

RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

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During the survey period,¹ Indiana's courts rendered several significant decisions, which impact businesses as well as their owners, officers, directors, and shareholders. These developments are discussed herein and are of interest to business litigators and corporate transactional lawyers, as well as business owners and in-house counsel.

I. DISSENTERS' RIGHTS, APPRAISAL, AND "FAIR VALUE"

In *Lees Inns of America, Inc. v. William R. Lee Irrevocable Trust*,² the Indiana Court of Appeals held that, in determining the fair value of a dissenter's shares under Indiana's Dissenters' Rights Statute (DRS),³ it was appropriate for experts valuing the shares to consider the company's future plans and prospects, including the nature of the enterprise, its business plans, and its earnings prospects.⁴ The court of appeals also held that the trial court was qualified to consider complex business valuations without the assistance of an appointed special master or expert.⁵

The trial court proceedings in *Lees Inns*, which spanned over eight years, involved an Indiana-based hotel chain.⁶ Following a merger pursuant to which the majority shareholder in the corporation that owned the hotel chain bought out the interest of the sole minority shareholder, the minority shareholder initiated appraisal proceedings under the DRS. The minority shareholder dissented to the merger and alleged that the majority shareholder had breached its fiduciary duties through a number of self-motivated transactions designed to benefit itself to the detriment of the value of the minority owner's stock.⁷

A. Business Valuation "Must" Consider Future Plans and Prospects

At trial, the parties offered three valuations for the trial court's consideration: (1)

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period, i.e., from October 1, 2009 through September 30, 2010.

2. 924 N.E.2d 143 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 821 (Ind. 2010).

3. IND. CODE § 23-1-44-1 through -20 (2011).

4. *Lees Inns*, 924 N.E.2d at 157.

5. *Id.* at 154.

6. *Id.* at 147.

7. *Id.* at 148-50.

the valuation used to value the payment to the minority shareholder at the time of the merger, based on financial information from the corporation as well as general market data, industry information, and other relevant information; (2) a valuation offered by the minority shareholder, utilizing a discounted cash flow approach, which incorporated a real estate appraisal that assumed the company's income would increase in the future and considered the company's future business plans and prospects (including a plan to expand by three hotels and to acquire another chain, thereby significantly cutting expenses); and (3) a valuation offered by the company, using historical results to determine the value of the owners' capital.⁸

The trial court adopted the minority shareholder's appraisal and entered judgment in the minority shareholder's favor in the amount of more than \$7.5 million (the difference between the amount paid to the minority shareholder at the time of the merger and the share value determined at trial, plus interest, expenses, and attorney fees).⁹ The majority shareholder appealed, arguing, among other things, that "the appraisal was based on speculation" in that it assumed future expansion and reduction in expenses through future acquisition of another hotel chain.¹⁰ The primary issue on appeal, then, was whether the trial court's determination of "fair value" under the DSR was supported by admissible evidence.

"Fair value" under the DSR "is defined as the value of the shares 'immediately before' the sale."¹¹ "'Fair value' contemplates that the shareholders will be fairly compensated, which may or may not be the same as the market's judgment regarding the stock's value."¹² Recognizing that "there is no case law in Indiana specifying how dissenting shareholders' shares are to be appraised,"¹³ the court in *Lees Inn* looked to other jurisdictions and found that "a number of jurisdictions have determined that *future elements susceptible of proof as of the merger date may be considered*."¹⁴ The court in *Lees Inn* quoted at length, and with approval, a Delaware Supreme Court decision, as follows:

The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value,

8. *See id.* at 150-52 (describing the three valuation methods in greater detail).

9. *Id.* at 152-53.

10. *Id.* at 155.

11. *Id.* (citing IND. CODE § 23-1-44-3 (2011); *Galligan v. Galligan*, 741 N.E.2d 1217, 1224 (Ind. 2001)).

12. *Id.* (citing *Trietsch v. Circle Design Grp., Inc.*, 868 N.E.2d 812, 820 n.4 (Ind. Ct. App. 2007)).

13. *Id.*

14. *Id.* (emphasis added) (citations omitted).

the appraiser and the courts *must* take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of the merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholder[']s interest, but *must* be considered by the agency fixing the value.¹⁵

The court in *Lees Inn* explained that “*all* elements of a corporation’s fair value must be considered on the valuation date, and elements of future value *that are not attributable to the merger itself* are properly considered in the calculation of fair value.”¹⁶ In affirming the trial court’s decision, the court of appeals concluded that “it was appropriate for the experts valuing [the company] . . . to consider the company’s future plans and prospects.”¹⁷

B. Trial Court Qualified to Evaluate Complex Business Valuations

The majority shareholder in *Lees Inns* also argued that the trial court erred in declining to “appoint a special master or expert to assist in addressing the valuation issues of the business.”¹⁸ Specifically, the majority shareholder argued that the “technical disagreements” among the valuations, which amounted to differences of “millions of dollars . . . in the bottom line valuation” were “outside the everyday knowledge of most judges.”¹⁹ The court of appeals found that the majority shareholder’s argument, “which presuppose[d] that a trial court does not have the ability to analyze expert testimony relating to the valuation of a business, [was] unavailing.”²⁰

II. DERIVATIVE SUITS AND “DISINTERESTED DIRECTOR” STANDARD

In *In re ITT Derivative Litigation*,²¹ the Indiana Supreme Court, on a certified question of state law from the United States District Court for the Southern District of New York, held that “the same ‘disinterestedness’ standard applies in

15. *Id.* at 156 (emphases added) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983)).

16. *Id.* (second emphasis added) (applying IND. CODE § 23-1-44-3, which provides that fair value means “the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable”).

17. *Id.* at 157. The court continued, “Therefore, the trial court properly considered the future prospects of [the company] including the nature of the enterprise, its business plans, and earnings prospects in arriving at the stock’s fair value.” *Id.*

18. *Id.* at 154.

19. *Id.*

20. *Id.*

21. 932 N.E.2d 664 (Ind. 2010).

both the demand futility context of Indiana Code [section] 23-1-32-2 and the investigatory committee procedure of Indiana Code [section] 23-1-32-4.”²² According to the court in *ITT*, “[i]n both instances, the shareholders must show that the directors face a substantial likelihood of personal liability on the claims to establish that a director is ‘not disinterested.’”²³

The underlying case was a derivative action brought by ITT shareholders alleging that ITT’s directors breached their fiduciary duties by failing to monitor and supervise the management of a unit that allegedly “exported military technology to various countries in violation of U.S. State Department restrictions on the export of technical data.”²⁴ One of the shareholders made no demand on ITT’s board to pursue the demand, arguing that “demand should be excused as futile.”²⁵ The federal district court held that the shareholder failed to show that a majority of the director-defendants “face[d] a substantial likelihood of liability for consciously failing to fulfill their fiduciary duties.”²⁶ The other shareholder, “on the other hand, did make a demand on ITT’s board to pursue the asserted claims.”²⁷ In response, the board appointed a special litigation committee (SLC) to decide if the corporation should pursue the claims.²⁸ The trial court, however, concluded that the “three independent, outside directors appointed to the [SLC] were not ‘disinterested’ for the purposes of Indiana Code § 23-1-32-4.”²⁹ The trial court reasoned that “unless it could be shown that the claim against the SLC was frivolous, the SLC’s work must be disregarded.”³⁰ In other words, the district court “found that the standard under Indiana Code § 23-1-32-4 was different, ‘more plaintiff-friendly than the much more onerous standard for showing a lack of disinterestedness in the demand futility context.’”³¹ On that basis, the defendant-directors’ motion to dismiss was denied.³²

Pursuant to Indiana Appellate Rule 64, the New York district judge certified the following question for decision by the Indiana Supreme Court:

What standard should be applied in determining whether a director is “disinterested” within the meaning of Indiana Code § 23-1-32-4(d), and more specifically, is it the same standard as is used in determining

22. *Id.* at 671.

