹⁴⁷

In these circumstances, the land sale contract purchaser was protected by forfeiture – unlike *Skendzel* where the purchasers’ protection was provided by foreclosure.

What about freedom of contract and private ordering? In both *Skendzel* and *Deason*, the court set aside the freely bargained language of the parties’ contracts

136. *Id.*

137. 112 N.E.3d 1082 (Ind. Ct. App. 2018).

138. *Id.* at 1084.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1086.

143. *Id.* at 1084.

144. *Id.* at 1085.

145. 415 N.E.2d 734, 737 (Ind. Ct. App. 1981).

146. *Id.*

147. *Int’l Bus. Machs. Corp. v. State on behalf of Indiana Family & Soc. Servs. Admin.*, 112 N.E.3d 1088 (Ind. Ct. App. 2018), *aff’d in part, vacated in part*, 124 N.E.3d 1187 (Ind. 2019).

and invoked equity to protect land sale contract purchasers from the extremely harsh effects of the contracts they had made.

C. Freedom of Contract: An Epic Clash

An epic clash¹⁴⁸ over whether to enforce the parties' freely bargained agreement was resolved by the Indiana Supreme Court after the close of the survey period but the case is so important and so interesting that it merits discussion here. Two of the state's most prominent lawyers squared off at oral argument before the Supreme Court.¹⁴⁹ By the time the case came to rest, a total of nine Indiana judges had ruled on the case (one at the trial court; three at the Court of Appeals; and five at the Supreme Court), five of whom voting against enforcement of the contract and four in favor!¹⁵⁰

*American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*¹⁵¹ involved agreed damages clauses (often referred to as "liquidated damages"¹⁵² clauses or "stipulated damages" clauses) in employment contracts between three individuals, Marlin A. Knowles, Jr., David Lancet, and Jonathan A. Day and their employer, American Consulting, Inc. d/b/a as American Structurepoint ("ASI").¹⁵³

Knowles's employment agreement required him to pay "liquidated damages" upon breach of the agreement's (1) non-competition covenant in an amount equal to 45 percent of all fees and other amounts that ASI had billed to former

148. *Am. Consulting, Inc.*, 136 N.E.3d 208. This litigation was also discussed in last year's survey. See Frank Sullivan, Jr., *Banking, Business, and Contract Law, 2018 Survey of Recent Developments in Indiana Law*, 52 IND. L. REV. 635, 669-71 (2019).

149. Mary Nold Larimore argued for American Consulting, Inc. and Bryan H. Babb argued for Hannum Wagle & Cline Engineering, Inc. See *Oral Arguments Online, American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*, COURTS.IN.GOV (Oct. 4, 2018), <https://mycourts.in.gov/arguments/default.aspx?&id=2265&view=detail&yr=2018&when=&page=1&court=SUP&search=&direction=%20ASC&future=True&sort=&judge=&county=&admin=False&pageSize=20> [perma.cc/7LVS-RJT9].

150. See *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, No. 49D01-1503-PL-7463, Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment (Ind. Marion Superior Ct. Sept. 13, 2016) (Welch, J., holding the contract unenforceable); 104 N.E.3d 573 (Ind. Ct. App. 2018) (Robb and Pyle, JJ., voting to hold the contract enforceable; Riley, J., dissenting, would hold the contract unenforceable); 136 N.E.3d 208 (Ind. 2019) (Rush, C.J., and David and Goff, JJ., voting to hold the contract unenforceable; Massa and Slaughter, JJ., dissenting, voting to hold the contract enforceable).

151. 136 N.E.3d 208 (Ind. 2019).

152. "The term 'liquidated damages' applies to a specific sum of money that has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by one party for a breach of the agreement by the other, whether it exceeds or falls short of actual damages." *Time Warner Entm't Co., L.P. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004) (citations omitted).

153. *Am. Consulting, Inc.*, 136 N.E.3d at 210.

customers lost to Knowles's new company during the twelve-month period immediately preceding the breach and (2) employee non-recruitment covenant in an amount equal to 50 percent of each employee's total compensation from ASI for the twelve months immediately preceding such employee's termination of employment with ASI.¹⁵⁴ Lancet's and Day's employment agreements required each of them to pay upon breach of the agreement's employee non-recruitment covenant "liquidated damages" in an amount equal to 100 percent of each improperly recruited employee's annual salary for the preceding calendar year.¹⁵⁵

Knowles, Lancet, and Day left plaintiff ASI to work for a competitor, Hannum Wagle & Cline Engineering, Inc. ("HWC"), in the 2014-15 timeframe. There are lots of moving parts to the litigation, but this discussion focuses solely on HWC's request for summary judgment on grounds that the liquidated damages clauses were unenforceable as a matter of law because they constituted penalties.¹⁵⁶

Now why would the freely bargained agreement of the parties' as to damages be unenforceable as a matter of law? For all of the judicial rhetoric pledging fealty to freedom of contract and private ordering, courts often do not defer to the agreement of the parties but instead impose a series of tests as to their enforceability.¹⁵⁷

The answer to this apparent anomaly is rooted in history. In early contract law, parties would stipulate to a so-called "penal bond" that required the payment of a sum of money if a specified act was not performed.¹⁵⁸ As time went on, enforcement of penal obligations became more and more entrenched.¹⁵⁹

Eventually, however, courts began to recognize that enforcing penalties and forfeitures at times offended society's sense of justice.¹⁶⁰ A century ago, it was observed that "[t]o the court of chancery [had fallen] the task of moulding the law of penalties and forfeitures into harmony with more humane standards of conduct, a task slowly performed and still uncompleted."¹⁶¹ To this day, the common law imposes limits on liquidated damages:

Damages for breach by either party may be liquidated in the agreement

154. *Id.*

155. *Id.*

156. *Id.*

157. *See Time Warner*, 802 N.E.2d at 894 (discussing judicial skepticism toward the enforceability of liquidated damage clauses). The author wrote *Time Warner*.

158. William H. Loyd, *Penalties and Forfeitures*, 29 HARV. L. REV. 117 (1915) (tracing penal bonds as far back as Roman law).

159. *Id.* at 122 (describing how the penal bond "won its way to legal favor" because, although "harsh," it was "capable of being understood and applied").

160. *Id.* at 122-23 (citing the "widespread tale of the bond for a pound of flesh, immortalized in [Shakespeare's] 'The Merchant of Venice'").

161. *Id.* at 123. For an early Indiana example, *see Sterne v. Fletcher Am. Co.*, 181 N.E. 37 (Ind. 1932) (holding a "guaranty" posted by entrepreneurs as part of a contract with investors in a downtown Indianapolis office building venture to be an unenforceable penalty).

but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.¹⁶²

Courts, in sum, still look askance at liquidated damages clauses. But the inquiry seems to be fact-intensive: examining reasonableness “in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.” These factors seem difficult to measure as a matter of law.¹⁶³ And in Indiana, summary judgment is supposed to be hard to get.¹⁶⁴

Nevertheless, in *American Consulting, Inc.*, the trial court, Judge Heather Welch presiding, granted summary judgment in favor of the defendant, holding the liquidated damages clauses in each of the three employment contracts unenforceable as a matter of law because they constituted penalties.¹⁶⁵ As to Knowles’s employment agreement, the trial court found in part that:

[T]he liquidated damages provisions . . . are punitive and thus unenforceable. . . . This figure may not adequately account for injuries suffered by the aggrieved party; or it could exceed them if the aggrieved party is able to quickly move on following such a breach of contract. . . . The clause allows damages to balloon out of control in the event of multiple employee exits, as has been the case here, regardless of the level of Knowles’ involvement or the amount of actual damages suffered by ASI. . . . [T]he valuation of the damages far exceeds what [ASI] could have reasonably expected to suffer. . . .¹⁶⁶

Plaintiff ASI appealed the ruling to the Indiana Court of Appeals.¹⁶⁷

Judge Margaret Robb, joined in her opinion by Judge Rudolph Pyle, began the court’s analysis using the familiar language of disproportionate liquidated damages constituting an unenforceable penalty.¹⁶⁸

But then she took a most interesting turn, quoting dicta from a 2004 Indiana Supreme Court decision:

162. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

163. See, e.g., *Time Warner*, 802 N.E.2d at 896 (holding that genuine issues of material fact existed as to whether a “late fee” charged in a cable television contract was a valid liquidated damages clause or an unenforceable penalty).

164. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (“Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims. [It is a] relatively high bar . . .”).

165. *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, No. 49D01–1503–PL–7463, Order Granting in Part and Denying in Part Defendants’ Motion for Summary Judgment at 34, 37 & 38 (Ind. Marion Superior Ct.) (Sept. 13, 2016).

