

BANKING, BUSINESS, AND CONTRACT LAW

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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, 2019, and August 31, 2020. This means that its coverage is pre-pandemic in the sense that almost all if not all the judgments and orders that are the subject of these appeals were entered by trial courts before the widespread curtailment of trial court activity due to the coronavirus pandemic.

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 Supreme Court’s commercial courts initiative.¹ And this Article reports on several important developments after the close of the survey period in which the Supreme Court issued decisions reversing the opinions of the Court of Appeals.²

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,³ 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.

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1. See *infra* notes 4-6 and accompanying text.

2. *Hartman v. BigInch Fabricators & Constr. Holding Co.*, 161 N.E.3d 1218 (Ind. 2021), *rev’g* 148 N.E.3d 1017 (Ind. Ct. App. 2020). See *infra* notes 80-107 and accompanying text. *New Nello Operating Co., LLC v. CompressAir*, 168 N.E.3d 238, 241 (Ind. 2021), *rev’g* 142 N.E.3d 508 (Ind. Ct. App. 2020). See *infra* notes 157-78 and accompanying text. *Culver Cmty. Teachers Ass’n v. Ind. Educ. Emp’t Relations Bd.*, 174 N.E.3d 601 (Ind. 2021), *rev’g* 153 N.E.3d 1130 (Ind. Ct. App. 2020). See *infra* notes 241-55 and accompanying text.

3. 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.

I. COMMERCIAL COURTS UPDATE

On May 16, 2019, the Indiana Supreme Court issued an order permanently establishing a commercial court system in Indiana after a three-year pilot project.⁴ During the survey period, the Court announced that effective January 1, 2021, new commercial courts in Hamilton, Madison, St. Joseph, and Vigo Counties would join the previously established commercial courts in Allen, Elkhart, Floyd, Lake, Marion and Vanderburgh Counties.⁵ The Court also enhanced the functionality of its statewide online court case management system called Odyssey to include substantive order searches of commercial court dockets.⁶

II. LENDING AND BORROWING

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

A. Residential Mortgage Loans

That law’s door can swing both ways is illustrated by *Mannion v. Wilmington Savings Fund Society FSB*.⁷ The door is the critically important principle established in 1886 by the United States Supreme Court in *Long v. Bullard*⁸ that while a bankruptcy discharges the bankrupt debtor’s personal liabilities, it does not discharge liens on a debtor’s property.

Michael Mannion signed a note secured by a mortgage on his residence back in 1998.⁹ In 2009, he received a discharge from the mortgage debt and made no payments thereafter.¹⁰ Within a few months of the discharge, as *Long v. Bullard*

4. *In re Ind. Commercial Courts*, 121 N.E.3d 537, 537-38 (Ind. 2019) (mem.).

5. *Vigo County to Open a Commercial Court*, TRIB.-STAR (Dec. 2, 2020), https://www.tribstar.com/news/local_news/vigo-county-to-open-a-commercial-court/article_fa8db806-1a13-5ce5-95a3-587f853e0a2b.html [<https://perma.cc/ZRX3-RANY>]; *Ind. Commercial Courts*, 121 N.E.3d at 538.

6. *Vigo County to Open a Commercial Court*, *supra* note 5.

7. *Mannion v. Wilmington Sav. Fund Soc’y FSB*, 133 N.E.3d 240 (Ind. Ct. App. 2019). *Mannion* is the only residential mortgage foreclosure case decided by an appellate court during the survey period in which the mortgagor prevailed. See *Coleman v. U.S. Bank Nat’l Ass’n*, 145 N.E.3d 151, No. 19A-MF-1621, 2020 WL 1482209 (Ind. Ct. App.) (unpublished disposition), *trans. denied*, 149 N.E.3d 600 (Ind. 2020); *Hussain v. Salin Bank & Tr. Co.*, 143 N.E.3d 322 (Ind. Ct. App.), *trans. denied*, 152 N.E.3d 585 (Ind. 2020); *Wells Fargo Bank, N.A. v. Hallie*, 142 N.E.3d 1033 (Ind. Ct. App. 2020); *Bratcher v. Wells Fargo Bank, N.A.*, 135 N.E.3d 176, No. 19A-MF-1404, 2019 WL 5539040 (Ind. Ct. App. 2019) (unpublished disposition); *Ringley v. Caliber Home Loans, Inc.*, 134 N.E.3d 87, No. 19A-MF-782, 2019 WL 4850203 (Ind. Ct. App. 2019) (unpublished disposition).

8. *Long v. Bullard*, 117 U.S. 617 (1886).

9. *Mannion*, 133 N.E.3d at 241.

10. *Id.*

permits, the mortgagee filed an in rem foreclosure action.¹¹ But the bank never appeared and the trial court dismissed pursuant to Trial Rule 41(E) for failure to prosecute.¹² The mortgage passed through several hands and ended up being owned by Wilmington Savings Fund.¹³ It filed a new foreclosure action to which Mannion responded by saying that because a Trial Rule 41(E) dismissal is a dismissal with prejudice and on the merits, it was therefore res judicata as to the issues that may have been litigated.¹⁴ The argument had no traction with the trial court which granted summary judgment for the plaintiff creditor.¹⁵

On appeal, the bank did not argue that the earlier dismissal was with prejudice nor did it argue that it was not on the merits nor even that it was not res judicata as to the issues then before the court.¹⁶ It conceded that Mannion was right about all that.¹⁷ What the bank did argue was that the new foreclosure action arose from the failure of the debtor to pay the mortgage *after* the first foreclosure action was dismissed.¹⁸

Now what the Court of Appeals does here sounds in *Long v. Bullard* even though it does not cite it. The Court says that the bank's argument ignores the "undisputed fact" that the defendant debtor's personal liability under the mortgage had been discharged in bankruptcy.¹⁹ As such, Mannion's failure to pay could not have been an issue either in the first foreclosure action or in this one.²⁰ The *Long v. Bullard* door that so often swings in the creditor's favor by allowing it to proceed in rem even after bankruptcy discharge,²¹ here swung in the debtor's favor by prohibiting the creditor from proceeding in rem because the debtor had no obligation to pay once discharged.

B. Commercial Lending

Two commercial debt collection cases during the survey period provide useful reminders of important legal principles applicable to the commercial lender-borrower relationship.

*Westphal v. Chemical Bank*²² presented the familiar pattern of a borrower challenging the bona fides of a lender who claimed to be the legal successor of

11. *Id.*

12. *Id.* at 241-42.

13. *Id.* at 241.

14. *Id.* at 242.

15. *Id.*

16. *Id.* at 243.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 243-44.

21. See *McCullough v. CitiMortgage, Inc.*, 70 N.E.3d 820, 827 (Ind. 2017) (citing *Long v. Bullard*, 117 U.S. 617 (1886)).

22. *Westphal v. Chem. Bank*, 152 N.E.3d 1069, No. 20A-CC-626, 2020 WL 4516810 (Ind. Ct. App. 2020) (unpublished disposition).

the borrower's original lender. Wayne C. Westphal, doing business as S & W Timing, financed the purchase of some business equipment through Elkhart Community Bank in 2001.²³ Elkhart Community Bank merged into Indiana Community Bank in 2010, which merged into Talmer Banking Trust in 2015, which merged into Chemical Bank in 2016.²⁴

Chemical subsequently sued Westphal to collect an alleged deficiency that remained after the collateral had been sold and the proceeds applied to the debt.²⁵ Westphal's response challenged Chemical's ownership of the debt.²⁶ Chemical Bank was able to establish to the satisfaction of both the trial court and the Court of Appeals that a contract existed between it and Westphal and that it was the assignee and owner of the debt under the contract.²⁷

In *Old Plank Trail Community Bank, N.A. v. Mattcon General Contractors, Inc.*,²⁸ the trial court entered judgment against the counterclaim defendant, Burrink Commercial Services, Inc., in a mechanic's lien foreclosure. To collect on its judgment, counterclaim plaintiff Mattcon General Contractors, Inc., sought to garnish amounts that Burrink had on deposit at Old Plank Trail Community Bank.²⁹

In general, a depository bank has the right of set-off after receipt of notice of garnishment.³⁰ However, when a bank is a garnishee defendant, the bank may waive its right to a set-off.³¹ In this case, the bank indicated a potential right to a set-off as a defense to a garnishment in its answers to interrogatories.³² But it did not include or reference any relevant loan documents, payment histories, statements of outstanding balances, or notices of default that would support set-off.³³ By failing to do so by the date set by the trial court for presenting all claims and defenses, the trial court held that Old Plank waived its right of set-off.³⁴ The Court of Appeals affirmed.³⁵

23. *Id.* at *1.

24. *Id.*

25. *Id.*

26. *Id.* at *3.

27. *Id.* at *4.

28. *Old Plank Trail Cmty. Bank, N.A. v. Mattcon Gen. Contractors, Inc.*, 137 N.E.3d 308 (Ind. Ct. App. 2019).

29. *Id.* at 310.

30. *Id.* at 311 (citing *Fifth Third Bank v. Peoples Nat'l Bank*, 929 N.E.2d 210, 214 (Ind. Ct. App. 2010)).

31. *Id.* (citing *First Bank of Whiting v. Samocki Bros. Trucking Co.*, 509 N.E.2d 187, 199 (Ind. Ct. App. 1987)).

32. *Id.*

33. *Id.*

34. *Id.* at 311-12.

35. *Id.* at 312.

C. Credit Cards

*Zelman v. Capital One Bank (USA) N.A.*³⁶ shows what can happen if the prevailing party in the trial court fails to defend its judgment on appeal.

Capital One sued its customer to collect an alleged credit card debt.³⁷ The trial court granted it summary judgment based on its affidavit of debt and attached exhibits.³⁸ But Capital One did not file an appellate brief or otherwise appear in the Court of Appeals.³⁹ The Court said that in such circumstances, it applies a less stringent standard of review and may reverse the grant of summary judgment if the nonmovant shows “prima facie error,” i.e., “error at first sight, at first appearance, or on the face of it.”⁴⁰

The Court then took out its microscope and looked at the affidavit of debt and attached exhibits and discovered that neither the customer agreement nor the debtor’s purported credit card statements were certified or sworn.⁴¹ The court held this evidence to be inadmissible hearsay.⁴² Furthermore, the Court said, an affidavit of debt does not serve to authenticate those unsworn and unverified documents such that they would constitute an exception to the hearsay rule for records of regularly conducted business activity.⁴³

The Court of Appeals reversed the summary judgment for Capital One, holding that it had “failed to designate admissible evidence establishing that [the debtor] had opened a credit card account with Bank and that [debtor] owed Bank the amount alleged” in the complaint.⁴⁴

*Florance v. American Express Centurion Bank*⁴⁵ explores the relationship between the settlement of a debt collection lawsuit and the underlying debt.

After American Express sued Charles Florance to collect a credit card debt, the parties agreed to settle the case on terms where the creditor would take an approximately forty percent haircut in return for the debtor paying the balance in eighteen equal monthly installments.⁴⁶ The parties agreed on the record that the case would be dismissed “with prejudice once the 18 months are complete and the payments are all made.”⁴⁷

The Court of Appeals held that the proper way to memorialize such an agreement is for the trial court to enter judgment for the total amount of the pre-

36. *Zelman v. Capital One Bank (USA) N.A.*, 133 N.E.3d 244 (Ind. Ct. App. 2019).

37. *Id.* at 245.

38. *Id.* at 247.

39. *Id.*

40. *Id.*

41. *Id.* at 248.

42. *Id.*

43. *Id.* at 248-49.

44. *Id.* at 249.

45. *Florance v. Am. Express Centurion Bank*, 134 N.E.3d 77, No. 19A-CC-854, 2019 WL 4619985 (Ind. Ct. App. 2019) (unpublished disposition).

46. *Id.* at *1.

47. *Id.*

settlement debt, along with an order to the creditor to file a motion to vacate the judgment within fourteen days of the date if and when the debtor's timely monthly payments total the reduced amount agreed to in the parties' settlement.⁴⁸

D. Student Loans

A recent survey article⁴⁹ treated in some detail a decision by the Court of Appeals, *Holmes v. National Collegiate Student Loan Trust*,⁵⁰ holding that a purported owner of a student loan had not established its entitlement to collect the debt as a matter of law. The debtor in *Smith v. National Collegiate Student Loan Trust*⁵¹ invoked *Holmes* to no avail. *Holmes* had set forth in clear detail the requirements that a creditor in such circumstances must meet to qualify for the business records exception to the hearsay rule when admitting documentary evidence of ownership of the debt.⁵² In *Smith*, the Court of Appeals said, the creditor had followed the dictates of *Holmes* and was entitled to summary judgment.⁵³

E. Two Collection Matters

Neither of the creditors in the next two matters, *Klink Trucking, Inc. v. Structures, Inc.*⁵⁴ and *Maschino v. Wayt*,⁵⁵ are financial institutions, but these disputes are discussed here because the issues presented are ones that face financial institution lenders with equal force.

The relevant facts in *Klink Trucking* date back to 2009, when Klink Trucking secured a judgment of approximately \$100,000 from Structures, Inc.⁵⁶ Klink Trucking then pursued Structures in proceedings supplemental and also sought to pierce the corporate veil so that it could collect from Michael Klink.⁵⁷ Its piercing theory was that Structures had fraudulently conveyed certain real estate for consideration of \$1.00 to Michael and Debra Klink as tenants by the entirety.⁵⁸ These proceedings were stayed when Structures filed Chapter 7

48. *Id.* at *2.

49. Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 52 IND. L. REV. 635, 640 (2019) [hereinafter *Banking, Business, and Contract Law* 2019]

50. *Holmes v. Nat'l Collegiate Student Loan Tr.*, 94 N.E.3d 722 (Ind. Ct. App. 2018).

51. *Smith v. Nat'l Collegiate Student Loan Tr.*, 153 N.E.3d 222 (Ind. Ct. App. 2020).

