

# Property Survey 1987

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## I. SHOPPING CENTER LEASES

During this survey period there were three reported landlord-tenant cases involving shopping center leases. The cases point out some of the common and not so common problems that can arise in such leases.

Shopping center leases present special problems. While the center's space is leased to individual tenants, the center itself is a carefully planned enterprise that functions as a single unit.<sup>1</sup> Tenants are not randomly selected but instead are carefully chosen according to a plan. The shopping center is designed in such a way that it will attract a particular type of customer or will best meet the shopping needs of the surrounding community.<sup>2</sup> Since it is common practice in shopping center leases to include rental based on a percentage of gross sales in addition to a minimum base rent, it is in the interest of the landlord to insure that there is a high patronage of the center.<sup>3</sup> This can best be insured by a proper tenant mix.<sup>4</sup> It is generally not in the best interest of the landlord to have similar businesses operating in the shopping center since they would be competing for the same customers and would not lead to an overall increase in the number of potential customers, whereas a variety of diverse businesses would attract different customers to the

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<sup>1</sup>Fogel, *Executory Contracts and Unexpired Leases in the Bankruptcy Code*, 64 MINN. L. REV. 341, 359 (1980).

<sup>2</sup>Roswick and McEvily, *Use Clauses in Shopping Center Leases: The Effect of the Tenant's Bankruptcy*, 14 REAL EST. L.J. 3, 4-5 (1985) [hereinafter Roswick & McEvily].

<sup>3</sup>Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1206 n.19 (1973); Schear & Sheehan III, *Restrictive Lease Clauses and the Exclusion of Discounters From Regional Shopping Centers*, 25 EMORY L.J. 609, 612 (1976). "[T]enant mix . . . may be as important . . . as the actual promised rental payments, because certain mixes will attract higher patronage of the stores in the center, and thus a higher rental for the landlord from those stores that are subject to a percentage of gross receipts rental agreement. 11 U.S.C.S. § 365 at 222 (Law. Co-op. 1985) (quoting H.R. REP. NO. 595, 95th Cong., 2d Sess. 348-349, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 5963, 6305).

<sup>4</sup>Tenant mix can be defined as developing a variety of uses and juxtaposing tenants in such a way as to permit the public to "shop the center, not shop one store and run home." *In re TSW Stores of Nanuet, Inc.*, 34 Bankr. 299, 302 (Bankr. S.D.N.Y. 1983).

center, thereby creating more potential sales to all center tenants.<sup>5</sup> For this reason it is common for the landlord to include a use clause (sometimes referred to as a purpose clause) in the lease prohibiting tenants from engaging in already existing center businesses.<sup>6</sup>

The success of the shopping center will depend upon the landlord's ability to attract the best anchor tenants.<sup>7</sup> Because anchor tenants are vital to the success of the shopping center, they are able to negotiate better terms. They may insist upon a noncompetition clause in the lease or perhaps even a veto power over the selection of other tenants.<sup>8</sup> The lesser tenants are not in as favorable of a position and are likely to pay a higher rent and have more restrictive terms forced upon them for the privilege of becoming a tenant in the shopping center.<sup>9</sup>

### A. Use Clauses, Breach of Lease

In *Ray-Ron Corp. v. DMY Realty Co.*,<sup>10</sup> Ray-Ron Corp. (Ray-Ron) d/b/a Noble Roman's Pizza, leased a free-standing building in a shopping

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<sup>5</sup>Roswick & McEvily, *supra* note 2, at 22-23 (citing *In re TSW*, 34 Bankr. at 303). In addition, such competition might decrease the interest of potential tenants to lease space in the "shopping center because there would be fewer categories of business to attract customers." Roswick & McEvily, *supra* note 2, at 23. In some situations, however, competition will be beneficial. Competition between women's apparel and shoe stores in the same shopping center will lead to comparison shopping which is beneficial to both the competing stores and the other tenants since it will attract more patrons to the center. *Id.* at 22-23.

<sup>6</sup>For a discussion of various justifications for such clauses, see Note, *supra* note 3, at 1218-38.

<sup>7</sup>Pollack, *Clauses in a Shopping Center Lease*, 16 PRAC. LAW. 31, 32 (May 1970). Anchor tenants are physically located at "anchor points" in the shopping center in such a way as to cause the customers to pass by the line of lesser tenants while walking from one anchor to another. Thus these line tenants will profit from the impulse buying of the customers. Note *supra* note 3, at 1205 n.16.

Roswick & McEvily, *supra* note 2, indicate that there are four different types of shopping centers. A "neighborhood" center provides convenience goods and personal services and the principal (anchor) tenant is usually a supermarket. A "community" center provides "soft ware" (men's, women's and children's apparel) and hard ware as well as convenience goods and personal services. The tenant who usually anchors this type of center is a department store or variety store. The "regional" center is an enclosed mall which provides general merchandise, apparel, furniture and home furnishings. This type center is usually anchored by one or two full line department stores. The "super-regional" center is one which is anchored by at least three major department stores. *Id.* See also Eagle, *Shopping Center Control: The Developer Beseiged*, 51 J. URBAN L. 585, n.1 (1973-74).

<sup>8</sup>One justification used by major tenants is their concern for the "image" of the shopping center. Schear & Sheehan, *supra* note 3, at 612.

<sup>9</sup>Pollack, *supra* note 7, at 32.

<sup>10</sup>500 N.E.2d 1163 (Ind. 1986).

center from DMY Realty Company (DMY). Problems developed when another tenant in the shopping center, Village Pantry, moved out and DMY proposed to lease the space to either a Chinese restaurant or a restaurant called "John's Hot Stew." Ray-Ron objected to the proposed use, citing a clause in its lease wherein DMY promised not to permit the sale of competitive food or beverage products within the shopping center.<sup>11</sup> Unable to obtain Ray-Ron's consent to these proposals, DMY brought this action claiming that Ray-Ron had breached the clause in the lease limiting the use of the premises "for a restaurant and/or retail sale of liquor and associated commissary and for no other purpose or purposes, without the written consent of the Lessor," by placing arcade-type machines in the restaurant.<sup>12</sup> Later, an additional count was added alleging that Ray-Ron had breached the lease by failing to include the gross income from the machines in the percentage rent.<sup>13</sup> DMY filed a motion for partial summary judgment asking the trial court to affirm its right to evict the tenant.<sup>14</sup> The trial court granted DMY's motion for partial summary judgment, and DMY then filed for a writ of assistance in evicting Ray-Ron; whereupon Ray-Ron filed an appeal.<sup>15</sup> The court of appeals determined that the appeal was not timely and dismissed.<sup>16</sup> The Indiana Supreme Court disagreed and heard the appeal.<sup>17</sup>

The supreme court first examined the nature of the use clause in the lease, noting that had the clause merely specified the purpose of the lease without prohibiting other uses it would have been permissive only.<sup>18</sup> However, in this case the purpose clause contained a prohibition on other uses of the leased premises, making it restrictive and entitling the lessor to limit the use of the premises to those specified in the lease.<sup>19</sup> The court found, however, that even where the lessee puts the premises to a use outside the term of the lease such action may not

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<sup>11</sup>*Id.* at 1164.

<sup>12</sup>*Id.* DMY also requested the court to declare the non-competition clause in the lease to be void or alternatively to declare that DMY's proposed use would not violate the clause. *Id.* These issues were not addressed by the court.