166. *Id.* at 34.

167. *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 104 N.E.3d 573, 586 (Ind. Ct. App. 2018), *rev’d*, 136 N.E.3d 208 (Ind. 2019).

168. *Id.* at 586.

[Despite the longstanding principles represented by these cases of ours and the Court of Appeals, we are left with] some unease over any decision where what appears to be the freely bargained agreements of the parties are set aside. Fixing the respective rights and expectations of the parties as to damages makes economic and commercial sense. Enforcing such provisions would seem to conform to this Court's longstanding recognition of the freedom of parties to enter into contracts and our presumption that contracts represent the freely bargained agreement of the parties.¹⁶⁹

Proceeding on this basis, Judge Robb emphasized that these were individually negotiated agreements and recognized the "very strong presumption that freely negotiated contracts are enforceable, based on the policy that it is in the best interest of the public for courts not to unnecessarily restrict the freedom to contract."¹⁷⁰

While Judge Robb viewed the contract through the lens of freedom of contract-private ordering principles, she nevertheless also applied the traditional method of examining stipulated damages clauses and concluded that the provisions in the Knowles, Day, and Lancet contracts did not constitute penalties because:

- These were negotiated agreements, in which the parties agreed in clear and explicit terms that liquidated damages were appropriate.¹⁷¹
- The relative bargaining power of the parties was reflected in the agreements, in that the agreements had different provisions and different damages calculations depending on the employee's tenure and position.¹⁷²
- The actual damages are difficult to calculate because of the widespread and ongoing nature of the contacts between the HWC Parties and ASI employees and clients.¹⁷³
- The actual damages are difficult to calculate because ASI was required to seek and train multiple new people due to the HWC Parties' targeted recruitment efforts.¹⁷⁴
- The actual damages are difficult to calculate because the nature of the business means ASI could have lost only some or all of any one

169. *Id.* at 588 (quoting *Time Warner Entm't Co., L.P. v. Whiteman*, 802 N.E.2d 886, 894-95 (Ind. 2004)). The language was dicta because both sides in *Time Warner* litigated this issue based on whether the clause at issue was a penalty and not on grounds of freedom of contract.

170. *Id.* at 588-89 (citing *Zollman v. Geneva Leasing Assocs., Inc.*, 780 N.E.2d 387, 391-92 (Ind. Ct. App. 2002)).

171. *Id.*

172. *Id.* at 589.

173. *Id.* at 590.

174. *Id.* at 590-91.

client's business due to HWC's interference.¹⁷⁵

The court's decision was not unanimous. Judge Patricia Riley dissented, arguing that Judge Welch had been correct in holding the stipulated damages provisions to be unenforceable penalties.¹⁷⁶

As to both the non-competition and non-recruitment provisions, Judge Riley made forceful arguments why any loss that ASI may have suffered due to a breach of the employment contracts was in her view clearly grossly disproportionate to the amount sought in liquidated damages.¹⁷⁷

The Supreme Court accepted jurisdiction of the case on August 30, 2018, but did not issue its opinion until December 18, 2019,¹⁷⁸ an unusually long period of time. The bottom line is that three justices agreed with Judges Welch and Riley's position and held the liquidated damages clauses unenforceable; the other two voted with Judges Robb and Pyle to enforce the provisions. Nine judges – split 5-4!

According to Justice Steven David's majority opinion, HWC demonstrated that the agreed damages provisions were unreasonable on their face.¹⁷⁹ Justice David says that the liquidated damages for breach of the non-solicitation clauses would have amounted to an aggregate of \$686,000 for the three employees combined, the breach of the non-competition clause "could be in the range of millions of dollars," and the plaintiff had not shown that these damages were correlated to its actual losses.¹⁸⁰

But Justice Geoffrey Slaughter's dissent argues that Justice David's position "essentially relieves Defendants of [their burden of showing the damages are unenforceable penalties] by concluding that the liquidated-damages clauses are 'problematic on their faces.'"¹⁸¹ This ignores, Justice Slaughter says, "four substantive considerations: each liquidated-damages provision includes a causation requirement; an employee's value to an employer—and the resulting loss when the employee leaves—is reflected by that employee's salary; ASI is seeking individualized damages for separate breaches of contract; and there is nothing inappropriate about a high-level, equity-owning employee having contractual restrictions different from those of lower-level employees."¹⁸²

Up to this point, Justice Slaughter and the majority were fighting on the same terrain, looking through the parties' agreement to see whether it constitutes an "unenforceable penalty"; on the traditional terrain of judicial skepticism of

175. *Id.* at 591.

176. *Id.* at 596 (Riley, J., concurring in part and dissenting in part).

177. *Id.*

178. *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208 (Ind. 2019).

179. *Id.* at 213.

180. *Id.*

181. *Id.* at 215, 216 (Slaughter, J., concurring in part and dissenting in part).

182. *Id.* Justice Slaughter also points out the inconsistency between the majority's affirming summary judgment here and the Court's non-movant friendly summary judgment standard enunciated in *Hughley*, 15 N.E.3d at 1004.

liquidated damage clauses.

But Justice Slaughter then moves to higher ground and says, “Rather than condemning such damages when judges conclude they are facially problematic, courts should get out of the business of deciding whether the parties’ estimate of the harm underlying liquidated damages is reasonable. . . . This approach to liquidated damages here would have the virtue of honoring the parties’ freedom of contract, including their settlement of a disputed issue it has taken our Court more than a year to resolve.”¹⁸³

The author aligns himself with Justice Slaughter.

IV. CONTRACT LAW – PART 2

A. The Parol Evidence Rule

*Sail 22, LLC v. Outdoor Business Network*¹⁸⁴ provides a quick refresher on several aspects of the parol evidence rule, the most important of which is the somewhat counterintuitive notion that the parol evidence rule is not a rule of evidence at all. Instead, the parol evidence rule is a substantive rule of contract law that prohibits both the trial court and appellate court from considering such evidence even though it is admitted to trial without objection.¹⁸⁵

A formulation of the parol evidence rule widely used by Indiana courts provides that:

[W]here the parties to an agreement have reduced the agreement to a written document and have included an integration clause that the written document embodies the complete agreement between the parties, . . . the parol evidence rule prohibits courts from considering parol or extrinsic evidence for the purpose of varying or adding to the terms of the written contract.¹⁸⁶

While the parol evidence rule is designed to preserve the integrity of written contracts,¹⁸⁷ its nuances raise many questions of interpretation.¹⁸⁸

First, the existence of an integration clause does not control the question of whether the contract is final and complete.¹⁸⁹

Second, the prohibition against the use of parol evidence is not absolute. Extrinsic evidence may be considered if it is not being offered to vary the terms of the written contract, for example, to show that fraud, intentional

183. *Id.* at 215, 220 (Slaughter, J., concurring in part and dissenting in part).

184. *Sail 22, LLC v. Outdoor Bus. Network*, No. 49A02-1707-CC-1627, 111 N.E.3d 259, 2018 WL 4403435 (Ind. Ct. App. Sept. 12, 2018).

185. *Franklin v. White*, 493 N.E.2d 161, 165-66 (Ind. 1986).

186. *Krieg v. Hieber*, 802 N.E.2d 938, 943-44 (Ind. Ct. App. 2004).

187. *Galmish v. Cicchini*, 734 N.E.2d 782, 789 (2000).

188. John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Interpretation*, 42 IND. L.J. 333 (1967).

189. *Franklin*, 493 N.E.2d at 166.

misrepresentation, or mistake entered into the formation of a contract.¹⁹⁰ It may also be used to clarify or interpret an ambiguous term or phrase.¹⁹¹

Third, as parties are always free to modify their agreements, the parol evidence rule does not apply when analyzing whether an alleged subsequent modification of a written contract is effective.

And fourth, the Uniform Commercial Code has its own parol evidence rule which differs in several respects from the common law parol evidence rule.¹⁹²

Several of these nuances were in play in *Sail 22* where a website developer sued a customer for failing to pay for services rendered.¹⁹³ A bench trial resulted in judgment for the developer after the trial court denied the parties' cross motions for summary judgment.¹⁹⁴ On appeal, the customer contended that it was entitled to summary judgment because the developer had charged it unauthorized amounts above the limit agreed to in their contract.¹⁹⁵

The Court of Appeals recited the parol evidence rule, noting that it applies only when the contract "embodies the final and complete agreement between the parties."¹⁹⁶ The court makes an important observation that while an "integration clause" serves to express the parties' intention that prior negotiations, representations, and communications are withdrawn, annulled, or merged into the final agreement, the existence of an integration clause does not control the question of whether the contract is final and complete.¹⁹⁷

Because the contract did not contain an integration clause, it was a question of fact as to whether the parties intended the contract to be totally integrated.¹⁹⁸ Furthermore, the court said that the parties' designated evidence created a genuine issue of material fact as to what the parties intended their contract to be at the time they entered into it.¹⁹⁹ As noted above, extrinsic evidence is permissible to determine the meaning of an ambiguous or uncertain contract.²⁰⁰

In such circumstances, the contract's construction is a matter for the factfinder. The trial court affirmed.²⁰¹

190. *Krieg*, 802 N.E.2d at 944.