23. *Id.*

24. *Id.* at 666.

25. *Id.*

26. *Id.* (citation omitted).

27. *Id.*

28. *Id.*

29. *Id.* at 667.

30. *Id.* The court based its conclusion on IND. CODE § 23-1-32-4(d)(1) (2011), “which provides that directors named in a derivative suit remain ‘disinterested’ if they are named in the action ‘only on the basis of a frivolous or insubstantial claim or for the sole purpose of seeking to disqualify the director . . . from serving on the committee.’” *Id.*

31. *In re ITT Derivative Litigation*, 932 N.E.2d at 667 (citation omitted).

32. *Id.*

whether a director is disinterested for purposes of excusing demand on the corporation's directors under Federal Rule of Civil Procedure 23.1 and *Rales v. Blasband*?³³

Regarding Indiana's standard on demand futility, the court in *ITT* explained that "Indiana law requires that potential derivative plaintiffs make a demand on the board of directors that it pursue the potential claims, unless the demand would be futile."³⁴ The court continued, "[t]o excuse demand, a court must determine whether the particularized factual allegations create a reasonable doubt that the board could have properly exercised disinterested business judgment in responding to a demand."³⁵ According to the court in *ITT*, a director is "interested" for purposes of a futility argument "if a derivative claim poses a significant risk of personal liability for the director."³⁶

Regarding the standard for determining whether a SLC director is disinterested, Indiana Code section 23-1-32-4(d)(1) provides that directors named in a derivative suit remain "disinterested" if they are named in the action "only on the basis of a frivolous or insubstantial claim or for the sole purpose of seeking to disqualify the director . . . from serving on the committee."³⁷ Because the district court found that the claims against the SLC directors were not "frivolous," it ruled that the SLC's determination was not "conclusive."³⁸

The Indiana Supreme Court in *ITT*, however, took a "different view."³⁹ The court in *ITT* concluded that the Indiana Business Corporation Law "requires the application of a consistent standard to determine whether directors are considered 'disinterested' in both the SLC and demand futility contexts."⁴⁰ The court recognized that

under subsection (d)(1) [applicable to SLC directors], directors or other persons named in a derivative suit remain "disinterested" if they were joined "only on the basis of a frivolous or insubstantial claim or for the sole purpose of seeking to disqualify the director or other person from serving on the committee."⁴¹

But the court explained that by applying a "frivolous" standard in the SLC context, the plaintiffs (and the district court) did "not give due consideration to

33. *Id.* at 665-66 (citation omitted).

34. *Id.* at 668 (citation omitted).

35. *Id.* (citation omitted).

36. *Id.* (citation omitted) (noting that "[b]eing deemed 'interested' requires more than a 'mere threat' of personal liability—there must be 'a substantial likelihood' of liability for the director." (citation omitted)).

37. *Id.* at 667 (quoting IND. CODE § 23-1-32-4(d)(1) (2011)).

38. *Id.* at 669.

39. *Id.*

40. *Id.*

41. *Id.* at 670.

[the term] ‘insubstantial.’”⁴²

Applying statutory interpretation principles and considering the policies underlying the Indiana Business Corporation Law, the Indiana Supreme Court concluded the same standard—that “*shareholders must show that the directors face a substantial likelihood of personal liability on the claims*”⁴³—applies in both the demand futility and the SLC contexts.⁴⁴

III. SECURITIES REGULATION AND LITIGATION

A. Note as a “Security” and the “Family Resemblance” Test

In *Reinhart v. Boeck*,⁴⁵ the Indiana Court of Appeals analyzed the “family resemblance” test for determining whether a “note” constitutes a “security” under the Indiana Uniform Securities Act (the “Act”), concluding that the notes at issue in the case were “securities” and that an individual who solicited the plaintiff’s investment was jointly and severally liable with the seller of the unregistered securities.⁴⁶

The plaintiff in *Reinhart* “invested” \$197,000 in a “phony” real estate business—Thomas Real Estate Group, Inc. (“TRG”).⁴⁷ The plaintiff’s investment in TRG was solicited by the entity’s owner, Thomas, as well as another individual, Reinhart, who was tasked with soliciting investments for the business.⁴⁸ The investment was effectuated through two loans, documented by promissory notes, in the amounts of \$125,000 and \$72,000.⁴⁹ The plaintiff was promised returns on his investments of 20% and 33%, respectively.⁵⁰ The plaintiff was repaid only \$60,000.⁵¹ The plaintiff sued Reinhart alleging, among other theories, derivative liability under the Act for Thomas’s unlawful and fraudulent sale of securities.⁵²

The threshold question in establishing liability under the Act was whether the two promissory notes were “securities.”⁵³ “The Act defines ‘security’ broadly and includes an ‘illustrative list’ of numerous items, but it begins its litany of examples by stating that ‘[s]ecurity means a note . . . [or] evidence of indebtedness.’”⁵⁴ The term “security” is “ordinarily used as a synonym for

42. *Id.*

43. *Id.* at 671 (emphasis added).

44. *Id.*

45. 918 N.E.2d 382 (Ind. Ct. App. 2009).

46. *Id.* at 392-96, 400-01.

47. *Id.* at 387-88.

48. *Id.* at 384-85.

49. *Id.* at 387-88.

50. *Id.* at 388.

51. *Id.*

52. *Id.* at 389.

53. *Id.* at 392.

54. *Id.* (quoting IND. CODE § 23-2-1-1(k) (2011)).

‘investment.’”⁵⁵ “The ‘investment of money with the expectation of profit through the efforts of other persons[] is within the Act’s definition of security.’”⁵⁶ In reaching its conclusion that the notes were “securities,” the court in *Reinhart* analyzed its earlier decision in *Manns v. Skolnik*,⁵⁷ in which the court of appeals concluded that a “compensation agreement” constituted a “note” and was therefore a “security” within the meaning of the Act.⁵⁸ The court in *Reinhart* outlined the “family resemblance” test applied by the court in *Manns* as follows:

The leading federal test in this area is the “family resemblance” test enumerated by *Reves v. Ernst & Young*. The “family resemblance” test begins with the presumption that a note constitutes a security. This presumption may be rebutted only by a showing that the note bears a “strong resemblance” to one of seven enumerated instruments deemed not to be “securities” within the meaning of the statute. The seven categories include: (1) a note delivered in consumer financing, (2) a note secured by a mortgage on a home, (3) a short-term note secured by a lien on a small business or some of its assets, (4) a note evidencing a “character” loan to a bank customer, (5) a short-term note secured by an assignment of accounts receivable, (6) a note which simply formalizes an open-account debt incurred in the ordinary course of business, or (7) a note evidencing loans by commercial banks for current operations.

The *Reves* court set forth the following four factors to use in determining whether the instrument bears a “strong resemblance” to any of these seven categories: (1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction, (2) the “plan of distribution” of the instrument, (3) the reasonable expectations of the investing public, and (4) the existence of another regulatory scheme significantly reducing the risk of the instrument.⁵⁹

The court in *Reinhart* agreed with the trial court in finding that the notes in question were “securities.”⁶⁰ The court explained that “the notes here were evidence of TRG’s obligation to pay [the plaintiff] in the future in exchange for [the plaintiff’s] . . . wire transfers.”⁶¹ Therefore, under *Manns*, “they are presumed to be securities.”⁶²

Reinhart attempted to rebut the presumption that the notes were securities by arguing that they bore “a ‘strong resemblance to an instrument deemed not to be

55. *Id.* (quoting *Holloway v. Thompson*, 42 N.E.2d 421, 424 (Ind. Ct. App. 1942)).

56. *Id.* (quoting *SEC v. Universal Serv. Ass’n*, 106 F.2d 232, 237 (7th Cir. 1939)).

57. 666 N.E.2d 1236 (Ind. Ct. App. 1996).

58. *Id.* at 1245-46.