<sup>13</sup>*Id.* It is not uncommon for a commercial lease to include a percentage of gross income as rent in addition to the base rent.

<sup>14</sup> In the motion, DMY stated that Ray-Ron had breached the lease by placing the game machines in the restaurant and by not including the gross income from video machines, record player, pay telephone, balloon machine and a cigarette machine in determining the percentage rent; that DMY had given notice of these breaches and had elected to terminate the lease. 500 N.E.2d at 1164-65.

<sup>15</sup>*Id.* at 1165.

<sup>16</sup> Ray-Ron Corp. v. DMY Realty Company, 485 N.E.2d 937 (Ind. Ct. App. 1985).

<sup>17</sup>*Ray-Ron*, 500 N.E.2d at 1165.

<sup>18</sup>*Id.* (citing *Silkey v. Malone*, 123 Ind. App. 395, 111 N.E.2d 665 (1953)).

<sup>19</sup>*Id.* (citing *Schaub v. Wright*, 79 Ind. App. 56, 130 N.E. 143 (1921)).

result in a breach if the use is casual or intermittent or where the use is deemed incidental to the main purpose of the lease.<sup>20</sup>

The court concluded that the term "restaurant" does not limit the use to serving food and drink, pointing out that Noble Roman's restaurants customarily show movies as entertainment, but that no one would seriously claim that Noble Roman's is a movie house rather than a restaurant.<sup>21</sup> With 94% of the restaurant's total income attributable to the sale of food and drinks, it did not become a "video arcade" because of the existence of seven machines which allow the patrons to play Pac-Man and Galaga. The court noted that whether Ray-Ron had violated the lease by not reporting income from sources other than food and drink was a separate issue.<sup>22</sup> The court vacated the summary judgment and remanded the case for further proceedings on the merits.<sup>23</sup>

### *B. Subleases, Options to Extend Lease and Percentage Rent*

In *F.W. Woolworth Co. v. Plaza North, Inc.*,<sup>24</sup> F.W. Woolworth Co. (Woolworth) leased premises in a shopping center for a Woolco Department Store from Plaza North, Inc. (Plaza North). The lease provided that Woolworth was to pay a minimum rent of \$113,297.00 in equal monthly installments and rent based on a percentage of Woolco's annual gross sales. The lease further provided that Woolworth could at any time elect to discontinue the operation of its Woolco store by sending Plaza North written notice of its intent to do so, and that Plaza North could, within 90 days after the date of mailing of the notice, elect to cancel and terminate the lease.<sup>25</sup> In addition, the fifteen (15) year lease contained five successive options to extend the term of the lease up to five years on each option.<sup>26</sup>

In 1982, during the first option period, Woolworth decided to close all of its Woolco stores nation wide. On October 4, 1982, Woolworth sent written notice to Plaza North of its intent to discontinue operation of the Woolco store. Plaza North did not exercise its option to terminate the lease within the 90 day period, but instead chose to treat the lease

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<sup>20</sup>*Id.* at 1166 (citing *Galloway v. Ortega*, 61 Misc. 2d 539, 541, 305 N.Y.S.2d 546, 549 (1969)).

<sup>21</sup>*Ray-Ron*, 500 N.E.2d 1163, 1166.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>493 N.E.2d 1304 (Ind. Ct. App. 1986).

<sup>25</sup>*Id.* at 1307. Articles 5 and 5A of the lease contained the provisions concerning the right to terminate operations, the right of the landlord to terminate the lease and the change in the rent resulting from tenant's notice of discontinuance and the landlord's failure to exercise his option to cancel the lease. *Id.*

<sup>26</sup>*Id.*

as continuing.<sup>27</sup> On April 15, 1983, Woolworth and SCOA Industries, Inc. (SCOA) entered into an agreement to sublease the premises until January 30, 1997 with two options to extend the sublease for five years each. Woolworth then sent a letter to Plaza North that it was exercising its second and third options to extend the term of the original lease.<sup>28</sup>

Plaza North, after attempting to discover the terms of the agreement between Woolworth and SCOA, filed a complaint for injunction and declaratory judgment claiming that the sublease was really an assignment and that Woolworth had violated the terms of the overlease.<sup>29</sup> Plaza North asked the court for a judicial declaration of the rights of the parties to the lease and sublease. The trial court granted summary judgment in favor of Plaza North, finding: (1) that Woolworth did not have the right to extend the term of the lease after it ceased operations and thus the lease would end on January 31, 1987; (2) that Woolworth's agreement with SCOA was a valid sublease but would expire when the overlease terminated on January 31, 1987; and (3) that Plaza North had the right to receive rent based on a percentage of the amount of gross sales on the premises made by SCOA or any other subtenant (substituting the sales by SCOA for those of Woolco in Article 5 of the original lease), thus requiring Woolco to pay rent based on the gross sales of SCOA.<sup>30</sup> Appeal and cross appeal were taken.

On appeal, the court reviewed the three findings of the trial court. On the question of Woolworth's right to extend the lease after ceasing operations of the Woolco store, the court noted that there was nothing in the lease suggesting that the unexercised options were no longer valid after discontinuation of Woolco operations. Article 3 of the lease stated that the term of the lease ended on January 31, 1982, unless extended or earlier terminated. Likewise, Article 29 of the lease provided that all lease terms apply to the extended terms. Neither article made reference to Woolworth ceasing operations.<sup>31</sup> It should also be noted that Article 5A, which governed the cessation of operations by Woolworth, clearly contemplated that the lease might continue after cessation of operations. Nothing in Article 5A indicated the unexercised options to extend were no longer valid.<sup>32</sup>

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<sup>27</sup>More than three weeks after the 90 day period had expired Plaza North notified Woolworth that it still desired to terminate the lease but Woolworth replied that Plaza North had missed its deadline and that Woolworth did not want the lease terminated. *Id.* at 1306.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at 1307.

<sup>32</sup>*Id.*

The appellate court thus concluded that the trial court had erred and that Woolworth could exercise the options to extend after it had ceased operation of the store.<sup>33</sup> Since Woolworth had already exercised one 5-year option which extended the present term until January 31, 1987, at the time it notified Plaza North of its intent to exercise two more extensions, it had complied with the requirement of Article 29 that notice be sent to Plaza North no later than one year prior to the expiration of the term.<sup>34</sup>

The trial court had concluded that the Woolworth/SCOA agreement was a sublease and not an assignment. The issue of whether the agreement was a sublease or an assignment was critical. Article 15 prohibited an assignment without the consent of the landlord, but did not prohibit Woolworth from subleasing the premises.<sup>35</sup> Plaza North argued that it was an assignment because the term was for a period beyond that of the overlease. A sublease must be for a term less than the lease. If the transfer is for the full term of the lease without any reversion in the original tenant, then it is an assignment and not a sublease.<sup>36</sup> Here the sublease was to expire January 30, 1997, unless extended or sooner terminated. Plaza North argued that this is beyond the present term of the overlease, which at the time of the agreement was to end on January 31, 1986. The court of appeals rejected this argument, pointing out that the agreement between Plaza North and Woolworth gave Woolworth a fixed term of 17 years and an optional term of 25 years. The previous exercise of one option gave Woolworth an absolute term until 1987 and the four unexercised options give Woolworth a contingent term until 2007 at its option.<sup>37</sup> Thus Woolworth did not convey its entire interest to SCOA. Instead, it conveyed the remainder of its absolute (vested) term and a portion of its contingent term.<sup>38</sup>

The final issue addressed by the court was whether the percentage rent clause in the lease gave Plaza North a right to a percentage rent based on SCOA's sales. The court found that the lease did not give Plaza North a percentage rent following the discontinuation of Woolco operations and that the trial court was in error. The language of Article 5A is clear and unambiguous:

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<sup>33</sup>*Id.* at 1307-08.

