

Recent Developments In Tort Law*

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I. INTRODUCTION

During the survey period, late spring 1989 through late summer 1990, there have been a number of significant developments in tort law. The judiciary has been responsible for most of them. The Indiana Supreme Court examined the scope of liability of a children's center for a sexual attack upon one of its patients,¹ crafted the boundaries of premises liability² and incurred risk,³ and refused to recognize a child's cause of action for loss of consortium when the child's parent is injured due to the negligence of a third party.⁴ In several cases, the Indiana appellate court and Seventh Circuit further refined the public policy exception to at-will employment discharge articulated by earlier decisions of the Indiana Supreme Court.⁵ The Indiana Court of Appeals also addressed the reach of the Indiana Medical Malpractice Act,⁶ adopted the tort of wrongful life,⁷ and rejected efforts to make "enjoyment of life" a separate element of damages.⁸

The Indiana General Assembly enacted several provisions relating to tort law. The legislature enhanced civil penalties for unfair claim settlement practices by insurers⁹ and required the insurance commissioner to publish figures showing the ratio of valid consumer complaints lodged against companies weighed by direct premiums earned in Indiana.¹⁰ The legislature also enacted provisions that permit persons "adversely af-

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1. *Stropes v. Heritage House Children's Center*, 547 N.E.2d 244 (Ind. 1989).

2. *Douglas v. Irvin*, 549 N.E.2d 368 (Ind. 1990).

3. *Get-N-Go, Inc. v. Markins*, 544 N.E.2d 484 (Ind. 1989), *reh'g on other grounds*, 550 N.E.2d 748 (Ind. 1990).

4. *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135 (Ind. 1990).

5. See *infra* notes 73-121 and accompanying text.

6. IND. CODE ANN. § 16-9.5-9-2 (West Supp. 1990). See *infra* notes 122-43 and accompanying text.

7. *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962 (Ind. Ct. App. 1989).

8. See *infra* notes 156-70 and accompanying text.

9. Pub. L. No. 149-1990 (codified at IND. CODE ANN. § 27-4-1-6(a)(1) (West Supp. 1990)).

10. *Id.* § 27-4-1-19.

fected" by an unfair claim settlement practice to file a complaint with the insurance commissioner and that require the commission to respond promptly to the complainant and deliver it to the insurer if he or she believes the unfair practice has occurred.¹¹

The Indiana General Assembly also provided that the attorney general defend a public school teacher if the attorney general determines that the suit arises from "an act that the teacher in good faith believed was within the scope of the teacher's duties in enforcing discipline policies"¹² Additionally, the legislature enacted a "guest statute" for owners/occupiers of agricultural land, which provides that if the owner/occupier allows gratuitous use of the land to glean agricultural products, then an injured person can recover only when the injury results directly from gross negligence or willful, wanton misconduct.¹³ Lastly, the Assembly immunized from civil liability certain persons who provide information during investigations of judicial candidates to the judicial nominating commission if that information is relevant, is an expression of opinion, or is a statement of fact made without knowledge of the statement's falsity or reckless disregard of the truth.¹⁴

This Article will focus on the decisions of the Indiana Supreme Court and appellate courts in the areas indicated above. Also included is an analysis of the remarkable non-development of Indiana Civil RICO. This is somewhat surprising because RICO frequently is correlative to commercial tort claims.

II. LOSS OF PARENTAL CONSORTIUM

When a tortfeasor negligently kills a parent, and the child sues for wrongful death, many states, including Indiana, recognize the child's recovery for loss of affection and society.¹⁵ However, when a tortfeasor negligently injures a parent, only eight states (since 1980) permit a minor child to recover for loss of parental consortium.¹⁶ In *Dearborn Fabricating*

11. *Id.* § 27-4-1-5.5.

12. Pub. L. No. 16-1990 (codified at IND. CODE ANN. § 4-6-2-1.5 (West Supp. 1990)).

13. Pub. L. No. 217-1989 (codified at IND. CODE ANN. § 34-4-12.9 (West Supp. 1990)).

14. H.E.A. No. 1027 (codified at IND. CODE ANN. § 33-2.1-4-16 (West Supp. 1990)).

15. See, e.g., *Andis v. Hawkins*, 489 N.E.2d 78, 82 (Ind. Ct. App. 1986).

16. *Hibpshman v. Prudhoe Bay Supply*, 734 P.2d 991 (Alaska 1987); *Villareal v. State Dep't of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989); *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981), *overruled by* *Audubon-Exira v. Illinois Cent. Gulf R.R.*, 335 N.W.2d 148 (Iowa 1983); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981); *Hay v. Medical Center*

& *Engineering Corp. v. Wickham*,¹⁷ the Indiana Supreme Court joined the majority of jurisdictions that refuse to recognize a child's loss of parental consortium claim. In *Dearborn*, William Wickham's children sought relief based on the loss of the "services, society, and companionship of their father."¹⁸ The court of appeals refused to dismiss this claim. The appellate court reasoned that damages for loss of parental consortium are neither more speculative nor more difficult to assess than awards for lost spousal consortium or for pain and suffering in general, which are customarily recoverable in Indiana.¹⁹ The court also concluded that the other arguments advanced in support of denial of a child's parental consortium claims — (1) multiplicity of and protracted litigation; (2) rise in insurance premiums; (3) deference to the legislature; and (4) possible double recovery — were similarly unpersuasive.²⁰

Subsequent to the appellate court decision in *Dearborn*, two judges on a different panel of the Third District Court of Appeals reached a contrary conclusion. In *Barton-Malow Co. v. Wilburn*,²¹ Judges Hoffman and Shields declined to follow *Dearborn*,²² stating that it is within the province of the legislature to weigh the benefits of a child's parental consortium cause of action against other societal concerns.²³ In particular, the judges noted that although the legislature had recognized a child's loss of parental consortium in a wrongful death action,²⁴ it had not enacted a companion action for the same loss when the parent is injured.²⁵ Although the judges conceded that the omission could have been an oversight, they believed that the legislature made a deliberate choice. Based upon their interpretation of legislative intent and the fact that

Hosp., 145 Vt. 533, 496 A.2d 939 (1985); *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 691 P.2d 190 (1984); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984). See generally Gerse, *Compensating the Child's Loss of Parental Love, Care, and Affection*, 1983 U. ILL. L. REV. 293; Note, *Recovery for Lost Parental Consortium: Nightmare or Breakthrough*, 9 NOVA L.J. 183 (1984); Note, *Loss of Parental Society*, 17 SUFFOLK U.L. REV. 777 (1983); Annotation, *Child's Right of Action for Loss of Support, Training, Parental Attention, or the Like, Against a Third Person Negligently Injuring Parent*, 11 A.L.R.4TH 549 (1982).

17. 551 N.E.2d 1135 (Ind. 1990).

18. *Dearborn*, 532 N.E.2d 16 (Ind. Ct. App. 1988), *rev'd*, 551 N.E.2d 1135 (Ind. 1990).

19. *Id.* at 17.

20. *Id.* at 17-18. For a discussion of the appellate court decision, see Talley, *Survey of Recent Developments in Tort Law*, 23 IND. L. REV. 583, 610-12 (1990).

21. 547 N.E.2d 1123 (Ind. Ct. App. 1989), *vacated in part, aff'd in part*, 556 N.E.2d 324 (Ind. 1990).

22. Judge Staton dissented. See *id.* at 1128 (Staton, J., dissenting).

23. *Id.* at 1126-27.

24. IND. CODE ANN. § 34-1-1-2 (West Supp. 1990).

25. *Barton-Malow*, 547 N.E.2d at 1127.

the vast majority of courts that have considered the issue have denied a child's parental consortium claim, the judges concluded that the judiciary should not create a cause of action for loss of parental consortium due to tortious injury by a third party.²⁶

Unlike the *Barton-Malow* view that would leave the question to legislative resolution, the Indiana Supreme Court in *Dearborn* believed the consortium issue "to be entirely appropriate for judicial determination,"²⁷ and proceeded to address the arguments urging recognition of such damages. One of the strongest arguments favoring the adoption of a parental consortium cause of action based on negligent injury, ultimately rejected by the court, is that similar damages are usually allowed for analogous claims. Such claims, already recognized in Indiana, include those brought by a parent to recover damages for loss of a child's services, society, and companionship;²⁸ those brought by a wife²⁹ or husband³⁰ for loss of consortium (whether as a result of death or injury); and those brought by a child for the wrongful death of a parent.³¹ It seems logical that relationship losses suffered by a child when a parent is negligently injured should be afforded comparable treatment. As has been stated: "A child has a moral and should have a legal right to receive parental love and affection, discipline, and guidance, and how to grow to maturity in a home environment which enables . . . develop[ment] into a mature and responsible adult."³² Continuity of relationships, surroundings, and environmental influence are essential to a child's normal development.³³

The Indiana Supreme Court was not persuaded by *Dearborn's* attempt to distinguish spousal and parental consortium claims by emphasizing the childbearing and sexual relations aspects of spousal consortium not present in the parent/child relationship. It observed, appropriately, that other relational elements — "love, companionship, affection, society, comfort, services and solace" — are present both in spousal and parent/child relationships.³⁴ Nor was the court entirely swayed by *Dearborn's* emphasis on the dangers of multiplicity of actions and substantial increase of liability, although it did note that the remedy of joinder of the child's

26. *Id.* at 1129.

27. *Dearborn*, 551 N.E.2d at 1136.

28. *School City of Gary v. Claudio*, 413 N.E.2d 628 (Ind. Ct. App. 1980), *rev'd*, 448 N.E.2d 1212 (Ind. 1983).

29. *Troue v. Marker*, 253 Ind. 284, 252 N.E.2d 800 (1969).