59. *Reinhart*, 918 N.E.2d at 393 (internal citations omitted) (quoting *Manns*, 666 N.E.2d at 1243-44).

60. *Id.* at 394.

61. *Id.*

62. *Id.*

a security.”⁶³ However, Reinhart failed to identify which of the seven “nonsecurities” the notes purportedly resembled.⁶⁴ The court, therefore, found that he “failed to support his argument with cogent reasoning and waived it.”⁶⁵

Instead, Reinhart argued that the notes were actually loans and were therefore contracts.⁶⁶ The court disagreed, explaining that “notes are not contracts; they are simply evidence of indebtedness.”⁶⁷ The court reasoned that the notes reveal “no consideration, a requirement for a valid contract.”⁶⁸ Furthermore, “[t]o constitute consideration, there must be a benefit accruing to the promisor or a detriment to the promisee.”⁶⁹ In any event, the court explained, even if the notes were evidence of loans and not indebtedness, that alone would not rebut the presumption that the notes were securities.⁷⁰ “‘Loans’ generally are not one of the seven nonsecurities identified in *Reves*.”⁷¹

The court in *Reinhart* also concluded that a “sale” occurred within the meaning of the Act⁷² and that Reinhart was Thomas’ “partner by estoppel,” supporting a claim for joint and several liability under the Act.⁷³ The court therefore affirmed the trial court’s entry of summary judgment in favor of the plaintiff on his claim that Reinhart was “jointly and severally liable under the Act for Thomas’[s] unlawful sale of securities.”⁷⁴

B. Appointment of Receiver over Assets of Wife Who “Materially Aids” Securities Violation

In *Schrenker v. State*,⁷⁵ the Indiana Court of Appeals held as a matter of first impression that evidence was sufficient to show that a registered investment advisor’s wife “aided” in violations of the Indiana Uniform Securities Act (the “Act”), as required to support the appointment of a receiver over her assets.⁷⁶ Marcus and Michelle Schrenker were principals in various investment firms.⁷⁷

63. *Id.* at 395 (citation omitted).

64. *Id.*

65. *Id.* (“Having failed to identify a nonsecurity that the notes might resemble, we do not consider what the motivations of the buyer and seller of the notes may have been.”).

66. *Id.* at 396.

67. *Id.*

68. *Id.*

69. *Id.* (quoting *Jackson v. Luellen Farms, Inc.*, 877 N.E.2d 848, 857 (Ind. Ct. App. 2007)).

70. *Id.*

71. *Id.* The court in *Reinhart* also concluded that a “sale” occurred within the meaning of the Act, and that Reinhart was Thomas’s “partner by estoppel.” *Id.* at 390, 397-400.

72. *Id.* at 397.

73. *Id.* at 390, 397-400.

74. *Id.* at 401.

75. 919 N.E.2d 1188 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 794 (Ind. 2010).

76. *Id.* at 1196.

77. *Id.* at 1190.

Both had been the subjects of an action by the Indiana Securities Commissioner.⁷⁸ Marcus fled the state “with an unknown amount of investor money and/or assets purchased with investor money.”⁷⁹ In the commissioner’s action against the Schrenkers and their companies, the trial court appointed a receiver over Michelle’s assets.⁸⁰ Michelle appealed.

The court of appeals in *Schrenker* recognized that the appointment of a receiver is an “extraordinary and drastic remedy to be exercised with great caution.”⁸¹ Nevertheless, the court affirmed the trial court’s finding that Michelle “materially aided” Marcus in violating the Act through her access to (and withdrawal of at least \$66,500 of investors’ funds from) one of the company bank accounts—a company of which she was the chief financial officer.⁸² Michelle was a principal in the investment firms; the offices were leased to both Marcus and Michelle; Michelle kept the books and was the chief financial officer for the firms; and she was paid \$11,600 per month.⁸³

The court in *Schrenker* recognized that “[t]he conduct necessary to ‘materially aid’ a securities law violation appears to be a question of first impression in Indiana.”⁸⁴ After discussing the Indiana Supreme Court’s decision in *Kirchoff v. Selby*,⁸⁵ the court in *Schrenker* adopted the standard used in *Foley v. Allard*, “which requires a substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff.”⁸⁶ The court in *Schrenker* held as follows:

[I]t is apparent there was a substantial causal connection between Michelle’s culpable conduct, in the form of withdrawing investor funds

78. *Id.*

79. *Id.* (citation omitted).

80. *Id.* The trial court’s appointment of a receiver was based on that court’s conclusions that Michelle “materially aided” Marcus and his corporations in violating the Act and that she was “‘jointly and severally liable with and to the same extent as’ Marcus and his companies,” due to her position as Chief Financial Officer of the companies. *Id.* at 1192 (citations omitted). The court of appeals in *Schrenker* found that the trial court erred in concluding that Michelle was “‘jointly and severally liable with and to the same extent as’ Marcus” because the statute relied upon by the trial court to support that finding—IND. CODE § 23-19-5-9(d) (2011)—“applie[d] only to private rights of action by a purchaser who is harmed by a violation of the Securities Act.” *Id.* at 1192 n.3.

81. *Id.* at 1191 (quoting *Crippin Printing Corp. v. Abel*, 441 N.E.2d 1002, 1005 (Ind. Ct. App. 1982)). The court noted that “[t]he power to appoint a receiver should be exercised only when it is clear that no other full and adequate remedy exists whereby justice between the parties may be affected and a wrong prevented, and only in a clear case of extreme necessity. Accordingly, the standard by which the appointment can be justified is exceptionally stringent.” *Id.* at 1192 (citation omitted).

82. *Id.* at 1193-96.

83. *Id.* at 1190, 1193.

84. *Id.* at 1195.

85. 703 N.E.2d 644, 651 (Ind. 1998).

86. *Schrenker*, 919 N.E.2d at 1195.

from the [company] account, and the harm the investors suffered in the form of lost money. Therefore, the court did not err in concluding Michelle materially aided Marcus in violating the Securities Act. The appointment of a receiver was not an abuse of discretion, and we affirm.⁸⁷

IV. PIERCING THE CORPORATE VEIL

In *Longhi v. Mazzoni*,⁸⁸ the Indiana Court of Appeals analyzed Indiana's requirements for piercing the corporate veil of a limited liability company to reach the assets of a member and concluded that sufficient evidence existed to pierce the corporate veil on grounds of both inadequate capitalization and fraud.⁸⁹

The plaintiffs in *Mazzoni* paid a \$50,000 earnest money deposit for the construction of a home.⁹⁰ The defendant, Longhi, was a family friend of the plaintiffs and an "architect whose role in the [p]roject was to be the representative on-site, assist with sales, meet with customers and help them with the selection process of their finishes, and serve as a liaison between customers and the construction superintendent for the [p]roject."⁹¹ Construction was never commenced on the home, and despite repeated demands, the plaintiffs were never repaid their \$50,000 deposit.⁹² The plaintiffs filed suit against the construction company (a limited liability company) and Longhi, "alleging that Longhi was personally liable for the receipt, escrow, and disposition of the . . . deposit."⁹³ The trial court found Longhi personally liable under veil-piercing and quantum meruit theory.⁹⁴ Longhi appealed.

First, the court of appeals addressed the corporate veil-piercing issue, noting that "[c]ourts have pierced the corporate veil of limited liability companies."⁹⁵ Further, "courts have pierced a corporate veil to find an individual liable even where the individual was not a shareholder/member of a corporation/company."⁹⁶

87. *Id.* at 1196.

88. 914 N.E.2d 834 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).

89. *Id.* at 846.

90. *Id.* at 836.

91. *Id.*

92. *Id.* at 837-38.

93. *Id.* at 838.

94. *Id.*

95. *Id.* at 839 n.3 (citing *Four Seasons Mfg., Inc. v. 1001 Coliseum, LLC*, 870 N.E.2d 494, 504-06 (Ind. Ct. App. 2007)).

