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, 2020, and August 31, 2021 ("Survey Period"). It is distinct among the now eight consecutive annual such surveys prepared by the author in two respects. First, the pandemic affected the volume of cases decided by trial courts during the survey period and, consequently, the flow of cases to the appellate courts. Second, the Supreme Court decided two block-buster cases during the Survey Period which were discussed in last year's Article because its publication was delayed due to the pandemic; those decisions will be mentioned only briefly here.[1]

As in the past, 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.[2] This Article also discusses the Supreme Court's commercial courts initiative.[3]

I. COMMERCIAL COURTS UPDATE

After a three-year pilot project, the Supreme Court in 2019 issued an order permanently establishing commercial courts in Allen, Elkhart, Floyd, Lake, Marion and Vanderburgh Counties.[4] Commercial courts seek to "streamline[] [a] court's efficiency, educate[] judges and litigants, and create[] predictable business case law that encourages companies to incorporate or complete transactions

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1. *See infra* Section III.C (discussing New Nello Operating Co., LLC v. CompressAir, 168 N.E.3d 238 (Ind. 2021)); Section III.D (discussing Hartman v. BigInch Fabricators & Constr. Holding Co., Inc., 161 N.E.3d 1218 (Ind. 2021)).

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, see Ind. R. App. P. 65, 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.

3. *See infra* Part I.

4. *In re* Ind. Commer. Courts, No. 19S-MS-295, 2019 WL 2135832 (Ind. May 16, 2019) (mem.).

within the state."[5]

Effective January 1, 2021, the Court established four new commercial courts in Hamilton, Madison, St. Joseph, and Vigo Counties.[6]

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.[7] E-filing in Odyssey gives access to filings made in Indiana trial courts. This enhancement gives us not only access but the ability to search documents filed in commercial court cases: https://public.courts.in.gov/CCDocSearch.

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. Commercial Lending

1. Acceleration.—It is likely malpractice for lenders' counsel to not require that an installment promissory note or loan agreement contain an "acceleration clause" which makes the entire principal and interest due upon default.[8]

> Acceleration clauses alter the legal rules otherwise applicable to the parties' rights on default. Unless the parties agree otherwise, that rule gives the lender the right to recover only for its loss resulting from the debtor's failure to make the required interest payment. The debtor's breach does not give the lender the right to the immediate payment of the outstanding principal.[9]

Lenders need the protection of acceleration for the obvious reason that a debtor's failure to make a periodic payment or other default increases the risk that the debtor will not be able to repay the obligation in full when due.[10]

The lender in *Barrows v. Crossroads Bank* had the protection of an acceleration clause, but the borrower contended that she had cured her default such that the lender could not accelerate.[11] The underlying transaction in this case was a mortgage loan for which the borrower granted a security interest in certain

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5. Tyler Moorhead, *Business Courts: Their Advantages, Implementation Strategies, and Indiana's Pursuit of Its Own*, 50 IND. L. REV. 397, 398 (2016).

6. *Vigo County to Open a Commercial Court*, TRIBUNE-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/LR9H-48H2].

7. *Id.; see Odyssey*, *available at* https://public.courts.in.gov/mycase/#/vw/Search.

8. Steven D. Walt & William D. Warren, SECURED TRANSACTIONS IN PERSONAL PROPERTY 263 (10th ed. 2019).

9. *Id.*

10. *Id.*

11. 163 N.E.3d 281, No. 20A-MF-978, 2020 WL 7018918 (Ind. Ct. App. Nov. 30, 2020).

rental property.[12] When the borrower defaulted on payments totaling approximately $400, the lender sent a letter to the borrower advising that "if the default was not cured within thirty days, the entire amount" of the debt (approximately $23,000) "would be immediately due and payable."[13] The lender sent the borrower a second letter several days later saying that it was accelerating the amount due.[14] Around six weeks later, the borrower made a payment of approximately $700.[15]

The lender filed a foreclosure action several months later and the trial court eventually issued a decree of foreclosure.[16] On appeal, the borrower challenged the foreclosure primarily on grounds that the lender did not have the right to accelerate because she had cured the default.[17] The Court of Appeals affirmed the trial court.[18] It held that the lender's right to accelerate turned on the language of the promissory note and mortgage documenting the transaction.[19] The mortgage in this case expressly provided the right to accelerate, saying that upon and any time after an event of default, the lender, at its option and "without notice to" the borrower, had the right to "declare the entire Indebtedness immediately due and payable."[20]

Had the documents been drafted differently, e.g., providing a right to cure, the result could well have been different.

2. Unauthorized Disposition of Collateral.—The Indiana Uniform Commercial Code provides that upon default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.[21] And in *Nature's Comfort, LLC v. First State Bank of Middlebury*,[22] the security agreement between the borrower, Nature's Comfort, LLC, and its bank lender "obligated Nature's Comfort to leave its assets at its business location, not sell any assets other than inventory, only sell inventory in the normal course of business, maintain all assets in good repair, and possess all assets until it defaulted."[23]

Nature's Comfort was a single-member LLC owned by Nyhof.[24] At a point in time when the lender was concerned about Nature's Comfort's viability, Nyhof

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12. *Id.* at *1.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *1-2.
17. *Id.* at *2-3.
18. *Id.* at *3.
19. *Id.*
20. *Id.*
21. IND. CODE Ann. § 26-1-9.1-609 (LEXIS through Pub. L. 1-221 of the Second Regular Session of the 122nd General Assembly).
22. No. 20A-PL-2138, 2021 WL 2346254 (Ind. Ct. App. June 9, 2021) (unpublished decision).
23. *Id.* at *1.
24. *Id.*

assured the bank that the company was "doing well," giving the bank a balance sheet showing an excess of $900,000 in assets.[25] Shortly thereafter, Nyhof began selling the company's assets, which "were almost completely depleted within two months."[26] Discovery later showed that many unsecured creditors had been paid, including more than $300,000 in payments from Nature's Comfort's account at the bank.[27]

What makes this case particularly interesting is that in its lawsuit to collect its loan and foreclose on its collateral, the bank added a claim of conversion against Nyhof utilizing provisions of the Indiana Crime Victims Relief Act that allows up to treble damages for pecuniary loss resulting from criminal conversion.[28] Not surprisingly, Nature's Comfort and Nyhof "contend[ed] that the Bank could not pursue a conversion claim against Nyhof as a matter of law and that, even if it could, the evidence does not support a conclusion that Nyhof converted the Bank's property."[29]

The trial court ruled that Nyhof and Nature's Comfort had converted approximately $225,000 in collateral and ordered a final money judgment of approximately $450,000.[30] The Court of Appeals affirmed the judgment against Nyhof.[31] Its reasoning is instructive and persuasive.[32]

First, while the Court acknowledged Nyhof's argument that "the failure to pay a debt [. . .] does not constitute criminal conversion,"[33] it said that "Nyhof's conduct went beyond a mere failure to satisfy contractual obligations."[34] In point of fact, Nyhof was not a party to the loan and had no obligations with respect to it.[35] Rather, he was alleged to have disposed of the bank's collateral after Nature's Comfort had defaulted and the collateral had essentially become the bank's property.[36] This was sufficient to make out the elements of conversion.[37]

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25. *Id.* at *2.

26. *Id.*

27. *Id.*

28. *Id.*; *see also* IND. CODE § 35-43-4-3(a) provides: "A person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor"; IND. CODE § 34-24-3-1 provides: "If a person . . . suffers a pecuniary loss as a result of a violation of IC 35-43 . . . the person may bring a civil action against the person who caused the loss for . . . [a]n amount not to exceed three (3) times . . . the actual damages of the person suffering the loss" plus "[t]he costs of the action," "[a] reasonable attorney's fee," and certain other related expenses.

29. *Nature's Comfort*, 2021 WL 2346254 at *1.

30. *Id.*

31. *Id.* at *4. The Court of Appeals set aside the conversion judgment against Nature's Comfort because the bank had not named Nature's Comfort in its conversion count.

32. *Id.* at *3.

33. *Id.* (quoting Tobin v. Ruman, 819 N.E.2d 78, 89 (Ind. Ct. App. 2004).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at *4.

Second, the Court held that the mens rea element of conversion could be inferred from Nyhof's actions, namely his selling off the vast majority of Nature's Comfort's assets and transferring several hundred thousand dollars to unsecured creditors instead of the bank.[38]

Third, the Court rejected Nyhof's contention that the bank "implicitly consented" to his disposition of the collateral when it did not offset or otherwise prevent Nature's Comfort from paying its other creditors from its account at the bank.[39] The Court adopted the bank's position that it would not have permitted those payments had it known that they were being made.[40]

The observer of this situation is left with the conclusion that the bank was gullible, if not negligent, in allowing Nyhof to essentially liquidate the business without the bank even noticing, and probably for not securing a personal guaranty from Nyhof in the first place—an example of which we will see in the next case.[41] But its successful litigation strategy appears to have compensated for those mistakes, assuming Nyhof has the resources to satisfy the judgment.

3. Disposition of Collateral "Out-of-Trust."—Floor planning" is a term used to describe a form of inventory financing when the inventory consists of big-ticket items such as automobiles, farm equipment, and manufactured housing.[42] Floor planning for automobiles was at stake in *Frenkel v. NextGear Capital, Inc.*[43] The details are recited here primarily for the purpose of illustrating the operation of this financing technique.

NextGear Capital provided funds to an automobile dealership owned by the Frenkels under terms that included the following:

- NextGear had a security interest in each automobile in the Frenkels' business's inventory and NextGear had physical possession of the title to each such automobile while in inventory.[44]
- The Frenkels' business was required to keep all inventory at the dealership and not to allow any vehicle to be absent from the dealership for more than twenty-four hours without prior written approval from NextGear.[45]
- The Frenkels' business was required to hold "in trust for the sole benefit of and for" NextGear all amounts received from the sale of any automobile in inventory and to remit these funds to NextGear within twenty-four hours of their

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38. *Id.*

39. *Id.*

40. *Id.*

41. *See infra* Section II.A.3 (discussing Frenkel v. NextGear Capital, Inc. No. 20A-CC-2218, 2021 WL 3027286 (Ind. Ct. App. July 19, 2021) (unpublished decision), *trans. denied*, 176 N.E.3d 454 (Ind. Nov. 16, 2021) (unpublished table decision)).

42. William H. Lawrence, William H. Henning, & R. Wilson Freyermuth, SECURED TRANSACTIONS 103-04 (5th ed. 2012).

43. No. 20A-CC-2218, 2021 WL 3027286 (Ind. Ct. App. July 19, 2021) (unpublished decision), *trans. denied*, 176 N.E.3d 454 (Ind. Nov. 16, 2021) (unpublished table decision).

44. *Id.* at *1.

45. *Id.* at *5.

receipt.[46]

- NextGear was entitled to declare, "in its sole discretion and without notice" to the Frenkels' business, that the loan was in default if the Frenkels' business did not hold the proceeds of any sale in trust or pay the amounts owed NextGear when due.[47]
- The Frenkels' business was entitled to request, "for a legitimate business purpose," the title to any vehicle but NextGear could deny the request "in its sole discretion" and if NextGear granted the request, the title was required to be returned to NextGear within seven days.[48]
- The senior Frenkel personally guaranteed the obligations of the business.[49]

NextGear kept a close watch on its inventory by sending auditors to inspect the dealership at frequent intervals to assure that all inventory was present and accounted for.[50] One such audit revealed that eleven vehicles were missing from the dealership, six of which had been sold without NextGear having been paid and four of which could not be verified or found by the auditor.[51] Apparently coincidentally, on the same day as the audit, NextGear received a request from the Frenkels for the release of twelve titles, including those for the six vehicles that had been sold and three of the missing vehicles.[52] Unaware of the audit, NextGear released the titles but with a letter saying that the Frenkels' business would be in default if the titles were not received within seven days.[53]

The results of the audit triggered a series of events which eventually resulted in NextGear seizing all of its inventory collateral at the Frenkels' dealership and liquidating it.[54] In this litigation, NextGear sought to recover its deficiency.[55] After lengthy delays, the trial court awarded NextGear approximately $588,000.[56]

The Frenkels argument on appeal was essentially twofold: that NextGear wrongfully declared the Frenkels business in default when past business practices established that it was not unusual for vehicles in the various stages of sale to be absent from the dealership; and that the title release letter with respect to the twelve titles gave the business seven days to cure the default.[57]

The Court of Appeals rejected both of these contentions.[58] First, there was no evidence that vehicles had been missing from the dealership in quantities

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at *1.
50. *Id.*
51. *Id.*
52. *Id.* at *2.
53. *Id.*
54. *Id.* at *3.
55. *Id.*
56. *Id.* at *4.
57. *Id.* at *5.
58. *Id.*

remotely approaching those that were missing during the audit in question.[59] In addition, it was undisputed that six of those vehicles had been sold and yet payments had neither been placed in trust nor remitted to NextGear.[60] Second, the issuance of the twelve titles had occurred without NextGear's knowledge of the audit.[61] Indeed the loan documents provided that NextGear could be asked to release titles "for a legitimate business purpose," not for purposes of delaying the declaration of default.[62]

The Court of Appeals affirmed the trial court's judgment in favor of NextGear.[63]

B. Residential Mortgage Loans

During the five months preceding the Survey Period, Governor Eric Holcomb imposed a moratorium on initiation of mortgage foreclosures.[64] This, along with general delays in the trial courts due to the pandemic, doubtlessly explain why only a single residential mortgage foreclosure appeal was decided during the Survey Period.[65]

C. Some Collections Matters

The author began to write these annual surveys in the aftermath of the 2007-2009 financial crisis when there was widespread publicity about mortgage foreclosure proceedings that failed because the mortgagees did not have their

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59. *Id.* at *6.