30. *Burk v. Anderson*, 232 Ind. 77, 109 N.E.2d 407 (1952).

31. IND. CODE ANN. § 34-1-1-2 (West Supp. 1990).

32. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972).

33. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 30-32 (2d ed. 1979). *Cf.* FLA. STAT. ANN. § 23.131 (West 1983).

34. *Dearborn*, 551 N.E.2d at 1137.

claims with the injured parent's claim might be affected by the Indiana provision tolling the statute of limitations during minority.³⁵ Additionally, the court recognized that a child's recovery for psychological or medical expenses (which are not consortium damages) incurred as a proximate result of tortious injury to a parent is not precluded by its opinion,³⁶ thus admitting that there is already present a "multiplicity of litigation and increased liability" phenomenon.³⁷

The Indiana Supreme Court based its rejection of a child's loss of consortium claim primarily upon "the potential harm to the family which may be generated in children's actions for loss of consortium."³⁸ The court expressed concern that defendants, faced with such claims, would seek to undermine and devalue the parent/child relationship in order to escape or to reduce liability, and these efforts would cause significant emotional harm to loving children.³⁹ The court recognized that this, indeed, might also occur when a parent seeks loss of society caused by tortious injury to a child, but noted that such attacks were directed primarily at the parent, rather than at the child.⁴⁰ However, this may be an empty distinction. In either situation, whether it is a parent seeking damages for loss of a child's consortium (customarily allowable), or a child seeking damages for loss of parental consortium, it is the *relationship* that will be the focus of a defendant's attack.⁴¹ It would seem, therefore, that the potential emotional distress that a child may suffer is the same in either situation. In fact, the court acknowledged that its attempted distinction has not been applied to preclude a child's claim for loss of consortium under Indiana's Wrongful Death Act.⁴²

35. *Id.* (citing IND. CODE ANN. § 34-1-2-5 (West 1983)). Of course, the roadblock to joinder could be removed by enactment of a uniform limitations period both for the parent's personal injury action and for the minor's action for loss of consortium. See *Salin v. Kloempken*, 322 N.W.2d 736, 740 (Minn. 1982).

36. *Dearborn*, 551 N.E.2d at 1139 n.2.

37. *Id.*

38. *Id.* at 1137.

39. *Id.*

40. *Id.* at 1137-38.

41. In fact, even in spousal loss of consortium claims, the quality of the relationship is examined. See, e.g., *Planned Parenthood of Northwest Ind. v. Vines*, 543 N.E.2d 654, 657 (Ind. Ct. App. 1989) (that married couple was temporarily separated goes to the issue of damages).

42. *Dearborn*, 551 N.E.2d at 1138 (citing IND. CODE ANN. § 34-1-1-2 (West Supp. 1990)). As stated by the Arizona Supreme Court in *Villareal v. State Dep't of Transp.*, 160 Ariz. 474, 479, 774 P.2d 213, 218 (1989): "[O]ften death is separated from severe injury by mere fortuity . . . both may cause a deleterious impact on the quality of consortium. It would be inconsistent to allow recovery for loss of consortium resulting from death but to deny recovery when the loss results from severe injury."

Nevertheless, the court attempted to distinguish the two causes of action. The first distinction is based upon the rationale of wrongful death statutes. At common law, the heirs of a decedent did not have a cause of action against the tortfeasor.⁴³ Wrongful death statutes remedied the perceived injustice of permitting a tortfeasor who negligently killed someone to escape liability entirely, thus providing an incentive to "finish off" the injured victim. Yet, the court noted that when a parent is injured, the tortfeasor does not entirely escape liability because the injured victim has a cause of action for his or her injuries. The child's claim is not essential to closing the escape-of-all-liability loophole.⁴⁴

The second distinction drawn by the Indiana Supreme Court between a claim based on a parent's death and one based on the parent's injury relates again to the function of wrongful death actions. Wrongful death suits, stated the court, are "the only means by which a family unit can recover compensation for the loss of parental care and services when a parent is tortiously killed."⁴⁵ When the parent is negligently injured, but lives, "the child's loss can be compensated in the parent's *own* cause of action."⁴⁶ But this may not necessarily be so. It is at least conceivable that a relatively minor injury to the parent may occasion a far greater consortium loss to a child of tender years. The child's recovery for loss of parental consortium is distinct from the parent's recovery of, for example, lost wages, which provides for the child's economic, but not emotional, deprivation.⁴⁷

Nonetheless, *Dearborn* precludes a child's recovery for loss of parental consortium based upon injury, but not upon death of the parent. Indiana thus remains in the majority of states that have denied recovery to a child's parental consortium claim.⁴⁸

III. LIABILITY OF CHILD-CARE CENTERS

The prevalence of child abuse in this country is staggering.⁴⁹ When it occurs within the family home setting and is reported, social agencies

43. The first inroad was Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), which allowed recovery to the families of persons killed by tortious conduct. All states now have wrongful death statutes. See S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* (2d ed. 1975).

44. *Dearborn*, 551 N.E.2d at 1138.

45. *Id.*

46. *Id.* (emphasis supplied) (citing *Borer v. American Airlines*, 19 Cal. 3d 441, 452, 563 P.2d 858, 866, 138 Cal. Rptr. 302, 310 (1977)).

47. See, e.g., *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

48. See *supra* note 16.

49. See generally NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES* (rev. ed. 1981).

and the criminal justice system become involved. Somewhat more infrequently and with varying success, victims of child abuse sue their parent-victimizers in tort.⁵⁰ When child abuse occurs in an institutional setting, questions arise concerning the liability of the institution based on the conduct of one of its employees.

In its recent opinion, *Stropes v. Heritage House Childrens Center*,⁵¹ the Indiana Supreme Court held that victims of child abuse may proceed under two theories: respondeat superior and non-delegable duty. *Stropes* involved a sexual attack upon a fourteen-year-old by a male nurse's aide employed by the center. Plaintiff had cerebral palsy, severe mental retardation, and he had the mental capacity of a five-month-old infant with insufficient verbal and motor skills to assist in his own sustenance or hygiene. He was placed into the custodial care of the center as a ward of the county welfare department. While performing the usual tasks of feeding, bathing, and changing the plaintiff's clothing, the nurse's aide got into bed with him and performed both oral and anal sex on him. In the complaint filed against the aide and the center, *Stropes* claimed that the center was responsible for these sexual acts committed by the aide while on duty.

The appellate court agreed with the trial court that judgment in favor of the center was appropriate.⁵² The Indiana Supreme Court reversed the dismissal of the claims and remanded the case for trial. The court concluded that respondeat superior may apply even when the complained-of conduct is engaged in to satisfy the perpetrator's personal desires.⁵³ A per se determination that sexual assaults are outside the scope of employment

would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit in response to other personal motivations, such as anger or financial pressures. Rather, the nature of the wrongful act should be a consideration in the assessment of whether and to what extent [the aide's] acts fell within the scope of his employment such that [the center] should be held accountable.⁵⁴

50. See, e.g., *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990) (predicting that Indiana would not apply the discovery rule to toll the statute of limitations when injury stems from alleged physical and sexual abuse of minor by a parent). *But cf.* *Barnes v. Barnes*, 566 N.E.2d 1042 (Ind. Ct. App. 1991) (parental immunity precludes recovery by daughter who alleged rape and assault by her father when she was 15 years old).

51. 547 N.E.2d 244 (Ind. 1989).

52. *Stropes v. Heritage House Childrens Center*, 531 N.E.2d 250 (Ind. Ct. App. 1988) (unpublished opinion).

53. *Stropes*, 547 N.E.2d at 249.

54. *Id.*

The court held that the jury should determine whether the facts suggest that the aide acted to further the employer's business.⁵⁵ Of particular note in this case is that the aide engaged in fully authorized conduct (undressing and redressing the victim) immediately prior to and after the sexual attack. This was but one factor for a jury to consider in ascertaining the scope of employment issue.⁵⁶

The court found plaintiff's second theory of recovery based on non-delegable duty similarly viable. The court noted that the non-delegable duty inquiry differs from the respondeat superior analysis in that the focus of the respondeat superior determination is on the significant relationship between employer and employee. The court further stated that the "imposition of [vicarious] liability is premised on the control that the one may exercise over the other."⁵⁷ In contrast, the court observed that the non-delegable duty determination focuses upon the significant relationship between carrier (custodial center) and passenger (patient-resident) and stated that the "imposition of liability is premised on the control that is surrendered to the one by the other."⁵⁸

The effect of *Stropes* can only be beneficial. It will encourage those who assume the care of individuals most in need of care to provide close supervision of employee/care-givers. The willfulness of the servant will not automatically bar imposition of liability under either respondeat superior or non-delegable duty theories.

IV. LANDOWNER'S LIABILITY

The Indiana Supreme Court delineated the boundaries of premises liability and incurred risk in two recent cases during the survey period. In *Get-N-Go, Inc. v. Markins*,⁵⁹ the court considered whether a general awareness of potential harm amounts to incurred risk when 1) there is no reasonable opportunity to extricate oneself or 2) there is a real inducement to continue despite the danger. In both instances, the court found no incurred risk.⁶⁰

55. *Id.* at 249-50.

56. *Id.*

57. *Id.* at 254.

58. *Id.*

59. 544 N.E.2d 484 (Ind. 1989), *reh'g on other grounds*, 550 N.E.2d 748 (Ind. 1990).

As this Article went to press, the Indiana Supreme Court handed down a case which held that social guests are invitees, rather than licensees, and therefore are entitled to a duty of reasonable care from landowners. *Burrell v. Meads*, 59 U.S.L.W. 2642 (Ind. Apr. 10, 1991) (No. 92503-9104-CV-287). This significant case will be discussed more thoroughly in the 1991 survey.

60. *Get-N-Go*, 544 N.E.2d at 487-88.