191. *Pepsi-Cola Co. v. Steak 'N Shake, Inc.*, 981 F. Supp. 1149, 1156 (S.D. Ind. 1997).

192. U.C.C. § 2-202. For example, evidence "course of dealing, usage of trade and course of performance" is admissible to "explain or supplement[] the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached."

193. *Sail*, 2018 WL 4403435 at *1.

194. *Id.*

195. *Id.*

196. *Id.* at *4.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at *5.

B. Interpreting and Enforcing Particular Types of Contracts

1. *Leases.*—Two cases decided by the Court of Appeals during the survey period presented several interesting questions on the interpretation of commercial leases.

*Pearman v. Martin*²⁰² revisits the recurring problem of renewal options in commercial leases.²⁰³ The author submits that *Pearman* – although an unpublished decision breaking no doctrinal ground – contains a quite important holding.

Martin rented office space from Pearman in Richmond pursuant to a thirty-eight-month lease that expired March 31, 2011.²⁰⁴ The tenant had the option to renew the lease for an additional five-year term but never gave the landlord notice of intent to do so.²⁰⁵ Martin did, however, remain in the premises and for the most part complied with the terms of the lease, specifically including paying annual CPI-adjusted rent increases.²⁰⁶

On April 27, 2013, Martin advised Pearman that he was vacating the premises as of May 31, 2013; Pearman was not able to find a new tenant for the space.²⁰⁷ In the trial court, the landlord took the position that by holding over and paying rent at the CPI-adjusted rate, the tenant had exercised the five-year renewal option. The tenant took the position that it had no obligation on the lease after May 31, 2013. The trial court found in favor of the tenant; the Court of Appeals split the baby.

As to the landlord's contention that the five-year renewal option had been exercised such that the lease expired May 31, 2016, the Court of Appeals disagreed. It distinguished *Norris Avenue Professional Building Partnership v. Coordinated Health, LLC*,²⁰⁸ which had held that the tenant in that case exercised options under the lease agreement and thus was responsible to pay rent for the entirety of a second option term. Unlike the tenant in *Norris*, the court said, Martin merely held over and paid rent in accordance with the terms of the lease, undertaking no other affirmative conduct indicating intent to exercise the five-year extension.²⁰⁹

As to the tenant's contention that its obligation terminated when it vacated

202. *Pearman v. Martin*, No. 18A-CC-239, 113 N.E.3d 811, 2018 WL 5813102 (Ind. Ct. App., Nov. 7, 2018).

203. *See, e.g.*, Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 49 IND. L. REV. 981, 997-98 (2016).

204. *Id.* at *1.

205. *Id.*

206. *Id.*

207. *Id.* at *2.

208. *Norris Ave. Prof'l Bldg. P'ship v. Coordinated Health, LLC*, 28 N.E.3d 296 (Ind. Ct. App. 2015)

209. *Pearman*, 2018 WL 5813102 at *4. The court specifically said that tenant's payment of the CPI-adjusted rent did not constitute conduct indicating intent to exercise the option because the CPI-adjustment was part of the original lease.

the premises on May 31, 2013, the Court of Appeals also disagreed. Here the court relied on *Walsh v. Soller*,²¹⁰ a 1934 decision of the Indiana Supreme Court, for the proposition that when a tenant holds over, successive one-year tenancies are created.²¹¹ When the original lease term expired on March 31, 2011, with Martin remaining in possession and continuing to make rent payments that Pearman accepted without reservation, a one-year tenancy was created.²¹² After the expiration of this one-year tenancy, Martin again remained in possession and paid rent that Pearman accepted without reservation, thereby creating another one-year tenancy.²¹³

In *Subway Real Estate Corp. v. GIV Green Tree Mall Investor, LLC*,²¹⁴ a Subway restaurant vacated rented space in a Clarksville mall. The lease contained an “acceleration clause,” providing that in the event of default by the tenant, all rent “for the remainder of the Term (through the Expiry Date) shall automatically accelerate and become due and payable, subject, however, to Landlord’s obligations to mitigate damages by re-letting” the premises.²¹⁵ In early 2017, Subway closed the restaurant and vacated the leased space.²¹⁶ Later that year, the landlord invoked the acceleration clause and sued for approximately \$800,000 in damages.²¹⁷ Finding that the lease term did not expire until June 30, 2024, and that the landlord had complied with its obligations to mitigate, the trial court entered judgment in favor of the landlord in that amount.²¹⁸

Three issues warrant mention.

First, Subway contended that its damages were limited by a clause in the lease that specified that the tenant’s “liability for rental defaults only . . . shall be limited to an amount which shall not exceed . . . \$40,000.” The trial court found that the language of the acceleration clause which appeared in Exhibit E of the lease prevailed over the \$40,000 limitation because Exhibit E explicitly provided that in the event of inconsistencies between the lease and the provisions of Exhibit E, the provisions of Exhibit E prevailed. “Because courts are required to enforce an ambiguous contractual language, the Court will do so here,” the trial court wrote.²¹⁹ Subway did not raise this issue on appeal.

Second, Subway argued that the trial court incorrectly found that the lease term ended on June 30, 2024, based on the fact that the lease contained an “Expiry Date” of June 30, 2014. The Court of Appeals rejected this argument,

210. *Walsh v. Soller*, 190 N.E. 61 (1934), *reh’g*, 191 N.E. 334 (1934).

211. *Pearman*, 2018 WL 5813102 at *6 (citing *Walsh v. Soller*, 191 N.E. 334, 335 (1934)); *Marcus v. Calumet Breweries*, 73 N.E.2d 351 (Ind. Ct. App. 1947).

212. *Id.*

213. *Id.*

214. *Subway Real Estate Corp. v. GIV Green Tree Mall Inv’r, LLC*, No. 18A-CC-1671, 124 N.E.3d 644, 2019 WL 1576065 (Ind. Ct. App., Apr. 12, 2019).

215. *Id.* at *1.

216. *Id.* at *2.

217. *Id.*

218. *Id.* at *4.

219. *Id.* at *3.

finding that amendments to the lease made in 2013 extending the term of the lease by ten years changed the expiration date to June 30, 2024, even if the defined Expiry Date in the original lease is not specifically amended.²²⁰

Third, Subway contended that the trial court committed reversible error in granting the landlord summary judgment on the question of mitigation.²²¹ In its original motion for summary judgment, the landlord asserted that it had complied with its mitigation obligations.²²² Subway denied this in opposition but without presenting evidence to the contrary.²²³ At this point, the landlord filed a reply with two affidavits detailing its efforts to find a new tenant for the vacated restaurant, including naming prospects that had been contacted. Subway contended on appeal that providing supplemental evidence in this way was error.²²⁴

The Court of Appeals found in favor of the landlord. It noted that Subway did not move to strike or object to the supplemental evidence nor did it offer any conflicting evidence of its own. “Green Tree Mall satisfied its prima facie burden Subway had an opportunity to address this issue It did not do so.”²²⁵ Summary judgment was affirmed.²²⁶

2. *A “Bonding Collateral Agreement.”*—Owners of construction projects frequently require their contractors to post insurance that work will be performed and paid for even if the contractor defaults on one or more of its contracts. This insurance goes by the name of performance bonds, payment bonds, or supply bonds depending upon its specific function. The insurance company providing the bond may require the contractor to pay a premium, or to post collateral or other guarantees, to reimburse the insurance company for any claims paid.

In *Champlain Capital Partners, L.P. v. Elway Co., LLP*,²²⁷ the Court of Appeals was called upon for a second time to interpret a “bonding collateral agreement” (“BCA”) between the majority and minority owners of John K. Elrod Company, Inc. (“JKE”), defining their respective financial obligations in the event that JKE’s insurer was required to pay claims against bonds posted by JKE.