60. *Id.* at *5-7.

61. *Id.* at *7.

62. *Id.* at *7.

63. *Id.* at *8.

64. Governor Holcomb imposed a moratorium on initiating foreclosure (and eviction) actions in Executive Order 20-06 (March 19, 2020). The moratorium expired on August 14, 2020. *See* Exec. Order. No. 20-39 § 2 (July 30, 2020). The Governor's orders did not relieve "individual[s] of their obligations to pay rent, to make mortgage payments, or to comply with any other obligation(s) that an individual may have under a tenancy or mortgage."

In addition, the U.S. Department of Housing and Urban Development (HUD) issued a moratorium on foreclosures of federally owned or backed single family mortgages which did not expire until June 30, 2021. *See* Press Release HUD No. 21-118, U.S. Department of Housing and Urban Development (July 30, 2021).

65. Spurlock v. Regions Bank, 171 N.E.3d 649, No. 20A-MF-2254, 2021 WL 1955892 (Ind. Ct. App. May 17, 2021). After noting that mortgagee's foreclosure action was stayed from approximately March 2020 until August 2020 due to the COVID-19 pandemic and the Indiana moratorium on foreclosures, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of the mortgagee. In a similar case, *Colvin v. Taylor*, 168 N.E.3d 784 (2021), involving a land contract, the land contract vendee tried to stave off forfeiture or foreclosure by invoking Governor Holcomb's emergency order. The trial court denied the request and the Court of Appeals affirmed, finding the relevant protections of the Governor's order had expired. The case is a reminder that the Governor's order applied to land contracts as well as mortgages and leases.

paperwork in order. Subsequent surveys have commented that mortgagees had cleaned up their practices but that some credit card lenders' collection efforts failed because the documentary evidence they submitted to the court was insufficient to establish their claims.[66]

The Court of Appeals gave a bank's documentary evidence in *Yuan v. Wells Fargo Bank, N.A.,* a credit card collection case, a close look, and found it sufficient to sustain the trial court's grant of summary judgment in favor of the lender.[67] To the same effect was *Taylor v. Public Service Credit Union*,[68] a case involving a defaulted auto loan. The author offers up both cases as exemplars of lenders and their lawyers getting collection right.

While these two cases suggest that mortgagees and consumer finance lenders have learned how to collect their debts, the creditor in *Jones v. Shenandoah Funding Trust*,[69] a student loan collection case, was unable to do so.

Jones was the co-signer of a student loan to a young man named Ian Gill.[70] The loan was originally made in 2007 by Sallie Mae but appears to have been "transferred multiple times as part of a large bundle of similar loans."[71]

In 2018, an entity called SLM Private Education Loan Trust 2012-E filed a collection lawsuit against Jones and Gill, claiming about $13,000 plus interest was delinquent.[72] Along the way, Shenandoah Funding Trust ("SFT") was substituted as the plaintiff.[73] SFT presented the trial court with various documentation that it found sufficient; judgment was entered for SFT.[74]

On appeal, the court says that SFT's burden at the trial court level was threefold: (1) to demonstrate that Gill and Jones had signed the loan agreement with Sallie Mae; (2) to prove that SFT now owned the debt; and (3) that Gill and Jones owed the amount alleged.[75]

And the court held that, even if points (1) and (3) had been established, the evidence was insufficient to prove that SFT now owned the debt.[76]

The take-away here for both lender and borrower is that a creditor needs to be able to prove that it owns the debt. One of the most interesting things about this case is that the reversal came after a trial on the merits.[77] In the past, when debtors have prevailed on appeal, it has usually been after a creditor has been

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66. *See generally* Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 52 IND. L. REV. 635, 639-40 (2019) [hereinafter *Banking, Business, and Contract Law* 2019].

67. 162 N.E.3d 481, 481 (Ind. Ct. App. 2020).

68. 171 N.E.3d 1072, No. 20A-CC-2233, 2021 WL 2643646 (Ind. Ct. App. June 28, 2021) (unpublished decision).

69. 157 N.E.3d 1241, No. 20A-CC-553, 2020 WL 6040233 (Ind. Ct. App. Oct. 13, 2020).

70. *Id.* at *1.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at *3.

76. *Id.*

77. *Jones*, 157 N.E.3d at 1241.

granted summary judgment on designated evidence deemed insufficient by the appellate court. For that reason, this case may well ratchet up the burden on creditors.

III. BUSINESS LAW

The author's flagship course at the Indiana University Robert H. McKinney School of Law is called "Closely Held Business Organizations," a sprawling examination of the formation, financing, and governance of partnerships, corporations, and LLCs which covers such topics as limited liability, agency, and fiduciary duty. The Survey Period produced at least four outstanding cases which need to be added to the Closely Held syllabus—or perhaps be the subjects of final exam questions.

A. Unintentional Partnerships

A general partnership is unique among business entity types because it may be created informally. No written agreement is required to form a general partnership and a general partnership may be created without filing any organizational documents with the state. And in disputes among partners, a partner's available rights and remedies will be governed by partnership law.

Wolfe v. Agro[78] illustrates this very point. The Wolfes, the defendants in this lawsuit, were in the business of raising "rare birds."[79] Agro, the plaintiff, bought some particular rare birds and ancillary supplies and delivered the birds to the Wolfes to be raised and cared for.[80] The business plan seems to have been that these birds would eventually be sold for a profit but no written contracts or agreements, partnership or otherwise, memorialized the arrangement between the Wolfes and Agro.[81]

Things did not go as planned and Agro sued the Wolfes, alleging conversion and fraud.[82] The case went to trial and the trial court found the Wolfes guilty of conversion but not fraud.[83] Utilizing provisions of the Indiana Crime Victims Relief Act[84] which allows damages for pecuniary loss as a result of criminal conversion, Agro was awarded approximately $38,000 including attorney fees and expenses.[85]

While the Wolfes appealed their liability under the Crime Victims Relief Act, for the Court of Appeals majority the predicate fact was that Agro had entered into a partnership with the Wolfes.[86]

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78. 163 N.E.3d 913 (Ind. Ct. App.), *trans. denied*, 168 N.E.3d 739 (Ind. 2021).
79. *Id.* at 915.
80. *Id.*
81. *Id.*
82. *Id.* at 916.
83. *Id.* at 921.
84. IND. CODE § 34-24-3-1.
85. Wolfe v. Agro, 163 N.E.3d 913, 921 (Ind. Ct. App. 2021).
86. *Id.* at 923.

A partnership is defined as "an association of two (2) or more persons to carry on as co-owners a business for profit."[87] Case law establishes that exists where there is "(1) a voluntary contract of association for the purpose of sharing profits and losses which may arise from the use of capital, labor, or skill in a common enterprise, and (2) an intention on the part of the principals to form a partnership for that purpose."[88] That's what happened here, the Court said, pointing to frequent points in the record and the trial court's findings in which the parties referred to themselves as "partners" and their business arrangement as a "partnership."[89]

The parties being partners, the Court said, took the dispute out of the realm of tort law.[90] Instead, the case was to be resolved by partnership law.[91] In other words, Agro's remedy was not for conversion; it was whatever remedy partnership law provided.

Indiana has adopted the Uniform Partnership Act[92] which prescribes the rights and remedies of partners in the absence of agreement. Those default rules, the Court held, provided Agro's recourse here: a partnership accounting and then "recovery of whatever may be found due upon a settlement of the partnership affairs."[93]

Judge Tavitas wrote a good dissent, arguing that neither of the parties argued partnership law on appeal, only whether the law of the Crime Victims Relief Act had been properly applied by the trial court.[94] Her argument was that the Court should have limited its analysis to the issues argued by the parties on appeal.[95]

That is certainly appellate judging orthodoxy. But it does seem to the author that the trial court had found the parties to be partners as a matter of law, and that determination having been made, it was within the purview of the Court of Appeals to limit the relief available to Agro to that available to a partner.

In any event, this case is important in two respects. First, it is a strong reminder that a partnership can be created informally or even inadvertently. And second, that once created, the rights and remedies of the individuals and entities involved are dictated by partnership law.

There is a third point, not implicated here, but also important to note. Because no written agreement is required to form a general partnership and a general partnership may be created without filing any organizational documents with the state, a person can become a partner in a general partnership without realizing it!

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87. IND. CODE § 23-4-1-6.

88. Wolfe v. Agro, 163 N.E.3d 913, 922 (Ind. Ct. App. 2021) (citing Curves for Women Angola v. Flying Cat, LLC, 983 N.E.2d 629, 632-33 (Ind. Ct. App. 2013)).

89. *Id.* at 923. To the author, these were vernacular references, not descriptions of legal status.

90. *Id.*

91. *Id.*

92. IND. CODE § 23-4-1.

93. Wolfe v. Agro, 163 N.E.3d at 923-24 (quoting *In re* Rueth Dev. Co., 976 N.E.2d 42, 57 (Ind. Ct. App. 2012)) (citing Butler v. Forker, 139 Ind. App. 602 (1966)).

94. *Id.* at 924-25.

95. *Id.* at 925.

And because partners in general partnerships are not protected by the principles of limited liability that shield corporate shareholders and members of limited liability companies, general partners have unlimited liability for the obligations of the partnership. In other words, the financial exposure of an unintentional or inadvertent partner could literally be unlimited.

Finally, it is worth remembering that the Indiana statute on general partnerships is the Uniform Partnership Act promulgated by the Uniform Law Commission ("ULC") all the way back in 1914. The ULC has revised the Act several times, most recently in 1997 (Revised Uniform Act ("RUPA")).[96] But Indiana has not adopted the RUPA; we continue to operate under the 1914 Act.

The author would like to see our partnership statute brought up-to-date and has encouraged the Indiana Business Law Survey Commission (a statutory body that tries to keep Indiana business statutes current with best practices nationally), of which he is a member, to pursue this in the Legislature.

B. The Limited Liability of Business Entity Owners

Blackwell v. Superior Safe Rooms LLC[97] implicates critical principles of business law.

Plaintiff Craig Blackwell discussed with Michael Wharff having Superior Safe Rooms, LLC ("Superior") build a "safe room" in Blackwell's house (a "safe room" appears to be a secure room where Blackwell could store guns and valuable property).[98] Blackwell and Superior executed a contract and Blackwell's wife wrote a check for $20,000 to Wharff Excavating, LLC ("Wharff Excavating") as a down payment.[99]

Things went bad and Blackwell sued Superior for damages.[100] The record suggests that Michael Wharff didn't take the lawsuit seriously; in any event, the trial court enters a substantial default judgment against Superior.[101]

To collect, Blackwell filed proceedings supplemental against Superior and named Jon Byers, Michael Wharff, and Wharff Excavating as garnishee defendants.[102] And he asked the court to order Jon Byers, Michael Wharff, and Wharff Excavating to pay out of their own assets the judgment against Superior.[103]

On what theory were they liable? Piercing the corporate veil—said

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96. Uniform Law Commission, "The Uniform Partnership Act" (UPA) (1997) (Last Amended 2013), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=fb5b38fb-4c2b-8fbf-d5dc-09dea721c1c6&forceDialog=0 [https://perma.cc/JE39-9VCT].