Get-N-Go involved a slip and fall accident in defendant's parking lot. On a wintry, icy day Markins, an elderly diabetic, walked to the convenience store where she normally shopped. She fell, injuring her knee. At trial, conflicting evidence was presented concerning the extent and timing of plaintiff's awareness of the icy conditions outside defendant's store. The jury found for the plaintiff, but the court of appeals reversed, holding that Markins had incurred the risk of her injuries.⁶¹ The Indiana Supreme Court vacated this decision and affirmed the judgment of the trial court. The court noted that plaintiff's actions were not entirely voluntary: she did not become aware of the specific risk until exposure to it and chose to continue because she was so close to the store and needed the food to avoid an adverse insulin reaction.⁶² The supreme court held that these facts, determined by the jury to be in Markins's favor, do not amount to incurred risk such that the store is relieved of liability.⁶³

In *Douglas v. Irvin*,⁶⁴ the court weighed the comparative knowledge of invitee and landowner in assessing whether the landowner breached its duty of care. The court overruled language in prior cases suggesting an independent "equal or superior knowledge" rule as a limitation on the initial existence of the landowner's duty of care.⁶⁵ *Douglas v. Irvin*⁶⁶ involved a man who had been contacted by police when the police were investigating a burglar alarm at the man's neighbor's house. While at the neighbor's residence, and in darkness because of a power failure, the man stumbled over a plant and fell into a floor-level hot tub. Sometime prior, the defendant homeowner had shown the man the new hot tub room. Defendant claimed that the "equal or superior knowledge" rule requires a plaintiff to provide proof of a landowner's superior knowledge before a duty of care even arises.⁶⁷ The court disagreed. Relying on section 343 of the Restatement of Torts,⁶⁸ the court noted that the comparative knowledge of landowner and invitee is not a factor in the duty analysis; rather, it is properly considered only in the second step of a negligence inquiry — breach of duty.⁶⁹ Thus, if "a landowner knows of a condition involving a risk of harm to an invitee, but could reasonably expect the invitee to discover, realize, and avoid such risk,"⁷⁰

61. *Id.* at 486.

62. *Id.* at 487.

63. *Id.* at 487-88.

64. 549 N.E.2d 368 (Ind. 1990).

65. *Id.* at 371.

66. 549 N.E.2d 368.

67. *Id.* at 369.

68. RESTATEMENT (SECOND) OF TORTS §§ 343, 343A(1) (1965).

69. *Douglas*, 549 N.E.2d at 370.

70. *Id.*

then plaintiff may well fail to prove breach of the duty. Further, the court distinguished the objective standard used to evaluate the landowner's knowledge for purposes of breach of duty from the subjective analysis used in evaluating the invitee's actual knowledge.⁷¹ These separate inquiries conceivably could result in finding a breach of duty on the part of the landowners, yet imposing no liability because plaintiff's actual knowledge and appreciation of the specific risks would establish a defense of incurred risk.⁷²

After *Get-N-Go* and *Douglas*, a successful premises liability case looks like this: Plaintiff must plead and prove that (1) the landowner owes a duty to the invitee to keep the premises reasonably safe; and (2) defendant breached that duty and caused injury by not possessing knowledge of the harm that a reasonably prudent person would have (objective standard). If, however, defendant can show that plaintiff's knowledge of the specific risks actually were equal or superior to that of defendant (subjective standard), then defendant would not be liable.

V. EMPLOYMENT TORTS

Indiana remains an "employment at-will" state. As a general proposition, an employee at-will may be discharged at any time for any reason or for no cause at all without triggering employer liability.⁷³ But "'generally' . . . is not always."⁷⁴

Between 1959 and 1978, Indiana was one of a few vanguard states⁷⁵ to carve out exceptions to the employment at-will doctrine.⁷⁶ In *Frampton v. Central Indiana Gas Co.*,⁷⁷ the Indiana Supreme Court crafted a public policy exception to the employment at-will doctrine: an employer could not discharge an employee solely because of the employee's exercise of a statutory right.⁷⁸ In *McClanahan v. Remington Freight Lines*, the court further defined the limits of the public policy exception by holding

71. *Id.*

72. *Id.*

73. See *Ryan v. J.C. Penney Co.*, 627 F.2d 836 (7th Cir. 1980) (applying Indiana law); *Mead Johnson & Co. v. Oppenheimer*, 458 N.E.2d 668 (Ind. Ct. App. 1984).

74. *Hamann v. Gates Chevrolet*, 910 F.2d 1417, 1418 (7th Cir. 1990).

75. See, e.g., *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Kelsay v. Motorola*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

76. Today, a clear majority of states articulate some form of contract or tort theory as a basis for rejecting the strict at-will rule. See generally H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW & PRACTICE* (2d ed. 1987). For a 1989 overview, see *Employment-At-Will: A 1989 State-By-State Survey* (Nat'l Employment Law Institute).

77. 260 Ind. 249, 297 N.E.2d 425 (1973).

78. *Id.* (discharge of employee for filing workers compensation claim violates public policy).

that public policy prohibits an employer from discharging an at-will employee in retaliation for the employee's refusal to commit an illegal act for which the employee would be personally liable.⁷⁹ In a series of cases, discussed below, decided during the survey period, both Indiana and federal courts examined the boundaries of these decisions. The cases involved plaintiffs who urged an extension or a broad reading of *Frampton* and *McClanahan*, and defendants who urged the courts to narrowly confine *Frampton*'s articulation of the public policy statutory exception and *McClanahan*'s "refusal to act illegally"⁸⁰ retaliatory discharge exception. On balance, it appears that defendants have been more successful.

*Smith v. Electrical System Division of Bristol Corp.*⁸¹ involved discharge of an employee, allegedly in retaliation for pursuing workers' compensation benefits. Smith had been an employee of Bristol for approximately eight months. After her on-the-job injury, she applied for and received workers' compensation benefits. Bristol allowed a medical leave of absence for almost two years. Bristol then terminated Smith's employment pursuant to its absence control policy contained in its employees' manual.⁸² Subsequently, Smith sued Bristol for wrongful discharge.

In affirming the grant of summary judgment to the employer, the Indiana appellate court stressed that *Frampton*'s prohibition against retaliatory discharge was really quite narrow: it applies only when the discharge is "solely because of the employee's exercise of a statutory right."⁸³ The court noted that Smith claimed that her employer indirectly penalized her exercise of workers' compensation rights because the absence control policy discouraged application for fear of discharge. In reply, Bristol argued that its absence policy was non-discriminatorily applied: whether due to illness, employment-related injury, or non-employment-related injury, excessive absence of an employee results in termination of employment.

The court concluded that no penalty was directed at Smith's workers' compensation claim. In the court's view, Bristol penalized Smith for excessive absence.⁸⁴ The discharge would have occurred even if she had chosen to take an unpaid leave, instead of availing herself of workers' compensation benefits.⁸⁵ Thus, reasoned the court, the discharge did not

79. 517 N.E.2d 390 (Ind. 1988).

80. *Hamann v. Gates Chevrolet*, 910 F.2d 1417 (7th Cir. 1990).

81. 557 N.E.2d 711 (Ind. Ct. App. 1990).

82. *Id.* at 712.

83. *Id.* (emphasis added).

84. *Id.* at 713.

85. *Id.*

result "solely" from her exercise of a statutory right.⁸⁶ *Frampton* should not be extended to prohibit what is, in essence, "a neutral policy effecting an incidental detriment . . . to receiving work[ers'] compensation."⁸⁷

Defendant was successful in reining in the applicability of *Frampton* in another case. In *Lawson v. Haven Hubbard Homes, Inc.*,⁸⁸ an employee alleged that, in violation of *Frampton*, she was terminated in retaliation for filing unemployment compensation benefits.⁸⁹ Lawson claimed that she had a right to file for unemployment benefits when her employer refused to permit her to return to work following a medical leave. Upon refusal of re-employment, Lawson applied for these benefits and contended that the employer then fired her. She argued that the employer did exactly what *Frampton's* public policy exception forbids: induced her to forego statutory benefits by firing her when she applied for them.

The Indiana Court of Appeals did not find Lawson's reliance on *Frampton* persuasive. The court noted that *Frampton's* underlying rationale — "fear of discharge hav[ing] a deleterious effect on the exercise of a statutory right"⁹⁰ — simply was inapplicable to the *Lawson* facts because an employee does not file an unemployment compensation claim unless he or she is unemployed or unless, as here, the employer refuses to allow the employee to return to work. In either situation, so long as the employee comports with the statutory requirements,⁹¹ the employee obtains unemployment benefits. Thus, the court reasoned, the employer's actions did not induce Lawson to forgo statutory benefits. The court stated,

If Lawson files for unemployment benefits because her Employer unjustifiably refuses to allow her to return to work, she has not voluntarily left her employment without good cause and she will receive benefits. If she files a claim for unemployment benefits and her Employer fires her in retaliation, she has not been discharged for "just cause" and again, she will receive benefits.⁹²

86. *Id. Cf. Peru Daily Tribune v. Shuler*, 544 N.E.2d 560, 563-64 (Ind. Ct. App. 1989) (when no records indicating substandard performance and discharge followed filing of workers compensation claim, the jury could reasonably find a wrongful discharge).

87. *Smith*, 557 N.E.2d at 713.

88. 551 N.E.2d 855 (Ind. Ct. App. 1990).

89. *Id.*

90. *Id.* at 860 (quoting *Frampton*, 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973)).

91. IND. CODE ANN. § 22-4-15-1 (West Supp. 1990) requires, for eligibility, that a claimant have voluntarily left employment with good cause or have been discharged without just cause.