Champlain Capital Partners, L.P. (“Champlain”), and members of the Elrod family-owned majority and minority interests, respectively, in JKE, a business involved in the construction of stadium seating, construction of racing safety barriers, and renting seating for large events.²²⁸ They, JKE’s senior lender, and

220. *Id.* at *4-5.

221. *Id.* at *5.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at *6.

226. *Id.*

227. 58 N.E.3d 180. (Ind. Ct. App. 2016). This case was not discussed in the relevant prior survey. The author concluded that treatment was appropriate after the case returned to the Court of Appeals during the current survey period following remand. *See also* *Elway Co., LLP v. Champlain Capital Partners, L.P.*, 114 N.E.3d 1, 2 (Ind. Ct. App. 2018).

228. *Champlain Capital Partners, L.P.*, 58 N.E.3d at 185. Champlain acquired its majority interest in a 2005 through a leveraged buyout.

JKE's other lenders took an extensive series of steps in 2006 to stave off severe financial difficulties facing JKE. The restructuring contemplated JKE expanding its business to larger jobs which would require an agreement with JKE's bonding company, Safeco Surety ("Safeco"), to increase the amount of bonding available.

To provide the collateral required by Safeco to agree to increase JKE's bonding limits, Champlain and the Elrods entered into the BCA with each other. The BCA required Champlain to provide a Letter of Credit ("LOC") to Safeco in an amount not to exceed \$3.5 million and for the Elrods to provide collateral to Safeco also in an amount not to exceed \$3.5 million.²²⁹ This was a bilateral agreement; Safeco was not a party to it. In fact, by the time the BCA was executed, Champlain had already provided Safeco with the LOC. The BCA set forth no time limit under which the Elrods were to provide Safeco with additional collateral, and they never did so.

The finances of JKE did not improve and it was placed into bankruptcy later that year. Safeco used approximately \$2.9 million of the \$3.5 million LOC to reimburse itself for claims against JKE bonds and related expenses.²³⁰ When Champlain sought reimbursement from the Elrods under the BCA for the amount drawn on the LOC; the Elrods responded that they had no obligation to provide Champlain with any compensation associated with the amounts drawn on the LOC.²³¹

Champlain's first argument was that the Elrods had breached the BCA by not providing \$3.5 million in collateral to Safeco. Following a bench trial, the trial court held that the BCA did not require the Elrods to provide Safeco with the additional collateral.²³² There was evidence, in fact, that given JKE's financial condition and related considerations, Safeco had decided that it would no longer underwrite JKE's bonds, making any additional collateral unnecessary. The Court of Appeals affirmed the trial court on this point.

Champlain's second argument was that the Elrods had breached the BCA when they refused to reimburse Champlain for the LOC funds that Safeco used to pay claims on JKE's bonds.²³³ At issue was the following provision from the BCA:

To the extent that an LOC Draw does not result in a commensurate and concurrent request from Safeco for [the Elrods] to fund under the Elrod/Elway Guaranty, [the Elrods] will reimburse Champlain fifty percent (50%) of any and all amounts drawn down under the Substitute LOC so as to reduce Champlain's out-of-pocket liability and to ensure that Champlain and the [Elrods] exposure under their Collateral Commitment is *pro rata* and *pari passu*.²³⁴

229. *Id.* at 186.

230. *Id.* at 187-88.

231. *Id.* at 188.

232. *Id.* at 191-92, 194.

233. *Id.* at 194-95.

234. *Id.* at 195. In a footnote, the Court of Appeals defined *pro rata* as requiring "proportional

The Elrods maintained that they had no liability under this provision for two reasons:

- Champlain had not provided an accounting justifying the amount of reimbursement sought. The Court of Appeals found no requirement for an accounting in the BCA, saying that “[i]n the absence of an unambiguous expression of a condition precedent, we will not impose one – let alone one that would lead to forfeiture.”²³⁵
- The reimbursement provision was limited to LOC funds attributable to claims against performance bonds and not payment bonds.²³⁶ Once again, the Court of Appeals read the contract in Champlain’s favor, i.e., the BCA “does not limit the scope of the reimbursement obligation only to amounts drawn down due to performance bond defaults.”²³⁷

There was, however, one issue on which the Court of Appeals was required to remand to the trial court. The BCA contained language entitling Champlain to reimbursement only for amounts drawn on the LOC with respect to “completed” projects.²³⁸ The trial court, in the opinion of the Court of Appeals, had given this provision a highly restricted interpretation, limiting the scope of the evidence presented at trial.²³⁹ On remand, the trial court was instructed to consider and rule on whether the various projects from which the bond claims arose were completed within what the Court of Appeals determined was the BCA’s more expansive meaning of “completion.”²⁴⁰

The final issue considered by the Court of Appeals was Champlain’s claim that the Elrods had breached the BCA’s implied covenant of good faith and fair dealing.²⁴¹ The Court of Appeals analyzed this claim under Delaware law which governed the BCA but implied that the analysis would have been the same under

allocation, ‘according to an exact rate, measure, or interest,’” and *pari passu* as requiring “proportionality of pace, that is, compensation without preference.” *Id.* at 195 n.4 (citations omitted).

235. *Id.* at 199.

236. *Id.* Performance bonds insured JKE customers that projects would be completed; payment bonds insured JKE’s subcontractors’ payment.

237. *Id.* at 200.

238. *Id.*

239. *Id.* at 201.

240. *Id.* The matter was unable to be resolved successfully on remand. The trial court granted Champlain summary judgment as to all of the bonded projects having been completed within the meaning of the BCA. This time, the Court of Appeals agreed with the Elrods and held that genuine issues of material fact existed as to whether certain bonded projects were completed. *See Elway Co., LLP v. Champlain Capital Partners, L.P.*, 114 N.E.3d 1, 10 (Ind. Ct. App. 2018).

241. *Champlain Capital Partners, L.P.*, 58 N.E.3d at 201.

Indiana law.²⁴² The behavior complained of on the Elrods' part was, first, the failure to post the \$3.5 million collateral with Safeco²⁴³ and, second, the Elrods' disloyalty in forming a new corporation while JKE was collapsing to take over JKE's business.²⁴⁴ The Court of Appeals rejected the first for the reason described above, to wit, the Elrods did not breach the BCA with respect to posting the collateral.²⁴⁵ As to the second, the Court of Appeals held that the trial court was entitled to conclude differently based upon the evidence at trial that the Elrods were not disloyal.²⁴⁶ The Court of Appeals affirmed the trial court's rejection of Champlain's breach of good faith and fair dealing claim.²⁴⁷

D. Contract Defenses

1. Modification and Promissory Estoppel.—In *SWL, L.L.C. v. NextGear Capital, Inc.*,²⁴⁸ defendants sued for breach of contract asserted affirmative defenses of modification and promissory estoppel. The trial court granted the plaintiff summary judgment on these defenses²⁴⁹ but the Court of Appeals reversed, finding genuine issues of material fact.²⁵⁰

The contract sued on was a floorplan financing²⁵¹ extended to an automobile dealership enabling the dealership to purchase vehicles at auctions and then resell them at retail.²⁵² At one point during the relationship, Scott Lollar, who operated the dealership and had provided a personal guaranty of the financing, contacted the creditor and said that the dealership wanted to liquidate its inventory and pay off its balance on the financing.²⁵³ In response, the creditor proposed a plan that would continue the dealership's business relationship with the creditor.²⁵⁴ This was memorialized in an email from the creditor to the dealership which, *inter alia*, indicated that the dealership would make certain

242. *Id.* at 201-02.

243. *Id.* at 202.

244. *Id.* at 203. For a discussion of the relationship between Champlain's contract claim of disloyalty and a claim of breach of fiduciary duty, *see supra* notes 91–113, and accompanying text.

245. *Id.* at 202-03.

246. *Id.* at 203.

247. *Id.*

248. 131 N.E.3d 746 (Ind. Ct. App. 2019).

249. *Id.* at 751.

250. *Id.* at 758.

251. *Id.* "Floorplan financing" is a generic term used to describe the extension of credit to a debtor to enable the purchase of large items of inventory such as automobiles. Typically, the debtor will be advanced funds to pay the manufacturer's invoice on the item of inventory, acquiring a security in the item. As each item is sold, the debtor is required to remit the creditor's advance. *See Universal C. I. T. Credit Corp. v. Farmers Bank of Portageville*, 358 F. Supp. 317, 320 (E.D. Mo. 1973).

252. *Id.* at 749.

253. *Id.* at 750.