97. 174 N.E.3d 1082 (Ind. Ct. App.), *trans. denied*, 176 N.E.3d 443 (Ind. 2021).

98. *Id.* at 1086.

99. *Id.* at 1087.

100. *Id.*

101. *Id.* at 1088.

102. *Id.* at 1088-89.

103. *Id.* at 1089.

Blackwell.[104]

A full sense of what's going on here requires knowing that Byers is Michael Wharff's father-in-law; that Byers is the sole owner and member of Superior; and Michael Wharff is the sole owner and member of Wharff Excavating.[105]

Indiana law is explicit that "a shareholder of a corporation is not personally liable for the acts or debts of the corporation."[106] The business entities here are limited liability companies ("LLCs") but the rule is the same, if not even more explicit: a member of an LLC "is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise."[107]

This is the bedrock principle of limited liability.

Although the statutes do not recognize exceptions to the bedrock principle, courts have created them. The best known is that a court will "pierce the corporate veil" if a plaintiff can show that "that the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice."[108] Indiana appellate courts have said this in many places, probably the most frequently quoted of which is *Aronson v. Price*[109] where the court did uphold the bedrock principle and protect the defendant—a shareholder in a corporation—from liability. While the law in respect of LLCs in this regard is not as well-developed as for corporations, it would be more than fair to say that *Troutwine Estates Development Company, LLC v. Comsub Design and Engineering, Inc.*[110] stands for the proposition that Aronson's holding applies equally to LLCs. *Aronson* contains, and *Troutwine* repeats, a long list of factors that courts are to consider when deciding whether the "corporate form was so ignored, controlled, or manipulated" as to authorize piercing the corporate veil.[111]

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104. *Id.*

105. *Id.* at 1088.

106. IND. CODE § 23-1-26-3(b).

107. *Id.* § 23-18-3-3(a) ("A member, a manager, an agent, or an employee of a limited liability company is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company.").

108. Aronson v. Price, 644 N.E.2d 864, 867 (Ind. 1994).

109. *Id*.

110. Troutwine Estates Dev. Co., LLC v. Comsub Design & Eng'g, Inc., 854 N.E.2d 890, 899 (Ind. Ct. App. 2006); *accord* MFP Eagle Highlands, LLC v. Am. Health Network of Ind., LLC, No. 1:07-cv-04240DFH-WGH, 2009 WL 77679, at *8-9 (S.D. Ind. Jan. 9, 2009) (Hamilton, C.J.) (A party sought "to pierce the veil of limited liability to hold [certain individuals] personally responsible for [an] unpaid lease term. Although [the individuals were owners of] a limited liability company and not a corporation, it makes sense to address the issue in terms of piercing the proverbial corporate veil. The same standards apply equally to corporations and to limited liability companies.").

111. "In deciding whether a plaintiff has met this burden of proof, an Indiana court considers whether the plaintiff has presented evidence showing: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of

There is a second, related, theory at play here called "enterprise liability" or "alter ego liability." Rather than asking whether a shareholder should be held personally liable for a corporate obligation, it asks whether one corporation should be held liable for another closely related corporation's obligation.[112] The theory is that the separateness of affiliated corporations should be disregarded "when the corporations are not operated as separate entities but are manipulated or controlled as one enterprise through their interrelationship to cause illegality, fraud, or injustice or to permit an economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise."[113]

In *Blackwell*, the Court says that the "alter ego" doctrine is a subset of piercing the corporate veil.[114] (For reasons set forth in the margin, the author considers them independent of each other but acknowledges that the analysis for resolving such claims is similar, if not identical.) While the trial court had held that the plaintiff had not established the elements for piercing, the Court of Appeals vehemently disagreed.[115] It gave a very detailed look at the criteria for piercing and for alter ego liability and held that the corporate veil should be pierced, and alter ego liability imposed.[116]

The examination that the Court of Appeals gives to the record here looks like appellate fact-finding; it is surprising that the trial court's findings were not given more deference. But it seems very clear that Byers and Wharff gave very little attention to the requisite corporate formalities of Superior. "[F]ailure to observe

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the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form." *Aronson*, 644 N.E.2d at 867.

112. *See* Smith v. McLeod Distrib., Inc., 744 N.E.2d 459, 463 (Ind. Ct. App. 2000). The cases, including *Smith* and *Blackwell*, often conflate the doctrines of piercing the corporate veil and enterprise or alter ego liability, or treat the latter as a species of the former. The author considers them as stand-alone propositions: a piercing claim is directed at the equity owner of a business entity; and an enterprise claim is directed at a closely-related entity. A piercing claim operates in a vertical dimension to impose liability upstream on an owner when the criteria for piercing have been met. An enterprise claim operates in a horizontal dimension to impose liability on another business entity when the criteria for holding it to be an alter ego is met. To illustrate, the author considers a claim against a parent corporation to collect a subsidiary's debt to be a piercing claim; a claim against a corporation to collect another corporation's debt where both corporations have common ownership ("sibling corporations") to be an enterprise claim. (*Smith* involved sibling corporations; *Blackwell* did not.)

113. *Smith*, 744 N.E.2d at 463 (citing Eden United, Inc. v. Short, 573 N.E.2d 920, 933 (Ind. Ct. App. 1991)).

114. Blackwell v. Superior Safe Rooms LLC, 174 N.E.3d 1082 (Ind. Ct. App.), *trans. denied*, 176 N.E.3d 443 (Ind. 2021).

115. *Id.* at 1095-96.

116. *Id.* at 1096-97.

required corporate formalities" is one of the Aronson factors,[117] and that factor was deemed of particular consequence in a fairly recent Seventh Circuit decision,[118] so perhaps the Court's conclusion is grounded in law more than fact. The defendants did ask for Indiana Supreme Court review but that Court unanimously declined.[119]

C. Successor Liability in Mergers and Acquisitions

The Indiana Supreme Court decided *New Nello Operating Co v. CompressAir*[120] during the Survey Period but due to publication delays in last year's Survey Article, the case is discussed there and will only be summarized here.[121]

Under the law of mergers and acquisitions, the liabilities of a seller become the liabilities of the buyer if the seller is merged into the buyer.[122] On the other hand, the buyer does not take on any of a seller's liabilities in an asset purchase unless agreed; an "asset purchase" is just what it sounds like: a purchase of assets only.[123] Among the exceptions to this latter rule of non-liability are "a purchase that is a de facto . . . merger" and "instances where the purchaser is a mere continuation of the seller."[124]

In *New Nello*, an LLC purchased the secured debt of a near insolvent corporation from a bank and then effectuated a strict foreclosure under UCC Article 9,[125] with the result that the LLC became the owner of the corporation's assets, and the corporation was left a shell, holding only the debts and obligations not transferred to the LLC in the strict foreclosure.[126]

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117. Aronson v. Price, 644 N.E.2d 864, 867 (Ind. 1994).

118. Cont'l Cas. Co. v. Symons, 817 F.3d 979, 995 (7th Cir. 2016).

119. Blackwell v. Superior Safe Rooms, LLC, 176 N.E.3d 443 (Ind. 2021) (denying transfer 5-0).

120. 168 N.E.3d 238 (Ind. 2021), *rev'g* 142 N.E.3d 508 (Ind. Ct. App. 2020). Both the decisions of the Supreme Court and Court of Appeals were handed down during the Survey Period.

121. *See* Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 54 IND. L. REV. 783, 798-801 (2022) [hereinafter *Banking, Business, and Contract Law* 2022].

122. IND. CODE § 23-0.6-2-6(a) ("When a merger under this chapter becomes effective . . . (4) all debts, obligations, and other liabilities of each merging entity are debts, obligations, and other liabilities of the surviving entity"); *id.* § 23-1-40-6(a) ("When a merger takes effect . . . (3) the surviving corporation has all liabilities of each corporation party to the merger").

123. Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994) ("[W]here one corporation purchases the assets of another, the buyer does not assume the debts and liabilities of the seller.")

124. *Id.* ("Generally recognized exceptions to this rule include (1) an implied or express agreement to assume the obligation; (2) a fraudulent sale of assets done for the purpose of escaping liability; (3) a purchase that is a de facto consolidation or merger; or (4) instances where the purchaser is a mere continuation of the seller.").

125. IND. CODE § 26-1-9.1-620.

126. New Nello Operating Co. v. CompressAir, 168 N.E.3d 238, 240 (Ind. 2021).

The trial court agreed with CompressAir that New Nello Operating should be considered to have assumed Old Nello's indebtedness to it, both because this was a de facto merger and because New Nello was a mere continuation of Old Nello.[127] The Court of Appeals affirmed as to "de facto" merger and, having done so, found it unnecessary to address the "mere continuation" claim.[128]

In a unanimous opinion, the Indiana Supreme Court reversed.[129] Dispositive was the fact that the ownership of the New Nello entities was different: "continuity of ownership between transacting companies is essential to the de-facto-merger exception in Indiana."[130]; "the mere-continuation exception applies only where there exists . . . 'common identity' of equity holders."[131] To the Indiana Supreme Court, the change in ownership took it out of the realms of de facto merger and of mere continuation.[132]

D. Lack of Marketability and Lack of Control Discounts

The Indiana Supreme Court also decided *Hartman v. BigInch Fabricators & Constr. Holding Co.*[133] during the Survey Period. It too was discussed in last year's Survey Article and will only be summarized here.[134]

At issue in *Hartman* was the critical concept of lack of marketability and lack of control discounts in valuing interests in closely held business organizations.[135] 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.[136] 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 . . . ."[137]

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.[138] The third-party valuation company's appraisal of Hartman's interest was $3,526,060. However, the valuation company

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127. *Id.* at 240-41.

128. *Id.* at 241.

129. *Id.* at 243.

130. New Nello Operating Co. v. CompressAir, 168 N.E.3d 238, 242 (Ind. 2021).

131. *Id.* at 243.

132. *Id.*

133. 161 N.E.3d 1218 (Ind. 2021), *rev'g*, 148 N.E.3d 1017 (Ind. Ct. App. 2020).

134. *See Banking, Business, and Contract Law* 2022, *supra* note 121, at 790-94.

135. Hartman v. BigInch Fabricators & Constr. Holding Co., 161 N.E.3d 1218, 1219 (Ind. 2021).

136. Hartman v. BigInch Fabricators & Constr. Holding Co., Inc., 148 N.E.3d 1017, 1019 (Ind. Ct. App. 2020), *rev'd,* 161 N.E.3d 1218 (Ind. 2021).

137. *Hartman*, 161 N.E.3d at 1223.

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

discounted this amount down to $2,398,000 as a consequence of lack of marketability and lack of control.[139]

Reversing the Court of Appeals, the Supreme Court held that as a matter of contract interpretation, the lack of marketability and lack of control discounts did apply—that Hartman was only entitled to $2,398,000, not $3,526,000.[140] "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."[141]

E. Two Owner Exit Cases

Two cases during the Survey Period involved disputes arising from the withdrawal of one of the owners of a business—the first, as shareholder of a corporation; the second, a member of an LLC.

Martin v. Front End Digital

In *Martin v. Front End Digital*,[142] Martin was one of four individual shareholders of Front End Digital, a corporation doing business as Pyrimont Operating Solutions. Martin executed a Stock Redemption Agreement with the corporation and the three other shareholders pursuant to which he would receive certain payments; agreed not to compete with the corporation; and released the corporation and other shareholders from claims arising before the date of the agreement.[143]

A week after the agreement was signed, Martin was discovered to have taken certain computer equipment from and to be competing with the corporation.[144] The corporation sought and obtained a preliminary restraining order which was soon converted into an agreed preliminary injunction.[145] But Martin also responded by filing a counterclaim against the corporation and a third-party complaint against the remaining three shareholders.[146]

One of the counts of the third-party complaint is worthy of discussion. In it, Martin alleged that the other three shareholders had breached their fiduciary duties to the corporation and their fellow shareholders.[147] To be sure, shareholders in closely held corporations owe fiduciary duties to deal fairly, honestly, and openly with both the corporation and fellow shareholders and the Court of

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139. *Id.*

140. *Hartman*, 161 N.E.3d at 1225.