92. *Lawson*, 551 N.E.2d at 860 (affirming grant of summary judgment to defendant, but denying defendant's request for attorney's fees pursuant to IND. APP. R. 15(G)).

However, Judge Chezem did not agree.⁹³ Although Judge Chezem agreed with the majority that as a general proposition an unemployed person cannot be fired, she observed "that is exactly what happened in this case; Lawson was still an employee of [defendant], but was eligible for unemployment benefits as a result of her employer's unwillingness to, at that time, allow her to return to work."⁹⁴ As such, the interference with the employee's attempt to recover statutory benefits is exactly that behavior proscribed by *Frampton*. Therefore, even though damages might be difficult to measure, Judge Chezem would have reversed the grant of summary judgment to the employer.⁹⁵

Hamann v. Gates Chevrolet, Inc.,⁹⁶ a diversity case, presented an even closer question of retaliatory discharge than did *Lawson* or *Smith*. Yet, once again, an appellate court upheld summary judgment for defendant. In *Hamann*, a car dealership company hired plaintiff in 1982 as a title clerk. She was reassigned to the accounting department, but occasionally processed titles as well. Part of her responsibilities involved several illegal activities: altering titles, forging signatures, and notarizing false documents. From 1983 until 1985, she refused on numerous occasions to alter car titles illegally. Although she complained frequently to her supervisors and refused to participate in the illegal activities, Gates did not fire her. In September 1985, a co-worker sought Hamann's advice concerning some illegal machinations of a title and Hamann advised the co-worker that it was wrong to do so. Hamann also telephoned an employee of a separate, but related, business entity and told her about Gates's illegal methods of title alteration. About a month later, Gates fired Hamann.⁹⁷

In response, Hamann sued Gates. Relying on *McClanahan v. Remington Freight Lines*,⁹⁸ she alleged that Gates fired her in retaliation for refusing to commit illegal acts for which she would be personally liable. The Seventh Circuit concluded that Hamann did not have a successful retaliatory discharge claim because *McClanahan* requires the plaintiff to prove more than that she was fired; she must allege and prove that her termination was caused by a prohibited retaliatory motive.⁹⁹ According to the Seventh Circuit, Hamann failed to do this. The court rejected Hamann's argument that it was reasonable to infer from the timing of her termination that it was done in retaliation for her refusal

93. *Id.* at 861 (Chezem, J., dissenting).

94. *Id.* at 862.

95. *Id.*

96. 910 F.2d 1417 (7th Cir. 1990).

97. *Id.* at 1419.

98. 517 N.E.2d 390 (Ind. 1988).

99. *Hamann*, 910 F.2d at 1420.

to alter documents illegally. Instead, Judge Eschbach, writing for the majority, stressed that the causation element, common in both title VII and Indiana retaliatory discharge claims,¹⁰⁰ was deficient. The fact that Hamann refused, with apparent impunity, to participate in the illegal scheme for some two years prior to termination destroyed the requisite nexus between her conduct and the alleged retaliatory discharge. Further, Gates's proffered reasons for firing Hamann ("bad attitude" and "lack of productivity") did not evidence retaliation, but were explainable from a "management perspective."¹⁰¹ Hamann was fired for "spread[ing] discomfort" among co-workers and "spread[ing] news that Gates was altering titles among persons outside of Gates."¹⁰² This, reasoned the court, may be a poor reason to fire an employee, but one that *McClanahan* does not proscribe.¹⁰³

McClanahan allows a claim of retaliatory discharge if there is a causal nexus between the employee's refusal to commit an illegal act for which he or she would be personally liable and termination.¹⁰⁴ Although *McClanahan* seemed to broaden the narrow exception to the general at-will rule based on exercise of statutory rights that *Frampton* articulated, it did not expressly reach all "whistleblowing" conduct.¹⁰⁵ Yet Hamann's claim is clearly encompassed by *McClanahan*. Given the conflicting inferences to be drawn from the timing of Gates's discharge of Hamann, there is, at least for purposes of disposition on summary judgment, a material fact in dispute. As Judge Wood noted in dissent, "the evidence as a whole" suggested it is not "unreasonable to view Hamann's discharge as sufficiently related to her refusal to advance the allegedly illegal activities of her employer,"¹⁰⁶ thereby rendering summary judgment inapposite. Interestingly, in a diversity case decided just a few years prior to *McClanahan*, the district court held that an employee discharged for refusing to participate in an illegal scheme to set back odometers stated a retaliatory discharge claim under Indiana law.¹⁰⁷ The Seventh Circuit did not refer to this case in *Hamann*.

During the survey period, at least one plaintiff succeeded in stating a retaliatory discharge claim. *Call v. Scott Brass, Inc.*¹⁰⁸ addressed the

100. *Id.*

101. *Id.* at 1422.

102. *Id.*

103. *Id.* Judge Wood dissented: "This situation is too much for summary judgment."
Id.

104. *McClanahan*, 517 N.E.2d 390.

105. *Id.*

106. *Hamann*, 910 F.2d at 1422 (Wood, J., dissenting).

107. *Sarratore v. Longview Van Corp.*, 666 F. Supp. 1257 (N.D. Ind. 1987).

108. 553 N.E.2d 1225 (Ind. Ct. App. 1990).

interplay between a *Frampton* cause of action and a statute that contains a civil remedy for the proscribed conduct.

Indiana law provides, in part, that it is a Class B misdemeanor to intentionally dismiss an employee because that employee has received or responded to a jury summons.¹⁰⁹ Further, an employee may, within ninety days of dismissal, sue for lost wages and reinstatement, and also may recover reasonable attorney's fees if successful.¹¹⁰ The *Call* plaintiff appeared for jury service on November 3, 1986. On that date, after threats of discharge if she complied with the jury summons, Brass discharged her. Call filed a complaint on March 9, 1987, to which Brass responded by a motion to dismiss, claiming that since its enactment in 1977, the Indiana Code provided the exclusive remedy for interference with jury service and that, therefore, Call's claim was time-barred under the Code. The trial court agreed and granted summary judgment for defendant on this basis.¹¹¹ The Indiana appellate court reversed.

The question before the court was whether the Indiana statute supplemented or excluded common law remedies. Under Indiana law, when the legislature enacts a statute that creates a new right and prescribes a remedy, the statutory remedy is exclusive.¹¹² Therefore, resolution of Call's claim depended upon timing: did the judicially created *Frampton/McClanahan* public policy exception precede the statutory remedy? The Indiana Supreme Court decided *Frampton* in 1973 and *McClanahan* in 1988. The legislature enacted the civil remedies for interference with jury service in 1977. If *Frampton* created the cause of action stated by Call, then the statutory remedies were not exclusive and Call's claim not time-barred. If, however, *Frampton* is viewed as limited to its facts until 1988, when the Indiana Supreme Court expanded the *Frampton* at-will exception in *McClanahan*, then the statute provides the exclusive remedy and Call's claim would fail.¹¹³

After an extensive examination of relevant case law since 1973, Judge Chezem, writing for the majority, concluded that *McClanahan* did not create a new cause of action as defendant urged, but "merely adopted and applied the Court of Appeals' interpretation of *Frampton*."¹¹⁴ Appellate decisions since *Frampton*, as well as the 1988 Indiana Supreme Court decision in *McClanahan*, "did not gradually develop the tort of retaliatory discharge; rather, the[se] courts . . . interpreted *Frampton*

109. IND. CODE ANN. § 35-44-3-10 (West 1986).

110. IND. CODE ANN. § 34-4-29-1 (West 1983).

111. *Call*, 553 N.E.2d at 1226.

112. *Id.* at 1227 (citations omitted).

113. *Id.*

114. *Id.* at 1229.

itself."¹¹⁵ Therefore, the retaliatory discharge tort created by the judiciary preceded by four years the statutory remedy crafted by the legislature, which, then, is not exclusive.¹¹⁶

It should be noted, however, that the court might well reach the same conclusion even if the timing varied — that is, even if the statute predated the *Frampton* cause of action. Other statutes containing exclusive remedies expressly state their exclusivity, as in the Worker's Compensation Act,¹¹⁷ Worker's Occupational Diseases Act,¹¹⁸ and Medical Malpractice Act.¹¹⁹ The jury dismissal statute makes no mention of exclusivity. Therefore, the court would not be inclined to read it into the statute.¹²⁰

Despite the plaintiff's success in *Call*, the conclusion to be drawn from the retaliatory discharge cases during the survey period is that Indiana is still very much an "at-will" state. Courts have been hesitant to extend *Frampton* and *McClanahan* much beyond their facts. At least in the employment area, Indiana courts seem unwilling to define public policy broadly, believing it to be a job best left to the legislature.¹²¹

VI. THE SCOPE OF THE MEDICAL MALPRACTICE ACT

Indiana's Medical Malpractice Act¹²² represents the nation's most strict and most lasting effort to curtail the cost of medical malpractice insurance. Its cap on the amounts awarded, raised from \$500,000 to \$750,000 this year,¹²³ and its precondition to suit, presentation to a

115. *Id.*

116. *Id.* Cf. *Holtz v. Board of Comm'rs of Elkhart County*, 548 N.E.2d 1220 (Ind. Ct. App. 1990) (county's termination of plaintiff's employment for "whistle blowing" is not within the purview of the Indiana Tort Claims Act, IND. CODE ANN. § 34-4-16-5-1 (West 1983), because a retaliatory discharge claim does not involve personal injury, death, or "property" loss).

117. IND. CODE ANN. § 22-3-2-6 (West Supp. 1990).

118. *Id.* § 22-3-7-6.

119. *Id.* § 16-9.5-9-2.

120. *Call*, 553 N.E.2d at 1229. The court also rejected defendant's argument that its conduct did not fall within *Frampton/McClanahan* prohibitions because plaintiff here would not be without a remedy. *Id.* at 1229-30.