<sup>34</sup>*Id.* at 1308.

<sup>35</sup>Article 15 provided, "Except as hereinafter provided, the Tenant agrees not to assign . . . this lease without first obtaining the written consent of the Landlord. . . . The Tenant is hereby given the right . . . to sublet the demised premises or any part thereof. . . ." *Id.* n.1.

<sup>36</sup>For a discussion of the distinction between subleases and assignments, see Krieger, *Developments in Property Law*, 20 *IND. L. REV.* 305, 315-321 (1987).

<sup>37</sup>*Woolworth*, 493 N.E.2d at 1309.

<sup>38</sup>*Id.*

Should the Landlord fail to exercise its said option [to cancel] and should the Tenant at any time thereafter discontinue the operation of its said store then and in any such event . . . the rent which Tenant shall pay to the Landlord during the remainder of the term of this lease shall be the rent more particularly set forth in said Article 5, and the word "minimum" in said Article 5 shall be deemed deleted. Upon the discontinuance of the operation of said store, all of the covenants and provisions contained in the preceding paragraphs of this article shall be of no further force and effect.<sup>39</sup>

Under the clear and unambiguous language of Article 5A, if the tenant ceases operations and the landlord chooses not to cancel the lease, the payment of percentage rent is deleted from the lease.<sup>40</sup>

Finally, Plaza North argued that where the lease provides for the payment of a percentage rent the lessee impliedly agrees to act in good faith so as not to deprive the lessor of his percentage rent. The court agreed but noted that there was no evidence that Woolworth acted in bad faith. The decision to close the Woolco stores was made in good faith and was based on a nation-wide decision unrelated to the lease under consideration.<sup>41</sup>

In conclusion the court found that Woolworth had a right to sublet the premises under the lease, that it had a right to exercise two of its four remaining options to extend the terms of the lease after it had ceased Woolco operations and that Woolworth was not liable for any percentage rent based on SCOA's sales.<sup>42</sup> This case is an excellent example of why the drafting of commercial shopping center leases is such a difficult task. One must anticipate the unexpected. In this case it appears that Woolworth reaped a windfall because Plaza North had not anticipated that when it chose not to cancel the lease, Woolworth would relet the premises and exercise its option to extend the lease.

### *C. Use Clauses, Assignments and Duty of Landlord to Mitigate Damages*

At common law the landlord was under no duty to mitigate damages when the tenant abandoned the leased premises before the end of the term,<sup>43</sup> unless there was a mandatory reletting clause in the lease.<sup>44</sup> Where

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<sup>39</sup>*Id.* at 1310.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 1311.

<sup>42</sup>*Id.*

<sup>43</sup>R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* § 6.80, at 404 (1984).

<sup>44</sup>*See, e.g.,* *Carpenter v. Wisniewski*, 139 Ind. App. 325, 215 N.E.2d 882 (1966); *Waffle v. Ireland*, 86 Ind. App. 119, 155 N.E. 513 (1927).

the reletting clause was permissive only, the landlord was not required to relet the premises to mitigate damages.<sup>45</sup> While this may still be the majority rule there is a rapidly growing minority view that when the tenant abandons the premises the landlord, under general contract law, must attempt to mitigate his damages.<sup>46</sup>

*Hirsch v. Merchants National Bank and Trust Co.*<sup>47</sup> was the first Indiana decision to adopt the minority view. In *Hirsch*, the court held that even where the lease contains only a permissive reletting clause allowing the landlord the option to relet should the tenant vacate the premises, the landlord "is still required to use such diligence as would be exercised by a reasonably prudent man under similar circumstances to relet the premises if possible."<sup>48</sup> *Hirsch* and later cases, however,

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<sup>45</sup>Even before the courts determined that there was a duty to mitigate damages the landlords inserted a reletting clause in the lease so that if the landlord chose to voluntarily mitigate his damages he would not be charged with a surrender and acceptance of the leased premises. A surrender by operation of law will arise when the parties to the lease do some act so inconsistent with the landlord-tenant relationship that the court will imply that the parties must have agreed to consider the lease terminated. *Paxton Realty Corp. v. Peaker*, 212 Ind. 480, 9 N.E.2d 96 (1937); *N. Indiana Steel Supply Co. v. Chrisman*, 139 Ind. App. 27, 204 N.E.2d 668 (1966). Without the reletting clause the landlord's reentry could be viewed as a surrender and acceptance, thereby ending the tenant's obligations under the lease, including the obligation to pay rent. *Grueninger Travel Serv. v. Lake County Trust Co.*, 413 N.E.2d 1034, 1041-42 (Ind. Ct. App. 1980). If the court adopts the minority view that there is a duty on the part of the landlord to mitigate damages, then it would be illogical to conclude that the landlord's reentry to relet the premises was a surrender and acceptance. *State v. Boyle*, 168 Ind. App. 643, 646, 344 N.E.2d 302, 304 (1976).

<sup>46</sup>For a list of cases on landlord's duty to mitigate damages, see Annotation *Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring another Tenant*, 21 A.L.R.3d 534 (1968).

<sup>47</sup>166 Ind. App. 497, 336 N.E.2d 833 (1975).

<sup>48</sup>*Id.* at 502, 336 N.E.2d at 836. In *Hirsch* there was a permissive reletting clause allowing the landlord to relet the premises following the tenant's abandonment. Since nearly all written leases contain a permissive reletting clause allowing the landlord to reenter and relet the premises in the event of the tenant's default of the lease, it is not surprising that in all but a few of the Indiana cases which followed the *Hirsch* decision, it was clear from the facts that the lease in question contained a permissive reletting clause. Some of the decisions seemed to emphasize the fact that there was a reletting clause which authorized the landlord to reenter and relet the premises. These decisions seem to tie the duty to mitigate damages to the permissive reletting clause. *E.g.*, *Sandor Development Co. v. Reitmeyer*, 498 N.E.2d 1020, 1022-23 (Ind. Ct. App. 1986); *Grueninger* 413 N.E.2d 1043.