254. *Id.*

payments to the creditor and the creditor would extend additional financing in return.²⁵⁵ And the creditor later informed Lollar that this “plan had been approved by the ‘front and risk manager’ for” the creditor.²⁵⁶

However, the creditor did not extend additional financing; the dealership was unable to make scheduled payments; and the creditor repossessed the remaining cars in the dealership’s inventory that it had financed.²⁵⁷ The creditor subsequently filed a collection action against the dealership and Lollar’s guaranty.²⁵⁸ The dealership responded that the email had “modified the terms” of the parties’ contract, that it had performed all of its obligations under the modified contract, and that the creditor had breached the modified agreement when it did not extend the additional financing.²⁵⁹

As noted above, the trial court granted summary judgment in favor of the creditor on the modification issue but the Court of Appeals took a skeptical eye, observing that “[a]s a general rule, ‘[q]uestions regarding the modification of a contract are ones of fact.’”²⁶⁰ The trial court had apparently based its decision on the fact that the parties’ original contract had a provision stipulating that it could only be modified by the consent of both parties. But the Court of Appeals found the law “well-settled” that even contract terms requiring modification to be in writing may nevertheless be modified orally.²⁶¹ Based on the designated evidence here, the Court of Appeals concluded, “the conduct of the parties is subject to more than one inference.”²⁶² Summary judgment was reversed.²⁶³

In a similar vein, the dealership also maintained that the trial court had erroneously granted summary judgment in favor of the creditor on the dealership’s affirmative defense of promissory estoppel.²⁶⁴ The elements of a promissory estoppel defense are: (1) a promise by the promisor; (2) made with the expectation that the promise will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise.²⁶⁵

255. *Id.*

256. *Id.*

257. *Id.* at 751. The creditor also notified the dealership’s other lenders of the default and they too foreclosed on their inventory. *Id.* at 750. This gave rise to a defamation claim by the dealership against the creditor. *Id.* (Discussion of the defamation claim, which is beyond the scope of this Article).

258. *Id.*

259. *Id.* at 750-51.

260. *Id.* at 753 (quoting *Gerdon Auto Sales, Inc. v. John Jones Chrysler Dodge Jeep Ram*, 98 N.E.3d 73, 80 (Ind. Ct. App. 2018), *trans denied* (quoting *Skweres v. Diamond Craft Co.*, 512 N.E.2d 217, 221 (Ind. Ct. App. 1987)).

261. *Id.* (citations omitted).

262. *Id.* at 754.

263. *Id.*

264. *Id.*

265. *Id.* (citing *Hinkel v. Sataria Distribution & Packaging, Inc.*, 920 N.E.2d 766, 771 (Ind. Ct. App. 2010)).

The designated evidence supporting the modification defense was sufficient to satisfy all but the fourth element, the Court of Appeals said.²⁶⁶ The creditor had maintained that any such promise was not “of a definite and substantial nature” because the dealership had been delinquent in its payment obligations at the time of the email exchange.²⁶⁷ Contradicting the creditor’s contention was an affidavit from Lollar that the dealership was not in default prior to the date the vehicles were repossessed.²⁶⁸ Under Indiana’s non-movant-friendly summary judgment standard, the Court of Appeals held that the affidavit was sufficient to defeat summary judgment.²⁶⁹

2. *Statutes of Limitations.*—In a quite unusual set of developments, the Court of Appeals found in favor of the defendants’ identical statute of limitations defenses in three separate cases seeking to collect on promissory notes, only to see the Supreme Court reverse two of the decisions and disapprove the third.²⁷⁰ Although the Supreme Court decisions followed the close of the survey period, the cases are so important and interesting that they are discussed here.

The specific question at stake in these cases was when the six-year statute of limitations begins to run for an action to collect an unpaid promissory note requiring installment payments and having a fixed maturity date.²⁷¹ This discussion best starts with a decade-old decision of the Court of Appeals, *Smither v. Asset Acceptance, LLC*.²⁷² *Smither* was written by Judge Michael P. Barnes who made a major contribution to Indiana business and commercial law,²⁷³ and *Smither* falls into that category.

Smither was an action to collect on a credit card debt.²⁷⁴ What made *Smither* important was that the court held that the statute of limitations for collection on a credit card account – what the court referred to as an “open account” – was different from the statute of limitations for collection of a promissory note.²⁷⁵

266. *Id.* at 754-55.

267. *Id.* at 754.

268. *Id.*

269. *Id.* at 755 (citing *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (emphasizing that marginal cases should proceed to trial on the merits, rather than “risk short-circuiting meritorious claims”)).

270. See *Blair v. EMC Mortg., LLC*, 139 N.E.3d 705 (Ind. 2020), *rev’g* 127 N.E.3d 1187 (Ind. Ct. App. 2019); *Collins Asset Grp., LLC v. Alialy*, 139 N.E.3d 712, 713 (Ind. 2020), *rev’g* 115 N.E.3d 1275 (Ind. Ct. App. 2018); *Stroud v. Stone*, 122 N.E.3d 825 (Ind. Ct. App. 2019) (disapproved by *Blair*, 139 N.E.3d at 705).

271. See IND. CODE § 26-1-3.1-118 and § 34-11-2-9 (providing that there is a six-year statute of limitations for an action on a promissory note).

272. 919 N.E.2d 1153 (Ind. Ct. App. 2010).

273. See Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 52 IND. L. REV. 635, 682-87 (2019). Judge Barnes, who retired from the Court of Appeals on June 15, 2018, died on May 22, 2020.

274. *Smither*, 919 N.E.2d at 1155.

275. *Id.* at 1160. The Court held that the six-year statute of limitation for collection of a credit card account is IND. CODE § 34-11-2-7(1).

Although both contain six-year limitations periods, the court said that a debt “related to an [open] ‘account’ or unwritten contract as opposed to a written contract for the payment of money affects the commencement of the running of the statute of limitations.”²⁷⁶ The statute of limitations for an open account “commences from the date the account is due.”²⁷⁷ And after “the last activity on an open account, such as the charging of an item or the making of a payment on the account, has occurred[,]” any lawsuit to collect the balance of the account filed beyond the statutory limitations period is time-barred.²⁷⁸

In *Smither*, the defendant made his last payment on February 9, 2000, and then failed to make the next minimum payment due March 11, 2000.²⁷⁹ The court said the statute of limitations began to run, at the latest, on March 11, 2000.²⁸⁰ The creditor’s lawsuit was filed on May 30, 2006, more than six years later, was, therefore, time-barred.²⁸¹

To this the creditor argued that it was entitled to delay the running of the statute of limitations because the credit card agreement contained an optional “acceleration clause.”²⁸² An acceleration clause entitles the creditor to declare the full amount of the existing debt immediately due and payable, thus revoking an earlier agreement to pay the debt gradually over time.²⁸³ Indiana law had previously held that for installment loan contracts and promissory notes with optional acceleration clauses, the statute of limitations “does not begin to run immediately upon the debtor’s default, but only when the creditor exercises the optional acceleration clause.”²⁸⁴ But this was not an installment loan contract or a promissory note and the court said it was not clear that the law regarding acceleration clauses in those contexts should be incorporated into credit card and open account situations.²⁸⁵ The court did not have to reach that question because it found that the creditor did not ever accelerate the debt, at least not until it filed its lawsuit.²⁸⁶

Smither concluded with some language that would be seized upon in the three cases decided by the Court of Appeals during the survey period (and about which the author will have some comments at the end of this section):

Clearly, waiting until after the statute of limitations has passed following

276. *Id.* at 1158.

277. *Id.* at 1160 (quoting 1 AM. JUR. 2D *Accounts & Accounting* § 22 (2005)).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 1162.

282. *Id.* at 1160.

283. *Id.* at 1161 (citing *Curry v. U.S. Small Bus. Admin.*, 679 F. Supp. 966, 969-70 (N.D. Cal. 1987)).

284. *Id.* at 1160 (citing *Griese-Traylor Corp. v. Lemmons*, 424 N.E.2d 173, 183 (Ind. Ct. App. 1981)).