121. See, e.g., *id.* at 1229 (citations omitted).

122. IND. CODE ANN. § 16-9.5-9-2 (West Supp. 1990).

123. Pub. L. No. 189-1989, § 2(a) (codified at IND. CODE ANN. § 16-9.5-2-2 (West Supp. 1990) (for acts of malpractice occurring on or after Jan. 1 1990)). Only three other states, Nebraska, South Dakota, and Virginia, have absolute limits on all damages and these states cap the amount at \$1 million. See, e.g., S.D. CODIFIED LAWS ANN. § 21-3-11 (1988). See also Wilkerson, *Indiana Law at Center of Malpractice Debate*, N.Y. Times, Aug. 20, 1990, at A13, col. 1. Most states restrict only pain and suffering damages. See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1989); OHIO REV. CODE ANN. § 2307.43 (Baldwin 1989).

medical review panel,¹²⁴ arguably have achieved the desired result. Indiana malpractice insurance premiums are among the lowest in the nation and the number of Indiana doctors has risen by fifty percent since 1975.¹²⁵ A recurrent problem, however, is defining the reach of the Act; for which of the injuries allegedly caused by health providers must a plaintiff comply with the Act? The question is, then, whether the tort claim arises as a consequence of the physician-patient relationship such that a plaintiff must submit all proposed malpractice claims to a medical review panel before filing suit against the health care provider. In several cases during the survey period, the Indiana appellate court addressed this question.

*Midtown Community Mental Health Center v. Estate of Gahl*¹²⁶ involved a wrongful death claim against a health care provider brought after a former patient of the mental health center shot and killed Gahl, a non-patient. The plaintiff alleged that defendant was negligent in the care of the patient and failed to warn Gahl of the patient's dangerous propensities. Defendant filed a motion to dismiss for failure to fulfill the pre-suit administrative medical review as required by the Indiana Medical Malpractice Act. The appellate court affirmed the denial of defendant's motion to dismiss. It concluded that the clear focus of the Act was the physician-patient relationship.¹²⁷ Because Gahl was not a patient, the defendant's conduct did not come within the purview of the Act. Rather, the Act's purpose was "unrelated to the sort of liability a health care provider risks when a patient commits a criminal act against a third party."¹²⁸ Even though the claim was based on conduct that could constitute malpractice relative to the third party, it did not constitute malpractice relative to Gahl.¹²⁹ Although "related" to the alleged malpractice, the claim was "not so intertwined" as to come within the Act's procedural requirements.¹³⁰

The court reached a similar conclusion in *Collins v. Thakkar*,¹³¹ *Harts v. Caylor-Nickel Hospital, Inc.*,¹³² and *Methodist Hospital of*

124. IND. CODE ANN. § 16-9.5-9-2 (West 1988).

125. Wilkerson, *supra* note 123.

126. 540 N.E.2d 1259 (Ind. Ct. App. 1989).

127. *Id.* at 1262 (citing IND. CODE ANN. § 16-9.5-1-1(h) (West Supp. 1990)). The Act defines malpractice as "any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." *Id.* (emphasis in original).

128. *Id.*

129. *Id.*

130. *Id.* It should be noted that Gahl's failure-to-warn claim may very well succeed. *Cf. Webb v. Jarvis*, 553 N.E.2d 151 (Ind. Ct. App. 1990) (shooting victim's negligence claim against assailant's physician states a claim because defendant owed a duty to this foreseeable plaintiff).

131. 552 N.E.2d 507 (Ind. Ct. App. 1990).

132. 553 N.E.2d 874 (Ind. Ct. App. 1990).

Indiana, Inc. v. Ray.¹³³ In all three cases, unlike *Gahl*, the plaintiff was a patient of the defendant health care provider. In *Harts* and *Ray*, plaintiffs suffered injury during hospitalization. Harts broke his hip as a result of a bedrail giving way and Ray contracted Legionnaire's disease. Defendants in both cases argued that the court had no subject matter jurisdiction because plaintiffs failed to comply with the medical review procedures of the Indiana Medical Malpractice Act. The courts disagreed, noting that not every patient-provider claim is subject to the Act's coverage. Rather, both Harts and Ray alleged ordinary negligence, unrelated to the rendering of medical treatment that would be subject to the Act's requirements. The issue in these cases, the courts stated, revolved around premises liability, deriving from common law.¹³⁴ The purpose of the medical review panel is to engage the expertise of those "actually qualified" in evaluating malpractice claims.¹³⁵ The services of these people are simply not needed in dealing with matters of ordinary negligence.¹³⁶

On very different facts, the *Collins v. Thakkar*¹³⁷ court reached the same conclusion. Sometime after Collins became Thakkar's patient, their relationship became sexually intimate. Collins subsequently consulted Thakkar about the possibility that she was pregnant with his child. Thakkar examined Collins, assured her that she was not pregnant, but then without her consent employed a metal instrument that caused her great pain and resulted in a miscarriage.¹³⁸ The court rejected defendant's contention that the Act governed Collins's claim.

Instead, the court read the Act as applying only to medical services "undertaken in the interest of or for the benefit of the patient's health," and involving "the exercise of professional judgment."¹³⁹ Here, in contrast, the physician's actions were "purposeful," "wanton and gratuitous," and "not designed to promote the patient's health."¹⁴⁰ Therefore, in the court's view, Collins's allegations were determinable by a jury, without need of such prior medical review as the Act requires.¹⁴¹

Taken together, these four cases seem to narrow the potentially broad applicability of Indiana's Medical Malpractice Act. Apparently, patient status is required before the Act's procedural review requirements

133. 551 N.E.2d 463 (Ind. Ct. App. 1990).

134. *Harts*, 553 N.E.2d at 878; *Ray*, 551 N.E.2d at 469.

135. *Ray*, 551 N.E.2d at 468.

136. *Harts*, 553 N.E.2d at 878-79; *Ray*, 551 N.E.2d at 468.

137. 552 N.E.2d 507 (Ind. Ct. App. 1990).

138. *Id.* at 509.

139. *Id.* at 510-11.

140. *Id.* at 511.

141. *Id.*

apply;¹⁴² however, *Collins*, *Harts*, and *Ray* indicate that patient status alone does not suffice. Instead, the courts will carefully inquire into the nature of the complained-of conduct, loathe to consign plaintiff's "ordinary" tort claims to the procedural restrictions of the Act. The effect, of course, is to free these plaintiffs from the necessity of referring their claims initially to a board of medical experts as a condition precedent to suit. An even more significant impact of these decisions is to provide successful plaintiffs with an uncapped damage remedy. The Act's cap of \$750,000 would also not apply in claims of ordinary negligence against health care providers.¹⁴³

VII. WRONGFUL LIFE

In *Cowe v. Forum Group, Inc.*,¹⁴⁴ the Indiana Court of Appeals upheld claims of wrongful life and prenatal tort based on preconception negligence. To sustain its conclusion, the court had to read quite narrowly the proscription of the Indiana statute that states that "no person shall maintain a cause of action or receive an award of damages on his behalf based on the claim that but for the negligent conduct of another he would have been aborted."¹⁴⁵

Only a few states have allowed a wrongful life action.¹⁴⁶ A wrongful life claim is brought on behalf of an impaired child and alleges that negligent advice, diagnoses, or treatment given to the child's parents allowed the child to be conceived and born. In contrast, wrongful birth claims are brought by parents. The crux of a wrongful birth claim is that negligent advice or treatment deprived the parents of the choice of terminating the pregnancy by abortion, thereby preventing birth of a defective child.¹⁴⁷

142. *Midtown Community Mental Health Center v. Estate of Gahl*, 540 N.E.2d 1259 (Ind. Ct. App. 1989).

143. *Cf. Collins*, 552 N.E.2d at 510 ("acts or omissions of a health care provider unrelated or outside the provider's role as a health care professional are not the Act's aim").

144. 541 N.E.2d 962 (Ind. Ct. App. 1989). For a good discussion of *Cowe*, see Note, *Pay Me Now or Pay me Later?: The Question of Prospective Damage Claims for Genetic Injury in Wrongful Life Cases*, 23 IND. L. REV. 753 (1990).

145. IND. CODE ANN. § 34-1-1-11 (West Supp. 1990).

146. See, e.g., *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

147. See, e.g., *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975). Courts have also permitted parents to recover for "wrongful pregnancy." See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. 1974); *Garrison v. Foye*, 486 N.E.2d 5 (Ind. Ct. App. 1985). For a discussion of these and related claims, see generally

In *Cowe*, the Indiana Court of Appeals took the "road less traveled," and recognized a wrongful life claim.¹⁴⁸ The impact of its holding, however, may be lessened due to the special circumstances of *Cowe*. *Cowe*'s mother is an extremely retarded adult, is unable to speak, and has no muscle control. While residing in a nursing home, she was raped by another resident and conceived a child, Jacob.¹⁴⁹ Jacob sued the owner of the nursing home for wrongful life, negligence, and prenatal tort.¹⁵⁰

According to the court, Jacob's wrongful life claim was not precluded by the Indiana statute which bars claims that "but for the negligent conduct of another [the child] would have been aborted."¹⁵¹ The court interpreted Jacob's claim as contending that "but for [defendant's] negligence he would not have been conceived," rather than as asserting "he would have or should have been aborted."¹⁵² Based on this constrained interpretation of the complaint and the "unusual situation" presented by the severe mental or physical impairments of both parents, the court permitted Jacob's wrongful life action, for which he could recover damages from the date of his birth until his adoption.¹⁵³

Due to the special circumstances of *Cowe* and the procedural posture of the case (appeal of summary judgment for defendant), it is difficult to assess whether *Cowe*'s wrongful life decision will be applied broadly. Given the strong dissent of Judge Ratliff,¹⁵⁴ the somewhat cursory treat-

Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461 (1969); *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597 (1986).