In other cases, the courts seem to state the rule in broader language suggesting that the landlord has a general contractual duty to mitigate his damages and that the reentry by the landlord will not operate as a surrender and acceptance of the lease. *E.g.*, *Sigsbee v. Swathwood*, 419 N.E.2d 789 (Ind. Ct. App. 1981); *State v. Boyle*, 168 Ind. App. 643, 344 N.E.2d 302 (1976) (finding a duty on the landlord to attempt to relet to mitigate



have held that where there is no mandatory reletting clause the burden of proof is on the tenant to show the landlord failed to use due diligence.<sup>49</sup>

The questions of the landlord's duty to attempt to relet the premises to mitigate his damages when the tenant vacates the premises before the end of the term and the effect of a use clause on this duty were raised in *Sandor Development Co. v. Reitmeyer*.<sup>50</sup> In *Sandor*, John and Fern Reitmeyer (Reitmeyers) leased space in a shopping center from Sandor Development Co. (Sandor). Later, the Reitmeyers sublet adjoining space leased to Kadel's Holiday Shoppe, Inc. (Kadel's). The Reitmeyers operated a music store on the premises, in accord with a purpose clause in their lease.<sup>51</sup> Both leases (Reitmeyers' lease and Kadel's lease) terminated on the last day of February 1973. On August 25, 1972, the Reitmeyers exercised their option to renew the leases for another 5 year term. On October 1, 1973, Sandor accepted an assignment of the leases by the Reitmeyers to the Conservatory of Music Inc. (Conservatory), subject to the continuing liability of the Reitmeyers and Kadel's.

In May 1976 the Reitmeyers sent a letter informing Sandor that they were moving the Conservatory from the shopping center sometime in July.<sup>52</sup> On May 20, 1976, the Reitmeyers tendered a written proposal to Sandor stating that Bernard Strange, who operated a retail carpet store, was willing to become an assignee of the leases. Sandor rejected the proposal. The Conservatory paid the rent for June, and moved out the next month. Sandor continued to make efforts to relet the premises both before and after the Conservatory moved out. After contacting a number of businesses, Sandor was able to lease a portion of the premises

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damages without any indication of whether there was a reletting clause in the lease authorizing the landlord to relet the premises). It would appear that the concern of those courts appearing to limit the duty to relet to situations where a reletting clause is contained in the lease is a fear that the entry by the landlord without such an authorization would be viewed as a surrender and acceptance, ending the duty of the tenant to pay rent. *Grueninger* 412 N.E.2d at 1037-45; *Sandor* 498 N.E.2d at 1022-23. However, the language in the decisions imposing a general duty on the landlord to make reasonable efforts to relet the premises to mitigate damages emphasizes that a mere attempt by the landlord to relet the premises to mitigate damages will not result in a surrender and acceptance by operation of law. *Sigsbee*, 419 N.E.2d at 799; *Boyle*, 168 Ind. App. at 646-47, 344 N.E.2d at 304-05. The language in the *Hirsch* decision seems to support the *Boyle-Sigsbee* rationale. *Hirsch*, 166 Ind. App. at 501-505, 336 N.E.2d at 836-37.

<sup>49</sup>E.g., *Sigsbee*, 419 N.E.2d at 797; *Grueninger*, 413 N.E.2d at 1039-40; *Hirsch*, 166 Ind. App. at 502, 366 N.E.2d at 836.

<sup>50</sup>498 N.E.2d 1020 (Ind. Ct. App. 1986).

<sup>51</sup>The lease described their business as the "sale of musical instruments, financing musical instruments, accessories, parts, lessons and associated products." *Id.* at 1021.

<sup>52</sup>The Reitmeyers stated that there were many reasons for the move but specifically mentioned failure to repair defects in the premises. *Id.*

to Majestic Paints on April 15, 1977, and another portion to the Pop Shoppe on October 1, 1977.<sup>53</sup>

In a subsequent suit for damages filed by Sandor, the defendants (Reitmeyers, Kadel's and the Conservatory) asserted as a defense that Sandor had acted unreasonably in refusing Strange as a tenant.<sup>54</sup> Following a bench trial the court found that while the Conservatory's abandonment was improper, Sandor had notice of it and was aware of the proposition for an assignment. The trial court concluded that Sandor had a duty to mitigate damages, and that its refusal of the assignment to Strange was unreasonable, and entered judgment for the defendants.<sup>55</sup> The trial court rejected Sandor's argument that the use clause in the lease justified the refusal to consent to the assignment. Instead the court concluded that the major purpose of such a clause was to prevent conflict between tenants and that it was not intended to limit uses where no conflict exists.<sup>56</sup>

Several interesting points were raised on appeal. Sandor first argued that where the lease does not contain a mandatory reletting clause, there is no duty to mitigate damages when the tenant wrongfully abandons the premises before the end of the term.<sup>57</sup> The court disagreed, however, pointing out that under Indiana law the landlord has a duty to attempt to relet the premises in order to mitigate damages, even when the reletting clause is permissive.<sup>58</sup> Sandor next argued that even if there was a duty to mitigate damages it was not required to increase its obligations under the lease by accepting an assignee with a business use inconsistent with that of the former tenant. This raised the issue of whether the use clause in the lease justified the refusal by Sandor to allow the assignment to Strange. Sandor cited *Carpenter v. Wisniewski*<sup>59</sup> in support of its argument.

In *Carpenter*, the landlord rejected every proposed tenant in reliance on the purpose clause limiting the use of the premises to a drug store. The court found that Sandor's conduct differed considerably from that of the landlord in *Carpenter*.<sup>60</sup> While Sandor at first rejected Strange on the basis of the purpose clause, it later sent letters to a variety of

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<sup>53</sup>*Sandor*, 498 N.E.2d at 1021-22.

<sup>54</sup>Additionally, the defendants claimed that Sandor's failure to repair defects in the premises acted as a constructive eviction. The trial court found no constructive eviction because the leases had been renewed despite the defects. *Id.* at 1022.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Sandor*, 498 N.E.2d at 1022.

<sup>58</sup>See *supra* notes 47-49.

<sup>59</sup>139 Ind. App. 325, 215 N.E.2d 882 (1966).

<sup>60</sup>*Sandor*, 498 N.E.2d at 1023-24.

businesses in an attempt to relet the premises, and at some point in its search for a new tenant Sandor even contacted Strange to see if he was still interested in leasing the premises. However, by this time Strange had found another location. Sandor did not contact another music store until after it had filed its complaint.<sup>61</sup> This conduct led the court to conclude that Sandor placed little or no reliance on the purpose clause in its search for a new tenant.<sup>62</sup> While the court did not raise this point, it should be noted that *Carpenter* was decided before Indiana adopted the modern contract position on the landlord's duty to mitigate damages and it is not clear that a court would allow the landlord to rely upon a use clause to refuse an otherwise qualified substitute tenant without some showing that the reliance upon the use clause was reasonable under the circumstances.

One rather interesting observation made by the court was with regard to the "primary objective" of the use clause in the lease. The court of appeals agreed with the trial court that "the 'primary objective of the purpose clause was to maintain a viable "retail" establishment in the shopping center, not necessarily to limit the activity to particular items of sale.'"<sup>63</sup> This conclusion was clearly supported by the evidence in the case. Sandor had sent letters to three shoe stores, a photo-development company, a muffler installer, an import company, a handicrafts shop and a tile flooring company in an attempt to relet the premises,<sup>64</sup> and ultimately leased the premises to Majestic Paints and the Pop Shoppe, two businesses inconsistent with the purpose clause. Sandor's managing partner stated that "you restrict the use that a particular tenant can do with his premises in order not to create conflicts among other tenants in the center," and admitted that his refusal to accept the proposed assignment to Strange was based upon a negative experience with a prior carpet store tenant. These statements support the court's conclusion that Sandor placed little significance on the use clause.<sup>65</sup>

The decision does not, however, suggest that the court will never give consideration to such a clause when determining the reasonableness of the landlord's refusal to accept an assignment of the lease. There are times when the defaulting tenant might be an anchor tenant and the intended use of the premises by the proposed assignee might be vital to the continued success of the center.<sup>66</sup> Likewise, not all tenants are

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<sup>61</sup>*Id.* at 1022.