52. *Holmes*, 94 N.E.3d at 725 (quoted in *Banking, Business, and Contract Law* 2019, *supra* note 49, at 641).

53. *Smith*, 153 N.E.3d at 228.

54. *Klink Trucking, Inc. v. Structures, Inc.*, 135 N.E.3d 184, No. 19A-CC-319, 2019 WL 5608183 (Ind. Ct. App. 2019) (unpublished disposition), *trans. denied*, 146 N.E.3d 329 (Ind. 2020).

55. *Maschino v. Wayt*, 145 N.E.3d 140, No. 19A-PL-2203, 2020 WL 1316390 (Ind. Ct. App. 2020) (unpublished disposition).

56. *Klink Trucking*, 2019 WL 5608183 at *1.

57. *Id.*

58. *Id.*

bankruptcy; Klink Trucking did not intervene in the bankruptcy.⁵⁹

When the bankruptcy proceedings were completed, Klink Trucking re-started the proceedings supplemental, again seeking to recover from both Structures and Michael Klink.⁶⁰ The trial court ruled against Klink Trucking, holding that because Structures had been discharged in bankruptcy, the debt to Klink Trucking no longer existed and could not form the basis for setting aside the transfer of the real estate.⁶¹ The court went on to say that even if Klink Trucking had a claim to the real estate, its failure to join Debra as a defendant made it impossible to pursue a claim against entireties property.⁶²

The Court of Appeals affirmed.⁶³ It said that while the trial court had incorrectly referred to the debts and obligations of Structures as having been “discharged” in bankruptcy, the practical effect was the same.⁶⁴ The Court’s point here is that unlike individuals who are given a “fresh start” in Chapter 7 bankruptcy, corporations are not.⁶⁵ Rather, following the liquidation of the corporation’s assets for the benefit of creditors, the corporation is left to dissolve under state corporate law.⁶⁶ But while the trial court’s terminology was a little off, the Court of Appeals said its decision was correct.⁶⁷ Structures was now a defunct corporation with no assets, and Klink Trucking “should have initiated an adversary proceeding in the bankruptcy case if it wished to have the transfer of the Real Estate deemed fraudulent.”⁶⁸

For good measure, the Court of Appeals also agreed with the trial court that Klink Trucking would not have been able to proceed against the real estate in any event because it had not sued Debra Klink who, as a co-tenant by the entireties, was an indispensable party in such an action.⁶⁹

*Maschino v. Wayt*⁷⁰ involved two Indiana debt collection principles. First, a money judgment becomes a lien on the debtor’s real property when the judgment is recorded in the judgment docket in the county where the realty held by the debtor is located.⁷¹ Second, to collect a final judgment, a judgment debtor may either enforce a judgment lien or execute the money judgment via proceedings

59. *Id.*

60. *Id.*

61. *Id.* at *2.

62. *Id.* at *3.

63. *Id.*

64. *Id.*

65. *Id.* at *2 (citing *In re Tri-R Builders, Inc.*, 86 B.R. 138, 141 (Bankr. N.D. Ind. 1986)).

66. *Id.* at *2-3.

67. *Id.* at *3.

68. *Id.*

69. *Id.* at *3-4.

70. *Maschino v. Wayt*, 145 N.E.3d 140, No. 19A-PL-2203, 2020 WL 1316390 (Ind. Ct. App. 2020) (unpublished disposition).

71. *Id.* (citing *Needham v. Suess*, 577 N.E.2d 965, 967 (Ind. Ct. App. 1991); IND. CODE § 34-55-9-2 (2021)).

supplemental.⁷² The Court of Appeals held that to either enforce the lien or execute the money judgment, the judgment debtor must do so by filing under the same cause number as that in which the money judgment was rendered. The author submits that this is a very important lesson for collection cases, one so important that the decision should have been designated “for publication.”

In January 2017, Phyllis Maschino secured a judgment against Tex and Edward Wayt in a proceeding in Jackson Superior Court 1 and denominated No. 36D01-1208-CC-000177.⁷³ In September 2019, she filed a new complaint against the Ways to foreclose on certain real estate owned by the Ways in satisfaction of the CC-000177 judgment.⁷⁴ This case was also filed in Jackson Superior Court 1; it was denominated No. 36D01-1903-PL-000010.⁷⁵

The Ways asked that the latter filing be dismissed on grounds of Trial Rule 12(B)(8) because “[t]he same action [was] pending in another state court of the state.”⁷⁶ The Ways’ argument was that the relief that Maschino sought could only be obtained in the CC-000177 case.⁷⁷ The trial court agreed, and the Court of Appeals affirmed.⁷⁸

The decision appears to the author to be correct but not so obviously so that it should have been disposed of by a memorandum decision. For example, suppose a party, having secured a judgment that operates by matter of law as a lien on the real property of the judgment debtor in the county, files an in rem mortgage foreclosure case in an entirely new action to collect on the judgment. Under this decision, the judgment debtor is entitled to have the action dismissed by operation of Trial Rule 12(B)(8).⁷⁹ But under the appellate rules, this decision cannot be cited to the court for that purpose. And none of the authorities cited in the decision of the Court of Appeals, Maschino’s brief, or the Ways’ brief are exactly on point; none of them cite to a case in which a judgment creditor’s action to foreclose on a judgment lien was dismissed for failing to be filed under the same cause number as that in which the money judgment was rendered.

III. BUSINESS LAW

A. *Hartman v. BigInch Fabricators: A Really Big Case*

The most important business case of the year was *Hartman v. BigInch Fabricators & Construction Holding Co.*⁸⁰ At issue was the critical concept of

72. *Id.* (citing *Arend v. Etsler*, 797 N.E.2d 1173, 1174 (Ind. Ct. App. 2000)).

73. *Id.* at *1.

74. *Id.*

75. *Id.*

76. *Id.* at *2 (quoting IND. R. TRIAL P. 12(B)(8)).

77. *Id.*

78. *Id.* at *3.

79. If the property had been in another county, a complaint in that county to foreclose Maschino’s judgment lien from Jackson County would have been the proper filing.

80. *Hartman v. BigInch Fabricators & Constr. Holding Co.*, 161 N.E.3d 1218 (Ind. 2021),

lack of marketability and lack of control discounts in valuing interests in closely held business organizations.⁸¹

The concept is straightforward. Suppose an individual owns a 5% interest in a closely held business organization. The fair market value of that individual's interest (the price at which a willing purchaser under no compulsion to buy and with complete information would buy and a willing seller under no compulsion to sell and with complete information would sell) will be less than 5%. Why? First, as a closely held business, there is no trading market for the shares and so the fair market value is discounted for the lack of liquidity. Second, a holder of only a 5% interest cannot be assured of any control or even influence over the way the business is managed or operated, and so the fair market value is also discounted for the lack of control. This issue arises with frequency—and marketability and control discounts are regularly applied—in a number of different valuation contexts in addition to the sale of an individual's interest in the business, including marriage dissolution and assessment of estate taxes.

The facts in *Hartman*, however, do not involve a minority shareholder trying to dispose of the shareholder's shares—or the valuation of a marital or estate asset. Rather, the ten shareholders of BigInch Fabricators, a closely held Indiana corporation, had an agreement between and among themselves and the corporation that required the corporation to purchase the shares of any shareholder who was involuntarily terminated as an officer or director.⁸² The agreement provided that the departing shareholder was to be paid the “appraised market value on the last day of the year preceding the valuation, determined in accordance with generally accepted accounting principles by a third-party valuation company.”⁸³

Hartman, one of the founders of the corporation and its president from 1998 to 2014, was involuntarily terminated at a point in time when he owned 17.77% of the shares of the corporation.⁸⁴ The third-party valuation company's appraisal of Hartman's interest was \$3,526,060.⁸⁵ However, the valuation company discounted this amount down to \$2,398,000 as a consequence of lack of marketability and lack of control.⁸⁶ Hartman instituted this declaratory judgment action, contending that the application of the discounts was improper and that he was entitled to the entire \$3,526,060.⁸⁷

BigInch Fabricators' argument was essentially that if Hartman were selling his shares, a willing buyer acting under no duress and with complete information would pay no more than \$2,398,000, and so that is what the corporation should

rev'g 148 N.E.3d 1017 (Ind. Ct. App. 2020).

81. *Hartman*, 148 N.E.3d at 1019.

82. *Id.*

83. *Id.* (citation omitted).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

have to pay to satisfy its obligation under the shareholder agreement.⁸⁸ That is what the trial court held.⁸⁹

Hartman argued the language of the contract—the shareholder agreement—first. The contract calls for payment of the “appraised market value” and says nothing about any discounts.⁹⁰ Second, he cited a 2002 decision of the Indiana Court of Appeals, *Wenzel v. Hopper & Galliher, P.C.*,⁹¹ concerning the proper valuation of a departing partner’s interest in a law firm. In *Wenzel*, the Court of Appeals rejected applying marketability and control discounts where the partner was to be paid the “fair value” of his shares.⁹² *Wenzel* said that was not the same as “fair market value” and represented instead a purpose that shareholders be fairly compensated which might or might not equate with the market’s judgment about the stock’s value.⁹³

In *Hartman*, the Court of Appeals followed *Wenzel* and what it described as the “wide majority of courts in sister states” and “rejected the application of control and marketability discounts to situations where a shareholder is compelled to sell to the majority.”⁹⁴ The Court reversed the trial court, holding that by applying the marketability and control discounts, the appraiser assessed the fair market value of Hartman’s shares when the shareholder agreement called for something different—the appraised market value.⁹⁵

The case attracted considerable attention, and the Indiana Legal Foundation, an organization comprised of Indiana’s biggest corporations and trade associations, filed an amicus brief on the corporation’s behalf.⁹⁶ The Supreme Court granted review,⁹⁷ and oral argument featured two of the state’s leading practitioners, Wayne C. Turner and Mark J. Crandley.⁹⁸ After the close of the survey period, the Supreme Court granted transfer and reversed,⁹⁹ holding that the lack of marketability and lack of control discounts did apply—that Hartman was

88. *See id.* at 1023.

89. *Id.* at 1024.

90. *Id.* at 1020.

91. *Id.* at 1021; *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30 (Ind. Ct. App. 2002), *trans. denied*, 792 N.E.2d 43 (Table) (5-0).

92. *Wenzel*, 779 N.E.2d at 38.

93. *Id.* at 39.

94. *Hartman*, 148 N.E.3d at 1022 (citing *In re Stebnitz*, 586 B.R. 289 (Bankr. E.D. Wis. 2018); *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 555 (Ky. 2011); *HMO-W Inc. v. SSM Health Care Sys.*, 611 N.W.2d 250, 257 (Wis. 2000)).

95. *Hartman*, 148 N.E.3d at 1024.

96. Brief of Amicus Curiae Indiana Legal Foundation in Support of Transfer, *Hartman*, 148 N.E.3d 1017, 2020 WL 4207947.

97. *Hartman v. BigInch Fabricators & Constr. Holding Co.*, 157 N.E.3d 526 (Ind. 2020).

98. *See* Oral Argument, *Hartman v. BigInch Fabricators & Constr. Holding Co.*, 161 N.E.3d 1218 (Ind. 2021) (No. 20S-PL-618), <https://mycourts.in.gov/arguments/default.aspx?&id=2516&view=detail&yr=&when=&page=5&court=&search=&direction=%20ASC&future=False&sort=&judge=&county=&admin=False&pageSize=20> [<https://perma.cc/G6BG-MEGY>].

99. *Hartman*, 161 N.E.3d at 1218.

only entitled to \$2,398,000, not \$3,526,060.¹⁰⁰

The Supreme Court did not hold that the two discounts must be applied in all such circumstances,¹⁰¹ only that the two discounts did apply in this circumstance. And what was the particular circumstance here? A contract among the company and the shareholders.¹⁰² The Court was very explicit that it is applying principles of contract interpretation:

While we recognize the public policy rationale underlying the shareholder's position, we hold that the parties' freedom to contract may permit these discounts, even for shares in a closed-market transaction. And under the plain language of this shareholder agreement—which calls for the “appraised market value” of the shares—the discounts apply.¹⁰³

The Court's frank “acknowledge[ment of] caselaw that declines, on public policy grounds, to apply marketability and minority discounts to a closed-market sale of a noncontrolling business interest”¹⁰⁴ warrants further attention. Here, the Court says that if the principles of freedom of contract and private ordering were not so strong, the two discounts would not apply in this circumstance as a matter of common law and, the author submits, economics.

The facts of Hartman illustrate why. Hartman's 17.77% interest in BigInch Fabricators is valued at \$3,526,060 before the discounts are applied. This means the value of the remaining 82.23% would be \$16,316,709, and the total market value of the corporation would be \$19,842,769.

Suppose that on the date of this valuation, BigInch Fabricators is acquired by another corporation in an arm's length transaction where each side has full information and neither side is under duress.

- The shareholders of BigInch Fabricators would receive \$19.8 million, the appraised market value of the company.
- Each of the shareholders other than Hartman would receive in the aggregate \$16.3 million, their 82.23% of the \$19.8 million purchase price. Hartman would receive the remaining \$3.5 million, his 17.77%.
- But if Hartman only gets paid \$2.4 million—the amount after discounting—then there is another \$1.1 million available to the other shareholders. Hartman has been reduced from a 17.77% shareholder to a 12.09% shareholder—essentially because he's been fired before the sale.

In *G & N Aircraft, Inc. v. Boehm*,¹⁰⁵ the leading Indiana case on both the business judgment rule and on fiduciary duty, Justice Boehm presciently wrote: “Typically, minority shares in a two-shareholder corporation will be valued at less than their proportionate ownership. However, the value of the entire

100. *Id.* at 1225.

101. *Id.* at 1222.

102. *Id.* at 1221.

103. *Id.* at 1220.

104. *Id.* at 1221.