96. *Id.* (citing *Fairfield Dev., Inc. v. Georgetown Woods Sr. Apartments Ltd. P'ship*, 768 N.E.2d 463, 473 (Ind. Ct. App. 2002) (imposing liability on an individual who was not a shareholder of a corporation because it promoted injustice that the individual was the principal figure in the corporation's dealings with the appellee and was intimately involved in the corporation's project); *Hart v. Steel Prods., Inc.*, 666 N.E.2d 1270, 1276-77 (Ind. Ct. App. 1996) (imposing liability on the agent of a corporation because the agent's conduct would work an injustice)).

The court then enumerated the factors for consideration in determining whether the corporate veil should be disregarded:

(1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.⁹⁷

“Inadequate capitalization,” for purposes of veil-piercing analysis, means “capitalization very small in relation to the nature of the business of the corporation and the risks attendant to such businesses.”⁹⁸ Further, “[t]he adequacy of capital is measured by evaluating the amount of capital the company had at the time of its formation, unless the company at some point substantially expands the size or nature of its business with an attendant increase in business hazards.”⁹⁹

The court in *Longhi* found that sufficient evidence was presented at trial to support the trial court’s finding that “based on bank requirements and financial projections the developers needed \$400,000” and that the company “did not have the amount of capital needed to finance the [p]roject based upon its lender’s capital requirements and the in-depth market analysis that it had performed at the time of [the company’s] formation or the [p]roject’s initiation.”¹⁰⁰ The court affirmed the trial court’s conclusion that the company and the project were undercapitalized, supporting the decision to pierce the corporate veil to reach Longhi personally.¹⁰¹

The court also found that the evidence supported the trial court’s decision to pierce the corporate veil based on Longhi’s perpetration of fraud.¹⁰² Specifically, Longhi testified that the plaintiffs’ \$50,000 was an “investment in the [p]roject.”¹⁰³ The plaintiffs testified that Longhi never told them that their money was an investment, but rather that the \$50,000 was a down payment on the house.¹⁰⁴ The purchase agreement also provided that the payment constituted an earnest money deposit.¹⁰⁵ These and other findings by the trial court supported the conclusion regarding Longhi’s use of the company to promote fraud.¹⁰⁶

97. *Id.* at 839 (quoting *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994)).

98. *Id.* at 840 (citing *Cmty. Care Centers, Inc. v. Hamilton*, 774 N.E.2d 559, 565 (Ind. Ct. App. 2002)).

99. *Id.* (citation omitted).

100. *Id.* at 841.

101. *Id.*

102. *Id.* at 843-44.

103. *Id.* at 842.

104. *Id.*

105. *Id.*

106. *See id.* at 843-44. The court in *Longhi* also affirmed the trial court’s decision to award

V. NON-COMPETITION COVENANTS

In *Zimmer, Inc. v. Davis*,¹⁰⁷ the Indiana Court of Appeals affirmed the trial court's denial of a preliminary injunction based on a "balance of the harms" analysis.¹⁰⁸ Zimmer sought a preliminary injunction against its former employee, Davis, "to enforce the confidentiality, non-solicitation, and non-competition provisions of their [e]mployment [a]greement."¹⁰⁹ The trial court denied the request, and Zimmer appealed, arguing that the trial court erred in finding that "the balance of harm tipped in favor of the denial of injunctive relief."¹¹⁰

After reciting the trial court's findings of fact and conclusions relevant to the "balance of the harms" element, the court in *Zimmer* discussed its earlier decisions in *Gleeson*¹¹¹ and *McGlothen*,¹¹² on the issue.¹¹³ The court explained that in *Gleeson*, "the employee freely entered into the non-competition agreement, voluntarily terminated her employment, sought a new job, and then attempted to hide her competitive activities from the employer."¹¹⁴ The court in *Gleeson* found that the employer's loss of customer goodwill outweighed the harm to the former employee, a "mother of three children, who relied upon a paycheck from her new employer to support herself and her family, and to satisfy financial obligations."¹¹⁵ In *McGlothen*, according to the court in *Zimmer*, the employee "voluntarily left his employment, retained materials from his employment constituting confidential information, actively solicited his former

treble damages in the amount of \$150,000 plus attorney fees under Indiana Code § 34-24-3-1. *Id.* at 846 (citing *Heartland Resources, Inc. v. Bedel*, 903 N.E.2d 1004, 1008 (Ind. Ct. App. 2009); *Harlan Bakeries, Inc. v. Muncy*, 835 N.E.2d 1018, 1037 (Ind. Ct. App. 2005); *Whitaker v. Brunner*, 814 N.E.2d 288, 298 (Ind. Ct. App. 2004); *Johnson v. Naugle*, 557 N.E.2d 1339, 1348 (Ind. Ct. App. 1990)).

107. 922 N.E.2d 68 (Ind. Ct. App. 2010).

108. *Id.* at 74.

109. *Id.* at 70.

110. *Id.* at 69, 71-72. To obtain a preliminary injunction, the moving party has the burden of proving that

- (1) the moving party's remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action;
- (2) the moving party has at least a reasonable likelihood of success on the merits at trial by establishing a prima facie case;
- (3) the threatened injury to the moving party outweighs the potential harm to the non-moving party resulting from the granting of the injunction; and
- (4) the public interest would not be disserved.

Id. at 71 (citing *PrimeCare Home Health v. Angels of Mercy Home Health Care, L.L.C.*, 824 N.E.2d 376, 380 (Ind. Ct. App. 2005)).

111. *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164 (Ind. Ct. App. 2008).

112. *McGlothen v. Heritage Envtl. Servs., LLC*, 705 N.E.2d 1069 (Ind. Ct. App. 1999).

113. *Zimmer*, 922 N.E.2d at 73-74.

114. *Id.* at 73 (citing *Gleeson*, 883 N.E.2d at 178).

115. *Id.* at 73-74 (citing *Gleeson*, 883 N.E.2d at 178-79).

employer's customers . . . and attempted to convince a former co-worker to leave and join the employee at his new place of employ."¹¹⁶ The court in *McGlothen* found that the employer's risk of "severe downsizing and layoffs" outweighed the potential harm to the employee, despite the employee's "age (54), his longevity as an employee in the industry, interference with his ability to earn a livelihood, and [the employee's argument] that the employer was not harmed because the employee had been unsuccessful in his attempts to solicit his employer's customers."¹¹⁷

In affirming the trial court's finding that the balance of harms weighed against entry of a preliminary injunction, the court of appeals explained its reasoning as follows:

Davis's employment was terminated by Zimmer, and Davis did not take any documents or other media containing Zimmer's confidential information with him after his employment was terminated. Davis testified that he has not disclosed any of Zimmer's confidential information in breach of the [e]mployment [a]greement and did not intend to breach the [e]mployment [a]greement.

Furthermore, there was no evidence that Zimmer lost any sales, lost any customers for its products, or lost any consulting surgeons as a result of Davis's employment with [his new employer]. No evidence was presented that anyone at [the new employer] had received confidential information about Zimmer from Davis.¹¹⁸

Regarding potential harm to Davis, the court recognized that "Davis testified that he . . . needed to work to earn a living" and that "certain of Davis's personal expenses increased, including health and life insurance premiums and automobile expenses previously paid for by Zimmer."¹¹⁹ The court in *Zimmer* concluded that the evidence and the reasonable inferences drawn therefrom did not "lead unerringly to a conclusion opposite that reached by the trial court."¹²⁰

VI. SHAREHOLDER AGREEMENTS AND TRANSFER OF SHARES

In *Gatlin Plumbing & Heating, Inc. v. Estate of Yeager*,¹²¹ the court held that a corporation could not "buy back" shares of a deceased shareholder's stock where the corporation failed to exercise its purchase option within one of two "alternative" time periods dictated by the parties' shareholder agreement.¹²² Specifically, the shareholder agreement provided the following:

116. *Id.* at 74.