<sup>62</sup>*Id.* at 1024.

<sup>63</sup>*Id.* at 1023 (citing trial court record).

<sup>64</sup>*Id.* At one point Sandor even recontacted Strange to see if he was still interested in leasing the premises, but by this time he had already found another location. *Id.*

<sup>65</sup>*Id.* at 1023-24.

<sup>66</sup>For a discussion of the function of anchor tenants, see *supra* note 7.

equally acceptable to the landlord because of the importance of maintaining the proper tenant mix or the image of the center.<sup>67</sup>

It might be useful to consider the analogous problems created by the bankruptcy of a shopping center tenant. In 1978 an amendment to the Bankruptcy Code provided that ipso facto clauses allowing the landlord to terminate the lease if the tenant filed bankruptcy were invalid.<sup>68</sup> This permitted the trustee of the debtor-tenant to assume or assign the unexpired lease. There was an attempt to protect landlord and other parties by providing for "adequate assurance of future performance of [the terms of the] lease."<sup>69</sup> Unfortunately, many bankruptcy courts either ignored or substantially modified use clauses of the debtor-tenant in shopping center leases.<sup>70</sup>

Recognizing that special problems existed in shopping center leases, Congress amended section 365(b)(3) of the Bankruptcy Code to provide that adequate assurance of future performance in shopping center leases includes among other things assurance that any percentage rent due under such lease will not decline substantially, that assumption or assignment of such lease is subject to all provisions such as radius, location, use or exclusionary provisions, and that assumption or assignment of such lease will not disrupt any tenant mix or balance in the shopping center. The history of the Bankruptcy Code in dealing with use clauses in shopping center leases suggests that state courts should be equally sensitive to the special problems in shopping center leases.

In this case the music store was not an anchor tenant, and there is no indication that the carpet store would adversely affect tenant mix or the image of the center, or that the volume of retail sales would substantially decrease the percentage rent in the lease, if in fact such a clause existed. However, had the original tenant been a major food store, or department store, the landlord might have been justified in invoking the use clause to find a similar business activity to replace the defaulting tenant. Even where the defaulting tenant is not an anchor tenant the need for a proper mix of tenants might justify the refusal to lease to a particular tenant even though there is no direct conflict with other existing tenant uses. One can envision a shopping center composed of a carpet store, a music store, a pet store, and a paint store, and another shopping center which includes a drug store, a novelty store, a hardware store, and a fast food restaurant. Even though none of these tenants might be considered an anchor tenant, the tenant mix

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<sup>67</sup>See *supra* note 4 and accompanying text.

<sup>68</sup>11 U.S.C. § 365(e) (1979).

<sup>69</sup>11 U.S.C. § 365(b)(3) (Supp. 1987).

<sup>70</sup>Roswick & McEvily, *supra* note 2, at 12-25.

in the latter example appears to be much more desirable. In the case at bar it does not appear from the facts that the carpet store would be less desirable than the other potential tenants contacted by Sandor and thus the court was justified in finding the refusal to allow the assignment was unreasonable. No evidence was presented by Sandor which would justify the refusal of Strange as an assignee.

## II. EASEMENTS

### A. Prescriptive Easements: Element of Adverse Use

Indiana Code section 32-5-1-1 provides for the acquisition of an easement over the land of another by adverse use. "The right of way, air, light or other easement from, in, upon, or over, the land of another, shall not be acquired by adverse use, unless such use shall have been continued uninterruptedly for twenty (20) years."<sup>71</sup> Indiana cases are more explicit regarding the acquisition of a prescriptive easement in Indiana.

In order to establish the existence of a prescriptive easement across the land of another, the evidence must show an actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for twenty (20) years under claim of right, or such continuous adverse use with the knowledge and acquiescence of the owner.<sup>72</sup>

Once the claimant establishes open and continuous use of another's land with knowledge on the part of the owner, he has made a prima facie showing of a prescriptive easement.<sup>73</sup>

However, this presumption may be defeated by a showing that the use was not adverse or under a claim of right.<sup>74</sup> The element of adverse use was raised during this survey period in *Greenco, Inc. v. May*.<sup>75</sup> In *Greenco*, Nancy May (May) d/b/a Monon Grill sought to establish a prescriptive easement for customers to use a parking lot on adjacent property owned by Greenco, Inc. (Greenco). Evidence established that restaurant customers had used the Greenco parking lot for 30 years.<sup>76</sup>

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<sup>71</sup>IND. CODE § 32-5-1-1 (1982).

<sup>72</sup>*Searcy v. LaGrotte*, 175 Ind. App. 498, 501, 372 N.E.2d 755, 757 (1978) (citations omitted).

<sup>73</sup>*Id.*; *accord* *Null v. Williamson*, 166 Ind. 537, 78 N.E.76 (1906).

<sup>74</sup>166 Ind. at 544-45, 78 N.E. at 78; 175 Ind. App. at 501-02, 372 N.E.2d at 757.

<sup>75</sup>506 N.E.2d 42 (Ind. Ct. App. 1987).

<sup>76</sup>*Id.* at 43. The Monon Grill was built in 1938, but evidence relating to the ownership and use of the property from 1938-1951 was scant. *Id.*

Prior owners of the restaurant and longtime patrons testified concerning customers' use of the parking lot. No one had paid rent to Greenco for the use of the property for parking nor was there any contract made regarding said use.<sup>77</sup> In the early 1980's Howard Moore (Moore), the owner of Greenco, asked for rent from the Yorks who then owned the restaurant, but they refused. May and her husband purchased the property in 1983. Moore made several attempts to obtain rent from May, and when she refused he began construction of a fence along the property line. May then paid Moore \$60.00 to stop construction of the fence pending the outcome of this suit.

The trial court found that restaurant customers had used the lot for parking since 1938, that it was done with the knowledge of Greenco, that there was no agreement concerning the use of the property and that no rentals or compensation was ever paid or even a demand made until sometime in the early 1980's. The court concluded that May had met her burden of proof to establish a prescriptive easement by showing that she and her predecessors in title had exercised an actual, hostile, open, notorious, continuous, uninterrupted and adverse use under claim of right and with knowledge and acquiescence of the owner for a period of 20 years.<sup>78</sup> Greenco appealed.

On appeal the court noted that the party asserting the prescriptive easement may make a prima facie case by showing an open and continuous use of another's land with the owner's knowledge. This presumption, however, is rebuttable by a showing that the use was permissive or not under a claim of right.<sup>79</sup> In this case all of the owners of the restaurant who testified admitted that they never claimed a right to use the parking lot and there was undisputed evidence that the parking lot was shared by customers of Greenco, the Monon Grill and other members of the public. The court noted that in a similar case, *Null v. Williamson*,<sup>80</sup> where members of the public used a way without any direction from the owner, it was held that:

Where a space is designedly left open by the owner, either for his own convenience or to enable his customers to resort to

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<sup>77</sup>*Id.* at 44. Charles Shuee, a former owner of the restaurant testified that he had made a verbal agreement with Ben Hoover, the manager of the curtain factory operated on the Greenco property, that he would put in rock and grade the parking lot, remove snow in the winter, and provide free coffee and a free lunch daily to Hoover in return for the right of restaurant customers to use the parking lot. Moore, who acquired title to the Greenco property in 1969, testified that Shuee had paid him money to maintain the parking lot. *Id.*

<sup>78</sup>*Id.* at 45.