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

corporation is whatever it is. If there is a minority discount, there is also a majority premium.”¹⁰⁶

In this case, the “majority premium” referred to in *G & N Aircraft* that BigInch Fabricators received rightfully belonged to Hartman—but for the fact, according to the Supreme Court, that “under the plain language of this shareholder agreement . . . the discounts apply.”¹⁰⁷

B. Fiduciary Duty of Owners of Closely Held Business Organizations

A seminal case on the fiduciary duty of majority to minority owners of closely held business organizations is *Donahue v. Rodd Electrotpe Co.*,¹⁰⁸ a decision of the Supreme Judicial Court of Massachusetts that the Indiana Supreme Court has said “mirrors” Indiana corporate law.¹⁰⁹ A subsequent Massachusetts case, *Smith v. Atlantic Properties, Inc.*,¹¹⁰ held that minority owners of closely held business organizations also owe a fiduciary duty to majority owners. This contrasts with Delaware where “a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation.”¹¹¹

In last year’s survey Article, the author wrote that while the Indiana Supreme Court has not explicitly answered the question of whether a minority shareholder has a fiduciary duty to a majority shareholder, “the language of one leading case and the facts of a second both suggest that the answer is yes.”¹¹² *MGI Traffic Control Products, Inc. v. Green*¹¹³ implicates this analysis although it ultimately concludes that it is unnecessary to decide the question.

Michael Green owned 25% and Mark Bennett 75% of the shares of MGI Traffic Control Products.¹¹⁴ The corporation is a successor to a successful business that Green had founded and managed for about twenty years.¹¹⁵ At that point, Bennett joined him in the same business with Bennett injecting a substantial amount of new capital.¹¹⁶ This arrangement appeared to work well for approximately five years until Bennett suffered a catastrophic accident and could

106. *Id.* at 244.

107. *Hartman*, 161 N.E.3d at 1220.

108. *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505 (Mass. 1975).

109. *Barth v. Barth*, 659 N.E.2d 559, 561 n.6 (Ind. 1995).

110. *Smith v. Atl. Props., Inc.*, 422 N.E.2d 798 (Mass. App. Ct. 1981).

111. *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 Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987)).

112. Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 53 IND. L. REV. 821, 831 (2021) [hereinafter *Banking, Business, and Contract Law 2021*].

113. *MGI Traffic Control Prods., Inc. v. Green*, 146 N.E.3d 369, No. 19A-PL-2371, 2020 WL 2091853 (Ind. Ct. App. 2020) (unpublished disposition).

114. *Id.* at *1.

115. *Id.*

116. *Id.*

no longer actively participate in the business.¹¹⁷ The ensuing tension resulted in Green leaving the corporation and operating a parallel business.¹¹⁸ Bennett sued, alleging breach of fiduciary duty on Green's part as well as asserting a host of other claims.¹¹⁹

The decision here affirms the trial court's denial of Bennett's request for a preliminary injunction.¹²⁰ To be entitled to a preliminary injunction, of course, Bennett was required to establish likelihood of success on the merits.¹²¹ In an effort to do so, he sought to establish that Green had breached his fiduciary duty to both Bennett and the corporation.¹²² Green argued that he had no fiduciary duty because he had severed his ties with the corporation.¹²³ (Green did not argue that a minority shareholder has no fiduciary duty to the majority as would be true under the Delaware rule but not the Massachusetts rule as discussed above).

The Court of Appeals said that it was unnecessary to decide the fiduciary duty question because Bennett was not entitled to a preliminary injunction on an entirely different ground: that everything that Bennett contended Green was liable for could be compensated for with a money judgment.¹²⁴

That appears to be an unremarkable application of preliminary injunction law. Nevertheless, as set forth in some detail in last year's survey Article,¹²⁵ the author's reading of Indiana's fiduciary duty precedents and their Massachusetts antecedents stand for the proposition that Green did have a fiduciary duty to both Bennett and the corporation simply by virtue of his 25% interest. That is not to say that Green breached that duty or that his conduct was in any other way contrary to law, but it is to say that it is the author's view that the owner of a minority interest in an Indiana closely held business organization owes a fiduciary duty to the organization itself and its other owners.

C. Agency

Although they did not break any new ground, two cases during the survey period are worthy of mention because they restate important principles of agency law.

*CSI Protective Services LLC v. Paragon Properties Co.*¹²⁶ reminds that when an agent acting with actual authority makes a contract on behalf of a disclosed principal, the agent is not a party to the contract unless the agent and third-party

117. *Id.*

118. *Id.* at *2.

119. *Id.*

120. *Id.* at *5.

121. *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 163 (Ind. 2002).

122. *MGI Traffic Control Prods.*, 2020 WL 2091853, at *4.

123. *Id.*

124. *Id.* at *5.

125. *Banking, Business, and Contract Law* 2021, *supra* note 112, at 831-32.

126. *CSI Protective Servs. LLC v. Paragon Props. Co.*, 149 N.E.3d 680, No. 19A-CC-2643, 2020 WL 3067802 (Ind. Ct. App. 2020) (unpublished disposition).

have agreed otherwise.¹²⁷ In this case, Paragon Properties, a property management firm, was authorized to enter into agreements on behalf of the owner of the Chapel Hill Apartments in Indianapolis. CSI Protective Services drafted and signed a contract with Chapel Hill to provide security services.¹²⁸ This contract was signed by the president of Paragon Properties on behalf of “Chapel Hill Apartments Management.”¹²⁹

CSI later filed suit against Paragon alleging it had not been paid for its security work at Chapel Hill. CSI argued that even though it knew that Paragon was acting as the agent for the owner of Chapel Hill, it was nevertheless entitled to pursue Paragon because the owner of the Chapel Hill Apartments was “undisclosed.”¹³⁰ The trial court ruled in favor of Paragon, reasoning that there was no dispute that Paragon was acting as an agent and information as to the owner of the apartments was readily ascertainable both before and after the contract was executed.¹³¹

The Court of Appeals affirmed.¹³² It emphasized that an agent, in order to avoid personal liability, must, at the time of contracting, disclose both the capacity in which it acts and the existence and identity of the principal.¹³³ But here, the Court said CSI was actually aware that Paragon was acting as an agent and was certainly aware that the apartments were owned by an entity other than Paragon.¹³⁴ Indeed, Paragon was not listed as a contracting party when CSI drafted the contract.¹³⁵ As such, Paragon was not liable to CSI for any alleged breaches of the contract.¹³⁶

*Self v. Estate of Collins*¹³⁷ was very different and came to a different result. It reminds among other things that an agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.¹³⁸ Wanda Self and Ralph Collins had lived together for many years, during which Wanda prepared and signed practically all checks for a checking account owned by Collins for which she was Collins’s agent.¹³⁹ In this case, Collins’s estate sued Self for the conversion of two checks written on Collins’s account for \$35,000.¹⁴⁰

127. RESTATEMENT (THIRD) OF AGENCY § 6.01 (AM. LAW INST. 2006).

128. *CSI Protective Servs.*, 2020 WL 3067802, at *1.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at *3.

133. *Id.* (citing *Brown v. Owen Litho Serv., Inc.*, 384 N.E.2d 1132, 1135 (Ind. Ct. App. 1979)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Self v. Estate of Collins*, 140 N.E.3d 895, No. 19A-PL-811, 2020 WL 465657 (Ind. Ct. App. 2020) (unpublished disposition).

138. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

139. *Self*, 2020 WL 465657, at *1.

140. *Id.*

Self defended on grounds that she had written the checks as Collins's agent.¹⁴¹ The trial court disagreed, finding that she had written "Collins's signature on the checks instead of signing them as his agent . . . and deposited the \$34,000 check in an account that he did not own, all without Collins's knowledge."¹⁴² The Court of Appeals affirmed.¹⁴³

D. Mergers and Acquisitions

Two decisions during the survey period examined important aspects of merger and acquisition law: the binding nature of a dispute resolution mechanism in an acquisition agreement, and "de facto" mergers.

1. Dispute Resolution.—The first case is *SGS North America, Inc. v. Mullholand*.¹⁴⁴ The shareholders of Cybermetrix, Inc., sold the stock in their company to SGS North America, Inc., in a stock purchase agreement that included a specified base amount of consideration plus additional amounts contingent upon Cybermetrix's earnings before interest, taxes, depreciation, and amortization (EBITDA) during two specified time periods following the closing of the transaction.¹⁴⁵ Such provisions in merger and acquisition agreements calling for contingent payments based on earnings following closing are referred to in M&A lingo as "earnout" clauses.¹⁴⁶

SGS paid the first contingent payment but not the second, claiming that Cybermetrix's EBITDA did not meet the applicable threshold for the second contingent payment.¹⁴⁷ Pursuant to a provision in the stock purchase agreement governing dispute resolution, "the parties hired an auditor to perform an independent audit of [Cybermetrix's EBITDA for the relevant time period] and to resolve the earnout dispute."¹⁴⁸ The auditor determined that Cybermetrix's relevant "EBITDA met the threshold and entered a 'final, conclusive, and binding' determination awarding the stockholders the second contingent payment of \$3,000,000 plus a portion of the auditor's fees."¹⁴⁹ SGS disagreed with the determination and refused to pay, so Christine Mullholand as representative of the Cybermetrix shareholders filed this case to enforce the auditor's determination, characterizing it as a binding arbitration award.¹⁵⁰

"The Marion County Commercial Court agreed with [Cybermetrix] and entered an order confirming the award and entering judgment in [Cybermetrix]'s

141. *Id.* at *3.

142. *Id.*

143. *Id.* at *4.

144. *SGS N. Am., Inc. v. Mullholand*, 135 N.E.3d 646 (Ind. Ct. App. 2019).

145. *Id.* at 648.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

favor; and the Court of Appeals affirmed.¹⁵¹ The precise issue before the courts was whether the dispute resolution mechanism in the parties' agreement was meant to be binding on the parties.¹⁵² Said differently, did the auditor's decision constitute an arbitration award subject to confirmation by the court?

The case was complicated by the fact that the agreement itself did not use the term "arbitration" and by the fact that the parties' agreement provided that it would be interpreted according to Delaware law.¹⁵³ As to the latter, the Court of Appeals concluded that under Delaware law, a contract "must reflect that the parties clearly and intentionally bargained for whether and how to arbitrate" before an award can be confirmed.¹⁵⁴ As to the former, the Court had little difficulty concluding that, from the language of the purchase agreement, the parties intended that the auditor have full and complete authority to act as an arbiter and issue a final and binding decision as to an earnout dispute.¹⁵⁵

As can well be imagined, SGS strenuously maintained that the absence of the term "arbitration" rendered it impossible to conclude that the auditor's calculation could be deemed an arbitration award. The author enjoyed Judge Crone's response and is pleased to share it:

[I]t is evident that Delaware courts, much like Indiana courts, are less concerned with the exact nomenclature used by the parties than they are with whether reasonable persons in the position of the parties would have thought they were clearly and intentionally agreeing to arbitrate. Thus, when a party, such as SGS, makes ambiguity arguments like those presented here, Indiana appellate courts have referred to Hoosier poet James Whitcomb Riley's "Duck Test" or to the famous Shakespeare quote, "What's in a name? that which we call a rose/By any other name would smell as sweet."¹⁵⁶

2. *De facto Mergers*.—When one business merges into another, all liabilities of the merging business become liabilities of the surviving entity.¹⁵⁷ But when one business "purchases the assets of another, the buyer does not assume the . . . liabilities of the seller."¹⁵⁸ However, there are "four general exceptions to this rule

151. *Id.*

152. *Id.* at 651.

153. *Id.*

154. *Id.* at 652 (citing *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010)).

155. *Id.*

156. *Id.* at 653 (citing *Walczak v. Labor Works-Ft. Wayne LLC*, 983 N.E.2d 1146, 1148 (Ind. 2013); *Becker v. State*, 992 N.E.2d 697, 698 (Ind. 2013)).

157. IND. CODE § 23-0.6-2-6(a)(4) (2021).

158. *New Nello Operating Co., LLC v. CompressAir*, 142 N.E.3d 508, 512 (Ind. Ct. App. 2020) (citing *Ziese & Sons Excavating, Inc. v. Boyer Const. Corp.*, 965 N.E.2d 713, 722 (Ind. Ct. App. 2012) (citing *Sorenson v. Allied Prods. Corp.*, 706 N.E.2d 1097, 1099 (Ind. Ct. App. 1999))), *rev'd*, 168 N.E.3d 238 (Ind. 2021); *see also Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1233 (Ind. 1994) (citing *Markham v. Prutsman Mirror Co.*, 565 N.E.2d 385, 387 (Ind. Ct. App.

against successor liability” in asset purchases:

- (1) an implied or express agreement to assume liabilities;
- (2) a fraudulent sale of assets done for the purpose of evading liability;
- (3) a purchase that is a de facto consolidation or merger; or
- (4) where the purchaser is a mere continuation of the seller.¹⁵⁹

Successor liability is implicated only when the predecessor entity no longer exists, such as in the case of dissolution or liquidation in bankruptcy.¹⁶⁰

These principles were implicated in *New Nello Operating Co., LLC v. CompressAir*,¹⁶¹ a case that began when CompressAir obtained an approximately \$45,000 judgment against Nello, Inc. For reasons that will become clear in a moment, Nello is referred to as “Old Nello.” When Old Nello did not satisfy the judgment, CompressAir filed proceedings supplemental against New Nello Operating Co., LLC, as a garnishee-defendant.¹⁶² In a transaction structured as a “strict foreclosure,”¹⁶³ New Nello had acquired the assets of Old Nello after having purchased a large secured debt owed by Old Nello to a bank.¹⁶⁴

New Nello defended on grounds of the principles set forth above, namely, that a buyer in an asset acquisition does not assume the seller’s liabilities.¹⁶⁵ But the trial court found that the third and fourth exceptions to the general rule applied: that New Nello’s purchase of Old Nello’s business assets was a de facto merger; and that New Nello was a mere continuation of Old Nello.¹⁶⁶

Indiana law holds that asset transfers can be considered de facto mergers “where the economic effect of the transaction makes it a merger in all but name.”¹⁶⁷ And the Court of Appeals agreed with the trial court that the doctrine applied here.¹⁶⁸ The Court pointed to the facts that New Nello continued Old Nello’s business enterprise as to management, location, and area of business; continued to use the name “Nello”; and assumed all of the debts of Old Nello that

1991)).