117. *Id.* (citing *McGlothen*, 705 N.E.2d at 1075).

118. *Id.*

119. *Id.*

120. *Id.*

121. 921 N.E.2d 18 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 797 (Ind. 2010).

122. *Id.* at 23-24.

In the event of the death of any person . . . who is holding shares of stock of this CORPORATION . . . the CORPORATION shall have the option, within sixty (60) days after such decease, or within thirty (30) days after the appointment and qualification of an executor or administrator of the estate of such decedent, to purchase any or all of the shares of stock of such decedent¹²³

One of Gatlin's shareholders died, but no executor or administrator was appointed due to the "minimal value" of the estate.¹²⁴ The decedent-shareholder's heirs petitioned for a transfer of the decedent's shares in Gatlin, and the court granted the petition.¹²⁵ Thereafter, Gatlin filed an objection to the order, arguing that it had a right to purchase the stock until thirty days after appointment of an executor or administrator, which had not occurred.¹²⁶ Gatlin argued that therefore, the thirty-day period should not begin to run until the trial court's order transferring the stock to the heirs.¹²⁷ The trial court disagreed, finding that having failed to exercise its right to purchase the shares within sixty days after death, Gatlin, as an "interested party," could have opened an estate and petitioned for the transfer of the stock within the thirty-day period dictated by the shareholder agreement.¹²⁸

Regarding the shareholder agreement, the court declared, "Provisions of a shareholder agreement that restrict the transfer of stock 'are treated as contracts either between shareholders or between shareholders and the corporation.'"¹²⁹ Moreover, "[r]estrictions on transfer are to be read, like any other contract, to further the manifest intention of the parties."¹³⁰ The court also noted that "[b]ecause they are restrictions on alienation and therefore disfavored, the terms in the restrictions are not to be expanded beyond their plain and ordinary meaning."¹³¹

The court in *Gatlin*, applying the dictionary definitions of the terms "and" and "or," concluded that "the [s]hareholders' [a]greement provided Gatlin with two alternatives."¹³² The court of appeals rejected the company's argument, explaining that Gatlin's argument would have the effect of replacing the word "or" with "and," making the two words "interchangeable."¹³³

123. *Id.* at 21.

124. *Id.*

125. *Id.*

126. *Id.* at 22.

127. *Id.*

128. *Id.*

129. *Id.* at 23 (quoting *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440, 445 (Ind. 2003)).

130. *Id.* (quoting *F.B.I. Farms*, 798 N.E.2d at 445-46).

131. *Id.* (quoting *F.B.I. Farms*, 798 N.E.2d at 446).

132. *Id.* at 24.

133. *Id.*

VII. BUSINESS TORTS

A. Defamation

In *Melton v. Ousley*,¹³⁴ the court of appeals held that statements calling a professional golfer a “cheater” were truthful and therefore not defamatory.¹³⁵ Resolution of the case required some explanation of the PGA of America’s (PGA’s) internal rules and regulations. The PGA maintains a detailed classification system for professional golfers.¹³⁶ The Indiana section of the PGA (“Indiana Section”) runs its own golf tournaments, and participation in many of its tournaments is limited by PGA classification.¹³⁷

After spending some time working in Illinois, plaintiff Melton moved back to Indiana and applied for classification as an “A-6” teaching professional in the Indiana Section.¹³⁸ Defendant Ousley was another professional golfer and Indiana Section member acquainted with Melton.¹³⁹ “Ousley told some other Indiana Section members that Melton was a ‘cheat,’ a ‘cheater,’ and was ‘cheating the system,’” apparently because Melton was playing in Indiana Section tournaments for which he was not eligible.¹⁴⁰ Ousley contacted the executive director of the Indiana Section and later put his concerns in writing.¹⁴¹ In response, the Indiana Section investigated Melton’s employment status; after several attempts, unsuccessful appeals to the national PGA, and more than two years, Melton finally established eligibility as an A-6 teaching professional.¹⁴²

At the same, in response to a cease and desist letter, Ousley’s former counsel wrote a letter to Melton’s counsel.¹⁴³ Among other gems, Ousley’s former counsel wrote, “once a cheater, always a cheater,” and quoted Bob Feller as saying, “You figure they cheat at the ballpark, they’ll cheat on the golf course, they’ll cheat in business, and anything else in life.”¹⁴⁴ Melton filed a complaint against Ousley, alleging defamation and tortious interference with an employment relationship.¹⁴⁵

The court of appeals considered whether summary judgment was appropriate for Ousley on the defamation count.¹⁴⁶ The court evaluated whether Ousley’s

134. 925 N.E.2d 430 (Ind. Ct. App. 2010).

135. *Id.* at 437. The court also considered whether the statements constituted tortious interference with contract. *See infra* notes 172-79 and accompanying text.

136. *Melton*, 925 N.E.2d at 432.

137. *Id.*

138. *Id.* at 432-33.

139. *Id.* at 433.

140. *Id.*

141. *Id.*

142. *Id.* at 433-34.

143. *Id.* at 434-35.

144. *Id.* at 435.

145. *Id.*; *see also infra* notes 172-79 and accompanying text.

146. *Melton*, 925 N.E.2d at 437-40.

statements were true because “truth is a complete defense in civil actions for defamation” so fundamental as to be included in the Indiana Constitution.¹⁴⁷ Ousley’s statements to other golf professionals that Melton was a “cheat” were truthful because the designated evidence showed that the statements referred to Melton’s PGA classification, and Melton “indisputably was not eligible” to be classified as a teaching professional.¹⁴⁸

Melton attempted to argue that Ousley’s statements were defamatory based on “the innuendo, the . . . implications and insinuations” therein, quoting language from *Cochran v. Indianapolis Newspapers*.¹⁴⁹ “But whether a statement in its entirety is susceptible to a defamatory meaning is a *question of law* for a court to decide.”¹⁵⁰ The court held that under their “plain and natural meaning,” Ousley’s comments were not defamatory because they were made in the context of Melton’s PGA classification.¹⁵¹

With respect to the statements in Ousley’s former counsel’s letter, the court held that these statements were not published and therefore could not form the basis of a defamation claim.¹⁵² However, the court went on to conclude that the statements were true, viewed in the context of the entire letter: “Melton is a professional golfer and, therefore, golf is his business. To the extent that the letter implies that he cheats in business, we conclude that such is true.”¹⁵³ The court did “observe that the letter is harsh, if not unprofessional.”¹⁵⁴

B. *Tortious Interference with Contract*

In *Bragg v. City of Muncie*,¹⁵⁵ the court of appeals held that a city’s legitimate business concerns about whether a municipal agreement with a developer satisfied statutory requirements provided the necessary justification to avoid a tortious interference claim.¹⁵⁶ *Bragg* revolved around the Muncie Housing Authority’s (MHA’s) efforts to demolish and rebuild two housing units.¹⁵⁷ The executive director of MHA entered into an agreement with Bragg to purchase Bragg’s real estate and hire Bragg as the developer for the project.¹⁵⁸ The executive director did not tell the mayor about the contract before it was entered,

147. *Id.* at 437 (citing IND. CONST. art. I, § 10).

148. *Id.* at 437-38.

149. *Id.* at 438 (quoting *Cochran v. Indianapolis Newspapers*, 372 N.E.2d 1211, 1217 (Ind. Ct. App. 1978)).

150. *Id.* at 439 (emphasis added) (citing *Journal-Gazette Co. v. Bandido’s, Inc.*, 712 N.E.2d 446, 457 (Ind. 1999)).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 440 n.8.

155. 930 N.E.2d 1144 (Ind. Ct. App. 2010).

156. *Id.* at 1148.

157. *Id.* at 1145-46.