<sup>79</sup>*Id.* at 46.

<sup>80</sup>*Null v. Williamson*, 166 Ind. 537, 78 N.E. 76 (1906).

him, the presumption ordinarily is that a use of such space by an individual, even for his own purposes, is permissive. And the fact that a use was one which was shared with the public gives rise, in the absence of evidence to the contrary, to a presumption that it was not under an exclusive or particular claim of right.<sup>81</sup>

The court then concluded that while customers of the restaurant had used the parking lot since 1938, these customers, who were members of the general public, could not create a prescriptive easement on behalf of the Monon Grill. May must establish that she and her successors in interest have met the elements of a prescriptive easement. Since this was not established the court held the decision of the trial court was erroneous and the judgment was reversed.<sup>82</sup>

### *B. Concurrent Easements: Rights and Duties*

In *Ashland Pipeline Co. v. Indiana Bell Telephone Co.*,<sup>83</sup> Ashland Pipeline Co. (Ashland) and Indiana Bell Telephone Company, Inc. (Indiana Bell) had acquired easements over the same land. Ashland acquired and recorded an easement to lay underground pipes in 1921 and sometime in the 1920's laid underground pipe along its easement which runs in a north and south direction. In 1974 Indiana Bell acquired and recorded an easement in the same area for laying underground phone cables, and in 1975 laid underground telephone cables along its easement which runs in an east-west direction. The two easements crossed in Warrick County 160 feet west of Indiana Highway 61 near the intersection of Indiana Highway 62.<sup>84</sup>

Indiana Bell never informed Ashland that it had laid its cable across Ashland's pipeline. In 1979 Ashland was performing routine maintenance of its pipeline when it severed Indiana Bell's cable while excavating. Bell sued for damages claiming negligence and trespass. Ashland argued that it was the duty of those who subsequently acquire a nonexclusive easement to notify concurrent easement holders so that potential problems can be avoided.<sup>85</sup> Ashland admitted that it did not search the county records to determine the existence of any concurrent easements, but instead relied upon a visual on-site inspection. Having observed the existence of overhead telephone lines and seeing no warnings of underground cables posted, the work crew assumed that none were present

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<sup>81</sup>*Id.* at 546, 78 N.E. at 78 (citations omitted).

<sup>82</sup>*Greenco*, 506 N.E.2d at 46.

<sup>83</sup>505 N.E.2d 483 (Ind. Ct. App. 1987).

<sup>84</sup>*Id.* at 485-86.

<sup>85</sup>*Id.* at 486.

and excavated, causing the severance of the underground cable. The trial court found that Ashland was lawfully upon its own easement but that the recording of the Indiana Bell easement was sufficient notice to impose a duty on Ashland to use reasonable care in excavating.<sup>86</sup>

On appeal Ashland argued that Indiana Bell's recording of its easement was not sufficient notice to impose any duty of care upon Ashland and that Indiana Bell was contributorily negligent in not notifying Ashland of the existence of its easement.<sup>87</sup> The court agreed that the rationale for the recording of an easement is to give notice to subsequent grantees, not prior grantees such as Ashland. Thus the recording of the Indiana Bell easement did not give constructive notice to Ashland.<sup>88</sup> The court also agreed with the trial court's conclusion that each concurrent easement holder has a right to make repairs, alterations and improvements to its easement so long as such acts do not injuriously affect his co-owners. Nevertheless the court found no duty on the part of grantees of subsequently acquired non-exclusive easements to notify prior grantees of similar easements over the same property.<sup>89</sup>

Having concluded that Indiana Bell had no duty to notify Ashland of the existence of its easement and that the recording of the easement by Indiana Bell did not give constructive notice to Ashland, the court addressed the issue of negligence. Ashland argued that absent notice of Indiana Bell's easement there was no duty on Ashland's part to exercise reasonable care.<sup>90</sup> Ashland conducted an on-site inspection, found no warning signs, consulted maps and charts to determine the location of underground pipes and cables, noticed overhead cables, and because of the custom of notifying prior easement holders assumed no underground cables were present at the site. The court rejected this argument holding "the better rule to be that it is the party who digs who bears the risk of encountering utility cables and pipes if it proceeds without consulting potentially affected services."<sup>91</sup> A factor which seems to have influenced the decision was the availability of a simple procedure whereby Ashland could have determined the existence or nonexistence of telephone cables in the area:

Our review of the evidence shows that Indiana Bell had a procedure for receiving and responding to requests for locations

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<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 487.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* at 487-88. Ashland cited *Hunsberger v. Wyman*, 247 Ind. 369, 373, 216 N.E.2d 345, 348 (1966) for the position that in order for an act or omission to constitute negligence a person must be charged with knowledge or notice that such an act or omission involves danger to another.

<sup>91</sup>*Ashland*, 505 N.E.2d at 488.



of underground cables and received thousands of such requests yearly. Indeed there is evidence that Ashland made a request for the area in question on the date the cable was severed, but began excavating before the information was provided.<sup>92</sup>

While the decision does not hold that the recording of a subsequent nonexclusive easement is constructive notice to prior concurrent easement owners of its existence,<sup>93</sup> it does suggest that prior owners of nonexclusive easements might have a duty to search the public records for subsequent easements before making repairs.<sup>94</sup> In examining what constitutes reasonable care the court remarked:

In determining reasonable care, several things may be expected of a person in order to inform himself of other rightful, concurrent, subterranean land uses, one of which may be researching recorded instruments and other public records. Other precautions may be an examination of the land itself, an inquiry of the servient estate owner, as well as a general inquiry of all utilities known to operate in the area.<sup>95</sup>

If one agrees with the court that the duty to determine the location and existence of concurrent easements should be placed on "the party who digs," the standard of care imposed by the court does not seem unreasonable. Nonetheless, from the standpoint of economic efficiency, the cost of notifying prior concurrent easement owners of the existence of the subsequent easement appears far less than requiring the prior owners to conduct an exhaustive and time consuming search to determine whether subsequent easements exist.

While in this case Indiana Bell provided others with a quick and inexpensive procedure for determining the existence of underground telephone cables, it is far from clear that other subsequent easement holders have similar procedures. If, on the other hand, the duty of notification were placed upon the subsequent easement holders the additional cost should be minimal, since a title search, inspection of the land and general inquiry of other potential easement holders would all be part of the normal procedure of purchasing the easement and laying underground pipes or cables.

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<sup>92</sup>*Id.*

<sup>93</sup>"Ashland correctly states that recording acts impart constructive notice only to those who claim through or under the grantor in question, and not prior grantees." *Id.* at 487.

<sup>94</sup>"[W]hether it investigated recorded instruments may be relevant to the steps a reasonable person would have taken, but it is neither exclusive nor exhaustive, as it would be in a question involving title." *Id.* at 488.