141. *Id.* at 1220.

142. Martin v. Front End Digital, Case No. 21A-PL-195, 2021 WL 3747191 (Ind. Ct. App. Aug. 25, 2021).

143. *Id.* at *1-2.

144. *Id.* at *2.

145. *Id.* at *3.

146. *Id.*

147. *Id.*

Appeals recognizes that in this case.[148] But, the Court said, Indiana has adopted the "shareholder termination rule" which provides that a former shareholder does not have standing to bring a breach of fiduciary duty claim in respect of actions taken after the claimant's ownership of the shares ended.[149] At the same time, the shareholder termination rule does not apply with respect to actions taken before share ownership ended.[150] The Court found no dispute over the fact that the actions Martin complained of had occurred after the effective date of the Stock Redemption Agreement at which point, the Court said, his ownership interest in the Corporation had terminated.[151] And, the Court said, to the extent that any of the actions complained of predated the effective date of the Stock Redemption Agreement, they were not available because they had been released under the terms of the Agreement.[152] Summary judgment in favor of the three remaining shareholders was affirmed.[153]

There is a practice pointer in Front End Digital when negotiating Stock Purchase Agreements and it is this: Because breach of fiduciary duty claims will not be available for actions taken by shareholders, directors, or officers following the sale of the withdrawing shareholder's stock, any actions that such persons could take that would jeopardize the withdrawing shareholder's rights should be clearly covered by post-closing covenants.

Foxworthy v. 3 Crown Capital, LLC

Foxworthy v. 3 Crown Capital, LLC,[154] is a pure contract construction case but is presented here as a good illustration of the mechanics of a member's withdrawal from a limited liability company. Foxworthy was one of three members of an LLC which elected to utilize the "pass-through taxation" provisions of the Internal Revenue Code.[155] Under the terms of the LLC's operating agreement, the members received cash distributions only to the extent necessary to satisfy their tax obligations on LLC income; the balance of their respective shares of income remained with the LLC.[156]

Foxworthy decided to withdraw from the LLC and after protracted negotiations, he and the LLC executed both a Severance Agreement and an

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148. *Id.* at *6 (quoting G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227, 240 (Ind. 2001) (quoting Hartung v. Architects Hartung/Odle/Burke, Inc., 301 N.E.2d 240, 243 (Ind. Ct. App. 1973)).

149. *Id.* (quoting Abdalla v. Qadorh-Zidan, 913 N.E.2d 280, 286 (Ind. Ct. App. 2009) (quoting Thompson v. Cent. Ohio Cellular, Inc., 639 N.E.2d 462, 470 (Ohio Ct. App. 1994)).

150. *See id.* (quoting *Abdalla*, 913 N.E.2d at 286) (quoting *Thompson*, 639 N.E.2d at 470)).

151. *Id.*

152. *Id.*

153. *Id.*

154. Foxworthy v. 3 Crown Cap., LLC, Case No. 20A-PL-1572, 2021 WL 1011430 (Ind. Ct. App. Mar. 17, 2021).

155. *See generally* Internal Revenue Serv., *Limited Liability Company (LLC)*, INTERNAL REVENUE SERV. (Feb. 4, 2022), https://www.irs.gov/businesses/small-businesses-self-employed/limited-liability-company-llc [https://perma.cc/8NUZ-D4VQ]; INTERNAL REVENUE SERV., FORM 8832 (Dec. 2013), https://www.irs.gov/pub/irs-pdf/f8832.pdf [https://perma.cc/P2W6-VVRN].

156. *Foxworthy,* 2021 WL 1011430, at *1.

Assignment. Under the former, Foxworthy received an after-tax payment of approximately $191,000 which was paid and has not been disputed.[157]

The amount due Foxworthy under the Assignment was the subject of the litigation. The Assignment recites that Foxworthy's share of the LLC's profits for the relevant time period was $365,000 and that the "associated tax distribution" was approximately $129,000.[158] After the LLC distributed the $129,000, Foxworthy filed this litigation seeking payment of the $365,000 as well.[159] The trial court denied his motion for summary judgment, finding genuine issues of material fact as to his entitlement to the additional amount.[160] The Court of Appeals, applying quite standard principles of contract construction, found the Assignment's language to be subject to more than one reasonable interpretation and, therefore, ambiguous.[161] It affirmed the trial court's determination that genuine issue of material fact remained as to the amount that Foxworthy agreed to be paid.[162]

IV. CONTRACT LAW

A. Covenants Not to Compete

Each year covenants not to compete reach the Indiana appellate courts, but the survey period covered by last year's Article may have been the apogee, with the Indiana Supreme Court refusing to enforce non-competes in the *American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*,[163] and *Heraeus Medical, LLC v. Zimmer, Inc.*,[164] cases, thereby throwing cold water on what had been a consistent record of enforcement by the Court of Appeals.[165]

In this Survey Period, the Court of Appeals affirmed the denial of a preliminary injunction seeking to enforce a noncompete in *Telecom, LLC v. Affordable Telephones, LLC*.[166] An employee who had been terminated by his prior employer set up a new company and began soliciting the former employer's customers, notwithstanding having signed a noncompete forbidding solicitation during his prior employment.[167] When the former employer sought to have the

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157. *Id.* at *2.

158. *Id.*

159. *Id.* at *3.

160. *Id.*

161. *Id.* at *4-6.

162. *Id.* at *6.

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

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

165. *See Banking, Business, and Contract Law* 2022, *supra* note 121, at 817-20; *see also* Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 51 IND. L. REV. 945, 987-88 (2018) [hereinafter *Banking, Business, and Contract Law* 2018].

166. Telecom, LLC v. Affordable Telephones, LLC, No. 20A-PL-2122, 2021 WL 1586384 (Ind. Ct. App. 2021).

167. *Id.* at *1. The noncompete read, in relevant part:

former employee enjoined from violating the covenant, the trial court refused, concluding in relevant part that the Agreement was unreasonably broad and therefore unenforceable.[168]

The Court of Appeals affirmed.[169] After citing to both the *American Consulting* and *Heraeus Medical* decisions of the Supreme Court just mentioned, the Court said that it found persuasive the trial court's conclusion that the former employer had not shown that it had a legitimate interest to be protected by the noncompete or that its scope was reasonable.[170] Of note, the Court also explicitly affirmed the trial court's ruling that the noncompete was "unable to be salvaged by the 'blue pencil doctrine,' . . . because there [was] no language that the Court [could] erase to render it reasonable."[171]

The result in *Carroll v. Long Tail Corp.* was mixed but did include holding a portion of a noncompetition covenant to be unenforceable, relying heavily on *Heraeus* in doing so.[172]

Carroll was a senior sales executive for separate but closely affiliated corporations doing business in the United States, Australia, India, and New Zealand; it did business in the United States under the assumed business name of "Long Tail Corporation."[173] In March, 2017, he signed the non-competition

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> During Employee's employment with the Company [i.e., Priority] and for a period of two (2) years after termination of the Parties' employment relationship for whatever reason (the "Restricted Period"), Employee hereby warrants and agrees that neither Employee nor any agent, affiliate, employer, or other entity of Employee will solicit or accept work on Employee's own behalf from any person who:
>
> (a) Is or has been a client of the Company at any time during the Restricted Period;
>
> (b) Was a client of the Company at any time while Employee was employed by the Company; or
>
> (c) Was a client of the Company at any time twelve (12) months prior to the Effective Date [i.e., June 4, 2018].

168. *Id.*

169. *Id.*

170. *Id.* at *2.

171. *Id.* at *3. This followed *Heraeus* which set explicit parameters for use of the "blue pencil doctrine" pursuant to which "a court may excise unreasonable, divisible language from a restrictive covenant—by erasing those terms—until only reasonable portions remain." Heraeus Med., LLC v. Zimmer, Inc., 135 N.E.3d 150, 153 (Ind. 2019).

172. Carroll v. Long Tail Corp., 167 N.E.3d 750, 763 (Ind. Ct. App.), *trans. denied*, 171 N.E.3d 612 (Ind. 2021) (Rush, C.J., and Slaughter, J., voting to grant transfer). The Justices did not disclose their reasons for voting as they did. As noted in the text, the Court of Appeals held a portion of the non-competition agreement at issue to be enforceable and another portion to be unenforceable. Based upon their votes in *American Structurepoint*, the author speculates that Chief Justice Rush voted to grant transfer to have the entire agreement declared unenforceable and Justice Slaughter to have the entire agreement declared enforceable.

173. There is a question of fact in *Long Tail Corp.* over whether Carroll's noncompete extended to all of these entities. However, the trial court made extensive findings that it did so extend, Order Granting Plaintiff's Motion for Preliminary Injunction at 16-19, Long Tail Corp. v. Carroll, No.

agreement at issue in this case; in September, 2019, he resigned from Long Tail and formed a competing business.[174] Soon thereafter, Long Tail filed this litigation to enforce the noncompete and the trial court granted its requested preliminary injunction.[175]

On appeal, the Court of Appeals first gave the case law in general and *Heraeus* in particular a thorough read to set the stage for its analysis.[176] It then set forth language of the noncompete that referred to Carroll as the "Contractor" and specified that:

> [T]he Contractor agrees that the Contractor shall not, during the term of the Contractor's employment with the Company and for a period of two year(s) thereafter directly or indirectly contact or solicit, or attempt to contact or solicit, any Customer of the Company for purposes of . . . gaining the business of such Customer, or providing such Customer any products or services which are the same as or substantially similar to, or in competition with, the products or services sold by the Company at the time of the Contractor's termination . . . .[177]

The Court's analysis proceeded from there to examine whether the evidence was sufficient to support the trial court's entry of the preliminary injunction, including the scope of the term "Customer";[178] that customer identity and other information was kept confidential;[179] and the economic importance of the information to the company.[180] The Court concluded that the trial court's preliminary injunction on this issue was warranted.[181]

However, the Court of Appeals reversed the trial court's preliminary injunction to the extent that it prohibited Carroll from soliciting Long Tail's employees to leave the company.[182] The relevant language in the noncompete on this issue specified that: "[T]he Contractor shall not, directly or indirectly, approach, solicit, entice, or attempt to approach, solicit, or entice Contractors of the Company to leave the employment of the Company."[183]

02D03-2001-PL-000039 (Allen Co. Ind. Super. Ct. June 11, 2020), which the Court of Appeals affirmed, *Carroll v. Long Tail Corp.*, 167 N.E.3d 750, 758 (Ind. Ct. App. 2021). The reasoning by both courts on this issue seems unassailable.

174. *Long Tail Corp.*, at 753-54.

175. Order Granting Plaintiff's Motion for Preliminary Injunction, Long Tail Corp. v. Carroll, No. 02D03-2001-PL-000039 (Allen Co. Ind. Super. Ct. June 11, 2020).

176. Carroll v. Long Tail Corp., 167 N.E.3d 750, 755-56 (Ind. Ct. App. 2021) (citing Heraeus Med., LLC v. Zimmer, Inc., 135 N.E.3d 150, 152 (Ind. 2019)).

177. *Id.* at 757.

178. *Id*. at 760.

179. *Id*.

180. *Id*.

181. *Id*. The Court of Appeals also affirmed the trial court's preliminary injunction enforcing the noncompete's prohibition on soliciting former customers. *Id*. at 763.

182. *Id.* at 761.

183. *Id*.

The Court found Chief Justice Rush's opinion in *Heraeus* controlling.[184] There, an employee nonsolicitation covenant was held to be overbroad because it applied to all of the company's employees.[185] Furthermore, the noncompete could not be "blue-penciled because there [was] no language that . . . could [be] excise[d] to render its scope reasonable."[186] Because the employee nonsolicitation covenant in Carroll's agreement with Long Tail applied to all of the affiliated companies' employees, it too was overbroad and unenforceable.[187]

As noted above, over the past decade, the Court of Appeals has routinely enforced non-competes, and so the results (voted for by six different Court of Appeals judges) in *Telecom LLC* and *Carroll* suggest a departure from the past, especially because both decisions are firmly grounded in the language of the Supreme Court's 2019 *Heraeus* decision.