159. *New Nello Operating Co., LLC*, 142 N.E.3d at 512 (quoting *Ziese & Sons Excavating*, 965 N.E.2d at 722 (citing *Sorenson*, 706 N.E.2d at 1099)).

160. *Id.*

161. *Id.* at 508.

162. *Id.* at 509.

163. “Strict foreclosure” is a remedy provided by Article 9 of the Uniform Commercial Code (UCC) under which a secured party acquires the debtor’s rights in the collateral without having to go through the normal disposition processes required by Article 9. In exchange, the underlying obligation of the debtor (or some portion of that obligation) is extinguished. *See* IND. CODE § 26-1-9.1-620 to -622 (2021).

164. *New Nello Operating Co., LLC*, 142 N.E.3d at 510-11.

165. *Id.* at 512.

166. *Id.*

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

168. *Id.* at 513.

it considered necessary to continue the business.¹⁶⁹

After the conclusion of the survey period, the Supreme Court reversed, holding that continuity of ownership between the seller and buyer is required for either the “de facto merger” or “mere continuation” exceptions to the rule against successor liability to apply.¹⁷⁰ Because there was no continuity of ownership between Old Nello and New Nello (four individuals who had owned as much as 99% of Old Nello had no ownership interest whatsoever in New Nello), the rule against successor liability protected New Nello.¹⁷¹

The author offers two thoughts on the *New Nello* litigation. First, while previous cases considering the applicability of the “de facto merger” and “mere continuation” exceptions treated continuity of ownership as a factor to be weighed, the Supreme Court’s decision elevated its absence into a bright line rule. While this aligns Indiana law with that of other states like New York,¹⁷² its literal application may allow collusion that results in precisely the inequities that the “de facto merger” and “mere continuation” exceptions are meant to prevent.¹⁷³

Second, as the Supreme Court itself recognizes, the transaction at issue in *New Nello* was not the typical asset purchase that calls the “de facto merger” and “mere continuation” exceptions into question.¹⁷⁴ It was, as noted above and in the margin, a “strict foreclosure” under Uniform Commercial Code Article 9, section 620.¹⁷⁵ The Court in effect says that if this case were analyzed as one of a strict foreclosure, rather than an asset sale, the result would have been the same.¹⁷⁶ The author agrees.

In addition, the author submits that when a transaction is conducted in full compliance with the requirements of UCC § 9-620, no claim of successor liability should be available. Because of the prerequisites and objection procedures of § 9-620, a strict foreclosure will not take place if there is any reasonable likelihood that a normal disposition of the collateral would produce a surplus.¹⁷⁷ This is because the strict foreclosure would be objected to by the debtor or the holder of a junior interest, precluding the strict foreclosure from being consummated. In other words, under a properly-executed strict foreclosure under § 9-620, there will never be any value in the assets foreclosed upon for unsecured creditors. To deploy the “de facto merger” and “mere continuation” doctrines in such a

169. *Id.* Having affirmed on the “de facto” merger exception, the Court of Appeals did not address the “mere continuation” exception.

170. *New Nello Operating Co., LLC v. CompressAir*, 168 N.E.3d 238, 241 (Ind. 2021).

171. *Id.* at 243.

172. *Id.* at 242 (citing *Dritsas v. Amchem Prods., Inc.*, 94 N.Y.S.3d 264, 264-65 (N.Y. App. Div. 2019); *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45-46 (2d Cir. 2003)).

173. The author is grateful to his student, Victoria Blackwell, for her insights in this regard.

174. *New Nello Operating Co.* 168 N.E.3d at 242.

175. *See supra* at 163 and accompanying text.

176. *New Nello Operating Co.* 168 N.E.3d at 2423.

177. WILLIAM H. LAWRENCE, WILLIAM H. HENNING, & R. WILSON FREYERMUTH, *UNDERSTANDING SECURED TRANSACTIONS* 451 (5th ed. 2012).

circumstance would countermand the clear dictate of Article 9.¹⁷⁸

IV. CONTRACT LAW

A. The Common Law Parol Evidence and Mirror Image Rules

The bedrock “parol evidence” and “mirror image” rules of common law contract formation were nicely explicated in *Downs v. Radentz*,¹⁷⁹ where the disputed contract was an agreement settling litigation over a prior contract between the parties for the purchase and sale of residential real estate.¹⁸⁰

The parol evidence rule analysis grew out of the following set of facts. The parties spent the first half of 2018 negotiating the settlement agreement. On August 9, the sellers’ attorney sent an email to the buyers’ discussing some language in the agreement and concluding with the sentence, “If the Settlement Agreement is not fully executed by the close of business on Monday, August 13, 2018, I have been instructed to proceed with the litigation.”¹⁸¹ The sellers signed the settlement agreement on August 12, 2018.¹⁸² As drafted and signed by the sellers, it provided the buyers a “reasonable period of time (as long as they deemed necessary) to consider this agreement before signing.”¹⁸³ The buyers executed the agreement on August 30.¹⁸⁴ The agreement as fully executed contained the following merger and integration clause:

This Agreement has no terms other than those expressly set forth herein. Each Party to this Agreement represents and warrants to the other Party that it is not signing this Agreement in reliance upon any term, representation or warranty other than those expressly set forth in this Agreement. This Agreement shall not be modified in any respect except by a writing executed by both Parties.¹⁸⁵

At trial, the sellers attempted to use the August 9 email to prove that the

178. There is a line of cases in New York that suggests the contrary. *See Perceptron, Inc. v. Silicon Video, Inc.*, No. 5:06-CV-0412, 2010 WL 3463098, at *6 (N.D.N.Y. Aug. 27, 2010) (“[T]he Court is not persuaded that following the loan, security and statutory foreclosure process under the New York Uniform Commercial Code automatically precludes the imposition of successor liability on Defendants. *See Miller v. Forge Mench P’ship Ltd.*, No. 00 Civ. 4314, 2005 WL 267551, at *12 (S.D.N.Y. Feb. 2, 2005) (“[C]ourts have rejected the view that a foreclosure sale conducted under section 9-504 of the UCC precludes the imposition of successor liability.”)). However, neither the case quoted nor any of the cases cited involved the strict foreclosure procedures of UCC § 9-620.

179. *Downs v. Radentz*, 132 N.E.3d 58 (Ind. Ct. App. 2019).

180. *Id.* at 61.

181. *Id.* at 64.

182. *Id.* at 61.

183. *Id.* at 62 (citation omitted).

184. *Id.* at 61.

185. *Id.* at 62.

deadline for the buyers to sign the settlement agreement was August 13 and that by their not having done so, the settlement agreement never took effect.¹⁸⁶ The trial court refused to consider the email on grounds that it violated the parol evidence rule, a decision with which the Court of Appeals agreed.¹⁸⁷ “In general,” the Court wrote:

[W]here, as 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.¹⁸⁸

The sellers argued that a recognized exception to the parol evidence rule is that it does not operate to exclude evidence of contract formation.¹⁸⁹ The Court of Appeals acknowledged the existence of such an exception,¹⁹⁰ but held that it was not available in this circumstance because the evidence was not offered to show that no contract was formed; instead, “the email was a clear attempt to vary an express provision of the settlement agreement and, as such, it was inadmissible under the parol evidence rule.”¹⁹¹

The “mirror-image rule” analysis grew out of a similar but slightly different set of facts. The settlement agreement incorporated by reference the prior contract between the parties for the purchase and sale of residential real estate that was in litigation.¹⁹² Among the terms of the prior contract was a requirement that the sellers deliver a survey “certified as of a current date” and that was “reasonably satisfactory to Buyer.”¹⁹³ On August 16, the sellers’ attorney sent to the buyer a survey dated 1996; buyers rejected this as not complying with the terms of the agreement.¹⁹⁴

The sellers used this exchange to argue that the settlement agreement was not valid and enforceable because it did not satisfy Indiana’s mirror-image rule.¹⁹⁵ Specifically, the sellers argued that when the buyers rejected the 1996 survey, this constituted a rejection of the settlement agreement itself and constituted a proposed counteroffer.¹⁹⁶

As the Court of Appeals explained, the mirror-image rule provides that, in order for an offer and acceptance to constitute a contract, the acceptance must

186. *Id.* at 64.

187. *Id.* at 65.

188. *Id.* at 63-64 (citing *Krieg v. Hieber*, 802 N.E.2d 938, 943 (Ind. Ct. App. 2004)).

189. *Id.* at 64.

190. *Id.*

191. *Id.* at 65 (citing *Krieg*, 802 N.E.2d at 944).

192. *Id.* at 61.

193. *Id.*

194. *Id.*

195. *Id.* at 67.

196. *Id.*

meet and correspond with the offer in every respect; and acceptance that varies the terms of the offer is considered a rejection and operates as a counteroffer, which may be then accepted by the original offeror.¹⁹⁷

But here, as both the trial court and the Court of Appeals agreed, the buyers' rejection of the 1996 survey was simply a demand that the sellers comply with the agreement as written.¹⁹⁸ As the Court says, "nothing about Buyers' demands regarding the survey constituted a 'counteroffer' or otherwise sought to alter the terms of the proposed settlement agreement."¹⁹⁹

Having rejected the sellers' attempts both to avoid application of the parol evidence rule and to invoke the mirror-image rule, the Court of Appeals affirmed the trial court's grant of specific performance of the settlement agreement in favor of the buyers.²⁰⁰

B. Contracts for the Sale of Goods

In *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*,²⁰¹ the Indiana Supreme Court tackled related issues as to the statute of limitations for warranty claims arising under both Article 2 of the UCC and conflicting decisions of the Indiana Court of Appeals.

The sale at issue consisted of forty dump trucks sold by Kenworth of Indianapolis, Inc., to seven trucking companies, apparently utilizing seller-provided financing.²⁰² The trucks came with the following warranty, set forth in detail here because its precise language is central to the Court's resolution of the case:

Kenworth Truck Company warrants directly to you that the Kenworth vehicle . . . will be free from defects in materials and workmanship during the time and mileage periods set forth in the Warranty Schedule and appearing under normal use and service.

Your sole and exclusive remedy against Kenworth Truck Company and the selling Kenworth Dealer arising from your purchase and use of the vehicle is limited to the repair and replacement of defective materials or workmanship . . . to the extent of Kenworth Truck Company's obligations under the Warranty Schedule on the reverse side of this Agreement.²⁰³

197. *Id.* (citing I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co., 695 N.E.2d 1030, 1034-35 (Ind. Ct. App.), *trans. denied.*, 706 N.E.2d 174 (Ind. 1998)). While this is the common law rule, Article 2 of the UCC varies this rule in respect of contracts for the sale of goods. *See* IND. CODE § 26-1-2-207 (2021).

198. *Id.*

199. *Id.*

200. *Id.* at 68.

201. *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 134 N.E.3d 370 (Ind. 2019).

202. *Id.* at 373.

203. *Id.* at 374.

Sellers disclaimed all other warranties (express or implied) and liability for incidental or consequential damages.²⁰⁴ The warranty language included the following limitations period for filing a lawsuit: “It is agreed that you have one year from the accrual of the cause of action to commence any legal action arising from the purchase or use of the vehicle, or be barred forever.”²⁰⁵

The plaintiffs took delivery of the trucks from late 2005 through 2006.²⁰⁶ The trucks vibrated excessively while idling and at specific RPMs.²⁰⁷ When the defendants were unable to correct the problem within the one-year basic vehicle warranty period described above, they extended the warranty period to four years. Eventually, the plaintiffs filed this breach of warranty case in October 2010.²⁰⁸

Defendants sought summary judgment on grounds that the plaintiffs’ claims were barred by the UCC’s statute of limitations and, when the trial court denied summary judgment, brought this interlocutory appeal.²⁰⁹ The Court of Appeals affirmed, and the Supreme Court granted jurisdiction.²¹⁰

The statute at issue—UCC § 2-725(2)—provides:

A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.²¹¹

This section sets forth two different rules for when a cause of action for breach of warranty accrues, depending upon whether or not the “warranty explicitly extends to future performance of the goods.”²¹² If the warranty does explicitly extend to future performance, the discovery rule applies; if it does not, the cause of action accrues “when tender of delivery is made.”²¹³

While the Court recognized future-performance warranties are few and far between,²¹⁴ it nevertheless gave the warranty here a careful read and concluded

204. *Id.*

205. *Id.*

206. *Id.* at 375.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 376.

211. IND. CODE § 26-1-2-725(2) (2021); U.C.C. § 2-725(2) (AM. LAW INST. & UNIF. LAW COMM’N 1951).

212. *Id.*

213. *Id.*

214. *Kenworth of Indianapolis*, 134 N.E.3d at 377 (“Because the future-performance exception applies in only narrow circumstances, courts interpret and apply the exception strictly. . . . Consequently, courts will generally apply the future-performance exception to breach of express warranties only.” (citing *Controlled Env’ts Constr., Inc. v. Key Indus. Refrigeration Co.*, 670

that it “explicitly extend[ed] to future performance of the goods” for the following reasons:

- “[T]he phrase ‘Kenworth Truck Company warrants directly to you’ clearly qualifies as an explicit promise.”²¹⁵
- “[T]he promise relates to the quality or performance standards of the goods alone—the defect-free Kenworth truck.”²¹⁶
- “[T]he parties identified a specific future time for performance by using future-tense language (‘will be free from defects’ . . .), rather than past-tense (‘were free from defects’) or present-tense language (‘are free from defects’).”²¹⁷

The Court emphasized that the grammar mattered. “Had Sellers not used future-tense language, for example, or had they omitted a specific future time period for the trucks’ quality and performance, or had they promised only to repair and replace defects rather than warrant against future defects, then this warranty would fall outside the limited future-performance exception.”²¹⁸ Words to the wise in drafting warranties!