<sup>95</sup>*Id.*

## III. OTHER NOTABLE CASES

A. *Innkeepers: Liability for Loss or Destruction of Guests' Property*

Traditionally the liability of an innkeeper for the loss or destruction of property of guests was based on the law of bailment. The common law placed an extraordinary duty on the innkeeper which far exceeded that of the ordinary bailee for hire. He became an insurer against loss or destruction of his guests' property unless caused by the negligence of the guest, act of God or the public enemy.<sup>96</sup> This liability was limited, however, to property which was *infra hospitium* (within the inn or within the innkeeper's custody or control) and did not extend to property which was not within the protection of the inn.<sup>97</sup> Statutes in many states have reduced the extraordinary liability imposed upon innkeepers by the common law.<sup>98</sup> The Indiana Innkeepers' Statute, Indiana Code section 32-8-28-2, limits the liability of an innkeeper to \$200.<sup>99</sup> In *Plant v. Howard Johnson's Motor Lodge*,<sup>100</sup> the Indiana Court of Appeals extended the liability of the innkeeper beyond the traditional bailee concept and at the same time removed him from the protection of the Innkeeper Statute. In *Plant*, guests' moving van and contents were stolen from the motel parking lot. The trial court found the defendant liable but limited the liability to \$200 under the Innkeepers' Statute. On appeal the court noted that at common law the innkeeper was liable for property of the guest *infra hospitium* unless caused by an act of God, the public enemies or the fault of the guest.<sup>101</sup> However, the court also noted that by its wording the Indiana statute applies only to property "brought into such hotel, apartment hotel, or inn by any guest thereof," and since the van and its contents were never brought into the inn, the statute limiting the liability of the innkeeper to \$200 did not apply.<sup>102</sup> The defendant

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<sup>96</sup>R. BROWN, THE LAW OF PERSONAL PROPERTY § 12.15 (W. Raushenbush 3d ed. 1975).

<sup>97</sup>*Id.* at § 12.18. The protection did not extend to an automobile of the guest unless the inn operates a garage facility as an integral part of the hotel. *Id.* at 384.

<sup>98</sup>*Id.* at § 12.19.

<sup>99</sup>The innkeeper statute provides that the proprietor or manager of a hotel or inn shall not be liable for loss or damage to personal property (with certain exceptions not applicable to the case) "brought into such hotel, apartment hotel, or inn by any guest thereof, exceeding two hundred dollars (\$200.00) in value, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise." IND. CODE § 32-8-28-2 (1982).

<sup>100</sup>500 N.E.2d 1271 (Ind. Ct. App. 1986) *transfer denied*, 514 N.E.2d 1048 (Nov. 2, 1987).

<sup>101</sup>*Plant*, 500 N.E.2d at 1272-73.

<sup>102</sup>*Id.* at 1273.

pointed out, however, that even if the statute did not apply, it had no duty to protect the plaintiffs' property since the goods had never been delivered to the defendant for safekeeping. The parking lot was open and the plaintiffs had retained the keys to the van.

The court agreed that no bailment existed,<sup>103</sup> but concluded that "in modern society with its love of and dependence upon travel by motor vehicle that available parking for such vehicles is an integral and essential ingredient to establishing the relationship [between guest and innkeeper]." <sup>104</sup> Thus, an innkeeper has a duty to exercise ordinary care to prevent loss or damage to the vehicles of its guests. The liability of the innkeeper for vehicle contents will depend upon whether the guest has exercised reasonable care in leaving the property in the vehicle under the circumstances.<sup>105</sup>

### B. Sale of Homes

1. *Sale of Older Home: Fraud or Misrepresentation.*—In *Lyons v. McDonald*,<sup>106</sup> the court found that while there was no implied warranty of habitability in the sale of an older home, the statement by the nonbuilder vendor that there were no particular problems regarding the real estate when he had actual knowledge of a termite infestation was a material representation of an existing fact upon which the buyer relied. The court found the statement was fraudulent and that the buyer could recover damages caused by the termites.<sup>107</sup> The court distinguished *Vetor v. Shockey*,<sup>108</sup> which had held the vendor was not liable for latent defects in the sale of an older home. In *Vetor* there was no showing that the defects were known to the vendor or that he had made any statements regarding the defects. The court quoted the language from *Vetor* that "[A]s for defects known to the vendor of an older home at the time of sale, the tort theories of misrepresentation or fraudulent concealment are alternatives open to the unknown buyer."<sup>109</sup>

2. *Implied Warranties in Sale of Home: Integration Clause.*—In *Franklin v. White*,<sup>110</sup> the developer of a subdivision stated to a buyer

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<sup>103</sup>The court noted that in order to have a bailment, the goods must be delivered to the bailee (citing *Stubbs v. Hook*, 467 N.E.2d 29 (Ind. Ct. App. 1984), and *Weddington v. Stolkin*, 122 Ind. App. 670, 106 N.E.2d 239 (1952)). *Plant*, 500 N.E.2d at 1273.

<sup>104</sup>*Id.* at 1274.

<sup>105</sup>*Id.*

<sup>106</sup>501 N.E.2d 1079 (Ind. Ct. App. 1986).

<sup>107</sup>*Id.* at 1082.

<sup>108</sup>414 N.E.2d 575 (Ind. Ct. App. 1980).

<sup>109</sup>501 N.E.2d at 1081 (quoting *Vetor v. Shockey*, 414 N.E.2d 575, 577 (Ind. Ct. App. 1980)) (emphasis original).

<sup>110</sup>493 N.E.2d 161 (Ind. 1986).

that the property was suitable for a septic tank system, which later proved untrue. The contract for sale, which was silent as to the suitability of the land for a septic tank system, contained an integration clause which provided that "all previous communications and negotiations between the parties hereto, either verbal or written, which are not herein contained, are hereby withdrawn and annulled or merged in this agreement."<sup>111</sup> The trial court admitted evidence of oral statements and permitted the buyer to rescind the contract on the basis of mutual mistake. The court of appeals affirmed the judgment of the trial court but did so on the additional ground that the integration clause would prohibit otherwise competent evidence and was therefore void as against public policy.<sup>112</sup>

The Indiana Supreme Court held that the integration clause was not against public policy and vacated the court of appeals opinion.<sup>113</sup> Nevertheless, the court affirmed the judgment of the trial court because the integration clause is merely probative of the intent of the parties, and the determination of whether the parties intended the writing to be totally integrated must be based on all relevant evidence. On the preliminary question of integration the court should hear all relevant evidence, parol or written.<sup>114</sup>

#### IV. LEGISLATIVE DEVELOPMENTS

This session the legislature enacted Indiana Code section 34-4-20.5 which allows a builder-vendor to give a statutory express warranty in the sale of a new residential home.<sup>115</sup> Section 8 of the statute provides that in selling a completed new home or in contracting to sell a new home to be completed, the builder may warrant to the initial home buyer that:

(1) During the two (2) year period beginning on the warranty date,<sup>116</sup> the new home will be free from defects caused by faulty workmanship or defective materials.

(2) During the two (2) year period beginning on the warranty date, the new home will be free from defects caused by faulty installation of plumbing, electrical, heating, cooling, or venti-

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<sup>111</sup>*Id.* at 163-64.

<sup>112</sup>*Id.* at 165.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* at 166-67.

<sup>115</sup>IND. CODE § 34-4-20.5 (Supp. 1987).