If so, the departure tracks a growing national skepticism towards enforcing noncompetition agreements that was described in a very good *Indiana Lawyer* article during the Survey Period by Melissa Macchia.[188] In it, she notes that President Biden has recently issued an executive order in July, asking the Federal Trade Commission to "curtail the unfair use of non-compete clauses."[189]

Also during the Survey Period, the Uniform Law Commission,[190] in July, promulgated a new Uniform Restrictive Employment Agreement Act[191] that would drastically curtail the use of non-competes. While it remains to be seen whether Indiana will consider adopting the Uniform Law Commission's recommendations,[192] there seems to be no doubt that the noncompetition covenant landscape is shifting towards non-enforceability.

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184. *Id.*

185. *Id*. at 755-56 (citing Heraeus Med., LLC v. Zimmer, Inc., 135 N.E.3d 150, 152 (Ind. 2019)).

186. *Id*. (citing Heraeus Med., LLC v. Zimmer, Inc., 135 N.E.3d 150, 156 (Ind. 2019)).

187. *Id*. at 761.

188. Melissa Macchia, *Are Noncompetes Standing on Shaky Ground?*, IND. LAW., https://www.theindianalawyer.com/articles/macchia-are-noncompetes-standing-on-shaky-ground (Aug. 18, 2021).

189. *Id*. (citing Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021)).

190. The Uniform Law Commission is a non-profit, non-governmental organization consisting of representatives selected pursuant to the laws of each state. *See*, e.g., IND. CODE § 2-5-35-6 (2022). The Commission drafts and promotes the enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

191. Katie Robinson, *ULC Approves Uniform Restrictive Employment Agreement Act*, UNIF. LAW COMM'N (July 23, 2021), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=ef54eaf7-88d8-4bba-8597-7bb794f99867&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer [https://perma.cc/85D2-LS7A].

192. Indiana has adopted many Uniform Law Commission recommendations, e.g., the Uniform Commercial Code (IND. CODE § 26-1 (2022)); Uniform Child Custody Jurisdiction Act (IND. CODE § 31-21-1 (2022)); and Revised Uniform Unclaimed Property Act (IND. CODE § 32-34-1.5 (2022)).

B. The Economic Loss Rule

Two cases implicating the "economic loss rule" were decided by the Court of Appeals during the Survey Period, the second of which was affirmed by the Supreme Court after the close of the Survey Period.

CW Farms, LLC v. Egg Innovations, LLC

In *CW Farms, LLC v. Egg Innovations, LLC*,[193] an egg producer hired a farmer to raise chickens for egg production. Under their contract, the egg producer agreed to provide the chickens and the feed, and the farmer agreed to provide the facilities, care for the chickens, and oversee egg production.[194] The producer agreed to pay the farmer per each dozen eggs produced.[195] A dispute arose and the farmer sued the egg producer alleging the egg producer had prematurely removed chickens from the farmer's barns and failed to provide suitable feed and necessary supplies.[196] In addition to suing for breach of contract, the farmer also sought damages for negligence.[197]

The economic loss rule stands for the proposition that, where economic loss allegedly incurred is covered by the subject of a contract between the parties, the plaintiff cannot maintain a separate tort action.[198]

Both the trial court and the Court of Appeals recognized the applicability of the economic loss rule to the plaintiff farmer's claim. "While there are exceptions to this rule," the Court of Appeals said, the farmer's "complaint clearly alleges a purely economic loss as a result of . . . negligence 'under the contract,' and none of the limited exceptions applies here."[199] The Court affirmed the trial court's dismissal of the negligence count in the farmer's complaint.[200]

Residences of Ivy Quad Unit Owners Ass'n, Inc. v. Ivy Quad Development, LLC

Although also implicating the economic loss rule, *Residences of Ivy Quad Unit Owners Ass'n, Inc. v. Ivy Quad Development, LLC*, was a different kettle of

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193. 169 N.E.3d 874 (Ind. Ct. App.), *trans. denied*, 175 N.E.3d 275 (Ind. 2021).

194. *Id*. at 877.

195. *Id*.

196. *Id*.

197. *Id*.

198. Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 728 (quoting Gunkel v. Renovations, Inc., 822 N.E.2d 150, 153 (Ind. 2005)). This proposition is a corollary of the economic loss rule which is formulated in Indiana to the effect that a person is not subject to liability for purely economic loss under negligence, strict liability, or products liability causes of action or theories of recovery. *Id*. at 726-27. For these purposes, purely economic loss is pecuniary harm not resulting from an injury to the plaintiff's person or property. *Id*. at 727. For a more detailed discussion of the economic loss rule, see *Banking, Business, and Contract Law* 2019, *supra* note 66, at 656-58 nn.165, 167 ("Relationship between Contract and Tort Law; Economic Loss Rule").

199. CW Farms, LLC v. Egg Innovations, LLC, 169 N.E.3d 874, 881 (Ind. Ct. App. 2021).

200. *Id*.

fish altogether.[201]

The plaintiff was a homeowners' association ("HOA") comprised of the residents of what the author knows to be[202] a 68-unit condominium complex called Ivy Quad across the street from the University of Notre Dame that alums and others have purchased for use while visiting the campus, especially during football season. In the fall of 2017, unit owners began noticing crumbling and cracking concrete and water infiltration at Ivy Quad.[203] The HOA hired an engineering firm which conducted multiple inspections and produced five reports that identified a wide range of construction and design defects.[204]

Armed with these reports, the HOA sued two categories of defendants for negligence,[205] one category referred to in the litigation as the "Matthews Defendants," described in the margin,[206] and another comprised of various subcontractors involved in the construction of the complex. The court decisions to be discussed here involve only the Matthews Defendants. They filed a motion to dismiss, arguing that the negligence claim was barred by the economic loss doctrine, which the trial granted in a brief order.[207] The trial court was incorrect in doing so.

First, the economic loss rule itself holds that a person is not subject to liability for negligence for pecuniary harm not resulting from an injury to the plaintiff's person or property.[208] This principle provides no basis for granting defendants' motion to dismiss because the plaintiffs did suffer substantial injury to their

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201. Residences of Ivy Quad Unit Owners Ass'n. v. Ivy Quad Development, LLC, Case No. 21S-PL-294, 2022 WL 213317 (Ind. Jan. 25, 2022), *aff'g* Residences of Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, 164 N.E.3d 142 (Ind. Ct. App. 2021).

202. The author has no financial interest in this case but has followed it closely because he knows one of the leaders of the HOA and because he was the author of *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2005), one of the key precedents at issue.

203. Residences of Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, 164 N.E.3d 142, 145 (Ind. Ct. App. 2021).

204. *Id*. at 144.

205. The HOA also sued for breach of an implied warranty of habitability. *Id*. at 146. This Article will only address the negligence count.

206. The defendant named in the caption, Ivy Quad Development, LLC, was the developer that arranged for the construction of the complex, supervised construction, and sold units to the original members of the HOA. The developer is in bankruptcy and so not subject to the court decisions described here. The Matthews Defendants are Matthews, LLC, the general contractor involved in the development, design, and construction of Ivy Quad; DMTM, Inc., which managed the construction of the complex; David Matthews, the (or at least an) owner of the developer; Matthews, LLC; DMTM, Inc.; and Velvet Canada, David Matthews's wife, who was involved in the design, construction, development, and sale of the condos.

207. Order filed Oct. 28, 2019, Residences at Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, No. 71D05-1803-PL-000105 (St. Jos. Co. Ind. Super. Ct.).

208. Residences of Ivy Quad Unit Owners Ass'n, Inc. 164 N.E.3d at 149 (citing Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 727 (Ind. 2005)).

property.

Second, as discussed above in the consideration of the *CW Farms, LLC*,[209] decision, a corollary to the economic loss rule is that where economic loss allegedly incurred is covered by the subject of a contract between the parties, the plaintiff cannot maintain a separate tort action. This corollary too provides no basis for granting the defendants' motion to dismiss because the plaintiff did not recite or allege the existence of a contract or contracts between itself and the defendants.

However, in *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.,* the Supreme Court held that the Public Library could not pursue negligence claims against subcontractors on a library remodeling and expansion project even though the Public Library did not have contracts with the subcontractors.[210] It was enough, the Court held, that the Library had a contract with the general contractor which in turn had contracts with the subcontractors.[211] Here is the key language from the decision:

> [T]here is no liability in tort to the owner of a major construction project for pure economic loss caused unintentionally by contractors, subcontractors, engineers, design professionals, or others engaged in the project with whom the project owner, whether or not technically in privity of contract, is connected through a network or chain of contracts.[212]

The trial court likely thought that this principle exonerated the defendants from liability, but if that was its reasoning, it was wrong for two reasons. First and foremost, the plaintiff in *Charlier Clark & Linard* was the owner of the project—the Public Library—which had commissioned the library renovation and expansion project and owned it throughout construction.[213] In contrast, neither the HOA nor the individual unit owners commissioned the condo construction project nor owned it or any part of it until construction was completed and units were sold by the developer.[214] Second, even if there had been a network or chain of contracts among the defendants, neither the plaintiff nor any of the unit holders

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209. *See supra* text accompanying notes 168-75.

210. Indianapolis Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722 (Ind. 2010).

211. *Id.*

212. *Id*. at 740.

213. *Id*. at 725.

214. Third Amended Complaint and Jury Demand file stamped Aug. 7, 2019, ¶ 13, Residences at Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, No. 71D05-1803-PL-000105 (St. Jos. Co. Ind. Super. Ct.). The developer denied plaintiff's allegation that it arranged for the construction of Ivy Quad, supervised construction, and sold units to original members 0f the Association. Defendant Ivy Quad Development, LLC's Answer and Affirmative Defenses to Plaintiff's Third Amended Complaint and Jury Demand, ¶ 13, Residences at Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, No. 71D05-1803-PL-000105 (St. Jos. Co. Ind. Super. Ct.).

was connected to it.[215]

Recognizing that neither general principles of economic loss nor *Charlier Clark & Linard* applied, the Court of Appeals reversed[216] in a very careful and impressive examination of the economic loss rule.[217]

After the conclusion of the Survey Period, the Supreme Court affirmed the decision of the Court of Appeals.[218] Its grounds were narrower than those described above but only slightly so: "the HOA's complaint includes nothing about if, or to what extent, the parties were connected contractually . . . . [a]nd without a factual basis demonstrating any contractual relationship between the HOA and the Matthews Defendants, it would be unjust to foreclose a tort theory of relief based on the economic loss doctrine."[219]

C. Contracts Involving Residential Real Estate

1. A Lease-to-Own Contract.—Suppose someone wants to purchase your home but does not have sufficient credit to finance the purchase—and you are willing to supply the financing until they become sufficiently stable financially to obtain credit. The parties in *Washington v. Perry*[220] structured such an arrangement as a lease-to-purchase agreement; it had an unhappy ending for the sellers.

The purchase price of the home in question was approximately $400,000.[221] In executing documents referred to as "a purchase agreement, financing addendum, and lease to purchase agreement," the buyers (or lessees if you prefer) paid a $40,000 "nonrefundable down payment," and also agreed to pay monthly rent of $2,500 plus stringent late fees.[222] Lastly, the buyers agreed to be

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215. Defendant Ivy Quad Development, LLC's Answer and Affirmative Defenses to Plaintiff's Complaint file stamped May 17, 2018, at 13 (Affirm. Def. 2), Residences at Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, No. 71D05-1803-PL-000105 (St. Jos. Co. Ind. Super. Ct.).

216. Residences of Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, 164 N.E.3d 142, 153 (Ind. Ct. App. 2021).

217. The Court of Appeals correctly observed that *Charlier Clark & Linard* relied on a working draft of the Restatement (Third) of Torts on economic harms that was substantially narrowed by the time it was adopted. Residences of Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, 164 N.E.3d 142, 153 (Ind. Ct. App. 2021) (citing Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 727-740 (Ind. 2010)). "In light of the foregoing, we are persuaded that the reasoning behind and sweeping holding of Indianapolis-Marion County Public Library was meant to apply only to sophisticated parties involved on all sides of large commercial construction projects and not in the typical residential construction context." *Id*. at 152.