148. *Cowe*, 541 N.E.2d at 965.

149. *Id.* at 964.

150. *Id.* at 965.

151. IND. CODE ANN. § 34-1-1-11 (West Supp. 1990).

152. *Cowe*, 541 N.E.2d at 965.

153. *Id.* at 966. *But see id.* at 970-974 (Ratliff, J. dissenting). The court also allowed recovery for failing to provide prenatal care that might result in fetal hydantoin syndrome. *Id.* at 967-68.

154. Judge Ratliff would deny the wrongful life claim on two bases. First, he notes that the majority's effort to distinguish the language of IND. CODE § 34-1-1-11 from Jacob's complaint fails. One count of the complaint states that Jacob "is owed a duty of support by [Forum] because negligence proximately caused his birth into a world in which there was no natural parent capable of caring for and supporting him." *Cowe*, 541 N.E.2d at 971 (Ratliff, J. dissenting). This seems to conflict with the policy expressed in § 34-1-1-11 that life, even if impaired or burdened, is preferable to non-life. Secondly, Judge Ratliff emphasized the impossibility of measuring appropriate damages: "the relative benefits of an impaired life as opposed to no life at all. . . ." (quoting *Simienic v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 512 N.E.2d 691 (1987) (rejecting wrongful life claim)). Further, Judge Ratliff noted that, unlike those few prior cases in which a specific birth defect was involved, Jacob could show no medical evidence indicating that he actually suffers a disability or defect. *Id.* at 973.

ment of the wrongful life issues, and the arguably limited window of damages (birth to adoption),¹⁵⁵ *Cowe* may not prove to be the landmark decision it otherwise might be.

VIII. HEDONIC DAMAGES

[T]o enjoy the companionship of loved ones, . . . to see the glorious dawn and sunset, to feel the caress of gentle breezes or the invigorating sting of winter winds, to hear the murmur of the idling brook and the music of warbling birds, to smell the sweet fragrance of nature's flowers, and to taste the diet of life itself.¹⁵⁶

This is the enjoyment, the pleasure of living, the "hedonic"¹⁵⁷ value of life. In three cases decided on the same day,¹⁵⁸ the Indiana Court of Appeals for the Third District decided that loss of enjoyment of life is not recoverable as a separate element of damages, but may be a factor in determining damages for physical injury.¹⁵⁹ Further, the court held that any claims based on reduction of the enjoyment of life must be coupled, in jury instructions, for damages either with pain and suffering claims or permanency of injury allegations.¹⁶⁰ The Indiana Supreme Court, in vacating the court of appeals decision in *Canfield*, agreed that a plaintiff is not entitled to a jury instruction treating loss of enjoyment of life as a separate element of damages.¹⁶¹ Rather, that aspect of damages is to be included in the assessment of the permanency of the damages.¹⁶²

There is a slowly growing body of case law that recognizes hedonic (loss of enjoyment of life) damages as a separate element in wrongful

155. Judge Conover, concurring, would broaden the damages available to Jacob to include "mental pain, suffering and anguish based on any diminished quality of life he may suffer from being the genetic off-spring of mentally deficient parents." *Cowe*, 541 N.E.2d at 968.

156. *Downie v. United States Lines, Inc.*, 359 F.2d 344, 350 (3d Cir. 1966) (Kalodner, C.J. dissenting).

157. From the Greek *hedonikos* — pleasure of living.

158. The claims in each case arose from automobile accidents.

159. *Canfield v. Sandock*, 546 N.E.2d 1237 (Ind. Ct. App. 1989), *vacated*, 563 N.E.2d 1279 (Ind. 1990); *Marks v. Gaskill*, 546 N.E.2d 1245 (Ind. Ct. App. 1989); *Seifert v. Bland*, 546 N.E.2d 1242 (Ind. Ct. App. 1989).

160. *Canfield*, 546 N.E.2d at 1242; *Marks*, 546 N.E.2d at 1249; *Seifert*, 546 N.E.2d at 1244.

161. *Canfield v. Sandock*, 563 N.E.2d 1279, 1282 (Ind. 1990).

162. *Id.*

death actions based on 42 U.S.C. § 1983.¹⁶³ Additionally, a few courts have treated loss of enjoyment of life as a separate element of damages for injury¹⁶⁴ or death.¹⁶⁵ Nonetheless, Indiana's rejection of this view clearly is in the mainstream. Courts in nearly every state have declined to permit separate recovery of hedonic damages.¹⁶⁶

The primary reason courts, including the Indiana Court of Appeals and the Indiana Supreme Court, refuse to permit recovery for hedonic damages is the danger of double recovery if loss of enjoyment is treated as a separate element of damages.¹⁶⁷ Arguably, a plaintiff can recover for his or her injuries all damages proximately caused by the defendant, including pain and suffering and reduction of the ability to live life normally. If hedonic damages were recoverable, the same "damages" that are a factor (such as in pain and suffering) also would be recoverable, thereby permitting duplicate awards for what is essentially the same injury.¹⁶⁸

Not mentioned by the Indiana Court of Appeals as a basis for its decision, but often advanced as another reason to deny separate hedonic damages, is the difficulty of assessing the monetary value of the pleasure of life. The valuation of hedonic loss is potentially fraught with great uncertainty and jury whim. One economist has noted that the hedonic value of life could range from under \$100,000 to more than \$2 billion.¹⁶⁹ Given the current "tort reform" caps on pain and suffering,¹⁷⁰ attempted restrictions of punitive damages¹⁷¹ and medical malpractice awards,¹⁷²

163. *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981), was the first case to allow a decedent's estate to recover for loss of life's pleasures. See also *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds on reh'g*, 856 F.2d 802 (7th Cir. 1988). See generally Blodgett, *Hedonic Damages*, 71 A.B.A. J. 25 (Feb. 1985); Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965 (1981); Blum, *More Suing Over Lost Joy of Life: Defense - Plaintiffs' Bars Split on Hedonic Damages*, Nat'l L.J., Apr. 17, 1989, at 1, col. 3.

164. See, e.g., *Culley v. Pennsylvania R.R.*, 244 F. Supp. 710 (D. Del. 1965) (applying Maryland law); *Powell v. Hegney*, 239 So. 2d 599 (Fla. App. 1970).

165. See e.g., *Katsetos v. Nolan*, 170 Conn. 637, 368 A.2d 172 (1976).

166. See Note, *Hedonic Damages in Section 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, 44 WASH. & LEE L. REV. 321, 328 (1987).

167. See *Canfield*, 546 N.E.2d at 1237; *Marks*, 546 N.E.2d at 1245; *Seifert*, 546 N.E.2d at 1242.

168. See, e.g., *Seifert*, 546 N.E.2d at 1244.

169. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J. 70 (Sept. 1, 1988) (Smith testified for plaintiff in *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985) and argued in favor of hedonic damage awards.).

170. See generally Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL ADVOC. 317 (1986).

171. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989) (punitive damages in a civil case far exceeding actual damages do not violate the

and the problematic nature of hedonic damages, the Indiana courts' rejection of "enjoyment of life" as a separate element of damages will likely remain the prevalent view.

IX. INDIANA CIVIL RICO

Inclusion of a review of developments (or remarkable lack thereof) in Indiana civil RICO litigation is appropriate in the context of tort discourse. This is so because the subject matter of both federal¹⁷³ and state¹⁷⁴ RICO proscriptions often involves conduct that comes within the ambit of what is described as "commercial" or "business" torts.¹⁷⁵

eighth amendment prohibition of "excessive fines"). This term the Court considered and rejected a fourteenth amendment due process challenge to allegedly excessive punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 59 U.S.L.W. 4157 (1991).

Some states have abolished punitive damages entirely. *See, e.g.*, N.H. REV. STAT. ANN. § 507:16 (1986). Other states have enacted caps on punitive damages awards. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-240b (West 1989) (two times compensatory damages).

172. *See, e.g.*, IND. CODE ANN. § 16-9.5-2-2(a) (West Supp. 1990).

173. 18 U.S.C. §§ 1961-1968 (1982 & Supp. 1989).

174. As of 1989, 28 states, including Indiana, have enacted versions of federal RICO. *See* ARIZ. REV. STATE ANN. §§ 13-2301 to -2316 (1978 & Supp. 1988); CAL. PENAL CODE §§ 186-186.8 (West 1988); COLO. REV. STAT. §§ 18-17-101 to -109 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West 1985 & Supp. 1989); DEL. CODE ANN. tit. 11, §§ 1501-11 (1987); FLA. STAT. ANN. §§ 895.01 to .09 (West Supp. 1989); GA. CODE ANN. §§ 26-3401 to -3414 (Harrison 1988 & Supp. 1988); HAW. REV. STAT. §§ 842-1 to -12 (1985 & Supp. 1988); IDAHO CODE §§ 18-7801 to -7805 (1987 & Supp. 1989); ILL. ANN. STAT. ch. 56-1/2, paras. 1651-60 (Smith-Hurd 1985) (limited to narcotics); IND. CODE ANN. §§ 34-4-30.5-1 to -6 (West 1983 & Supp. 1990); *id.* §§ 35-45-6-1 to -2 (West Supp. 1990); LA. REV. STAT. ANN. §§ 15:1351-56 (West Supp. 1989) (limited to narcotics); MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1988); NEV. REV. STAT. ANN. §§ 207.350-.520 (Michie 1986); N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982 & Supp. 1989); N.M. STAT. ANN. §§ 30-42-1 to -6 (1978 & Supp. 1988); N.Y. PENAL LAW §§ 460.00 to .80 (McKinney Supp. 1988); N.C. GEN. STAT. §§ 75D-1 to -14 (1987 & Supp. 1988); N.D. CENT. CODE §§ 12.1-06 to -08 (1985 & Supp. 1989); OHIO REV. CODE ANN. §§ 2923.31 to .36 (Anderson 1987 & Supp. 1988); OKLA. STAT. ANN. tit. 22, §§ 1401-1419 (West Supp. 1989); OR. REV. STAT. §§ 166.715-735 (1985 & Supp. 1988); 18 PA. CONS. STAT. ANN. § 911 (Purdon 1983 & Supp. 1989); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985); TENN. CODE ANN. §§ 39-1-1001 to -1010 (Supp. 1988); UTAH CODE ANN. §§ 76-10-1601 to -1609 (Supp. 1989); WASH. REV. CODE ANN. §§ 9A.82.001 to .904 (1988 & Supp. 1989); WIS. STAT. ANN §§ 946.80 to .87 (West Supp. 1987). Puerto Rico has also adopted a RICO statute. P.R. LAWS ANN. tit. 25, §§ 971-971(p) (1979 & Supp. 1988).