<sup>116</sup>The warranty date is defined in the statute as "the date of the first occupancy of the new home as a residence by the initial home buyer." IND. CODE § 34-4-20.5-7 (Supp. 1987).

lating systems, exclusive of fixtures, appliances, or items of equipment.

(3) During the four (4) year period beginning on the warranty date, the new home will be free from defects caused by faulty workmanship or defective materials in the roof or roof systems of the new home.

(4) During the ten (10) year period beginning on the warranty date, the new home will be free from major structural defects.<sup>117</sup>

Section 8 further provides that the statutory warranties survive the passing of legal or equitable title in the home to a subsequent purchaser.<sup>118</sup>

One of the more interesting aspects of the statute is the duration of the new express warranties. Under the implied warranty of habitability theory in the sale of new homes recognized by case law in Indiana,<sup>119</sup> the statute of limitations in an action against the builder for breach of an implied warranty is ten years.<sup>120</sup> Under section 8 of the statute, most of the express warranties are limited to a two or four year period beginning on the date of the first occupancy of the new home as a residence by the initial home buyer.<sup>121</sup> Only the warranty against major structural defects<sup>122</sup> is provided for a full ten year period. This shortening of the warranty period greatly reduces the protection afforded to the buyer by these express statutory warranties.

Section 9 of the statute permits the builder to disclaim any implied warranties of habitability, but only if the following conditions are met:

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<sup>117</sup>IND. CODE § 34-4-20.5-8(a) (Supp. 1987). The statute defines a "major structural defect" as "actual damage to the load-bearing part of a new home including actual damage due to subsidence, expansion, or lateral movement of the soil affecting the load-bearing function unless the subsidence, expansion or lateral movement of the soil is caused by flood, earthquake, or some other natural disaster." IND. CODE § 34-4-20.5-3 (Supp. 1987).

<sup>118</sup>IND. CODE § 34-4-20.5-8(b) (Supp. 1987). This provision does not appear to change existing Indiana law. *See Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976) (extending an implied warranty of habitability in the sale of a new home by a builder-vendor to a subsequent purchaser of the home).

<sup>119</sup>*E.g.*, *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972); *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976) (extending builder's implied warranty to subsequent purchaser of home).

<sup>120</sup>*Capital Builders, Inc. v. Shipley*, 439 N.E.2d 217 (Ind. Ct. App. 1982) (ten years statute of limitations governs action for negligence and breach of warranty in construction of home). IND. CODE § 34-4-20-2 (Supp. 1987) established a ten year statute of limitations in actions concerning real estate improvements.

<sup>121</sup>*See supra* text accompanying notes 13-14.

<sup>122</sup>A major structural defect is defined in the statute as "actual damage to the load-bearing part of a new home including actual damage due to subsidence, expansion, or lateral movement of the soil affecting the load-bearing function unless the subsidence, expansion, or lateral movement of the soil is caused by flood, earthquake, or some other natural disaster." IND. CODE § 34-4-20.5-3 (Supp. 1987).

(1) the warranties defined in the statute are expressly provided in the written contract between the builder and the initial home buyer; (2) the performance of the warranty obligations is backed by an insurance policy in an amount at least equal to the purchase price; (3) the builder carries completed operations products liability insurance covering liability for reasonably foreseeable consequential damages arising from defects covered by the warranties given; and (4) the disclaimer must be printed in a minimum size 10 bold face type stating that the statutory warranties are in lieu of the implied warranties that have been disclaimed by the builder, and the buyer must affirmatively acknowledge by complete signature that he has read, understands and voluntarily agrees to the disclaimer; and (5) the initial buyer must acknowledge the disclaimer of implied warranties by signing at the time of execution of the contract, a separate one page "Notice of Waiver of Implied Warranties,"<sup>123</sup> attached to the contract.<sup>124</sup>

It was not clear under what circumstances the implied warranties of habitability of a new home builder could have been waived by the initial home buyer in Indiana prior to the enactment of this statute.<sup>125</sup> The statute resolves this problem by setting forth the conditions under which the builder will be allowed to disclaim any implied warranties.

Section 10 of the statute provides that where the builder has provided and breached a statutory warranty, the home buyer can bring an action for damages or for specific performance against the builder.<sup>126</sup> If damages are awarded, the buyer can recover no more than actual damages, which means either the amount necessary to effect repair of the defect or the amount of the difference between the value of the new home without the defect and the value of the new home with the defect, reasonably

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<sup>123</sup>The statute provides that the disclaimer notice must include and begin with the language in the Notice of Waiver of Implied Warranty contained in section 34-4-20.5-9(b). IND. CODE § 34-4-20.5-9 (Supp. 1987).

<sup>124</sup>IND. CODE § 34-4-20.5-9 (Supp. 1987).

<sup>125</sup>There are no Indiana cases dealing with a disclaimer of an implied warranty of habitability in the sale of a new home by a builder-vendor. In states which have addressed the problem it appears the implied warranty can be disclaimed, but only by a conspicuous provision in clear and unambiguous language in the written contract between the builder-vendor and the purchaser. *E.g.*, *Sloat v. Matheny Co.*, 625 P.2d 1031 (Colo. 1981); *Hesson v. Walmsley Const. Co.*, 422 So.2d 943 (Fla. App. 1982); *Conyers v. Molloy*, 50 Ill. App. 3d. 17, 364 N.E.2d 986 (1977); *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976); *Tyus v. Resta*, 476 A.2d 427 (Pa. Super. 1984); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex. 1982); *Frickel v. Sunnyside Enterprises, Inc.*, 725 P.2d 422 (Wash. 1986). For an argument that a disclaimer of any implied warranty of habitability in the sale of a new home by a builder-vendor should be held unconscionable and against public policy, see Hashel, *The Case of An Implied Warranty of Quality in Sale of Real Property*, 53 GEO. L.J. 633, 654 (1965).

<sup>126</sup>IND. CODE § 34-4-20.5-10 (Supp. 1987).

foreseeable consequential damages arising from the defect, and attorney's fees, if those fees are provided for in the written contract between the builder and the home buyer.<sup>127</sup> The recovery of attorney's fees by the buyer seems theoretical at best, since the standard contract drafted by the builder will seldom provide for the recovery of attorney's fees in the event of a breach of the warranty by the builder.

It is interesting to speculate whether or not the legal position of a purchaser of a new home in Indiana has been enhanced by the enactment of this statute. Perhaps the strongest argument in support of the statute is that it will encourage builders to give express warranties and to carry performance and completed operations products liability insurance in order to take advantage of the provision allowing disclaimer of implied warranties. If the statute results in more builders carrying liability insurance, this would be a major benefit to the buyer since one of the greatest dangers faced by the new home purchaser is the risk that the builder may later prove to be insolvent, preventing any recovery for the builder's breach of an express or implied warranty. Unfortunately, the statute does not require that builders carry liability insurance, and it is likely that reputable builders were already carrying such insurance before the enactment of this statute because of their potential liability under the implied warranty of habitability theory in the sale of a new home by a builder-vendor.<sup>128</sup> While the statute will undoubtedly result in builders expressly providing the statutory warranties in the building contract, the corresponding elimination of any implied warranties and the short duration of these express statutory warranties appear to offset any advantage to the initial home buyer.

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<sup>127</sup>*Id.*

<sup>128</sup>See *supra* note (16) and accompanying text.