Having conclusively held that this was a future-performance warranty, the Court perforce had held that the discovery rule applied.²¹⁹ Now while there’s a statute on when the limitations period accrues, there’s no statute on how the discovery rule operates; that’s a matter of common law.²²⁰ The Court says that under Indiana’s common law discovery rule, “a cause of action accrues and the limitations period begins, when the circumstances involving contractual rights and obligations ‘put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.’”²²¹ And here the Court gets to the same place that the trial court did; there is a genuine issue of material fact precluding summary judgment as to the points at which the buyers discovered or should have discovered that the sellers breached the warranty.²²²

The buyers and sellers disputed an additional issue which the Court was not required but did elect to address: To what extent, if any, should the limitations period be tolled while a seller attempted to repair or replace defective goods?

In a 1987 case called *Ludwig v. Ford Motor Co.*,²²³ Chief Judge Ratliff had written for the Court of Appeals that repair promises and efforts did not toll the

N.W.2d 771, 778-79 (Neb. 2003) (citing *Joswick v. Chesapeake Mobile Homes, Inc.*, 765 A.2d 90 (Md. 2001)))).

215. *Id.* at 380.

216. *Id.*

217. *Id.* (footnote omitted).

218. *Id.*

219. *Id.* at 380-81.

220. *Id.* at 381.

221. *Id.* (quoting *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 689 (Ind. Ct. App. 2006)).

222. *Id.* at 382.

223. *Ludwig v. Ford Motor Co.*, 510 N.E.2d 691 (Ind. Ct. App. 1987).

UCC statute of limitations. But when the sellers raised *Ludwig* as a bar to tolling here, Judge Crone writing for the Court of Appeals found *Ludwig* to be non-binding horizontal authority that was wrongly decided.²²⁴ Under his analysis, a promise to repair or replace is not an express warranty, and a cause of action for the breach of that contractual obligation does not accrue until the promisor refuses or fails to repair or replace.²²⁵

The Supreme Court did not take sides in the Court of Appeals split, finding it sufficient to say that *Ludwig* had been properly decided but that it should be limited to its facts,²²⁶ and not expressing any view as to Judge Crone's approach. Rather, the Court said, the question was really one of "equitable estoppel" which, while "typically linked to claims of fraudulent concealment, . . . also applies to other conduct that 'lull[s] [a party] into inaction.'"²²⁷ In the end, there were genuine issues of material fact as well on whether sellers' conduct related (or, the Court says, unrelated) to repair efforts tolled the limitations period as a matter of equitable estoppel.²²⁸

C. Contracts with Governmental Bodies

Special rules can apply when contracting with governmental bodies as the following three cases decided during the survey period demonstrate.

*Happy Valley LLC v. Madison County Board of Commissioners*²²⁹ teaches the toughest lesson of all. Madison County entered into a four-year lease at the end of 2014 to provide housing for minimum security jail detainees.²³⁰ During deliberations on the county's 2017 budget, the Madison County Council did not appropriate any funds for the lease.²³¹ The parties litigated whether this action relieved the county of its obligations under the lease it had signed. The Court of Appeals found the landlord's arguments unavailing, holding simply that "county leases are subject to annual appropriation," and the landlord could not bind the county to fulfill the lease without the Council's appropriation of funds.²³²

In *City of Plymouth v. Michael Kinder & Sons, Inc.*,²³³ Michael Kinder & Sons, Inc., sued the City of Plymouth and related entities for amounts allegedly due under a contract to design a public swimming pool. According to Kinder, a

224. *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 112 N.E.3d 1106, 1112 (Ind. Ct. App. 2018), *vacated*, 134 N.E.3d 370 (Ind. 2019). Judge Altice dissented and would have followed *Ludwig*. *Id.* at 1120 (Altice, J., dissenting).

225. *Id.* at 1117.

226. *Kenworth of Indianapolis*, 134 N.E.3d at 384.

227. *Id.* at 383 (quoting *Paramo v. Edwards*, 563 N.E.2d 595, 599 (Ind. 1990)).

228. *Id.* at 385.

229. *Happy Valley LLC v. Madison Cty. Bd. of Comm'rs*, 133 N.E.3d 193 (Ind. Ct. App. 2019).

230. *Id.* at 195-96.

231. *Id.* at 196.

232. *Id.* at 201.

233. *City of Plymouth v. Michael Kinder & Sons, Inc.*, 137 N.E.3d 312 (Ind. Ct. App. 2019).

mediation of the dispute on January 25, 2019, resulted in:

a signed, written Mediation Agreement, which kept the last offer open after the mediation, with the condition that it would be kept open “subject to the approval of the City of Plymouth Redevelopment Commission.”

. . . The written Mediation Agreement also provided that if “the Plaintiff [Kinder] accepts the defendants [sic] offer to pay \$130,000.00 to settle this case then the case shall be settled.”²³⁴

On February 12, Kinder’s attorney emailed the city’s attorney that Kinder had “decided to accept the City’s last mediation offer of \$130,000.”²³⁵ After some correspondence between the two, none of which suggested that the deal was in trouble, the city’s attorney notified Kinder’s attorney on March 20 that “the settlement was unable to win the support of majority of the [City of Plymouth Redevelopment] Commission.”²³⁶

Kinder then asked the court to enforce the mediation agreement, and the court agreed.²³⁷ Treating the case purely as a matter of contract interpretation and not local government law, the Court of Appeals held that the requirement that the Commission approve the settlement offer of \$130,000 was a condition precedent to the effectiveness of the agreement, not, as Kinder contended, an offer to settle the litigation unless the Commission rescinded the offer before Kinder accepted.²³⁸ The Court did cite as authority for its decision another government contract case in which the Indiana Supreme Court had refused to enforce a purported settlement agreement that by its terms was subject to approval by state agency.²³⁹ As such, the Court of Appeals reversed the trial court.²⁴⁰

The outcome of the third case, *Culver Community Teachers Ass’n v. Indiana Education Employment Relations Board*,²⁴¹ decided by the Supreme Court after the conclusion of the survey period, marks the second time in recent memory that

234. *Id.* at 314.

235. *Id.*

236. *Id.*

237. *Id.* at 315.

238. *Id.* at 317.

239. *Id.* at 316 (citing *Ind. State Highway Comm’n v. Curtis*, 704 N.E.2d 1015 (Ind. 1998)).

240. *Id.* at 317. “The City [brought] this interlocutory appeal as a matter of right under Indiana Appellate Rule 14(A)(1) (‘for the payment of money’).” *Id.* at 315 n.3. The Court of Appeals says that this was improper because “an order for the payment of money is appealable as of right only if it requires a party ‘to pay a specific amount at a specific time.’” *Id.* Here, the trial court’s order required the payment of a specific amount but not at a specific time. The author observes that the Rule itself does not use the “specific amount at a specific time” language and that the authority that the Court cites for this proposition is distinguishable (involving a case in which the amount was not specific) and not that of the Supreme Court.

241. *Culver Cmty. Teachers Ass’n v. Ind. Educ. Emp’t Relations Bd.*, 174 N.E.3d 601 (Ind. 2021), *rev’g* *Culver Cmty. Teachers Ass’n v. Ind. Educ. Emp’t Relations Bd.*, 153 N.E.3d 1130 (Ind. Ct. App. 2020).

the Court of Appeals has disagreed with the Indiana Education Employment Relations Board (IEERB), only to be reversed (at least in part) by the Supreme Court.²⁴²

Since 1974, Indiana has authorized collective bargaining between school corporations and the exclusive representatives of their respective teachers.²⁴³ However, the collective bargaining regime requires that negotiated and ratified collective bargaining agreements be approved by the IEERB for compliance with the statute.²⁴⁴ Decisions of the IEERB are subject to judicial review in accordance with the requirements of the Indiana Administrative Orders and Procedures Act.²⁴⁵

In *Culver Community Teachers Ass'n*, teachers' associations from four school districts appealed the decision of the trial court that affirmed the IEERB's holding that their respective collective bargaining agreements violated state law because they impermissibly bargained what constitutes an "ancillary duty,"²⁴⁶ a term not defined by the statute. In sum, the IEERB's position is that the statute contains an exclusive list of the subjects that can be bargained and what constitutes an ancillary duty is not on the list.²⁴⁷

The teachers' argument on appeal was that Indiana case law establishes that negotiating compensation for ancillary duties is a mandatory collective bargaining topic.²⁴⁸ The IEERB responded that although wages for ancillary duties are bargainable, what constitutes an ancillary duty is not.²⁴⁹

The Court of Appeals agreed with the teachers,²⁵⁰ saying that while the IEERB framed the issue as whether the definition of ancillary duty is bargainable, the record establishes that the respective school corporations and teachers' associations "agreed as to what constituted an ancillary duty and bargained regarding the compensation therefor, as is authorized by" case law.²⁵¹

After the conclusion of the survey period, the Supreme Court unanimously reversed. After a helpful review of the history of teachers' collective bargaining in Indiana and relevant precedent, the Court found no ambiguity in the language of the statute or intent of the Legislature.²⁵² "Schools alone have the authority to

242. See *Jay Classroom Teachers Ass'n v. Jay Sch. Corp.*, 45 N.E.3d 1217 (Ind. Ct. App. 2015), *aff'd in part, rev'd in part*, 55 N.E.3d 813 (Ind. 2016).

243. IND. CODE § 20-29-6 (2021).

244. *Id.* § 20-29-6-6.1.

245. *Id.* § 4-21.5.

246. *Culver Cmty. Teachers Ass'n*, 153 N.E.3d at 1137.

247. *Id.* at 1136.

248. *Id.* at 1139 (citing *Jay Classroom Teachers Ass'n*, 45 N.E.3d 1217, *summarily aff'd in relevant part*, 55 N.E.3d 813; *Ind. Educ. Emp't Relations Bd. v. Nettle Creek Classroom Teachers Ass'n*, 26 N.E.3d 47 (Ind. Ct. App. 2015)).

249. *Id.* at 1137.

250. *Id.* at 1143. Judge Riley dissented. *Id.* (Riley, J., dissenting).

251. *Id.* at 1141 (majority opinion).

252. *Culver Cmty. Teachers Ass'n v. Ind. Educ. Emp't Relations Bd.*, 174 N.E.3d 601, 604 (Ind. 2021).

manage and direct the work of teachers” and “a collective bargaining agreement may not include provisions that conflict with this right of school employers,” the Court said.²⁵³ Furthermore, the Court said that the Indiana case law cited by the teachers, while it allowed teachers to be paid for ancillary duties, it did not authorize bargaining over the duties themselves.²⁵⁴

The Court’s bottom line was that while “teachers organizations and schools may bargain over wages for ancillary duties, and describe the conditions with proper disclaimers,” they may not bargain over work assignments, including ancillary duties, because such constitutes an impermissible bargaining subject and interferes with schools’ exclusive rights to assign and direct teachers’ work.²⁵⁵

D. Settlement Agreements

Several settlement agreements are discussed under different headings in this Article,²⁵⁶ but *ShermansTravel Media, LLC v. Gen3Ventures, LLC*,²⁵⁷ is most conveniently grouped here. The case gives us a window into the brave new world of online advertising and, specifically, the volume of email advertisements we all receive.

ShermansTravel Media’s business is selling advertising placements—airlines, hotels, and the like. Shermans puts these advertisements in emails that are distributed to a list of millions of email “subscribers.”²⁵⁸

A company like Shermans gets its list of subscribers from a company like Gen3Ventures. Gen3Ventures owns and operates websites that focus on the travel industry and uses these to collect “subscriber” email addresses.²⁵⁹

Shermans had a contract with Gen3 under which the parties agreed to share revenue generated from email advertisements sent by Shermans to subscribers collected and identified by Gen3.²⁶⁰ The business relationship broke down and litigation resulted.²⁶¹ However, the parties were able to compromise and settle their differences under the terms of a Settlement Agreement that required Shermans to make periodic payments to Gen3 and, crucially, also required that Shermans delete any and all email addresses from its database that it had acquired from Gen3.²⁶²

This litigation is Gen3’s lawsuit to enforce the Settlement Agreement.²⁶³

253. *Id.* at 607.

254. *Id.*

255. *Id.* at 608.

256. *See supra* notes 45-48, 179-200, 233-40 and accompanying text.

257. *ShermansTravel Media, LLC v. Gen3Ventures, LLC*, 152 N.E.3d 616 (Ind. Ct. App. 2020), *trans. denied*, 167 N.E.3d 1154 (Ind. 2021).

258. *Id.* at 618.

259. *Id.*

260. *Id.* at 618-19.

261. *Id.* at 619.

262. *Id.* at 619-20.

263. *Id.* at 621.

There is no contention that Shermans did not make the payments that it was required to make, but Gen3 does allege that Shermans continued to use Gen3-supplied email addresses.²⁶⁴ Shermans, for its part, acknowledges some mistakes but says that it was using its best efforts to remove the Gen3 emails; and, besides, there were some email addresses that Shermans had obtained from other sources that duplicated those that it had received from Gen3.²⁶⁵

The trial court granted summary judgment to Gen3, finding Shermans to be in breach of its obligations under the Settlement Agreement as a matter of law.²⁶⁶ However, the Court of Appeals reversed, finding there to have been at least genuine issues of material fact as to whether Shermans's efforts to delete the Gen3 emails were "substantial performance" of that obligation.²⁶⁷

Although the Supreme Court ultimately decided not to take jurisdiction over the case, it did so by a 3-2 vote and only after first granting transfer and holding oral argument.²⁶⁸ Its interest may have been motivated by Judge Crone's strong dissent. Pointing to Shermans's acknowledgement that it sent 68,521 emails to Gen3 subscribers in April 2017 alone, Judge Crone says, "In no rational universe would this constitute substantial performance."²⁶⁹ On the other hand, Judge Kirsch writing for the Court was okay with that number, buying into the fact that it constituted less than one third of one percent of the total volume of emails sent by Shermans that month!²⁷⁰

If nothing else, the case helps us understand the volume of advertising email that we get.