158. *Id.* at 1146.

and no records existed indicating that the MHA board ever authorized the executive director to enter the contract.¹⁵⁹ Based on the concerns of the mayor and MHA board members, the MHA board voted to nullify the contract.¹⁶⁰ Bragg sued the MHA and the city, alleging that the city and the mayor tortiously interfered with the contract by inducing the MHA board to repudiate the contract.¹⁶¹ The trial court granted summary judgment for the city.¹⁶²

The court of appeals enumerated the elements of an action for tortious interference with a contract as follows: “(1) the existence of a valid and enforceable contract; (2) the defendant’s knowledge of the existence of the contract; (3) the defendant’s intentional inducement of the breach of contract; (4) *the absence of justification*; and (5) damages from the defendant’s wrongful inducement of the breach.”¹⁶³ Resolution of the case hinged on whether the city had provided adequate justification for inducing MHA’s breach.¹⁶⁴ The court declared that “[i]n short, a legitimate reason for the defendant’s actions provides the necessary justification to avoid liability.”¹⁶⁵ No justification exists, however, if “the interferer acted intentionally, without a legitimate business purpose.”¹⁶⁶

The designated evidence showed that the city and the MHA board were concerned that the executive director had exceeded his authority in entering the contract.¹⁶⁷ Pursuant to Indiana Code section 36-7-18-13, a majority vote of the commissioners of a housing authority is required to authorize the authority’s actions, and it was clear no vote on the contract had been taken.¹⁶⁸ Because the city’s actions were justified, the city was properly granted summary judgment on Bragg’s claim for tortious interference.¹⁶⁹

In *Melton v. Ousley*,¹⁷⁰ the court of appeals held that statements calling a professional golfer a “cheater” were justified and therefore not a basis for a claim of tortious interference.¹⁷¹ Initially, the court considered whether plaintiff Melton asserted a claim for tortious interference with a business relationship or a

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1146-47.

163. *Id.* at 1147 (emphasis added) (citing *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 118 (Ind. Ct. App. 2008)).

164. *See id.* at 1147-48.

165. *Id.* at 1148 (citing *Morgan Asset Holding Corp. v. CoBank ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000)).

166. *Id.* (quoting *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005)).

167. *Id.*

168. *Id.*

169. *Id.*

170. 925 N.E.2d 430 (Ind. Ct. App. 2010). For a discussion of the facts of the case, see *supra* notes 140-45 and accompanying text.

171. *Melton*, 925 N.E.2d at 442.

contractual relationship.¹⁷² The elements for both claims are the same, except (1) interference with a business relationship “does not require a showing of the existence of a valid contract,” and (2) interference with a contractual relationship “does not require a showing of illegality.”¹⁷³ The court determined that Melton’s claim was for tortious interference with contract and disregarded arguments relating to the other tort.¹⁷⁴

Applying the elements of the claim, the court evaluated whether defendant Ousley was justified in reporting his concerns about Melton’s PGA classification to the Indiana Section.¹⁷⁵ The court held that the Indiana Section’s procedure for reporting concerns about proper classification provided the required justification.¹⁷⁶ Specifically, the court held that “[w]ith such a procedure in place, Melton cannot reasonably argue that one member of the Section may not allege to the organization such a violation by another member.”¹⁷⁷ It is notable that unlike defamation, the court’s discussion of tortious interference did not evaluate whether the statements to the Indiana Section were true, but only if they were “justified”—that is, made pursuant to a “legitimate business purpose.”¹⁷⁸ The court’s holding should be of interest to other professions that require members to report violations by fellow professionals.¹⁷⁹

VIII. CONTRACT PERFORMANCE AND BREACH

A. Forfeiture

In *Ream v. Yankee Park Homeowner’s Ass’n*,¹⁸⁰ the court of appeals determined that forfeiture of a long-term lease was the appropriate remedy for default where the default was material and the parties agreed to forfeiture in the lease.¹⁸¹ The Reams leased two lots in Yankee Park, a seasonal lakefront trailer park, pursuant to ninety-nine year leases.¹⁸² Because they were lessees, the Reams were also voting members of the nonprofit cooperative that owned Yankee Park.¹⁸³ Upon default, the leases expressly provided for termination of the lease and forfeiture of any membership rights and payments made to Yankee Park.¹⁸⁴

172. *Id.* at 440 n.9.

173. *Id.* (citing *Furno v. Citizens Ins. Co.*, 590 N.E.2d 1137, 1140 (Ind. Ct. App. 1992)).

174. *Id.*

175. *Id.* at 440-42.

176. *Id.* at 441.

177. *Id.*

178. *See id.* at 441-42.

179. *See, e.g.*, IND. PROF’L CONDUCT R. 8.3.

180. 915 N.E.2d 536 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 789 (Ind. 2010).

181. *Id.* at 545.

182. *Id.* at 538.

183. *Id.*

184. *Id.* at 539 (“Upon any such termination of this lease, all membership rights of Lessee in Lessor shall terminate and all payments made by Lessee to Lessor for a Membership Certificate

The Reams moved their trailer several times without providing the notice required in the lease, leading to a dispute with Yankee Park.¹⁸⁵ The Reams initially filed suit against Yankee Park, and Yankee Park counterclaimed, seeking to evict the Reams from their lots.¹⁸⁶ After a bench trial, the trial court ruled for Yankee Park, evicting the Reams and denying all of their requested relief.¹⁸⁷

The Reams argued that there was no basis for involuntary forfeiture because Yankee Park had not shown an “ongoing and material violation” of the lease.¹⁸⁸ The court acknowledged that “forfeitures are rarely, if ever, favored in law”¹⁸⁹ However, where “the contracting parties agreed that a forfeiture should take place upon the failure of one of the parties to the contract to comply with a *material part* thereof, courts will decree a forfeiture.”¹⁹⁰ Because the language of the lease expressly called for forfeiture on default, the court analyzed the sufficiency of the evidence to establish material breach.¹⁹¹

The court concluded without much difficulty that the Reams were in default because they failed to give the required notice before moving their trailer on several occasions and because the trailer was placed in a location that interfered with the access road to the lake and the service road to the other lots in the park.¹⁹² The analysis then turned to whether the Reams’ default was material.¹⁹³

Forfeiture of a lease for breach, as opposed to the award of compensatory damages, is warranted when “the breach is a material one, going to the heart of the contract.”¹⁹⁴ Whether a breach is material is an issue of fact, and the court should consider five factors:

- (A) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (B) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (C) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (D) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (E) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair

shall be retained by Lessor.” (citation omitted)).

185. *Id.* at 539-40.

186. *Id.* at 540.

187. *Id.*

188. *Id.* at 541.

189. *Id.*

190. *Id.* (emphasis added) (citing *Goff v. Graham*, 306 N.E.2d 758, 765 (Ind. App. 1974)).

191. *Id.*

192. *Id.* at 541-42.

193. *Id.* at 542-45.

194. *Id.* at 542-43 (citing *Goff*, 306 N.E.2d at 765).

dealing.¹⁹⁵

The court concluded that the evidence showed that the members of Yankee Park, the other lessees in the park, suffered by having their property encroached upon, their views of the lake disrupted, and access to their lots limited or blocked.¹⁹⁶ These losses, especially access by emergency vehicles on the service road, were unlikely to be adequately compensated monetarily.¹⁹⁷ The court discounted the magnitude of the Reams' loss, because "they specifically agreed to this forfeiture in the event that their leases for Lots 50 and 68 were terminated," equating the provision to a liquidated damages provision.¹⁹⁸ Considering Yankee Park's likely expenses incurred in enforcing the leases and reselling them against the amount paid for the leases, the court determined that forfeiture was not "penal in nature."¹⁹⁹ On the other factors, there was ample evidence of the Reams' bad behavior to show no likelihood that the default would be cured and no good faith effort to comport with the standards of fair dealing.²⁰⁰

Judge Vaidik dissented.²⁰¹ Judge Vaidik thought that the damages caused by the Reams' defaults—"five months of obstructed road access and lake views" and "inconvenience" from not receiving appropriate notice—were capable of measurement and "grossly disproportionate" to "the loss of two prepaid century-long leases."²⁰²

B. Statute of Frauds

In *Grabill Cabinet Co. v. Sullivan*,²⁰³ the court of appeals applied to guaranty contracts the long-established rule that the Statute of Frauds requires only a writing signed by the party to be charged with the contract.²⁰⁴ Sullivan signed a personal guaranty for the debts of her company to Grabill.²⁰⁵ The guaranty was not signed by any person on behalf of Grabill.²⁰⁶ Later, she sold her interest and

195. *Id.* at 543 (quoting *Collins v. McKinney*, 871 N.E.2d 363, 375 (Ind. Ct. App. 2007)).