285. *Id.*

286. *Id.* at 1161.

default before making demand for full and immediate payment of a debt is *per se* an “unreasonable” amount of time to invoke an optional acceleration clause and cannot be given effect. *See Newsom v. Board of Comm’rs*, 103 Ind. 526, 530, 3 N.E. 163, 165 (1885) (holding that parties cannot avoid the running of the statute of limitations by waiting until after the limitations period has passed before demanding payment).²⁸⁷

The first of the three cases decided during the survey period by the Court of Appeals was *Collins Asset Group, LLC v. Alialy*.²⁸⁸ The defendant had executed a promissory note secured by a mortgage requiring monthly payments from September 1, 2017, through August 1, 2032, and providing that if the defendant defaulted, the creditor was entitled to accelerate the debt, i.e., declare the entire unpaid amount due and payable.²⁸⁹ No payments were made on the note after July 28, 2008.²⁹⁰

On October 24, 2016, the creditor notified the defendant that it was accelerating the payments due from September 1, 2016, to the maturity date of the loan.²⁹¹ On April 26, 2017, the creditor sued to collect the note.²⁹² The defendant argued that the lawsuit should be dismissed because the claim was barred by the six-year statute of limitations applicable to actions to collect promissory notes.²⁹³ The creditor took the position that the statute was not triggered until it had accelerated the debt on October 24, 2016.²⁹⁴ The defendant took the position that the statute began to run on July 28, 2008, the date of last payment.²⁹⁵

The Court of Appeals agreed with the defendant.²⁹⁶ For precedent, it looked to a credit card case²⁹⁷ (even though the debt here was evidenced by a promissory note requiring installment payments and containing a maturity date) and concluded that the statute of limitations began to run when the last payment was made. The court did acknowledge the presence of an acceleration clause and the general rule enunciated in *Smither* that the statute of limitations begins to run when the acceleration clause is exercised.²⁹⁸ But because the creditor did not accelerate the debt until eight years after the last payment, the court ruled that the

287. *Id.* at 1161-62 (emphasis added).

288. 115 N.E.3d 1275 (Ind. Ct. App. 2018).

289. *Id.* at 1277.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* (citing IND. CODE § 34-11-2-9).

294. *Id.* at 1278.

295. *Id.*

296. *Id.*

297. *Holt v. LVNV Funding, LLC*, 147 F. Supp. 3d 756, 758, 2015 WL 7721222 (S.D. Ind. 2015).

298. *Collins*, 115 N.E.3d at 1279 (citing *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1162 (Ind. Ct. App. 2010)).

creditor had delayed for what *Smither* called, in the paragraph quoted above, “per se an unreasonable amount of time” and held the action time-barred.²⁹⁹

The second case decided was *Stroud v. Stone*,³⁰⁰ which had facts that paralleled *Collins Asset Group*. The promissory note required monthly installment payments beginning June 1, 2003, until the amount was paid in full.³⁰¹ The maturity date was July 1, 2013, and the note contained an acceleration clause.³⁰² Payments were made on the note through May 2008; no payments were made thereafter.³⁰³

After an elaborate effort to work out the matter, the creditor filed suit to collect on February 23, 2016.³⁰⁴ Again, the dispute was over when the six-year statute of limitations began to run. The creditor took the position that the statute was not triggered until July 1, 2013, the maturity date on the note.³⁰⁵ The defendant took the position that the statute began to run on May 31, 2008, the date of last payment.³⁰⁶

Once again, the Court of Appeals sided with the defendant.³⁰⁷ This time the court acknowledged that this case involved a promissory note requiring installment payments and containing a maturity date whereas *Smither* had involved a credit card open account but said that *Collins Asset Group* had held that the rule for both types of debt is the same, i.e., the statute of limitations begins to run at the time of the last payment.³⁰⁸ Channeling *Smither*, the court said that the creditor’s delay constituted “a per se unreasonable amount of time to wait before invoking an optional acceleration clause.”³⁰⁹

The third case, *Blair v. EMC Mortgage, LLC*,³¹⁰ also followed the patterns of *Collins Asset Group* and *Stroud*. The promissory note required monthly installment payments beginning in February 1993; the maturity date was January 1, 2008.³¹¹ Both the note and the mortgage securing it contained acceleration clauses.³¹² The last payment on the note was made on June 19, 1995.³¹³ The creditor did not sue to recover on the note and foreclose the mortgage until July

299. *Id.* (quoting *Smither*, 919 N.E.2d at 1162).

300. *Stroud*, 122 N.E.3d at 831.

301. *Id.* at 826.

302. *Id.*

303. *Id.*

304. *Id.* at 828.

305. *Id.* at 829.

306. *Id.*

307. *Id.* at 831.

308. *Id.* at 830-31 (citing *Smither*, 919 N.E.2d 1153, 1162 and *Collins Asset Grp., LLC v. Aialy*, 115 N.E.3d 1275, 1279 (Ind. Ct. App. 2018)).

309. *Id.* at 831 (citing *Smither*, 919 N.E.2d at 1162).

310. *Blair v. EMC Mortgage, LLC*, 127 N.E.3d 1187, 1191 (Ind. Ct. App. 2019).

311. *Blair v. EMC Mortgage, LLC*, 139 N.E.3d 705, 707 (Ind. 2020).

312. *Blair*, 127 N.E.3d at 1189.

313. *Id.* at 1190.

3, 2012.³¹⁴

Here the defendant did not so much argue that the six-year statute of limitations had begun to run on June 19, 1995, when the last payment was made, but instead that the collection action was time barred because the creditor did not accelerate within a reasonable time.³¹⁵

The Court of Appeals was content to proceed on that basis, invoking *Smither* and *Stroud* as authority³¹⁶ for prohibiting the creditor of a promissory note from waiting an “unreasonable amount of time” before filing suit.³¹⁷ By waiting “an unreasonable time to accelerate” the note and mortgage and “by failing to make demand within a reasonable time,” the court said, the creditor’s “rights are time barred.”³¹⁸

The Supreme Court fundamentally disagreed with both the analysis deployed and the result reached by the Court of Appeals in these three cases, reversing *Collins Asset Group*³¹⁹ and *Blair*³²⁰ and disapproving *Stroud*.³²¹ The lead opinion was *Blair*, written by Chief Justice Rush. She explained that the Court of Appeals had been wrong in two interrelated respects: First, the Court of Appeals had been wrong to impose an “additional rule of reasonableness” constraining the time within which a lender can sue to collect on a promissory note.³²² Second, the Court of Appeals was wrong to hold that the statute of limitations begins to run at the time that the last payment by the debtor is made.³²³

At bottom, the Supreme Court said, the Court of Appeals failed to appreciate the difference between a “closed installment contract” like a promissory note for a fixed amount of debt and specifying installment payments and a fixed maturity date, and an “open account” like a credit card account where the precise amount of debt that may be incurred is unknown and fluctuating and the account is kept open in anticipation of future transactions unless one of the parties decides to

314. *Id.* at 1192.

315. *Id.* at 1195.

316. *Id.* at 1196-97 (citing *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1162 (Ind. Ct. App. 2010), and *Stroud v. Stone*, 122 N.E.3d 825, 831 (Ind. Ct. App. 2019)). The court also relied at this point on *Heritage Acceptance Corp. v. Romine*, 6 N.E.3d 460 (Ind. Ct. App. 2014), disapproved, *Blair v. EMC Mortg., LLC*, 139 N.E.3d 705 (Ind. 2020). *Heritage Acceptance Corp.* heavily relied on *Smither*.

317. *Id.* at 1197.

318. *Id.* at 1197-98.

319. *Collins Asset Grp., LLC v. Alialy*, 139 N.E.3d 712 (Ind. 2020).

320. *Blair v. EMC Mortg., LLC*, 139 N.E.3d 705 (Ind. 2020).

321. *Id.* at 710. The Court also disapproved *Heritage Acceptance Corp. v. Romine*, 6 N.E.3d 460 (Ind. Ct. App. 2014), in which the Court of Appeals used the same analysis as the three cases at issue here. *Id.* When a court holds that an earlier decision of a lower court was wrongly decided, it is said to have “disapproved” the decision; when a court holds that an earlier decision of the same court was wrongly decided, it is said to have “overruled” the earlier decision.

322. *Id.*

323. *Id.* at 711.

close it.³²⁴ In each of *Collins Asset Group, Stroud*, and *Blair*, the Court of Appeals looked to *Smither*, which pronounced the rule to be that the limitations period begins to run when the last payment was made.³²⁵ But the debt in *Smither* was an “open account”; in each of *Collins Asset Group, Stroud*, and *Blair* it was a “closed installment contract.”³²⁶

“*Smither*,” the Supreme Court said, “recognized critical differences between open accounts and closed installment contracts and how those differences should impact the application of statutes of limitations.”³²⁷ In *Collins Asset Group, Stroud*, and *Blair*, the Court of Appeals failed to appreciate those differences.³²⁸

When it comes to closed installment contracts, the Court said, two statutes of limitations apply. First, Indiana Code section 34-11-2-9 provides that a lawsuit to collect a promissory note must be filed within six years “after the cause of action accrues.”³²⁹ Second, Indiana Code section 26-1-3.1-118, a provision of the Uniform Commercial Code, applies to “the obligation of a party to pay a note payable at a definite time.”³³⁰ It provides two alternative deadlines for filing a lawsuit to collect such a note: either six years after the due date stated in the note or, if a due date is accelerated, within six years after the accelerated due date.³³¹

The Court held that “[t]hese statutes’ plain language shows that they are not mutually exclusive when applied to an action on a promissory note” and “three events triggering the accrual of a cause of action for payment upon a promissory note containing an optional acceleration clause:”

- A creditor can sue for a missed payment within six years of a borrower’s default.
- A creditor can exercise its option to accelerate, rendering the full balance immediately due. The creditor must then bring a cause of action within six years of that acceleration date.
- A creditor can opt not to accelerate and sue for the entire amount owed within six years of the note’s date of maturity.³³²

But even with this statutory regime, what about *Smither*’s language requiring the lawsuit to be filed within a reasonable period of time? Isn’t that really the crux of the decisions of the Court of Appeals in *Collins Asset Group, Stroud*, and

324. *Id.* at 710.