175. Legal literature has taken cognizance of this development. *See, e.g.*, *RICO: The Ultimate Weapon in Business and Commercial Litigation*, ABA SECTION ON LITIG. NAT'L INSTIT. (Nov. 1983). *See also* 3 BUSINESS TORTS 24.01 to .52 (Mathew Bender); G. ALEXANDER, *COMMERCIAL TORTS* 9, at 251 (2d ed. 1988). *See generally* RICO Business Disputes Guide (CCH); Civil RICO Report (BNA).

In 1970, Congress enacted RICO¹⁷⁶ as part of the Organized Crime Control Act.¹⁷⁷ RICO's target is "racketeering activity."¹⁷⁸ Racketeering activity entails five categories of prohibited conduct: (1) any act chargeable under any state's criminal law and punishable by imprisonment for more than one year;¹⁷⁹ (2) any act indictable under many specific federal statutes,¹⁸⁰ including mail¹⁸¹ and wire fraud;¹⁸² (3) any act indictable under 29 U.S.C. sections 186 (restrictions on payments and loans to labor organizations) or 501(c) (embezzlement from union funds);¹⁸³ (4) any offense involving securities fraud or drug-related activity punishable under federal law;¹⁸⁴ and (5) any act indictable under the Currency and Foreign Transactions Reporting Act.¹⁸⁵ Section 1962(a) of RICO prohibits using income derived from a pattern of racketeering activity (at least two acts within ten years¹⁸⁶) in an operation affecting interstate or foreign commerce.¹⁸⁷ Section 1962(b) prohibits control of an enterprise through a pattern of racketeering activity, while section 1962(c) proscribes use of an enterprise for racketeering activity.¹⁸⁸ Section 1962 also makes unlawful conspiracy to violate any of the first three provisions of section 1962.¹⁸⁹

Congress put sharp teeth into RICO's prohibitions. It provided criminal penalties of imprisonment, fines, and forfeiture for RICO violations.¹⁹⁰ Additionally, for private civil suits, RICO affords far-reaching remedies including treble damages, costs, and reasonable attorney's fees.¹⁹¹

176. Organized Crime Control Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1970)). One federal judge suspects that the statute's awkward title and convenient acronym reflect a movie buff's legislative sense of humor and Hollywood expertise. In "Little Caesar," the first Hollywood gangster movie of the early 1930s, Edward G. Robinson played the barely-disguised Al Capone role. The character's name was "Rico." See *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20 n.1 (N.D. Ill. 1982).

177. Pub. L. No. 91-452, 84 Stat. 922.

178. 18 U.S.C. § 1961(1) (1970).

179. *Id.* at (A).

180. *Id.* at (B).

181. *Id.* § 1341.

182. *Id.* § 1343.

183. *Id.* § 1961(1)(C).

184. *Id.* at (D).

185. *Id.* at (E). All told, "racketeering activity" means any act or threat involving one of thirty-two predicate offenses.

186. *Id.* § 1961(5).

187. *Id.* § 1962(a).

188. *Id.* at (e).

189. *Id.* at (d).

190. *Id.* § 1963.

191. *Id.* § 1964(c). The award of treble damages is mandatory, not discretionary. The statute provides that an injured plaintiff "shall recover threefold the damage . . .

To obtain damages under federal civil RICO, a plaintiff must allege and prove by a preponderance of the evidence¹⁹² that:

- (1) the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invest(ed) in, or maintain(ed) an interest in, or participat[ed] in (6) an "enterprise" (7) the activities of which affect(ed) interstate or foreign commerce.¹⁹³

Civil RICO plaintiffs must also allege and prove that they suffered injury in their business or property "by reason of a violation of section 1962."¹⁹⁴

Federal civil RICO cases have increased eight-fold since 1984 to nearly 1,000 cases during 1988,¹⁹⁵ many of them involving a business or commercial "tort." Diverse claims have furnished the bases for federal civil RICO suits, such as competitive hiring practices;¹⁹⁶ sexual harassment;¹⁹⁷ accountant,¹⁹⁸ attorney¹⁹⁹ and bank misconduct;²⁰⁰ misrepresentation;²⁰¹ wrongful discharge;²⁰² misappropriation of trade secrets;²⁰³ injury

sustain(ed)." *Id.* (emphasis added). In addition, some courts have permitted injunctive relief in private suits. *See, e.g., F.D.I.C. v. Antonio*, 843 F.2d 1311, 1313 (10th Cir. 1988) (private injunctive relief available under Colorado's state RICO statute); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (federal RICO affords private equitable relief). *But see In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988) (private equitable relief is not available under federal civil RICO). *Cf. Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1047 (1980) (private equitable relief should be available).

192. *Parnes v. Heinold Commodities*, 487 F. Supp. 645, 647 (N.D. Ill. 1980). One commentator has observed that "a more exacting standard, such as 'clear and convincing evidence', may be more appropriate. . . ." Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO*, Nat'l L.J., Oct. 10, 1983, at 21. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985), the United States Supreme Court expressly chose not to decide the standard of proof issue. *See also Rubin & Zwirb, The Economics of Civil RICO*, 20 U.C. DAVIS L. REV. 883, 884 (1987).

193. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984).

194. *Id.* *See* 18 U.S.C. § 1964(c) (1982).

195. Rehnquist, *Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9 (1989).

196. *Systems Research, Inc. v. Random, Inc.*, 614 F. Supp. 494 (N.D. Ill. 1985).

197. *Hunt v. Weatherbee*, 626 F. Supp. 1097 (D. Mass. 1986).

198. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982).

199. *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061 (S.D.N.Y. 1983).

200. *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

201. *California Architectural Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988).

202. *Callan v. State Chemical Mfg.*, 584 F. Supp. 619 (E.D. Pa. 1984).

203. *Rockwell Graphic Sys. v. DEV Indus.*, RICO Business Disputes Guide (CCH) 6581 (N.D. Ill. 1987) (1987 WESTLAW 6862).

to goodwill and business reputation;²⁰⁴ and anti-abortion activism.²⁰⁵

The federal RICO "explosion"²⁰⁶ continues practically unabated — despite the professed distaste of federal judges,²⁰⁷ as expressed by Rule 11²⁰⁸ sanctions²⁰⁹ and strict imposition of Rule 9(b)²¹⁰ pleading requirements to civil RICO allegations of fraud.²¹¹ Not surprisingly, RICO issues have reached the Supreme Court. It has addressed the parameters of civil RICO in five cases.²¹² Yet the net effect of these decisions is that federal civil RICO remains a live, well, and available cause of action for a wide variety of civil complaints. Most RICO observers agree that the impact of one of the more recent Supreme Court RICO cases, *H. J., Inc. v. Northwestern Bell Telephone Co.*,²¹³ will be an increase in

204. *Ford Motor Co. v. B & H Supply*, 646 F. Supp. 975 (D. Minn. 1986).

205. *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 261 (1989); *Feminist Women's Health Center v. Roberts*, No. C86-1612 (W.D. Wash. 1989) (1989 WESTLAW 56017); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989). *See generally* Yonover, *Fighting Fire with Fire: Civil RICO and Anti-Abortion Activists*, 12 WOMEN'S RIGHTS L. REP. 153 (1990).

206. Yonover, *supra* note 205, at 157 nn.43-44.

207. *See, e.g.*, *Fields v. National Republic Bank of Chicago*, 546 F. Supp. 123, 124 (N.D. Ill. 1982) ("[L]ike the myth of the lemming drawn to the sea, [plaintiff] follows the unfortunately all-too-prevalent trend of seeking to reshape the [state law] claim into one that can be wrapped into the RICO mantle."). *See also* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985); P. BATISTA, CIVIL RICO PRACTICE MANUAL 4 (1987) (discussing federal judges' distaste for civil RICO); Fielkow and Eisenberg, *Civil RICO: The Insurers Fight Back*, 21 TORT & INS. L.J. 1, 3 & nn. 18-21 (1985).

208. FED. R. CIV. P. 11.

209. *See, e.g.*, *O'Malley v. New York City Transit Auth.*, 896 F.2d 704 (2d Cir. 1990); *Chapman & Cole v. ITEL Container Int'l B.V.*, 865 F.2d 676 (5th Cir. 1989); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989).

210. FED. R. CIV. P. 9(b).

211. *See, e.g.*, *Cayman Exploration Corp. v. United Gas Pipeline Co.*, 873 F.2d 1357 (10th Cir. 1989); *Blount Fin. Serv., Inc. v. Walter Heller & Co.*, 819 F.2d 151 (6th Cir. 1987); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986).