E. Leases

During the survey period, the Indiana Supreme Court decided the highly publicized case of *Rainbow Realty Group, Inc. v. Carter*,²⁷¹ holding that Rainbow's "Rent-to-Own" arrangements constituted unenforceable leases under the Indiana Landlord-Tenant Act. Because this case was decided prior to the publication of last year's survey Article, it is discussed there.²⁷²

In a more conventional landlord-tenant setting, *Husainy v. Granite*

264. *Id.* at 621-22.

265. *Id.* at 622.

266. *Id.* at 623.

267. *Id.* at 628.

268. *ShermansTravel Media, LLC v. Gen3 Ventures, LLC*, 167 N.E.3d 1154 (Ind. 2021) (order vacating grant of transfer and denying transfer) (3-2, Chief Justice Rush and Justice David voting to grant). The opinion of the Court of Appeals was reinstated as Court of Appeals precedent.

269. *ShermansTravel Media*, 152 N.E.3d at 629 (Crone, J., dissenting).

270. *Id.* at 627 (majority opinion). Judge Brown concurred in the reversal of summary judgment, saying that the number or percentage of emails sent "is not dispositive as to whether there was a breach of the Settlement Agreement," and did not entitle Gen3 to summary judgment. *Id.* at 629 (Brown, J., concurring).

271. *Rainbow Realty Grp., Inc. v. Carter*, 131 N.E.3d 168 (Ind. 2019).

272. *Banking, Business, and Contract Law 2021*, *supra* note 112, at 833-35.

Management, LLC,²⁷³ the tenant also prevailed. In this case, the owner's management company filed an eviction action for alleged nonpayment of rent and breach of contract.²⁷⁴ The tenant responded by suing both the owner and the management company, alleging breach of the covenant of quiet enjoyment and violation of the landlord's statutory warranty of habitability.²⁷⁵ A jury found in favor of the tenant on both the breach of covenant and breach of warranty claims,²⁷⁶ the latter of which entitled the tenant to attorney's fees.²⁷⁷ The trial court set aside the jury's verdict on the breach of covenant (but not breach of warranty) claim and awarded \$2,000 in attorney's fees.²⁷⁸

Both parties appealed. The Court of Appeals affirmed the trial court as to its judgment in favor of the tenant on the breach of warranty claim but reversed the trial court as to its judgment in favor of the landlord on the breach of covenant claim.²⁷⁹ The Court of Appeals also reversed the trial court's award of attorney's fees as inadequate.²⁸⁰

As to the breach of covenant claim, the Court of Appeals said that the trial court had abused its discretion in setting aside the jury's verdict when the evidence showed "numerous interruptions of and difficulties with the building's water and heating service."²⁸¹ And on the breach of warranty claim, the Court recited evidence from which it concluded that "a jury could reasonably find" that the landlord did not perform the obligations imposed upon it by statute.²⁸²

Most significant was the way in which the Court dealt with the attorney's fees issue. As noted above, because the tenant prevailed on his statutory claim, he was entitled to attorney's fees under the statute.²⁸³ The tenant requested approximately \$59,000 in attorney's fees, but the trial court held that to be unreasonable and unwarranted and awarded only \$2,000.²⁸⁴ But the Court of Appeals took the position that the trial court "disregarded [the landlord's] significant role in driving up [the tenant's] legal fees."²⁸⁵ It quoted with approval the tenant's observation

273. *Husainy v. Granite Mgmt., LLC*, 132 N.E.3d 486 (Ind. Ct. App. 2019).

274. *Id.* at 490.

275. *Id.*; see IND. CODE § 32-31-8-5 (2021) ("Duties of landlord at commencement of and during occupancy").

276. *Husainy*, 132 N.E.3d at 490.

277. IND. CODE § 32-31-8-6(d)(1)(B) ("Enforcement of obligations; remedies").

278. *Husainy*, 132 N.E.3d at 490.

279. *Id.* at 491.

280. *Id.*

281. *Id.* at 494-95.

282. *Id.* at 496-97. For example, the Court said that "a jury could reasonably find that [the landlord] did not remedy the lack of hot running water within a reasonable amount of time" and "had both actual knowledge and notice of [a serious] leak and did not make all reasonable efforts to keep the building's common areas in a clean and proper condition as required by [the statute]." *Id.* at 497.

283. IND. CODE § 32-31-8-6(d)(1)(B) (2021) ("Enforcement of obligations; remedies").

284. *Husainy*, 132 N.E.3d at 499.

285. *Id.* at 498 (footnote omitted).

that the purpose of “statutes authorizing the recovery of attorney’s fees is to ‘serve [the] public policy of equal access to courts despite [the] relative financial conditions of parties.’”²⁸⁶ To uphold the \$2000 award as adequate, the Court continued in quoting from the tenant, would mean that “even when a tenant wins, he loses.”²⁸⁷

F. Contracts Between Attorneys and Their Clients

Each year, this survey includes cases such as the one in the preceding section in which litigants assert various claims as to why their attorney’s fees should be paid by their adversaries. During the survey period, there were at least four appellate decisions involving attorney’s fee collection litigation between lawyers and their clients. The results were mixed.

In *Sockrider v. Burt, Blee, Dixon, Sutton, & Bloom, LLP*,²⁸⁸ a client contested the amount of her attorneys’ contingency fee earned by securing a recovery under an insurance policy on the life of her deceased husband that was achieved without litigation.²⁸⁹ The trial court granted the law firm summary judgment, and the Court of Appeals affirmed,²⁹⁰ holding both that the contingency fee as negotiated between the law firm and client was reasonable²⁹¹ and that the contingency fee agreement unambiguously indicated that the fee was due upon recovery of any amount regardless of whether it was achieved prior to filing suit.²⁹²

Bardonner v. Clendening, Johnson, & Bohrer, P.C.,²⁹³ reflects the not-unusual pattern of an effort by a law firm to collect its fee from a client only to see the client file a counterclaim for legal malpractice. And it raises an extremely important issue, one that demonstrates why “unpublished dispositions” need to be read for education even if they cannot be used for citation.

When the client counterclaimed for legal malpractice, the law firm sought summary judgment on statute of limitations grounds which the trial court granted.²⁹⁴ But the client appealed, arguing that his counterclaim was timely, citing Indiana Trial Rule 13(J) which provides:

The statute of limitations, [] shall not bar a claim asserted as a counterclaim to the extent that:

(1) It diminishes or defeats the opposing party’s claim if it arises out of

286. *Id.* at 499 (quoting Appellant’s Brief at 23, *Husainy*, 132 N.E.3d 486, 2019 WL 8222807, at *23).

287. *Id.* (quoting Appellant’s Brief, *Husainy*, *supra* note 286, at 24).

288. *Sockrider v. Burt, Blee, Dixon, Sutton, & Bloom, LLP*, 135 N.E.3d 638 (Ind. Ct. App. 2019), *trans. denied*, 145 N.E.3d 115 (Ind. 2020).

289. *Id.* at 641.

290. *Id.* at 644.

291. *Id.* at 643.

292. *Id.* at 646.

293. *Bardonner v. Clendening, Johnson, & Bohrer, P.C.*, 144 N.E.3d 208, No. 19A-CC-2222, 2020 WL 741995 (Ind. Ct. App. 2020) (unpublished disposition).

294. *Id.* at *2.

the transaction or occurrence that is the subject-matter of the opposing party's claim, or if it could have been asserted as a counterclaim to the opposing party's claim before it (the counterclaim) was barred[.]²⁹⁵

The Court of Appeals readily acknowledges that the client's counterclaim for legal malpractice falls within the description of Trial Rule 13(J) as related to the firm's claim of unpaid legal fees because it arises out of the firm's representation of the client.²⁹⁶ As such, for the firm to prevail on summary judgment, it must be able to show that the client's legal malpractice claim fails on the merits as a matter of law.²⁹⁷ And, giving a careful read to the designated evidence, the Court of Appeals concludes that it does.²⁹⁸ That was a hard fought result in favor of the law firm—but it still has to collect its fee.

In *Poer v. Crum-Hieftje*,²⁹⁹ the attorney did not prevail in either the trial court or on appeal. The lawsuit sought approximately \$76,000 in allegedly unpaid fees, but the trial court found that the documentation in support of the claim was “not specific enough for the determination of fees owed.”³⁰⁰ Based on the evidence, the trial court did award the attorney approximately \$20,000. On appeal, the Court of Appeals affirmed, finding the attorney's claims waived for filing a brief that did not provide a single citation to either the record or legal authority.³⁰¹

Nor was the law firm successful in *Bopp Law Firm, PC v. Schock for Congress*.³⁰² In this case, the law firm sued the client for breach of contract, claiming that it was owed \$160,000 plus interest.³⁰³ The case was tried to the trial court which found that the reasonable value of the services performed was \$30,000 and that, because the firm had already been paid approximately \$92,000, no further amount was owed to the firm.³⁰⁴

The Court of Appeals had no difficulty affirming,³⁰⁵ finding that the law firm “did not meet its burden as plaintiff to prove that it was entitled to recover all fees” and that the trial court's determination that the value of the firm's work was \$30,000 fell “squarely within the evidence presented at trial.”³⁰⁶

The Court makes two other points well worthy of note. First, after trial (but only after trial), the law firm attempted to frame the issue as one for “account

295. *Id.* at *3 (quoting IND. R. TRIAL P. 13(J)).

296. *Id.*

297. *Id.*

298. *Id.* at *4.

299. *Poer v. Crum-Hieftje*, 146 N.E.3d 362, No. 19A-CC-2552, 2020 WL 1933241 (Ind. Ct. App. 2020) (unpublished disposition).

300. *Id.* at *1.

301. *Id.* at *2.

302. *Bopp Law Firm, PC v. Schock for Cong.*, 151 N.E.3d 286 (Ind. Ct. App. 2020).

303. *Id.* at 289.

304. *Id.* at 291.

305. *Id.* at 296.

306. *Id.* at 294.

stated.”³⁰⁷ An “account stated” is an agreement, “inferred from the delivery of the statement coupled with the recipient’s failure to object within a reasonable period of time,” that “all items of an account and balance are correct, together with a promise, expressed or implied to pay the balance.”³⁰⁸ The Court of Appeals treats the issue as waived for failure to be presented to the trial court³⁰⁹; says that even if it was available, it would fail on the merits³¹⁰; and questions its applicability to legal services agreements.³¹¹

Second, the law firm criticized the trial court for utilizing Rule 1.8(f) of the Indiana Rules of Professional Conduct in its analysis, arguing that “only [the Indiana] Supreme Court may sanction attorneys for violation of the Rules of Professional Conduct.”³¹² The Court of Appeals deems this a “red herring,” pointing out that “the trial court did not find that the Law Firm had violated Rule 1.8(f). Instead, the trial court used [the rule] as a guidepost to determine whether the Law Firm was entitled to recover” fees that it charged its client when the billing records also “included work it performed for other entities.”³¹³

G. Insurance Contracts

Plews Shadley Racher & Braun LLP has deservedly earned a reputation for innovative and effective advocacy on behalf of businesses against their property, casualty, and liability insurance carriers. Most notably, the firm secured coverage for pollution damage suffered by its clients in two famous decisions of the Indiana Supreme Court, *American States Insurance Co. v. Kiger*³¹⁴ and *State Automobile Mutual Insurance Co. v. Flexdar, Inc.*³¹⁵ However, during the survey period, the firm’s efforts to deploy the *Kiger* and *Flexdar* precedents on behalf of the National Collegiate Athletic Association (NCAA) to secure coverage for antitrust litigation filed by college athletes proved unavailing.

The case is *National Collegiate Athletic Ass’n v. Ace American Insurance*.³¹⁶

307. *Id.* at 291-92.

308. *MHC Surgical Ctr. Assocs., Inc. v. Ind. Office of Medicaid Policy & Planning*, 699 N.E.2d 306, 309 (Ind. Ct. App. 1998).

309. *Bopp Law Firm*, 151 N.E.3d at 292.

310. *Id.* at 292 n.7 (citing *B.E.I., Inc. v. Newcomer Lumber & Supply Co.*, 745 N.E.2d 233, 237 (Ind. Ct. App. 2001)).

311. *Id.* at 291 n.4 (citing *Thrasher, Buschmann, & Voelkel, P.C. v. Adpoint Inc.*, 24 N.E.3d 487, 499 (Ind. Ct. App. 2015)).

312. *Id.* at 293.

313. *Id.*

314. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996). The author dissented in this case while a member of the Supreme Court. *Id.* at 949 (Sullivan, J., dissenting).

315. *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 848 (Ind. 2012). The author also dissented in this case while a member of the Supreme Court. *Id.* at 852 (Sullivan, J., dissenting).

316. *Nat’l Collegiate Athletic Ass’n v. Ace Am. Ins.*, 151 N.E.3d 754 (Ind. Ct. App. 2020), *trans. denied*, 166 N.E.3d 909 (Ind. 2021).