325. *Id.* at 709.

326. *Id.*

327. *Id.* at 710.

328. *Id.*

329. *Id.*

330. *Id.* The court does not address whether its holding is limited to promissory notes covered by Chapter 3.1 of the Indiana Uniform Commercial Code, but the breadth of the language strongly suggests that the holding applies to all closed installment contracts, whether covered by Chapter 3.1 or not.

331. *Id.* at 711.

332. *Id.*

Blair, i.e., once six years had passed after the respective debtors' last payments, it was a per se an unreasonable amount of time to allow the creditors to file suit?

"No," answered the Supreme Court in *Blair*.³³³

"[T]here is no need to impose a rule of reasonableness when a lender sues to enforce installment obligations on a closed installment contract, such as a mortgage or a promissory note. Unlike credit cards or other open accounts, a closed installment contract contemplates payment of a certain sum over a fixed period of time, which means a lender cannot wait indefinitely to sue for missed installments."³³⁴

Furthermore, "these statutes are triggered at multiple points in time, leaving the lender empty-handed if it delays too long."³³⁵ The Court buttressed its analysis with the following policy justification: "Imposing a further rule of reasonableness could spur lenders to sue borrowers prematurely, depriving them of the opportunity to first negotiate repayment."³³⁶

In *Blair*, the maturity date on the note was January 1, 2008, and the creditor filed suit on July 3, 2012.³³⁷ Because the creditor in *Blair* sued to collect on the note within six years of its maturity date, the Court held, it had done so within the limitations period and was entitled to recover.³³⁸ In *Collins Asset Group*, the Supreme Court followed *Blair*.³³⁹ The maturity date on the note was August 1, 2032;³⁴⁰ the creditor accelerated the debt on October 24, 2016;³⁴¹ and the creditor filed suit on April 26, 2017.³⁴² Because the creditor sued to collect on the note within six years of acceleration, the Court held, it had done so within the limitations period and was entitled to recover.³⁴³ Finally, although the creditor did not seek transfer in *Stroud*, the Court addressed it as well. In that case, the maturity date on the note was July 1, 2013,³⁴⁴ and the creditor filed suit on February 23, 2016.³⁴⁵ Because the creditor in *Stroud* sued to collect on the note within six years of its maturity date, it had done so within the limitations period and was entitled to recover. The Court disapproved the decision of the Court of

333. *Id.* at 709.

334. *Id.*

335. *Id.* at 707.

336. *Id.*

337. *Id.*

338. *Id.* at 711. The trial court had granted the creditor only partial relief, to wit, that it was entitled to recover only payments and interest that accrued during the six years immediately preceding the filing of its lawsuit. *Id.* at 708. The creditor "expressly disclaimed" on appeal that it was seeking further relief and on that basis, the Supreme Court affirmed the trial court. *Id.* at 712.

339. *Collins Asset Group, LLC v. Alialy*, 139 N.E.3d 712 (Ind. 2020).

340. *Collins Asset Group, LLC v. Alialy*, 115 N.E.3d 1275, 1277 (Ind. Ct. App. 2018).

341. *Id.* at 1279.

342. *Id.*

343. *Collins*, 139 N.E.3d at 715.

344. *Stroud v. Stone*, 122 N.E.3d 825, 826 (Ind. Ct. App. 2019).

345. *Id.* at 828.

Appeals in *Stroud*.³⁴⁶

But the fact that *Collins Asset Group* and *Blair* were reversed and *Stroud* was disapproved does not mean that the Court of Appeals was wrong at the time these decisions were rendered. As the State's court of last resort, the Supreme Court has the final say on the law. *Smither*'s quotation set forth above that contains the "per se unreasonable amount of time" language cites to *Newsom v. Board of Commissioners*,³⁴⁷ an Indiana Supreme Court decision, for the reasonableness proposition. Granted, it is an old decision, but it and a decision upon which it relies, *High v. Board of Commissioners of Shelby County*,³⁴⁸ appear to continue to be good law and both have been relied on in jurisdictions other than Indiana. In *High*, the Supreme Court had said:

Although the cause of action did not accrue until a demand was made, yet the demand should have been made within a reasonable period from the time that it might have been made. A reasonable time, in the absence of circumstances justifying or excusing a longer delay, is the time limited by the statute for the commencement of the action. If the rule was otherwise, a party, by his own act or failure to act, could preclude the running of the statute of limitations until such time as might suit his interest, convenience or pleasure to put it in motion.³⁴⁹

This is, of course, exactly the principle that the Court of Appeals deployed in deciding *Collins Asset Group*, *Stroud*, and *Blair*. The language of those cases does not reflect that the respective panels were following Supreme Court precedent, but it appears to the author that they were. *Smither* did invoke Supreme Court precedent for this proposition. It was *dicta* there because the court had already decided that the creditor had not accelerated the debt but the author's surmise is that Judge Barnes, being the careful judge that he was, wanted to signal that there was some additional law on the subject that might be relevant in another case. And the Court of Appeals picked up the signal and found it to be relevant in *Collins Asset Group*, *Stroud*, and *Blair*.

Viewed through this lens, the Supreme Court not only reversed the Court of Appeals in *Collins Asset Group* and *Blair* and disapproved that court in *Stroud*, but also held *sub silencio* that its own precedents in *Newsom v. Board of Commissioners* and *High v. Board of Commissioners of Shelby County* did not apply to closed installment contracts.³⁵⁰

346. *Blair v. EMC Mortgage, LLC*, 139 N.E.3d 705, 710 (Ind. 2020). The Court also disapproved *Heritage Acceptance Corp. v. Romine*, 6 N.E.3d 460 (Ind. Ct. App. 2014), in which the Court of Appeals used the same analysis as the three cases at issue here. *Id.*

347. 103 Ind. 526, 530, 3 N.E. 163, 165 (Ind. 1885).

348. 92 Ind. 580, 588 (1884). *High v. Board of Commissioners of Shelby Co.* relies on *Codman v. Rogers*, 27 Mass. 112 (1830), which appears to continue to be good law in Massachusetts and has also been relied on in jurisdictions in addition to Indiana.

349. *Id.* at 587-88.

350. Remember that the debt at issue in *Smither* was an open account and in *Collins Asset Group*, *Blair*, and *Stroud* a closed installment contract. The debt in *Newsom* and *High* was of a

3. *Statute of Frauds*.—Guaranties often raise knotty issues of interpretation and enforcement.³⁵¹ But *Nanak Holdings, Inc. v. 4M of Indianapolis, Inc.*,³⁵² reminds us that, at bottom, a guaranty is no more than “a promise to answer for the debt . . . of another person.”³⁵³ As such, it falls within Indiana’s Statute of Frauds which requires a lawsuit “charging any person, upon any special promise, to answer for the debt . . . of another” to be based upon a writing signed by the party against whom the lawsuit is brought or the parties authorized agent.³⁵⁴

In *Nanak Holdings*, two corporations signed a commercial lease, conditioned upon the lessee’s principal executing a written personal guaranty of the lessee’s obligations under the lease.³⁵⁵ The principal never signed the guaranty.³⁵⁶ When the lessor sought to enforce the guaranty, the trial court granted summary judgment in favor of the principal on Statute of Frauds grounds and the Court of Appeals affirmed.³⁵⁷

C. *International Business Machines Corporation v. State* – Finis?

*International Business Machines Corp. v. State*³⁵⁸ returned to the Court of Appeals and Supreme Court during the survey period after remand several years ago.³⁵⁹

Following the State’s termination of its contract with IBM to modernize and improve the State’s welfare eligibility system, the State and IBM sued each other for breach of contract.³⁶⁰ After a six-week bench trial, Judge David Dreyer held in a sixty-five-page order that the State failed to prove that IBM’s breach was material and awarded IBM damages for fees attributable to the State assuming IBM’s subcontracts (“assignment fees”) and retaining equipment (“equipment fees”) upon termination of the contract.³⁶¹ It also awarded termination payments

different character still. In both those cases, the claims were against government for money owed. *Newsom*, 3 N.E. at 165; *High*, 92 Ind. at 587-88.