196. *Id.*

197. *Id.* at 543-44.

198. *Id.* at 544. The court's logic appears somewhat circular on this point. The court was analyzing whether an *agreement* worked a forfeiture and determined that no forfeiture existed because the parties *agreed* to the remedy.

199. *Id.*

200. *Id.* at 544-45 (affirming order of forfeiture). The court also affirmed judgment against the Reams on their claims for equitable relief and damages. *Id.* at 545-47. In particular, the Reams were not entitled to damages for any breach by Yankee Park because they committed the first material breach. *Id.* at 547 (citing *Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc.*, 824 N.E.2d 388, 403 (Ind. Ct. App. 2005)).

201. *Id.* at 547 (Vaidik, J., dissenting).

202. *Id.* at 548.

203. 919 N.E.2d 1162 (Ind. Ct. App. 2010).

204. *Id.* at 1168.

205. *Id.* at 1164.

206. *Id.*

resigned from her company, but she did not send notice of termination of the personal guaranty to Grabill as allowed for in the guaranty.²⁰⁷ Years later, the company became indebted to Grabill, and Grabill filed suit against Sullivan to collect on her guaranty.²⁰⁸ The trial court granted summary judgment for Sullivan on grounds that the guaranty was defective because Grabill never signed it.²⁰⁹

Without too much difficulty, the court of appeals held that the guaranty was valid and need not have been signed by the obligee.²¹⁰ The Indiana Statute of Frauds states that a person may not bring “[a]n action charging any person, upon any special promise, to answer for the debt, default, or miscarriage of another” unless the contract “on which the action is based, or a memorandum or note describing the . . . contract . . . is in writing and signed by *the party against whom the action is brought*.”²¹¹ The court stated, “Indeed, this seems to be one of those propositions so well-settled in Indiana law that it is difficult to find recent cases restating it.”²¹² Because the action was brought *by* Grabill *against* Sullivan, there was no need for Grabill to sign the guaranty.²¹³

The court of appeals also distinguished and arguably limited the holdings of three prior court of appeals decisions which suggested that guaranty contracts must be “executed” by all parties to the guaranty.²¹⁴ The court first noted that “execution” of a written guaranty is not necessarily the same thing as “signing” the guaranty.²¹⁵ Additionally, the court regarded the cases’ discussion of execution of guaranty contracts as “dicta”; the cited court of appeals cases never addressed the signature requirement for a guaranty.²¹⁶ Lastly, the court felt “absolutely bound” because “[t]he Indiana Supreme Court has never wavered from the statutorily-mandated proposition that a guaranty need only be in writing and signed by the guarantor in order to be valid,” citing cases back to 1876.²¹⁷

In *Hrezo v. City of Lawrenceburg*,²¹⁸ the court of appeals held that two resolutions passed by the city with regards to a land development project were not sufficiently detailed to satisfy the Statute of Frauds, and the Statute of Frauds could not be avoided by operation of promissory estoppel.²¹⁹ Hrezo, a real estate

207. *Id.*

208. *Id.*

209. *Id.* at 1164-65.

210. *See id.* at 1165-67.

211. *Id.* at 1166 (citing IND. CODE § 32-21-1-1(b) (2011)).

212. *Id.*

213. *See id.* at 1166-67.

214. *Id.* at 1167-68 (citing *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585 (Ind. Ct. App. 2001); *Smith v. McLeod Distributing, Inc.*, 744 N.E.2d 459, 465-66 (Ind. Ct. App. 2000); *Kordick v. Merchants Nat’l Bank & Trust Co. of Indianapolis*, 496 N.E.2d 119, 123 (Ind. Ct. App. 1986)).

215. *Id.* at 1167 (citing BLACK’S LAW DICTIONARY 568 (6th ed. 1990)).

216. *Id.*

217. *Id.* at 1168 (citations omitted). The court of appeals reversed. *Id.* at 1168-69.

218. 934 N.E.2d 1221 (Ind. Ct. App. 2010), *trans. denied*.

219. *Id.* at 1229, 1234.

developer, proposed to purchase and redevelop a historic drug store building from the city, using funds loaned from the Lawrenceburg Bond Bank.²²⁰ The city passed a resolution stating, "The City Council is in approval of the basic terms of this project and requests that the matter be turned over to the Lawrenceburg Bond Bank to further develop the specific requirements of the plan."²²¹ The city passed a second, substantially identical resolution adding a second building to the proposal.²²² Hrezo and the city worked to negotiate a development agreement over the next two years, but due to disagreement largely over which party would bear costs of repairs to the building's roof, no development agreement was signed, and the city withdrew the proposal.²²³ Hrezo sued under breach of contract and promissory estoppel theories.²²⁴ The trial court granted summary judgment for the city on the breach of contract claim but denied summary judgment on the promissory estoppel claim.²²⁵ With regard to the breach of contract claim, Hrezo argued that the resolutions passed by the city were sufficient to satisfy the Statute of Frauds.²²⁶

The Indiana Statute of Frauds states that a person may not bring "[a]n action involving any contract for the sale of land" unless the contract "on which the action is based, or a memorandum or note describing the . . . contract . . . is in writing and signed by the party against whom the action is brought."²²⁷ To satisfy the statute, a writing evidencing a contract for the sale of land

must be evidenced by some writing:

- (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent;
- (2) which describes with reasonable certainty each party and the land; and
- (3) which states with reasonable certainty the terms and conditions of the promises and by whom and to whom the promises were made.²²⁸

The court of appeals concluded that the resolutions passed by the city represented "preliminary negotiations and . . . [did] not signify a final, written contract."²²⁹ The court largely relied on the Indiana Supreme Court case *Coca-Cola Co. v. Babyback's International, Inc.*, where the writing at issue specifically referenced several "preliminary details remaining to be resolved."²³⁰ Even though

220. *Id.* at 1223-24.

221. *Id.* at 1224.

222. *Id.*

223. *Id.* at 1224-26.

224. *Id.* at 1226.

225. *Id.*

226. *Id.* at 1227.

227. *Id.* (quoting IND. CODE § 32-21-1-1(b) (2011)).

228. *Id.* (citing *Johnson v. Sprague*, 614 N.E.2d 585, 588 (Ind. Ct. App. 1993)).

229. *Id.* at 1229.

230. *Id.* at 1228 (quoting *Coca-Cola Co. v. Babyback's Int'l, Inc.*, 841 N.E.2d 557, 563 (Ind.

numerous details had been agreed to, the “overall tenor” of the writing in *Babyback’s* established that no final agreement had been reached.²³¹ Like in *Babyback’s*, the resolutions at issue in *Hrezo* established preliminary negotiations; the resolutions specifically stated that “the specific requirements of the plan” had to be worked out in further negotiations with the Lawrenceburg Bond Bank, and the parties worked for two years in an attempt to reach final agreement.²³²

After finding that the Statute of Frauds had not been satisfied, the court considered whether the city could be bound by an oral promise under a theory of promissory estoppel.²³³ Of course, allowing a claim to proceed on an oral promise where the Statute of Frauds is not satisfied threatens to render the statute “virtually meaningless because the frustrated claimant would always assert an oral promise/agreement to defeat by means of estoppel the statute’s requirement for a written one.”²³⁴ Therefore a “high bar” must be satisfied to establish promissory estoppel.²³⁵ The claimant must show five elements: “1) a promise by the promisor; 2) made with the expectation that the promisee will rely thereon; 3) which induces reasonable reliance by the promisee; 4) of a definite and substantial nature; and 5) injustice can be avoided only by enforcement of the promise.”²³⁶ A claimant “is entitled to reliance damages only,” and to establish injustice required by the fifth element, the reliance injury must be “1) independent from the benefit of the bargain and the resulting expenses and inconvenience; and 2) so substantial as to constitute an unjust and unconscionable injury.”²³⁷

Applying the rule, the court of appeals determined that *Hrezo’s* claimed reliance damages were neither independent from the benefit of the bargain nor sufficiently substantial.²³⁸ *Hrezo* claimed it incurred expenses creating a new legal entity to enter the contract, devoting time to negotiations, applying for a liquor license, and hiring various professionals.²³⁹ All of these expenses were not independent because they were “actions it would have had to take in order to finalize the contract on any basis.”²⁴⁰ Essentially, the court held that expenses incurred in negotiating the contract and preparing for performance were not

2006)).