The NCAA's complaint sought coverage from its insurers for a lawsuit, *Jenkins v. National Collegiate Athletic Ass'n*, in which two classes of college football and basketball players sought on antitrust grounds to enjoin the NCAA and other defendants from imposing any restrictions on what money or other benefits could be afforded to student athletes.³¹⁷

Jenkins was initiated in March 2014.³¹⁸ In August 2008, final judgment had been entered in another lawsuit, *White v. National Collegiate Athletic Ass'n*, where the plaintiffs had alleged that financial aid provided to college athletes was less than the actual cost of attendance and also sought to enjoin on antitrust grounds the NCAA from enforcing its rules that capped the amount of financial aid available to athletes at an amount that did not cover the full cost of attendance.³¹⁹

The insurance policies under which the NCAA sought to recover contained a "Related Wrongful Acts Exclusion," which provided that the date of a claim for coverage with respect to an alleged wrongful act committed by an insured will be deemed to be the date a claim is first made for a *related* wrongful act.³²⁰ The NCAA had made a claim for insurance coverage in *White* when it was filed in 2006,³²¹ and so, if *Jenkins* and *White* both alleged related wrongful acts, the date of the claim in *Jenkins* would be deemed to be the date of the claim in *White*. And because the insurance policies under which the NCAA sought coverage in *Jenkins* were "claims made" policies applicable to 2012–2014, a claim deemed to have been made in 2006 would not be covered.³²²

The key to the NCAA prevailing was clearly to persuade the court that the allegations made in *White* and *Jenkins* were not "related wrongful acts." A detailed comparison of the similarities and differences between the allegations is beyond the scope of this Article; it is sufficient to say that the NCAA argued that the "exclusionary language [was] overbroad, ambiguous, and fail[ed] to give policyholders objective guidance as to the application of the provision."³²³ In doing so, the NCAA stressed the approach that the Indiana Supreme Court had taken in *Kiger* and *Flexdar* in addressing the language of pollution exclusion clauses from which it sought to extrapolate a general rule of Indiana insurance law to the effect that exclusions that are overbroad are ambiguous and unenforceable.³²⁴

317. *Id.* at 757-58.

318. *Id.* at 757.

319. *Id.* at 756-57 (discussing *White v. Nat'l Collegiate Athletic Ass'n*, No. CV 06-0999 (C.D. Cal. 2008)).

320. *Id.* at 759.

321. Consolidated Brief of Appellees, Federal Insurance Company, Illinois National Insurance Company and Westchester Fire Insurance Company at 20, *Ace Amer. Ins.*, 151 N.E.3d 754 (No. 19A-PL-01313), 2019 WL 12241074, at *20.

322. *Ace Amer. Ins.*, 151 N.E.3d at 763.

323. *Id.* at 762.

324. Appellant's Brief at 26, *Ace Amer. Ins.*, 151 N.E.3d 754 (No. 19A-PL-01313), 2019 WL 12241073, at *26.

The Court of Appeals emphatically rejected the analogy to the pollution exclusion, going so far as to say that “our courts’ approach to reading pollution exclusions in general liability policies has no bearing on the enforcement of the related wrongful acts language in the insurance policy before us.”³²⁵ Instead, the Court considered several cases construing Wrongful Act Exclusions in reaching the conclusion that the allegations in *White* and *Jenkins* were related as a matter of law.³²⁶ Summary judgment granted to the insurers by the trial court was affirmed.³²⁷

The NCAA next sought to invoke the jurisdiction of the Indiana Supreme Court by filing a Petition for Transfer, a full-throated exhortation that the decision of the Court of Appeals conflicted with the Supreme Court’s holdings in *Kiger* and *Flexdar*.³²⁸ The insurers filed a workmanlike response.³²⁹ The case drew amicus curiae briefs in support of both sides.³³⁰

It is the author’s perception, based on his experience as a member of the Supreme Court from 1993 to 2012, that when briefing is complete on a Petition to Transfer, the Justices meet and vote on whether to deny the Petition or grant it and, if the latter, issue an order to that effect as well as an order setting the matter for oral argument.³³¹ But on occasion, uncertainty on the part of one or more of the Justices or other factors will cause the Court to set the matter for oral argument in advance of denying or granting the Petition. That is what happened in this case.³³²

On March 11, 2021, the Court held oral argument via Zoom in which prominent lawyers George M. Plews argued for the NCAA and Stephen J. Peters for the insurers.³³³ Immediately following argument, the Court issued an order denying the Petition to Transfer, thereby declining to take jurisdiction over the

325. *Ace Amer. Ins.*, 151 N.E.3d at 763.

326. *Id.* at 763-65 (discussing *Gregory v. Home Ins. Co.*, 876 F.2d 602, 603 (7th Cir. 1989); *Am. Home Assurance Co. v. Allen*, 814 N.E.2d 662, 667 (Ind. Ct. App. 2004), *trans. dismissed*).

327. *Id.* at 766.

328. Petition for Transfer, *Ace Amer. Ins.*, 151 N.E.3d 754 (No. 19A-PL-01313).

329. Appellees, Federal Insurance Company, Illinois National Insurance Company and Westchester Fire Insurance Company’s Consolidated Response to Petition for Transfer, *Ace Amer. Ins.*, 151 N.E.3d 754 (No. 19A-PL-01313), 2020 WL 9424470.

330. Brief of Amicus Curiae United Policyholders, *Ace Amer. Ins.*, 151 N.E.3d 754 (No. 19A-PL-01313), 2020 WL 9424468; Brief of Amicus Curiae Complex Insurance Claims Litigation Association, *Ace Amer. Ins.*, 151 N.E.3d 754 (No. 19A-PL-01313), 2020 WL 9424469.

331. *Cf.* *ShermansTravel Media, LLC v. Gen3Ventures, LLC*, 167 N.E.3d 1154 (Ind. 2021), *supra* notes 256-70 and accompanying text, where the Court first granted transfer; then held oral argument; and then vacated its initial transfer order and denied transfer.

332. Order, *Ace Amer. Ins.*, 154 N.E.3d 754 (No. 19A-PL-01313).

333. Oral Argument, *Ace Amer. Ins.*, 154 N.E.3d 754, <https://mycourts.in.gov/arguments/default.aspx?id=2533&view=detail&yr=&when=&page=1&court=sup&search=&direction=%20ASC&future=False&sort=&judge=&county=&admin=False&pageSize=20> [https://perma.cc/885P-BBTS].

case.³³⁴ Chief Justice Rush and Justice Massa voted to grant the Petition to Transfer; Justices David, Slaughter, and Goff voted to deny the Petition.³³⁵

H. Covenants not to Compete

The author suggests a growing divergence between the jurisprudence of the Indiana Supreme Court and the Indiana Court of Appeals in respect of covenants not to compete. In a recent survey Article, the author observed that while the Supreme Court's 2008 decision in *Central Indiana Podiatry, P.C. v. Krueger*³³⁶ might have signaled heightened skepticism toward non-competes, the Court of Appeals continued to enforce them vigorously.³³⁷ After two cases decided during the survey period, the Supreme Court's signal seems much stronger; in its recent cases, the Court of Appeals seems just as steadfast.

The most important decision of the survey period involving covenants not to compete was undoubtedly *Heraeus Medical, LLC v. Zimmer, Inc.*,³³⁸ in which the Indiana Supreme Court refused to enforce a non-competition covenant or even to allow it to be revised pursuant to the "blue pencil" doctrine.

Zimmer employee Robert Kolbe's employment agreement contained a non-solicitation covenant that prohibited him from recruiting Zimmer employees to work for a competitor. Kolbe later went to work for Heraeus Medical, recruiting a sales team that ultimately included former Zimmer employees.³³⁹ The trial court found the covenant enforceable,³⁴⁰ but the Court of Appeals held it to be overbroad.³⁴¹ The Court of Appeals did not stop there, however, but instead revised the covenant to make it reasonable by adding language limiting the covenant's scope to only "those employees in which [Zimmer] has a legitimate protectable interest."³⁴²

The technique employed by the Court of Appeals is the well-known "blue pencil" doctrine by which courts can make overbroad covenants reasonable.³⁴³ The significance of the Supreme Court's holding is that it circumscribes blue pencil authority to deleting language. Blue pencil authority does not extend to adding terms, the Court said, "even if the agreement contains a clause authorizing

334. Nat'l Collegiate Athletic Ass'n v. Fed. Ins. Co., 166 N.E.3d 909 (Ind. 2021).

335. *Id.*

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

337. Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 51 IND. L. REV. 945, 987-88 (2018).

338. *Heraeus Med., LLC v. Zimmer, Inc.*, 135 N.E.3d 150 (Ind. 2019).

339. *Id.* at 152.

340. *Id.*

341. *Heraeus Med., LLC v. Zimmer, Inc.*, 123 N.E.3d 158, 167 (Ind. Ct. App. 2019).

342. *Id.* at 167-68.

343. *Heraeus Med.*, 135 N.E.3d at 153 (citing *Blue-Pencil Test*, BLACK'S LAW DICTIONARY (10th ed. 2014); Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 730 (Ind. 2008); *Dicen v. New SESCO, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005)).

a court to do so.”³⁴⁴ “[B]ecause Zimmer’s nonsolicitation covenant is overbroad and cannot be blue-penciled in a way that would render it reasonable under Indiana law, the covenant is void and unenforceable.”³⁴⁵ In another colorful turn of the phrase for which she is known, Chief Justice Rush concluded by saying that “Indiana’s ‘blue pencil doctrine’ is really an eraser—providing that reviewing courts may delete, but not add, language to revise unreasonable restrictive covenants. And parties to noncompetition agreements cannot use a reformation clause to contract around this principle.”³⁴⁶

To *Heraeus* should be added *American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*,³⁴⁷ discussed at length in last year’s survey,³⁴⁸ where the Supreme Court declared unenforceable the liquidated damages clauses of three employment contracts that would be triggered if the covered individuals engaged in competition with or recruited the employees of their former employer. While the court in that case did not declare unenforceable covenants that explicitly prohibited competition, the author submits that declaring unenforceable liquidated damages clauses linked to competition had the same practical effect.

Both *Heraeus* and *American Consulting* reversed decisions of the Court of Appeals.³⁴⁹ In addition to upholding the enforceability of the clauses at issue in those two cases, the Court of Appeals also upheld the enforceability of non-competition covenants in the following two other cases during the survey period.³⁵⁰

344. *Id.* at 151. The agreement in this case had a clause authorizing a court to modify unenforceable provisions.

345. *Id.* at 153.

346. *Id.* at 156.

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

348. *Banking, Business, and Contract Law 2021*, *supra* note 112, at 838-43.

349. *See Heraeus Med., LLC v. Zimmer, Inc.*, 123 N.E.3d 158, 167 (Ind. Ct. App. 2019); *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 104 N.E.3d 573 (Ind. Ct. App. 2018).

350. In addition, the Court of Appeals decided three other cases during the survey period that had the effect of affirming the validity of non-competition covenants although the Court’s decisions did not explicitly address the covenants’ enforceability.

In *Farnsworth v. Lutheran Med. Grp., LLC*, 139 N.E.3d 748, No. 19A-PL-1726, 2019 WL 6904540 (Ind. Ct. App. 2019) (unpublished disposition), a physician sued for breach of his employment contract and requested that enforcement of a non-competition provision in the employment agreement be enjoined. The Court of Appeals held that the trial court had properly denied the injunction because the physician failed to show a reasonable likelihood of success on the merits. *Id.* at *4.

In *Buck v. Samaron Corp.*, 144 N.E.3d 220, No. 19A-PL-1024, 2020 WL 891141 (Ind. Ct. App. 2020) (unpublished disposition), the trial court held that a former employee who had formed a business that competed with his former employer had breached his employment contract that had included a non-competition covenant. The Court of Appeals affirmed without directly addressing the enforceability of the non-competition covenant, perhaps out of respect to *Heraeus*, which it cites, but nevertheless held that there was no basis to set aside the trial court’s conclusion that the individual had breached the contract. *Id.* at *4.

In *SourceOne Group, LLC v. Gage*,³⁵¹ Ray Gage provided independent contractor services to an insurance brokerage business for many years under an employment contract that included a non-solicitation provision, prohibiting him from soliciting business from the brokerage's customers for thirty months after the termination of his employment. When the enforceability of the provision was challenged, the trial court held that the brokerage had a legally protectable interest in its customer list but that the 30-month term of the provision was unreasonable and that the court had no authority to "blue pencil" a shorter-term.³⁵² The Court of Appeals reversed, holding that there was "no evidence in the record indicating that, under the particular circumstances of this case, including Gage's competitive advantage and the nature of [the brokerage]'s protectable interest, a thirty-month restraint is unreasonable."³⁵³

*Zollinger v. Wagner-Meinert Engineering, LLC*³⁵⁴ examined the enforceability of non-competition covenants through the lens of *Dicen v. New SESCO, Inc.*, a watershed decision of the Indiana Supreme Court that held that covenants not to compete ancillary to the sale of a business are viewed more favorably than those arising out of an employer-employee relationship.³⁵⁵

Following Wayne Zollinger's termination by his employer, the employer initiated litigation to prevent Zollinger from violating non-competition provisions contained in an operating agreement and an employment agreement that Zollinger had signed while employed by predecessor business entities.³⁵⁶ The trial court and Court of Appeals walked through three steps in concluding that the non-competition covenants were enforceable.³⁵⁷ First, the courts agreed that the operating and employment agreements remained in effect notwithstanding the change in control of Zollinger's employer.³⁵⁸ Second, they also agreed that the continuation of the covenants' effectiveness was ancillary to the sale of the business³⁵⁹ and therefore subject to the more favorable standard of review

In *McKeon v. George Ins. Agency, Inc.*, 144 N.E.3d 201, No. 19A-PL-1538, 2020 WL 610876 (Ind. Ct. App. 2020) (unpublished disposition), the trial court granted summary judgment to a former employer on the question of whether its former employee had breached his employment contract's post-employment non-competition requirements. The former employee offered no evidence in opposition to the motion for summary judgment, and the Court of Appeals affirmed on that basis. *Id.* at *3.

351. *SourceOne Grp., LLC v. Gage*, 138 N.E.3d 994, No. 18A-PL-2153, 2019 WL 6334657 (Ind. Ct. App. 2019) (unpublished disposition), *trans. denied*, 145 N.E.3d 108 (Ind. 2020).

352. *Id.* at *3.

353. *Id.* at *7.

354. *Zollinger v. Wagner-Meinert Eng'g, LLC*, 146 N.E.3d 1060, (Ind. Ct. App.), *trans. denied*, 153 N.E.3d 1111 (Ind. 2020).

355. *Dicen v. New SESCO, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005) (quoting *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22 (Mass. App. Ct. 1986)).

356. *Zollinger*, 146 N.E.3d at 1065-66.

357. *Id.* at 1069.

358. *Id.* at 1067.