218. Residences at Ivy Quad Unit Owners Ass'n. v. Ivy Quad Dev., LLC, 179 N.E.3d 977 (Ind. 2022).

219. *Id*. at 984.

220. Washington v. Perry, Case No. 20A-PL-1419, 2021 WL 1045712 (Ind. Ct. App. Mar. 19, 2021).

221. *Id*. at *1.

222. *Id*.

responsible for homeowner association fees.[223] The documents did not specify a time for the buyers to acquire financing or otherwise provide a termination date for the arrangement.[224]

After five years, the arrangement was still in place and the sellers (lessors) sued to regain possession.[225] The buyers resisted, claiming that they were entitled to reimbursement from the sellers for repairs to the basement after flooding, reimbursement for replacing the furnace and air conditioning system, and otherwise disputing that they were in breach of contract.[226] The trial court agreed with the sellers and granted them summary judgment as to possession and holding as a matter of law that they were entitled to the $40,000 down payment, were entitled to reimbursement for accrued late and homeowner association fees, and had no liability for the flood repair or HVAC replacement expenses.[227]

The Court of Appeals reversed.[228] First, it found that as a matter of Indiana landlord-tenant law, the sellers had been responsible for the flood repair and HVAC replacement costs.[229] In doing so, the Court cited the recent celebrated *Rainbow Realty Group* litigation that held that lease-to-purchase agreements are leases under Indiana's residential landlord-tenant statutes.[230] Second, the Court found a genuine issue of fact as to whether the seller was entitled to possession given that there was no deadline specified in the documents for buyers to purchase the property.[231] While the sellers maintained that they had an unwritten agreement with the buyers imposing a two-year deadline, the Court said that because the buyers disputed this, the question could not be resolved on summary judgment.[232] Third, the Court found that the defenses that the buyers asserted for their failure to pay homeowner association fees and late fees were sufficient to create fact issues on the sellers' claims for those amounts, also precluding summary judgment.[233]

One is left to wonder whether, given *Rainbow Realty Group*, had the transaction been structured as a seller take-back mortgage with a $40,000 down payment and $2,500 per month payment of principal and interest, things would have worked out better for the sellers.

2. Home Improvements Contracts Act (HICA).—The Home Improvement Contracts Act ("HICA")[234] was the subject of two decisions by the Court of Appeals during the Survey Period. The purpose of this statute is "to protect

223. *Id*.
224. *Id*.
225. *Id*.
226. *Id*.
227. *Id*. at *2.
228. *Id*. at *4.
229. *Id*. at *2-3.
230. *Id*. at *2 (citing Rainbow Realty Grp. v. Carter, 131 N.E.3d 168, 173 (Ind. 2019)).
231. *Id*. at *3.
232. *Id*. at *3-4.
233. *Id*. at *4.
234. IND. CODE § 24-5-11 (2019).

consumers by placing specific minimum requirements on the contents of [real property] improvement contracts."[235] The Act requires real property improvement suppliers performing "any alteration, repair, replacement, reconstruction, or other modification of residential real property"[236] to provide the consumer with a written home improvement contract containing specified information before it is signed by the consumer.[237]

McGraw Property Solutions, LLC v. Jenkins,[238] is an unhappy tale of the importance of strict compliance with the HICA. A homeowner named Jenkins, whose property had suffered significant storm damage, entered into an agreement with a contractor who specialized in repairing storm damage to complete all storm remediation work to the property for the price approved by Jenkins' insurer.[239] This contract was dated June 11.[240] A month later, Jenkins decided not to repair the storm damage, took the insurance proceeds, and moved to Florida.[241] When the contractor sued for breach of contract, Jenkins identified several violations of the HICA in the original contract.[242] On August 24, the contractor re-issued the contract in a form that complied with the HICA but which had the same effective date as the original contract, i.e., June 11, approximately four and a half months earlier.[243]

One of the requirements of the provisions of the HICA is that the homeowner has an absolute right to cancel the contract at any time before midnight on the third business day after the date of the agreement.[244] Although Jenkins had not exercised his right to cancel the original contract, he immediately notified the contractor that he was canceling after receiving the replacement contract.[245] The contractor argued that Jenkins was too late; that the three day cancellation period expired three days after the June 11 effective date of the contract.[246]

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235. Imperial Ins. Restoration & Remodeling, Inc. v. Costello, 965 N.E.2d 723, 727 (Ind. Ct. App. 2012) (quoting Benge v. Miller, 855 N.E.2d 716, 720 (Ind. Ct. App. 2006)).

236. IND. CODE § 24-5-11-3(a) (2019).

237. *Id.* § 24-5-11-10(a). The specified information includes the consumer's name, the address of the real property that is the subject of the real property improvement, "a reasonably detailed description of the proposed real property improvements," approximate starting and completion dates, "a statement of any contingencies that would materially change the approximate completion date," and the contract price. *Id.*

238. McGraw Prop. Sols., LLC v. Jenkins, 159 N.E.3d 991 (Ind. Ct. App. 2020).

239. *Id.* at 993.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 994.

244. IND. CODE § 24-5-11-10.6(b)(1). In addition, the HICA also provides a homeowner the right to cancel a contract within three days after the homeowner receives written notification of a final determination as to whether all or any part of the homeowner's claim or the contract is a covered loss under the homeowner's insurance policy. *Id.*

245. *McGraw Prop. Sols., LLC*, 159 N.E.3d at 994.

246. *Id.* at 996-97.

If this were being decided in equity, the contractor would at least have a good argument. But both the trial court and the Court of Appeals concluded that the replacement contract was effective from its date of execution on October 27 and so Jenkins had timely exercised his right to cancel.[247]

Unlike *McGraw Property Solutions*, there is little basis for sympathy for the contractor in *Kluger v. J.J.P. Enterprises, Inc.*,[248] which did business under the name of Servpro of North Lexington. After a tornado ripped the roof from the Klugers' home requiring them to find temporary housing,[249] a Servpro representative presented them with a contract to sign.[250] Although Mr. Kluger did sign, the contract "did not contain a detailed description of the services to be provided, estimated starting and completion dates of the work, notice of cancellation, or the contract price."[251] While Servpro performed some cleanup services, it did not cover the roof with a heavy tarp and the house suffered significant additional water damage from heavy rains that occurred a few days after the tornado.[252] The Klugers were never billed for the services that were provided.[253]

The Klugers subsequently sued Servpro alleging violations of the HICA.[254] Servpro responded that the Klugers had not made out a violation of the HICA because the evidence did not prove the existence of the $150 threshold contract price required by the statute.[255] The trial court agreed and granted summary judgment for the contractor.[256]

The Court of Appeals reversed,[257] holding that the contract price for purposes of the threshold price requirement is the agreed-upon contract price prior to the commencement of the work.[258] Because a contract price was not included in the contract that Servpro had Mr. Kluger sign, the HICA had been violated.[259] In some belt-and-suspenders action, the Court also pointed out that Servpro had initially counterclaimed for approximately $8,100 for unpaid services, which certainly constituted evidence that the amount of the contract was for more than $150.[260] In fact, the Court said, the doctrine of judicial estoppel prevented Servpro from claiming that there was no evidence of a contract for more than $150 once

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247. *Id.* at 997.

248. 159 N.E.3d 82 (Ind. Ct. App. 2020), *reh'g denied*, No. 20A-PL-2352020, Ind. Appl. LEXIS 554 (Ind. Ct. App. Dec. 22, 2020), *and trans. denied*, 167 N.E.3d 1157 (Ind. 2021).

249. *Id.* at 84.

250. *Id.* at 85.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 85-86 (citing IND. CODE § 24-5-11-4).

256. *Id.*

257. *Id.* at 90.

258. *Id.* at 89.

259. *Id.*

260. *Id.*

Servpro had counterclaimed for $8,100.[261]

3. A Residential Real Estate Sales Listing Agreement.—In *Bartkowiak v. Falcone Realtors*, a realtor entered into a contract using a pre-printed form granting it the exclusive right to sell a residence.[262] When the property was not listed for sale online, the homeowners sent the realtor a letter terminating the contract.[263] The realtor then sued the homeowners for breach of contract and the trial court granted summary judgment in favor of the realtor and awarded the realtor its commission under the contract as damages.[264]

The Court of Appeals reversed.[265] It viewed the question as purely one of contract construction as to whether the realtor had been obligated to list the property for sale online.[266] Finding (unlike the trial court) that the realtor had an unambiguous obligation under the contract to do so, the Court held that the realtor had been the first to breach the contract such that the homeowners were entitled to terminate.[267] Thus, summary judgment was appropriate for the homeowners and the Court of Appeals remanded for calculation of their damages, if any.[268]

D. Contract Construction When a Contract Is Ambiguous

Reflecting "the principle that it is in the best interest of the public not to restrict unnecessarily persons' freedom of contract,"[269] a court will begin its interpretation of a contract "with the plain language of the agreement, reading it in context and, whenever possible, construing it so as to render each word, phrase, and term meaningful, unambiguous, and harmonious with the whole."[270] Consequently, "extrinsic evidence is not admissible to add to, vary or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction."[271]

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261. *Id.*

262. 172 N.E.3d 693, No. 21A-PL-9, 2021 WL 2944586 at *1 (Ind. Ct. App. 2021).

263. *Id.*

264. *Id.* at *2.

265. *Id.* at *4.

266. *Id.* at *3.

267. *Id.* at *4.

268. *Id.*

269. Fresh Cut, Inc. v. Fazli, 650 N.E.2d 1126, 1129 (Ind. 1995); Raymundo v. Hammond Clinic Ass'n, 449 N.E.2d 276, 279 (Ind. 1983).

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

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

But what if a contract is ambiguous?[272] If a court finds ambiguous terms or provisions in the contract, the court "will construe them to determine and give effect to the intent of the parties at the time they entered into the contract."[273] Courts may properly consider all relevant extrinsic evidence to resolve the ambiguity.[274]Prior to 2006, Indiana courts drew a distinction between patent and latent ambiguities, holding "extrinsic evidence—both circumstantial and direct evidence of intention—. . . admissible to establish the existence of a latent ambiguity and also to resolve it," but refusing "to admit extrinsic evidence to aid in the resolution of a patent ambiguity."[275] In its 2006 decision, *University of Southern Indiana Foundation v. Baker*, the Indiana Supreme Court concluded that the latent/patent distinction had "not been consistently applied and no longer serve[d] any useful purpose," and held that "where an instrument is ambiguous, all relevant extrinsic evidence may properly be considered in resolving the ambiguity."[276]

During the Survey Period, the Court of Appeals was faced with the two ambiguous contracts discussed below.[277]

1. Blind Hunting Club, LLC v. Martini.[278]—Martini and Farrell owned frontage property (the servient estate) along the road in Dearborn County over which an easement ran to the property (the dominant estate) owned by Blind Hunting Club, LLC.[279] The grant language in the Easement specifies "*an unrestricted right of ingress, egress, use and access to, over, across and upon a perpetual easement . . . being twenty (20) feet of even width . . . to provide access for farm equipment, pedestrian and vehicular traffic to and from the Dominant Estate*, to and from the physically open and publicly dedicated roadway."[280] The Easement went on to condition "*the use of said easement for the ingress and egress to no more than two (2) residences in total, that may hereafter be constructed* and located on the two (2) parcels that comprise the Dominant Estate."[281]

When the owner of the dominant estate leased it to a fee-based hunting club and shooting began, Martini and Farrell sought an injunction on grounds that the

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272. "A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation." *Citimortgage*, 975 N.E.2d at 813.

273. *Id.*

274. *Baker*, 843 N.E.2d at 535.

275. *Id.* at 534-35.

276. *Id.* at 535; *see also* Red Barn Motors, Inc. v. Nextgear Capital, Inc., 2018 WL 11310944, at *8 (S.D. Ind. Jan. 12, 2018).

277. *See supra* Section III.E (discussing *Foxworthy v. 3 Crown Capital, LLC*, Case No. 20A-PL-1572, 2021 WL 1011430 (Ind. Ct. App. Mar. 17 2021) (unpublished decision), for another case construing an ambiguous contract.

278. 169 N.E.3d 1121 (Ind. Ct. App. 2021).

279. *Id.* at 1122.

280. *Id.* at 1123 (second alteration in original).