212. The cases are: *Tafflin v. Levitt*, 110 S. Ct. 792 (1990) (civil RICO jurisdiction is concurrent, rather than exclusive); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2905, 2906 (1989) (rejecting a "pinched" construction; RICO's pattern requirement involves "long term criminal conduct" or the threat of same); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (civil RICO actions are "arbitrable" under the Federal Arbitration Act, 9 U.S.C. § 1 (1988)); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) (a four-year limitations period applies to all civil RICO actions); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (civil RICO requires neither a prior criminal conviction of the predicate acts nor a special "racketeering"-type injury, but focuses upon proscribed activity indicative of "continuity plus relationship").

213. 109 S. Ct. 2893 (1989).

RICO claims and concomitant pressure on Congress to amend the statute.²¹⁴

Indiana is one of several states that has enacted RICO legislation²¹⁵ modeled on the federal statute and that, like federal RICO,²¹⁶ permit a civil action to be brought by a private party.²¹⁷ Under Indiana civil RICO, one has standing to sue as an "aggrieved person"²¹⁸ if it can be alleged that plaintiff has an interest in real property or in an enterprise that either is the object of corrupt business influence or has suffered damages or harm as a result of corrupt business influence.²¹⁹ If plaintiff can prove by a preponderance of the evidence²²⁰ that defendant engaged in a "pattern of racketeering activity"²²¹ (at least two predicate acts occurring within a five-year period²²²), then plaintiff can recover, as in federal RICO,²²³ treble damages, costs, and reasonable attorney's fees.²²⁴

214. See 5 Civ. RICO Rep. (BNA) 3 (July 4, 1989). Congress has in the past year considered several RICO reform bills. To date, none has passed. See Outlook for 1990: *Future of Reform is Cloudy; House, Senate Divided on Bill*, 5 Civ. RICO Rep. (BNA) 2 (Jan. 30, 1990). See also 5 Civ. RICO Rep. (BNA) 1 (June 26, 1990); 5 Civ. RICO Rep. 1 (BNA) (July 3, 1990).

215. See *supra* note 174.

216. 18 U.S.C. § 1964 (1982).

217. IND. CODE ANN. § 34-4-30.5-5 (Burns 1985 & Supp. 1989). Other states allowing private-party civil suits include Arizona (ARIZ. REV. STAT. ANN. § 13-2314A (1978 & Supp. 1989)); Colorado (COLO. REV. STAT. § 18-17-106(6) (1986 & Supp. 1989)); Delaware (DEL. CODE ANN. tit. 11, § 1505(c) (1989)); Florida (FLA. STAT. ANN. § 895.05(6) (West Supp. 1989)); Georgia (GA. CODE ANN. 26-3406 (Harrison 1988 & Supp. 1989)); Hawaii (HAW. REV. STAT. § 842-8(c) (1985 & Supp. 1989)); Idaho (IDAHO CODE § 18-7805(a) (1987)); Louisiana (LA. REV. STAT. ANN. § 15:1356(E) (West & Supp. 1989)); Mississippi (MISS. CODE ANN. § 97-43-9(5) (Supp. 1989)); Nevada (NEV. REV. STAT. ANN. § 207.470(1)(Michie 1986)); New Jersey (N.J. STAT. ANN. § 2C:41-4(c) (West 1982 & Supp. 1989)); New Mexico (N.M. STAT. ANN. § 30-42-6(A) (1978 & Supp. 1989)); Ohio (OHIO REV. CODE ANN. § 2923.34(B) (Anderson 1987 & Supp. 1989)); Oregon (OR. REV. STAT. § 166.725(6) (1985 & Supp. 1989)); Rhode Island (R.I. GEN. LAWS § 7-15-4(c) (1985)); Utah (UTAH CODE ANN. § 76-10-1605(1) (Supp. 1989)); Washington (WASH. REV. CODE ANN. § 9A.82.100(1)(a) (1988 & Supp. 1989)); Wisconsin (WIS. STAT. ANN. § 946.86(4) (West Supp. 1989)). See generally Annotation, *Civil Action for Damages Under State Racketeer Influenced and Corrupt Organizations Acts (RICO) for Losses from Racketeering Activity*, 62 A.L.R.4TH 654 (1988).

218. IND. CODE ANN. §§ 34-4-30.5-1 (West Supp. 1989). See generally Scanlon, *Elements of a RICO Violation* § II-37-8 (ICLEF RICO Litig. 1989).

219. IND. CODE ANN. § 34-4-30.5-1 (West Supp. 1990).

220. *Id.* § 34-4-30.5-5.

221. *Id.* § 35-45-6-1.

222. *Id.* The predicate acts include: securities violations, IND. CODE ANN. § 23-2-1 (West Supp. 1990); statutory fraud, IND. CODE ANN. § 35-43-5-4 (West Supp. 1990); and various crimes involving obscenity, violence, guns, or narcotics, IND. CODE ANN. § 35-45-6-1 (West Supp. 1990).

223. 18 U.S.C. § 1964 (1982).

224. IND. CODE ANN. 34-4-30.5-5(b)(1)-(3) (West Supp. 1990). An "aggrieved person" also has a claim, superior to the state, to forfeited property or proceeds therefrom. *Id.* § 34-4-30.5-5(d).

In addition, and unlike federal RICO, an Indiana RICO claimant may also seek punitive damages "allowable under law"²²⁵ and injunctive relief.²²⁶

Despite the broad thrust of Indiana RICO's proscriptions and the wide range of civil remedies afforded by the statute, only one reported case is founded, at least in part, upon a state civil RICO claim: *Blakley Corp. v. Klain*,²²⁷ decided in late spring, 1989. In *Blakley*, plaintiff-subcontractor sued the owner of a corporation that built residential housing. The subcontractor supplied labor and materials for several houses for which the corporation did not pay. Subsequently at the closings, the corporation, which had built the houses under contract with lot owners, executed vendor's affidavits representing that "[t]here are no unpaid claims for labor done upon or materials furnished for the Real Estate in respect of which liens have been or may be filed."²²⁸ The subcontractor claimed that these repeated acts of perjury in the vendor's closing affidavits constituted a pattern of activity proscribed by Indiana RICO,²²⁹ and sought civil remedies as an "aggrieved person."²³⁰ *Blakley* asserted that the vendor's affidavits extinguished its rights to liens on the properties.

The Indiana Court of Appeals reversed, in part, the grant of summary judgment to defendant. The court noted that concerning two houses, a genuine dispute existed about defendant's knowledge of the alleged falsehood in the vendor's affidavits.²³¹ Thus, on remand, plaintiff still had

225. *Id.* § 34-4-30.5-5(b)(4).

226. *Id.* § 34-4-30.5-5(a). To date, federal courts are split with respect to the availability of private injunctive relief in federal civil RICO actions. *Compare In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988); *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987) (private equitable relief is not available) *with* *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 97-98 (6th Cir. 1982) (RICO affords private injunctive relief). The Supreme Court has not addressed the issue but has opined that private equitable relief may not be available. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 153 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985).

227. 538 N.E.2d 304 (Ind. Ct. App. 1989). One commentator suggests that the paucity of state RICO cases may be due to the relative ease of pleading federal RICO claims. He suggests that if Congress curtails the use of federal RICO in business cases, state RICO claims may experience an upswing. Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 Nw. U.L. REV. 1198, 1212 n.79 (1988). This year Congress has indeed indicated a willingness to narrow the reach of civil RICO. *See* 5 Civ. RICO Rep. (BNA) 2 (Jan. 30, 1990); 5 Civ. RICO Rep. (BNA) 1 (June 26, 1990); 5 Civ. RICO Rep. (BNA) 1 (July 3, 1990).

228. *Blakley*, 538 N.E.2d at 305.

229. *Id.* at n.2 (citing IND. CODE ANN. § 35-45-6-2(a)(1) (West 1986)).

230. *Id.* (citing IND. CODE ANN. § 34-4-30.5-5(b) (West Supp. 1990)).

231. *Id.* at 307.

a potentially viable RICO claim based on two predicate acts of racketeering activity.

Surprisingly, since the enactment of Indiana RICO in 1980 there has been only one reported private civil case. Allegations of business fraud, similar to the *Blakley* complaint, have often furnished the bases for federal RICO claims.²³² It is even more surprising when the panoply of state remedies is considered.²³³ Whether this lack is due to the availability of federal RICO²³⁴ (and the concomitant access to federal courts)²³⁵ or unfamiliarity with a relatively new statute is unclear. Several private suits in other jurisdictions have been based on state RICO statutes.²³⁶ Nevertheless, *Blakley* stands alone in Indiana. It indicates, however, that given the appropriate facts, a viable private civil RICO suit can be brought based on "racketeering activity," which in *Blakley* allegedly amounted to tortious business fraud.

232. See, e.g., *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989) (affirming Judge Moody's grant of summary judgment for defendant-developers on RICO claim). See also *supra* notes 225-28.

233. See *supra* notes 225-26.

234. See *supra* notes 195-205.

235. Note, however, that state courts have concurrent jurisdiction over federal RICO claims. See *Tafflin v. Levitt*, 110 S. Ct. 792 (1990).

236. See, e.g., *Sattell v. Continental Casualty Co.*, (Wis. App. 1990) (1990 WES-TLAW 130820); *Banco Indus. de Venezuela, C.A. v. Suarez*, 541 So. 2d 1324 (Fla. App. 1989); *Computer Concepts, Inc. Profit Sharing Plan v. Brandt*, 98 Or. App. 618, 780 P.2d 249 (1989); *Hale v. Burkhardt*, 764 P.2d 866 (Nev. 1988); *James v. Wolfe*, 512 So. 2d 954 (Fla. App. 1987); *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 733 P.2d 1142 (1986); *Waldschmidt v. Crosa*, 177 Ga. App. 707, 340 S.E.2d 664 (1986); *Banderas v. Banco Cent. del Ecuador*, 463 So. 2d 523 (Fla. App. 1985).