351. See, e.g., Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 51 IND. L. REV. 945, 985-87 (2018).

352. No. 18A-CC-2602, 132 N.E.3d 932, 2019 WL 4019928 (Ind. Ct. App. Aug. 27, 2019) (unpublished disposition).

353. *Id.* at *3 (quoting *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585 (Ind. Ct. App. 2001)).

354. IND. CODE § 32-21-1-1(b)(2).

355. 2019 WL 4019928 at *1.

356. *Id.* at *2, *3.

357. *Id.*

358. *Int’l Bus. Machines Corp. v. State on behalf of Indiana Family & Soc. Servs. Admin.*, 124 N.E.3d 1187 (Ind. 2019), *aff’g* in part, *rev’g* in part, 112 N.E.3d 1088 (Ind. Ct. App. 2018).

359. See Frank Sullivan Jr., *Banking, Business, and Contract Law*, 50 IND. L. REV. 1179, 1193-96 (2017), for an examination of the earlier iteration of this litigation.

360. *State v. Int’l Bus. Machines. Corp.*, 51 N.E.3d 150, 157 (Ind. 2016).

361. *Id.* at 158, 168.

and pre-judgment interest.³⁶² Both parties appealed. Ultimately, the Supreme Court reversed, most significantly holding that IBM had materially breached the contract.³⁶³ The Court reversed IBM's termination payment and pre-judgment interest awards, but affirmed its assignment and equipment fees in the amount of approximately \$49.5 million.³⁶⁴

The Court then remanded the case to the trial court with instructions to determine any appropriate offsets to the State as a result of IBM's material breach of the contract.³⁶⁵

This time Judge Heather Welch did the honors. Her eighty-three-page order awarded the State \$128 million in damages³⁶⁶ and credited IBM the \$49.5 million assignment and equipment fees.³⁶⁷ She denied IBM's request for post-judgment interest on the \$49.5 million-dollar award. IBM was ordered to pay the State \$78.2 million, after offsets.³⁶⁸

Both parties again appealed. IBM argued: (1) it was entitled to post-judgment interest on the fees upheld by Supreme Court in its earlier decision;³⁶⁹ (2) the trial court erred by setting aside the factual findings of the original trial court;³⁷⁰ and (3) the trial court erred by holding IBM responsible for the costs of implementing a different and more expensive welfare system than the one contemplated by the underlying contract.³⁷¹ For its part, the State argued it was entitled to additional damages resulting from the breach.³⁷²

The Court of Appeals rejected both of the State's requests for additional damages³⁷³ and concluded that IBM was entitled to post-judgment interest on the \$49.5 million damages award dating back to the time of the original judgment.³⁷⁴

The Supreme Court again granted transfer. It adjusted the holding of the Court of Appeals on post-judgment interest – holding that it ran from the judgment on remand, not the original judgment.³⁷⁵ In all other respects, the Court

362. *Id.* at 168.

363. *Id.*

364. *Id.*

365. *Id.* at 168-69.

366. *State v. International Business Machines Corporation*, No. 49D01-1005-PL-21451, Findings of Fact, Conclusions of Law, and a Final Judgment on All Issues on Remand from the Indiana Supreme Court at 81 (Ind. Marion Superior Ct. Aug. 4, 2017).

367. *State v. International Business Machines Corporation*, No. 49D01-1005-PL-21451, Findings of Fact, Conclusions of Law, and a Final Judgment on All Issues on Remand from the Indiana Supreme Court at 81 (Ind. Marion Superior Ct. Aug. 4, 2017).

368. *Id.*

369. *Int'l Bus. Machines Corp. v. State on behalf of Indiana Family & Soc. Servs. Admin.*, 112 N.E.3d 1088, 1101 (Ind. Ct. App. 2018), *aff'd* in part, *vacated* in part, 124 N.E.3d 1187 (Ind. 2019).

370. *Id.* at 1096.

371. *Id.* at 1098-99.

372. *Id.* at 1103-04.

373. *Id.* at 1104, 1105.

374. *Id.* at 1103.

375. *Int'l Bus. Machines Corp. v. State on behalf of Indiana Family & Soc. Servs. Admin.*, 124

of Appeals was affirmed.³⁷⁶

Justice Slaughter wrote a dissent with which the author agrees that would have reduced the State's damages award significantly,³⁷⁷ but no other justices joined his dissent.

The author is of the opinion that this brings the IBM litigation to a close.

VI. CONCLUSION: A SALUTE TO THE INDIANA COURT OF APPEALS

This is the sixth consecutive year that the author has been honored to write this survey for the *Indiana Law Review* on developments in banking, business, and contract law. Once again after completing his work, he is overwhelmed by the output of the Court of Appeals. This is not so much because of the prodigious volume or even the rapid turn-around time of that Court's decisions. What was so impressive to him during his nineteen years on the Supreme Court and what is driven home to him each time he prepares this survey is the seriousness and depth of each of the Court's decisions, including those euphemistically labeled "not for publication."

For example, during the survey period, the Court of Appeals was faced with mortgagors who just could not take "no" for an answer.³⁷⁸ In 2016, Michael and Carmen Jay Francis's mortgage had been foreclosed; the Court of Appeals had affirmed; and the Supreme Court denied transfer.³⁷⁹ In 2017, they attacked the results of that litigation in an action that the trial court dismissed on grounds of res judicata; again the Court of Appeals affirmed; again the Supreme Court denied transfer.³⁸⁰ In between, the mortgagors went through bankruptcy, including appealing the Bankruptcy Court's decision to the District Court.³⁸¹

Along the way, the property had been sold at sheriff's sale; when the owner went to evict the mortgagors, the owner discovered that they had already vacated the premises.³⁸² The new owner installed locks on the doors and listed the home for sale.³⁸³ A few weeks later, the new owner discovered a U-Haul truck in the driveway and the original mortgagors unloading items from the truck into the

N.E.3d 1187, 1191 (Ind. 2019).

376. *Id.*

377. *Id.* at 1191 (Slaughter, J., concurring in part and dissenting in part).

378. Francis v. EMC Mortg., No. 18A-MF-1493, 123 N.E.3d 712, 2019 WL 1217730 (Ind. Ct. App. March 15, 2019) (unpublished disposition).

379. See Francis v. EMC Mortg., LLC, No. 49A02-1604-MF-830, 83 N.E.3d 1276, 2017 WL 1398688 (Ind. Ct. App. Apr. 19, 2017) (unpublished disposition), *trans. denied*.

380. Two appeals of the trial court's ruling were prosecuted involving separate defendants. See Francis v. Accubanc Mortg. Corp., No. 18A-CT-596, 111 N.E.3d 260, 2018 WL 4403660 (Ind. Ct. App. Sept. 14, 2018) (unpublished disposition), *trans. denied*; and Francis v. Fannie Mae, No. 18A-CT-8, 113 N.E.3d 816, 2018 WL 6165898 (Ind. Ct. App. Nov. 26, 2018) (unpublished disposition), *trans. denied*.

381. 2019 WL 1217730 at *1.

382. *Id.* at *2.

383. *Id.*

home.³⁸⁴ They had cut the lock on the door and were moving back into the home!³⁸⁵ The new owner called for police assistance, and the mortgagors were directed to leave the premises.³⁸⁶

This time the mortgagee and the new owner sued to bar the mortgagors from the real estate and to declare the mortgagors “[v]exatious litigants.”³⁸⁷ The trial court granted these requests; predictably, the mortgagors appealed.³⁸⁸

Now given this track record, you might have expected the Court of Appeals to make short work of the matter. But just the opposite. In a 3,300-word opinion, the Court of Appeals gave careful and detailed analysis to all seven claims raised by the mortgagors in their appeal. Rather than reflecting any impatience or annoyance, the Court of Appeals treated the litigants with deference and respect. To be sure, the trial court was affirmed³⁸⁹ but any objective observer would say that the litigants were provided a very full measure of due process indeed.

Perhaps even the mortgagors recognized this; this time, they didn’t seek transfer to the Supreme Court.

This is the kind of service that litigants and lawyers get from the Indiana Court of Appeals – the very epitome of due process.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at *5.