281. *Id*.

use of the easement was limited to residential and agricultural uses.[282] The trial court agreed, enjoining the hunting club from using the easement.[283] The Court of Appeals saw the Easement as a contract and went to work deploying standard techniques of contract construction:

- Ascertaining and giving effect to the intention of the parties by examining all the parts of the instrument and by reading the instrument as a whole.[284]
- Finding ambiguity only when reasonable persons would find it subject to more than one interpretation.[285]

The Court did find it subject to more than one interpretation. "One reasonable person could read the provisions together and reach the conclusion that the easement can be used to access no more than two residences and is otherwise unlimited," the Court said.[286] "But another reasonable person could read the two clauses together and conclude that the easement can only be used to access no more than two residences and for no other purpose."[287]

At this point in its opinion, the Court said:

> In other words, the plain meaning is not readily apparent and does not disclose whether the "subject to" clause merely carves out an exception to the general grant or severely limits the general grant. When read together, those two provisions create an uncertainty and a patent ambiguity, an ambiguity apparent on the face of the instrument, such that reasonable people could come to different conclusions about the scope and meaning of the easement. *See Simon Prop. Grp., L.P. v. Mich. Sporting Goods Distrib. Inc*., 837 N.E.2d 1058, 1070 (Ind. Ct. App. 2005). The resolution of a patent ambiguity presents a pure question of law. *See id*. at 1071.[288]

This was, of course, a mistake on the Court's part. The method for resolving patent ambiguity described in the *Simon Property Group* decision upon which the Court relief had been subsequently changed by the Supreme Court in its *University of Southern Indiana Foundation v. Baker* decision discussed *supra*.[289]

The mistake, however, was not one of consequence. Remember that in *Baker*, the Court held that henceforth "all relevant extrinsic evidence may properly be considered in resolving the ambiguity."[290] The Court's analysis in *Blind Hunting Club* was entirely consistent with this new standard. First, the Court observed that

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282. *Id.*

283. *Id.* at 1124.

284. *Id.* at 1125.

285. *Id.*

286. *Id.*

287. *Id.*

288. Blind Hunting Club, LLC v. Martini, 169 N.E.3d 1121, 1125 (Ind. Ct. App. 2021).

289. *See* Red Barn Motors, Inc. v. Nextgear Capital, Inc., 2018 WL 11310944, at *8 (S.D. Ind. Jan. 12, 2018).

290. Univ. of S. Ind. Found. v. Baker, 843 N.E.2d 528, 535 (Ind. 2006).

the Easement contained a number of recitals that included numerous references to farming, including a reference to the easement itself as "the farm privilege."[291] Second, the Court examined the course of prior conduct which indicated that prior owners had used the dominant estate for a commercial farming operation.[292] From the language of the recitals and the course of prior conduct, the court concluded that the Easement was intended for agricultural and residential use.[293]

The owner of the dominant estate put up several strong arguments, notably that the grant itself refers to the easement as being "unrestricted."[294] And the owner further contended that farming and business are one and the same so that if the business of farming is allowed, then the business of fee-based hunting should also be allowed.[295] Finally, the owner maintained that fee-based hunting is a farming activity.[296] To each of these arguments, the Court of Appeals had a very good response and affirmed the trial court.[297]

2. Paradigm Speedway Small Shops, LLC v. Crawfordsville Road Partners, LLC.[298]—This case was a big, sprawling dispute with many moving parts. A company had developed a seven-parcel commercial subdivision called the Speedway Marketplace;[299] one of the seven parcels, Parcel 5, consisted of a building divided into five spaces, designated Suites A through E.[300] Suite E was leased to a Verizon cellular provider by the original developer of the Speedway Marketplace.[301] Later the developer sold Parcel 5 to a new owner and that new owner became Verizon's landlord on the lease.[302]

The dispute turned on whether Verizon had, at the time the new owner purchased Parcel 5, the exclusive right to sell cellular phones in the Speedway Marketplace as a whole or only in Parcel 5, this right being referred to as the "cellular exclusive."[303] The Court of Appeals saw its task as determining the scope of the cellular exclusive as described in the recorded Declaration of Easements, Covenants and Restrictions (the "Declaration") for the Development and Verizon's Lease of Suite E (the "Lease").[304]

In the same way as the Court of Appeals in *Blind Hunting Club*, the Court

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291. *Blind Hunting Club, LLC*, 169 N.E.3d at 1125-26.

292. *Id.* at 1126.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 1127.

297. *Id.* at 1126-27.

298. 173 N.E.3d 1070, 20A-PL-1862, 2021 WL 3733087 (Ind. Ct. App. 2021), *trans. denied sub nom.* Klausner v. Benge 2022 Ind. LEXIS 115, 2022 WL 549042 (Ind. 2022) (3-2 decision; Rush, C.J., and David, J., voted to grant transfer).

299. *Id.* at *1.

300. *Id.*

301. *Id.* at *3.

302. *Id.*

303. *Id.* at *5.

304. *Id.* at *7.

went to work deploying standard techniques of contract construction:

- Examining the plain language of the contract, reading it in context, and whenever possible, construing it so every word, phrase, and term is meaningful, unambiguous, and harmonious with the whole.[305]
- Finding a contract ambiguous only if reasonable people would differ as to the meaning of its terms.[306]

The Court concluded that it could not say as a matter of law what the scope of the cellular exclusive was when the new owner purchased Parcel 5.[307] It reached its conclusion after going through the following steps.

First, the Court observed that the Declaration contained six exclusives "for the benefit of" a specific parcel, only one of which was assigned to a specific parcel and the others of which left the parcel designation blank.[308] These exclusives were for such things as selling gourmet coffee and a barbershop as well as selling cellular phones.[309] Each exclusive, the Court said, was worded slightly differently, the net effect of which was that it was unclear whether each exclusive was meant to apply to the entire development and not just a specific parcel or whether each term had a specific meaning other than the entire development.[310]

Second, the Court looked at the Lease which the trial court had found provided Verizon a cellular exclusive as to Parcel 5 only.[311] The Court gave the Lease a very careful reading and held it to be ambiguous on that point.[312] Furthermore, following detailed review, the Court said that the extrinsic evidence did not point to only that conclusion.[313]

The Court's bottom line was this:

> [T]here is evidence supporting the conclusion that the exclusive use provision applies to the entire Development, and there is evidence supporting the conclusion that the exclusive use provision applies only to Parcel 5. One may seem more likely than the other, but the only way to decide that one applies over the other is to weigh the evidence. Our summary judgment standard is very specific: an issue of material fact is genuine if the trier of fact is required to resolve differing accounts of the truth, and summary judgment should not be granted when it is necessary to weigh the evidence. Therefore, summary judgment was inappropriate. One may question what evidence will be available at a trial that has not already been designated in this summary judgment proceeding, but at a

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305. *Id*. at *8.
306. *Id*.
307. *Id*. at *10.
308. *Id*. at *7.
309. *Id*. at *7-8.
310. *Id*.
311. *Id*. at *8-9.
312. *Id*. at *9.
313. *Id*. at *9-10.

> minimum, there will be live testimony and cross-examination, and at a trial, the trier of fact will have the ability to judge credibility and weigh the evidence to decide who and what to believe.[314]

E. Commercial Liability Insurance Coverage for Ransomware Attacks

Within the ambit of contract law is the interpretation of insurance contracts, including questions of coverage. In *G&G Oil Co. of Indiana, Inc. v. Continental Western Insurance Co.*,[315] the Indiana Supreme Court faced the question of whether a company's liability insurance covered the damages it incurred from a ransomware attack. Arguing for coverage was Plews Shadley Racher & Braun LLP, which specializes in prosecuting insurance coverage claims.[316]

After paying ransom of four Bitcoins to hackers, G&G Oil Co. of Indiana, Inc., sought coverage under the "Commercial Crime Coverage" section of its commercial liability policy that provided:

> We will pay for loss of or damage to "money", "securities" and "other property" resulting directly from the use of any computer to fraudulently cause a transfer of that property from inside the "premises" or "banking premises": a. To a person (other than a "messenger") outside those "premises"; or b. To a place outside those "premises."[317]

Both sides sought summary judgment; both the trial court and a unanimous panel of the Court of Appeals held that as a matter of law, the policy did not provide coverage for the ransom attack.[318] The Supreme Court reversed, holding that

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314. *Id*. at *10 (internal citation omitted).

315. 165 N.E.3d 82 (2021).

316. *Id*. at 84. Along with this claim, during the Survey Period, Plews Shadley also litigated coverage for Covid business interruption. *See, e.g.*, Ind. Repertory Theatre v. Cincinnati Casualty Co., No. 49D01-2004-PL-013137 (Marion Co. Ind. Super. Ct.), *aff'd*, 180 N.E.3d 403 (Ind. Ct. App. 2022). The firm also sought insurance coverage for claims against the NCAA in litigation over the financial aid its member universities and colleges may offer student-athletes, see 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). Plews Shadley also took its advocacy for insureds to the op-ed pages of the *Indiana Lawyer*. *See* George Plews & Greg Gotwald, *Contra proferentem — A bedrock of insurance coverage law*, IND. LAWYER (Feb. 17, 2021), https://www.theindianalawyer.com/articles/plews-and-gotwald-contra-proferentem-a-bedrock-of-insurance-coverage-law [https://perma.cc/6UFU-ZVVK]; *see also Banking, Business, and Contract Law* 2018, *supra* note 165, at 973-74 (suggesting that the use of *contra proferentem* is generally not appropriate in interpreting the meaning of a specific contract provision where the language of the contract as a whole has been actively negotiated by the parties).

317. Complaint for Damages and Request for Jury Trial, Exh. 1 at PDF 301, G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., No. 49D06-1807-PL-028267, 2019 WL 12023254 (Marion Co. Ind. Super. Ct.) (meanings of the defined terms are not material to the dispute).

318. G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., No. 49D06-1807-PL-028267, 2019 WL 12023254 (Marion Co. Ind. Super. Ct.), *aff'd*, 145 N.E.3d 842 (Ind. Ct. App. 2020).

neither side was entitled to summary judgment.[319]

The Court of Appeals and the trial court both reasoned that the coverage provided protection from fraud but that what G&G Oil Co. had suffered did not constitute fraud.[320] The hackers, the Court of Appeals said, "did not pervert the truth or engage in deception in order to induce G&G to purchase the Bitcoin."[321] Although their "actions were illegal, there was no deception involved in the . . . demands for ransom in exchange for restoring G&G's access to its computers."[322] Or, as the trial court put it, the hackers' conduct, "[w]hile devious, tortious and criminal, fraudulent it was not."[323]

The Supreme Court found further fact-finding necessary to determine whether the hack had been fraudulent.[324] Holding the term "fraudulently cause a transfer" can be reasonably understood as simply "to obtain by trick,"[325] the Court first concluded that summary judgement for G&G Oil was not appropriate because not "every ransomware attack is necessarily fraudulent. For example, if no safeguards were put in place, it is possible a hacker could enter a company's servers unhindered and hold them hostage. There would be no trick there."[326] However, said the Court, summary judgment was not appropriate for insurer, either, because "there is a question as to whether G&G Oil's computer systems were obtained by trick. Though little is known about the hack's initiating event, enough is known to raise a reasonable inference the system could have been obtained by trick."[327]

The Indiana appellate courts frequently say that interpretation of the language of insurance contracts is a "pure question of law"[328] so it may seem surprising that that the Supreme Court here found fact-finding necessary on a question that the trial court, the Court of Appeals, and both parties thought could be resolved as a matter of law. But the result is testament to the Supreme Court's continued adherence to the mandate of *Hughley v. State* that "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits."[329]

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319. G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., 165 N.E.3d 82 (Ind. 2021).

320. G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., No. 49D06-1807-PL-028267, 2019 WL 12023254 (Marion Co. Ind. Super. Ct.), *aff'd*, 145 N.E.3d 842, 847 (Ind. Ct. App. 2020).

321. G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., 145 N.E.3d 842, 847 (Ind. Ct. App. 2020).

322. *Id.*

323. G&G Oil Co. of Ind. v. Cont'l W. Ins. Co., No. 49D06-1807-PL-028267, 2019 WL 12023254 (Marion Co. Ind. Super. Ct.).

324. *G&G Oil Co. of Ind.*, 165 N.E.3d at 89-90.