359. As consideration for surrendering his equity interest as part of the change in control,

enunciated in *Dicen*.³⁶⁰

The courts' third step was a relatively simple one. Since Zollinger had argued for the stricter standard of review applicable to employer-employee non-competes, he had not contested the restrictions applicable to him using the more liberal *Dicen* standard.³⁶¹

V. CONTRACT DEFENSES

A. Statute of Limitations

During the survey period, the Indiana Supreme Court rejected defendant debtors' identical statute of limitations defenses in both *Blair v. EMC Mortgage, LLC*,³⁶² and *Collins Asset Group, LLC v. Alialy*,³⁶³ where creditors had sought to collect on promissory notes, reversing in both decisions in which the Court of Appeals had found in favor of the defendant debtors. Because these cases were decided prior to the publication of last year's survey Article, they are discussed there.³⁶⁴

B. Liquidated Damages

During the survey period, the Indiana Supreme Court declared unenforceable the liquidated damages clauses of three employment contracts that would be triggered if the covered individuals engaged in competition with or recruited the employees of their employer.³⁶⁵ The Court's decision in *American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*, reversed the Court of Appeals which had upheld the validity of the clauses.

Because these cases were decided prior to the publication of last year's survey Article, they are discussed there.³⁶⁶

C. Specific Performance

Perhaps the most unusual decision of the survey period came from the Indiana Supreme Court in *Salyer v. Washington Regular Baptist Church*

Zollinger received approximately \$1.3 million, approximately \$1.0 million more than the \$300,000 he had paid for his interest approximately three-and-one-half years earlier. *Id.* at 1063-64.

360. *Id.* at 1068.

361. *Id.* at 1069.

362. *Blair v. EMC Mortg., LLC*, 139 N.E.3d 705 (Ind. 2020), *rev'g* 127 N.E.3d 1187 (Ind. Ct. App. 2019).

363. *Collins Asset Grp., LLC v. Alialy*, 139 N.E.3d 712 (Ind. 2020), *rev'g* 115 N.E.3d 1275 (Ind. Ct. App. 2018).

364. *Banking, Business, and Contract Law* 2021, *supra* note 112, at 852-60.

365. *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).

366. *Banking, Business, and Contract Law* 2021, *supra* note 112, at 838-43.

Cemetery,³⁶⁷ where the court by a 3-2 vote granted specific performance on a breach of contract claim against a cemetery owner, the consequence of which appears to be that an innocent soul erroneously buried in the grave that was the subject of the contract will need to be disinterred.

The cemetery involved admitted to having mistakenly sold the gravesite twice, first to the plaintiff in this case who had purchased it for her mother, and later to another, who predeceased the plaintiff's mother and was buried in it.³⁶⁸ In point of fact, the plaintiff had purchased five contiguous gravesites that she had planned to use as a family plot.³⁶⁹ The trial court fashioned a remedy in which the plaintiff was awarded a vacant gravesite just south of the family plot free of charge,³⁷⁰ and the Court of Appeals affirmed.³⁷¹

To the Supreme Court majority, this was a statutory case, not a common law contract case. It looked to Indiana Code section 23-14-59-2, which specifies the duties of a cemetery “[w]hen a wrongful burial [or] entombment . . . occurs.”³⁷² This required removing the other individual's remains from the gravesite and restoring it for the plaintiff's use.³⁷³ “The statutory language,” the Court said, “does not contemplate a court's weighing of equities to fashion an alternative form of relief.”³⁷⁴ Perhaps not, but Judge Kirsch identifies another problem in his dissent in the Court of Appeals, namely, that there were two victims of the “wrongful burial” here—the plaintiff, and the family of the individual who was mistakenly interred in the plaintiff's plot.³⁷⁵ Judge Kirsch says that this conflict should be resolved in accordance with the “foundational legal principle” of “first in time, first in right.”³⁷⁶ And that is the approach that the Supreme Court takes. But the author submits that in the face of two violations of the statute, the trial court's “weighing of the equities” was every bit as appropriate a way to proceed.

Another case that implicated specific performance in a very different way was *Immense Salon & Spa, LLC v. Williams*,³⁷⁷ where the prospective purchasers of a business sought specific performance after the parties executed a stock purchase agreement but the transaction never closed.

Immense Salon & Spa, LLC, and its individual sole member together offered to purchase all of the shares of Studio 2000, Inc., from its three individual

367. *Salyer v. Wash. Regular Baptist Church Cemetery*, 141 N.E.3d 384 (Ind. 2020).

368. *Id.* at 385-86.

369. *Id.* at 386.

370. *Id.*

371. *Salyer v. Wash. Regular Baptist Church Cemetery*, 135 N.E.3d 955, 961 (Ind. Ct. App. 2019).

372. IND. CODE § 23-14-59-2 (2021).

373. *Salyer*, 141 N.E.3d at 387-88.

374. *Id.* at 387.

375. *Salyer*, 135 N.E.3d at 962 (Kirsch, J., dissenting).

376. *Id.*

377. *Immense Salon & Spa, LLC v. Williams*, 139 N.E.3d 742, No. 19A-PL-1048, 2019 WL 6871435 (Ind. Ct. App. 2019) (unpublished disposition).

shareholders for consideration totaling approximately \$660,000.³⁷⁸ The consideration consisted of several components, the most important of which was “\$240,000 in the form of a cashier’s check or wire transfer at closing.”³⁷⁹ The parties initially anticipated that the documents would be executed and the transaction closed simultaneously, but at the date set for closing, December 2, 2015, the purchasers proposed that the contract be signed that day but that funding not occur until two days later on December 4.³⁸⁰ After the documents were signed but before any payment was made, the purchasers’ lawyer changed the records in the Indiana Secretary of State’s office for Studio 2000 to show the purchasers as the corporation’s owners and the lawyer as its registered agent.³⁸¹ Though there was some back and forth during the following weeks, including a partial payment, the \$240,000 down payment was never made.³⁸² On December 14, the sellers sent the purchasers a letter terminating the purchase agreement, which the purchasers refused to accept.³⁸³ On January 20, 2016, the purchasers sued the sellers, seeking specific performance of the contract and making ancillary claims.³⁸⁴ The Sellers counterclaimed with claims of their own but essentially seeking rescission.³⁸⁵

Neither the trial court nor the Court of Appeals had much difficulty concluding that the sellers were entitled to rescission given that the purchasers never made the \$240,000 down payment.³⁸⁶ Because of this breach, both courts said, the purchasers were not entitled to enforce the provisions of the purchase agreement against the sellers.³⁸⁷

The Court of Appeals concludes with a quite good explanation of why specific performance is not available to the purchasers here:

The grant of specific performance directs the performance of a contract according to, or substantially in accordance with, the precise terms agreed upon. Specific performance is an equitable remedy, and the power of a court to compel specific performance is an extraordinary power that is not available as a matter of right. Generally, our courts will not exercise equitable powers when an adequate remedy at law exists.

Here, by ruling in favor of the Sellers, the trial court ensured that the parties were put back in the respective positions they held before entering into the Purchase Agreement. That is an adequate remedy at law. Moreover, we note that because the Purchasers were the first breaching

378. *Id.* at *1.

379. *Id.*

380. *Id.*

381. *Id.* at *2.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at *4.

387. *Id.*

party, we would be hard pressed to find that equity lies in their favor. Consequently, we find that the trial court did not err by ordering rescission and declining to order specific performance of the Purchase Agreement.³⁸⁸

D. Federal Preemption

Federal preemption was the defense offered to the breach of contract claim filed in *FMS Nephrology Partners North Central Indiana Dialysis Centers, LLC v. Meritain Health, Inc.*³⁸⁹ The plaintiff is a company that provides kidney dialysis services; the defendants are health insurance plans.³⁹⁰ The health insurance plans themselves are governed by the well-known ERISA³⁹¹ statute. FMS Nephrology, the dialysis provider, sued the insurance plans alleging they were in breach of their reimbursement obligations and owed FMS Nephrology substantial sums.³⁹² The insurance plans defense was federal preemption; that the claims asserted by FMS Nephrology were preempted by ERISA.³⁹³

A very respected trial court judge, St. Joseph Superior Court Judge Steven Hostetler, granted summary judgment in favor of the defendants, finding that in fact the claims were preempted by ERISA.³⁹⁴ The Court of Appeals affirmed.³⁹⁵

The Indiana Supreme Court granted transfer and unanimously reversed, one justice concurring in result only.³⁹⁶ The exhaustive opinion written by Justice Slaughter is a veritable treatise on preemption law.³⁹⁷

The author was surprised by this result because he has seen so many claims defeated by ERISA preemption. But confronting a federal preemption case very early on in his own judicial career and holding that it did not apply,³⁹⁸ he was pleased to see our Supreme Court similarly reject preemption here.

388. *Id.* at *4-5 (footnote and citations omitted).

389. *FMS Nephrology Partners N. Cent. Ind. Dialysis Ctrs., LLC v. Meritain Health, Inc.*, 144 N.E.3d 692 (Ind. 2020).

390. *Id.* at 696.

391. Employee Retirement Income Security Act of 1974.

392. *FMS Nephrology*, 144 N.E.3d at 697.

393. *Id.*

394. *Id.*

395. *FMS Nephrology Partners N. Cent. Ind. Dialysis Ctrs., LLC v. Meritain Health, Inc.*, 120 N.E.3d 1012 (Ind. Ct. App. 2019).

396. *FMS Nephrology*, 144 N.E.3d at 706.

397. *Id.* at 698-704.

398. *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995) (state negligence claim not pre-empted by Federal Motor Vehicle Safety Standards), *abrogated by Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

CONCLUSION

*Kyung Sil Choi v. Jung Hee Kim*³⁹⁹ was an extremely acrimonious dispute in which Jung Hee Kim sued Kyung Sil Choi, Bo Kang Park, and Han Chong for breach of contract, conversion, theft, and fraud in connection with \$150,000 that Kim had paid to acquire the assets of a restaurant in Bloomington called the Sake Bar.⁴⁰⁰ The jury returned a verdict in favor of Kim, and the trial court entered judgment on the verdict.⁴⁰¹

The defendants appealed, contending that the trial court had committed reversible error in instructing the jury⁴⁰² and that there was insufficient evidence of theft as a matter of law.⁴⁰³ The Court of Appeals reversed the verdict on grounds of instructional error,⁴⁰⁴ and then, over the dissent of Judge Tavitas,⁴⁰⁵ also found that the evidence of theft had been insufficient as a matter of law.⁴⁰⁶ The Supreme Court granted transfer to agree with Judge Tavitas—that is, that the jury’s verdict was improperly reversed, but the question of the sufficiency of the evidence of theft was a matter for retrial, not appellate resolution.⁴⁰⁷

Ramirez v. Swages Real Estate, LLC,⁴⁰⁸ was the appeal of plaintiff Celso Abraham Clemente Ramirez, also known as Maynor Clemente Ramos, of a decision by the trial court that he had not established that he held title to certain real property that he alleged had been sold without his permission.⁴⁰⁹ The trial court had concluded that “[t]itle to the Property was taken under the name of Celso A. Ramirez, but Plaintiff has not provided valid identification showing that Celso A. Ramirez is his name”;⁴¹⁰ “Plaintiff admits that he has a cousin by the name of ‘Celso Abraham Clemente Ramirez’”;⁴¹¹ and “[i]t is impossible to know if Plaintiff was ever the true title holder of the Property.”⁴¹² The Court of Appeals agreed.⁴¹³

Notwithstanding that, both the trial court and the Court of Appeals recognized that the plaintiff may well have used his cousin’s name in purchasing

399. *Kyung Sil Choi v. Jung Hee Kim*, 158 N.E.3d 774 (Ind. 2020), *rev’g* 149 N.E.3d 704, No. 19A-PL-1429, 2020 WL 3478646 (Ind. Ct. App. 2020) (unpublished disposition).

400. *Kyung Sil Choi*, 2020 WL 3478646, at *1-2.

401. *Id.* at *2.

402. *Id.* at *3.

403. *Id.* at *5.

404. *Id.*

405. *Id.* at *6 (Tavitas, J., concurring and dissenting).

406. *Id.*

407. *Kyung Sil Choi v. Jung Hee Kim*, 158 N.E.3d 774, 775 (Ind. 2020).

408. *Ramirez v. Swages Real Estate, LLC*, 145 N.E.3d 165, No. 19A-PL-2174, 2020 WL 1649742 (Ind. Ct. App. 2020) (unpublished disposition).

409. *Id.* at *2.

410. *Id.*

411. *Id.* at *3.

412. *Id.*

413. *Id.* at *6.

the property, but by purchasing the property in the name of another, he was precluded from seeking equitable relief by the doctrine of unclean hands.⁴¹⁴ The trial court was affirmed.⁴¹⁵

America's immigration system is part of the context of both of these cases. The *Kyung Sil Choi* decision indicates that the reason Jung Hee Kim invested \$150,000 in a restaurant in Bloomington was because she wanted to immigrate to the United States.⁴¹⁶ Indeed, the investment permitted her to obtain an E-2 visa, an investor visa which allows an individual to enter and work in the United States based on an investment the individual will be controlling while residing in the country.⁴¹⁷ The *Ramirez* decision indicates that the plaintiff originally came to Indiana as an undocumented immigrant and began a construction business here while maintaining a busing company in Guatemala.⁴¹⁸ Although he was deported, he was subsequently able to return to Indianapolis after having been granted asylum when he demonstrated that his bus company had become "embroiled in a conflict with local criminal gangs" that threatened his safety.⁴¹⁹

Standing together, these cases demonstrate that Hoosier business and Hoosier business law are linked to the American immigration system and will undoubtedly be positively impacted if that system can be improved.

414. *Id.*

415. *Id.*

416. *Kyung Sil Choi v. Jung Hee Kim*, 149 N.E.3d 704, No. 19A-PL-1429, 2020 WL 3478646, at *1 (Ind. Ct. App. 2020) (unpublished disposition).

417. *Id.*

418. *Ramirez*, 2020 WL 1649742, at *1.

419. *Id.* at *1 n.3.