325. *Id.* at 89 (citing McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000)).

326. *Id.*

327. *Id.* Resolving a second issue in the insured's favor, the Court held that the losses "resulted directly from the use of a computer." *Id*. at 90-91. The trial court had decided this issue in favor of the insurer and the Court of Appeals did not reach the issue.

328. Franke Plating Works, Inc. v. Cincinnati Ins. Co., 113 N.E.3d 257, 266 (Ind. Ct. App. 2018); *see, e.g.*, State Farm Mut. Auto. Ins. Co. v. Jakubowicz, 56 N.E.3d 617, 619 (Ind. 2016).

329. 15 N.E.3d 1000, 1004 (Ind. 2014); *see Banking, Business, and Contract Law* 2019, *supra* note 66, at 638 (see discussion under "Is *Hughley*'s High Hurdle Too High?"); Frank Sullivan, Jr.,

CONCLUSION: A CASE THAT COULD BE A FINAL EXAM IN CONTRACTS

From time to time, the author teaches Contracts and *Symons v. Fish*[330] caught his eye as a fodder for a terrific final exam question, requiring as it did the Court to assess the enforceability of four ubiquitous contract provisions.

Symons required interpretation of a stock purchase agreement (the "Stock Purchase Agreement") but the issues—the effect, validity, or interpretation of liquidated damages, indemnification, representation and warranty, and attorneys' fee clauses—are ones that arise under any purchase-and-sale contract; merger agreement; loan-and-financing agreement; employment contract; release-and-settlement agreement; lease; indeed, a contract of almost any kind.[331]

So here is the final exam.

1. Assess Whether a Contract Clause Providing for Treble Damages Was an Unenforceable Penalty.—Buyers purchased sellers' business for $350,000 pursuant to a Stock Purchase Agreement.[332] At the time of closing, there were in place certain personal guaranties made by the sellers to third parties.[333] The Stock Purchase Agreement required the buyers to obtain the release of those personal guaranties or suitable replacements.[334] If that did not occur, and any damages arose from or in connection with any of the personal guaranties, the buyers agreed to "indemnify and hold harmless" and "reimburse" the sellers three times the amount of any damages (the "Treble Damages Clause").[335]

Buyers did not obtain the release or suitable replacement for at least one guaranty and, in collateral litigation (the "Collateral Litigation"), the sellers were found liable.[336] The sellers then successfully sued buyers for damages which the trial court trebled; on appeal, the buyers challenged the enforcement of the Treble Damages Clause on grounds that it constituted an impermissible penalty rather than a valid liquidated damages clause.[337]

The Court of Appeals recited this standard:

> A typical liquidated damages provision provides for the forfeiture of a stated sum of money upon breach without proof of damages. Liquidated damages provisions are generally enforceable where the nature of the agreement is such that when a breach occurs the resulting damages would be uncertain and difficult to ascertain. However, the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as

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Selected Developments in Indiana Tort Law (1993-2012), 50 IND. L. REV. 1493, 1509-13 (2017) (see discussion under "Summary Judgment: *Hughley*'s High Hurdle").

330. 158 N.E.3d 352 (Ind. Ct. App. 2020).

331. *Id.*

332. *Id.* at 357 n.2.

333. *Id.* at 355.

334. *Id.*

335. *Id.*

336. *Id.* at 356.

337. *Id.* at 357.

compensation for the breach.[338]

The Court considered the sellers' argument that the provision was permissible but flatly rejected it: the Treble Damages Clause "is a textbook example of an unenforceable penalty."[339] The Court gave three reasons:

- "[T]here is no apparent or discernable relationship or correlation between the treble damages claimed and the losses actually suffered by the Sellers."[340]
- "[T]here is no evidence that treble damages even remotely approximate the Sellers' actual damages."[341]
- "The treble damages are not commensurate with the magnitude of the breach and are grossly disproportionate to the loss."[342]

For these reasons, the Court said, the Treble Damages Clause "does not provide for liquidated damages in lieu of performance but for payment of a penalty to secure performance of the contract. Such damages are void and unenforceable."[343]

The Court *Symons v. Fish* reflects long-standing judicial skepticism toward the enforceability of liquidated damage clauses that was grounded in equitable notions of equity and natural law: "It is the application, in a court of law, of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives only the damages actually sustained."[344] Indeed, the *Symons* court relies heavily on *Gershin v. Demming*,[345] a noted exemplar of such skepticism.

In 2004, the Indiana Supreme Court wrote in a unanimous opinion:

> Despite the longstanding principles represented by these cases of ours and the Court of Appeals, we are left with some unease over any decision where what appears to be the freely bargained agreements of the parties are set aside. Fixing the respective rights and expectations of the parties as to damages makes economic and commercial sense. Enforcing such provisions would seem to conform to this Court's longstanding recognition of the freedom of parties to enter into contracts and our presumption that contracts represent the freely bargained agreement of the parties.[346]

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338. *Id.* (citing Gershin v. Demming, 685 N.E.2d 1125, 1127-28 (Ind. Ct. App. 1997)).

339. *Id.* at 358.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* (internal citations omitted).

344. Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886, 894 (Ind. 2004) (quoting Sterne v. Fletcher American Co., 181 N.E. 37, 43 (Ind. 1932) (quoting Jaquith v. Hudson, 5 Mich. 123, 133 (1858))).

345. 685 N.E.2d 1125 (Ind. Ct. App. 1997).

346. Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886, 894-95 (Ind. 2004). A recent epic clash over whether to enforce the parties' freely bargained agreement, in *American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Inc.*, 136 N.E.3d 208 (Ind. 2019), was resolved by the

Symons nicely indicates that clash of policies at stake in this debate. On the one hand, as the *Symons* Court points out, the purchase price of the business here was $350,000 so it hardly seems fair that the buyers should be subsequently held liable for a judgment many, many times that amount.[347] (Sellers sought $3.5 million.)[348] But as a matter of economics, the purchase price was not $350,000; it was $350,000 plus buyers' assumption of the sellers' liability on the personal guaranties. The buyers agreed in the Stock Purchase Agreement to assume the seller's liability on the personal guaranties by obtaining their release or replacement—and agreed that if they did not keep their promise to do so, they would pay three times the amount of any resulting judgment.[349] If one party makes a bad deal by agreeing to treble damages if it does not keep its promise, is it the job of the court to bail that party out? Yes, at least on these facts, held the Court of Appeals in *Symons*.[350]

2. Assess Whether the Complaint Was Time Barred by an Eighteen-Month Contractual Limitations Period.—The Stock Purchase Agreement provided that "[u]nless otherwise provided herein, all representations, warranties, covenants, and obligations in this Agreement . . . shall survive the Closing for a period of eighteen (18) months following the Closing Date."[351] The buyers maintained that this provision rendered untimely the sellers' lawsuit to enforce the judgment in the Collateral Litigation.

The Court rejected the buyer's view that the provision limited the time for filing a lawsuit.[352] "The plain language of [this section of the lawsuit] speaks to the Buyers' obligations under the contract—those obligations that remained to be performed by Buyers within the first eighteen months after the closing. That section does not shorten the time within which a complaint for breach of contract

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Indiana Supreme Court in favor of the traditional approach used in *Symons v. Fish*. By the time the case came to rest, a total of nine Indiana judges had ruled on the case (one at the trial court; three at the Court of Appeals; and five at the Supreme Court), five of whom voted against enforcement of the contract and four in favor. *See* Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc., No. 49D01-1503-PL-7463, 2016 WL 11766784 (Marion Co. Ind. Sup. Ct.) (Welch, J., holding the contract unenforceable); 104 N.E.3d 573 (Ind. Ct. App. 2018) (Robb and Pyle, JJ., voting to holding the contract enforceable; Riley, J., dissenting, would hold the contract unenforceable); 136 N.E.3d 208 (Ind. 2019) (Rush, C.J., and David and Goff, JJ., voting to hold the contract unenforceable; Massa and Slaughter, JJ., dissenting, voting to hold the contract enforceable); *see also* Frank Sullivan, Jr., *Banking, Business, and Contract Law*, 53 IND. L. REV. 821, 838-43 (2021) (discussing the litigation of *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*); *Banking, Business, and Contract Law* 2019, *supra* note 66, at 669-71 (discussing the litigation of *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*).

347. Symons v. Fish, 158 N.E.3d 352, 363 (Ind. Ct. App. 2020).

348. *Id.* at 357 n.2.

349. *Id.* at 355.

350. *Id.* at 362.

351. *Id.* at 355.

352. *Id.* at 359.

can be filed."[353]

The Court's holding on this point is undoubtedly correct: if parties to a contract want to agree to shorten the applicable statute of limitations for enforcing their rights under the contract, they must provide that in clear terms; it will not be inferred from other times limits contained in the contract but not related to time limitations on actions.

3. Assess Whether the Evidence or the Parties' Indemnification Clause Supported an Award of Damages Greater Than $250,000.—As discussed above, the Stock Purchase Agreement required the buyers to obtain the release of those personal guaranties or suitable replacements. If that did not occur, and any damages arose from or in connection with any of the personal guaranties, the buyers agreed to "indemnify and hold harmless" and "reimburse" the sellers' damages (the "Indemnification Clause").[354] "Damages" for these purposes were defined as "any loss, liability, claim, damage, expense (including reasonable costs and of investigation and defense and reasonable attorneys' fees and expenses)."[355]

In the Collateral Litigation, the plaintiffs in that action and the sellers had agreed to a stipulated judgment that the sellers owed the plaintiffs $831,222, but that enforcement of the judgment would be stayed on the conditions that the sellers (1) pay the plaintiffs $250,000 according to a schedule of monthly installments and (2) sue the buyers to recover the damages paid the plaintiffs.[356] If the sellers complied with these conditions, the sellers' liability to the plaintiffs would be limited to $250,000.[357]

When the sellers sued the buyers for reimbursement under the Indemnification Clause, the jury returned a verdict of $831,222.[358] The Court of Appeals reversed in part, holding that sellers were entitled only to $250,000.[359] It reasoned that "the total judgment amount [in the Collateral Litigation] of $831,222 is subject to a condition precedent that has not occurred, namely, the Sellers' default on the settlement provisions. At the time of trial, the Sellers had not incurred actual damages in excess of $250,000."[360] And the Indemnification Clause:

> [C]annot be construed, strictly or otherwise, to mean that the Buyers agreed to indemnify the Sellers for any loss that the Sellers have not actually suffered. Indeed, such an interpretation cannot be reconciled with the concept of indemnification . . . . The payment of "damages" in excess of the loss actually suffered would not be an indemnification and reimbursement but a windfall, that is, "[a]n unanticipated benefit." The

353. *Id.*
354. *Id.* at 355.
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.* This was the amount the trial court trebled.
359. *Id.* at 362.
360. *Id.*

> language of the indemnification clause does not suggest, much less clearly and unequivocally provide, that the agreement to indemnify includes reimbursement for losses that have not been incurred.[361]

The Court's application of the language of the Indemnification Clause appears correct. But the author submits that it was the buyers who got the windfall. Following the Court's own reasoning, had the plaintiffs in the Collateral Litigation not been willing to compromise their (later jury-validated) claim of $831,000, buyer would have been liable for that amount instead of only $250,000.

4. Assess Whether the Buyers Met Their Burden on Appeal to Show That the Trial Court Abused Its Discretion in the Award of Attorneys' Fees and Costs to the Sellers.—As noted above, the Stock Purchase Agreement included within its definition of "Damages" to which the Indemnification Clause applied "expense (including reasonable costs and of investigation and defense and reasonable attorneys' fees and expenses)."[362]

Buyers challenged the sufficiency of the evidence supporting the trial court's award of sellers' attorneys' fees in the Collateral Litigation, but the Court of Appeals affirmed. The evidence buyers disputed, the Court said, was "accompanied by an affidavit of the submitting attorney in which the attorney represented that those entries were in connection with the Sellers' matter, and they were sufficiently definite for the court to determine a reasonable basis for the fee award."[363]

The Court's holding is a good reminder both of the fact that the American Rule as to attorneys' fees can be abrogated by agreement and of the evidence necessary to establish one's claim where it is available.

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361. *Id.* at 361-62 (citations omitted).

362. *Id.* at 355.

363. *Id.* at 362-63.