231. *Id.* (quoting *Babyback’s*, 841 N.E.2d at 563).

232. *Id.* at 1229 (emphasis omitted) (citation omitted).

233. *Id.* at 1230-34.

234. *Id.* at 1231 (quoting *Babyback’s*, 841 N.E.2d at 568-69).

235. *Id.* (quoting *Spring Hill Developers, Inc. v. Arthur*, 879 N.E.2d 1095, 1101 (Ind. Ct. App. 2008)).

236. *Id.* (quoting *Spring Hill*, 879 N.E.2d at 1100). Indiana’s rule is “more restrictive” than RESTATEMENT OF CONTRACTS § 139. *Id.* (citing *Babyback’s*, 841 N.E.2d at 569).

237. *Id.* at 1231-32 (quoting *Spring Hill*, 879 N.E.2d at 1103).

238. *Id.* at 1232-33.

239. *Id.* at 1233.

240. *Id.*

recoverable under promissory estoppel.²⁴¹

Additionally, there was no substantial or definite promise by the city to support a claim of promissory estoppel; as discussed above, the city's resolutions were preliminary in nature, and the parties engaged in negotiations for two years that eventually broke down.²⁴² The court of appeals reversed the trial court's denial of summary judgment for the city on the promissory estoppel claim.²⁴³

C. Money Had and Received

In *Farmers Elevator Co. of Oakville v. Hamilton*,²⁴⁴ the court of appeals held that a farmer's claims for money had and received and breach of fiduciary duty against an agricultural cooperative were barred by the applicable statutes of limitation and that the "hedge-to-arrive" contracts were enforceable forward contracts.²⁴⁵ Hamilton, a farmer, and FECO, a grain elevator, entered "four hedge-to-arrive [HTA] contracts for the sale of grain."²⁴⁶ The contracts specified that Hamilton was to deliver certain types and amounts of grain to FECO for stated prices in the future.²⁴⁷ The contracts did not specify a delivery date, but they did include language allowing the farmer to "roll" the contract to a later month in the same year for a fee (the amount of which was also not specified in the contract).²⁴⁸ Hamilton never delivered the grain, instead extending the contract several times and incurring rolling charges for doing so.²⁴⁹ The contracts were eventually terminated.²⁵⁰ After termination, Hamilton signed a series of promissory notes agreeing to pay FECO the amount due and made several payments on the notes.²⁵¹ Before his entire indebtedness had been paid, Hamilton sued FECO, seeking, inter alia, recovery of amounts paid on the promissory notes under a theory of money had and received, damages for breach of fiduciary duty, and a declaration that the HTA contracts were unenforceable futures contracts.²⁵² FECO appealed after the jury trial verdict for Hamilton.²⁵³

The court of appeals held that the trial court should have granted judgment on the evidence to FECO on Hamilton's claim for money had and received.²⁵⁴ In reaching this conclusion, the court stated that "[a]n action for money had and

241. *See id.*

242. *Id.* at 1233-34.

243. *Id.* at 1234.

244. 926 N.E.2d 68 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 823 (Ind. 2010).

245. *Id.* at 79-80, 83.

246. *Id.* at 72.

247. *Id.*

248. *Id.*

249. *Id.* at 73.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 73-75.

254. *Id.* at 77-79.

received ‘is an equitable remedy’” available when the defendant has received money that belongs to the plaintiff “‘under such circumstances that in equity and good conscience he ought not to retain the same.’”²⁵⁵ The court applied the three-year statute of limitations contained in Indiana Code section 26-1-3.1-118(g), which is the negotiable instruments chapter of Indiana’s UCC.²⁵⁶ The court did not state why the UCC statute of limitations applied; presumably, the promissory notes at issue were negotiable instruments subject to the UCC.²⁵⁷ The discovery rule is not applicable to section 3.1-118, meaning that a claim for money had and received “accrues at the time the payments are made irrespective of his knowledge or discovery of injury.”²⁵⁸ Notably, section 3.1-118(g) appears to be limited to claims arising under the UCC, but the court’s holding speaks generally of “recoupment of money had and received based on payments made to the defendant” without any limitation to UCC claims.²⁵⁹ Applying the statute, the court of appeals held that claims based on Hamilton’s first three payments were time-barred, and the “continuing wrong” doctrine was not applicable.²⁶⁰ The court also held that all of Hamilton’s claims for breach of fiduciary duty were barred by the two-year statute of limitations, and no evidence supported tolling the statute based on fraudulent concealment.²⁶¹

After deciding the statutes of limitation issues, the court moved on to determine whether the HTA contracts were unenforceable “futures contracts” or enforceable “forward contracts.”²⁶² Specifically, “[t]he reason the futures/forward distinction is of consequence is that futures contracts are governed and regulated by federal law, but forward contracts are not.”²⁶³ A “futures contract” must be traded on a designated or registered exchange, or under federal law it is

255. *Id.* at 77 (quoting *Lawson v. First Union Mortg. Co.*, 786 N.E.2d 279, 283-84 (Ind. Ct. App. 2003)).

256. *Id.* (“[A]n action . . . for conversion of an instrument, for money had and received, or like action based on conversion . . . must be commenced within three (3) years after the cause of action accrues.” (quoting IND. CODE § 26-1-3.1-118(g)(2011)); *see also* U.C.C. § 3-118(g)(1990) (same)).

257. *See Farmers Elevator Co.*, 926 N.E.2d at 77.

258. *Id.* at 78 (citing *Auto-Owners Ins. Co. v. Bank One*, 852 N.E.2d 604, 611-12 (Ind. Ct. App. 2006), *vacated on other grounds*, 879 N.E.2d 1086 (Ind. 2008) (UCC conversion); *Tanglewood Terrace, Ltd. v. City of Texarkana*, 996 S.W.2d 330, 337 (Tex. Ct. App. 1999) (money had and received); *Angelini v. Delaney*, 966 P.2d 223, 229 (Or. Ct. App. 1998) (money had and received)).

259. *Id.* The UCC official comment makes it clear that “[s]ubsection (g) covers warranty and conversion cases and other actions to enforce obligations or rights *arising under Article 3.*” U.C.C. § 3-118 cmt. 6 (1990) (emphasis added).

260. *Id.* at 78-79.

261. *Id.* at 79-80 (citing IND. CODE § 34-11-2-4; *City of East Chicago v. E. Chi. Second Century, Inc.*, 908 N.E.2d 611, 618 (Ind. 2009)).

262. *Id.* at 80-83.

263. *Id.* at 82.

“unlawful.”²⁶⁴ The court discussed “[t]he refined, prevailing test” from jurisdictions across the country, which considers whether (1) the contract contains unique terms making it not fungible with other commodities contracts; (2) the contract is between industry participants; and (3) delivery cannot be deferred forever.²⁶⁵ “Under any approach or formulation, the touchstone of the future/forward determination is whether the contract contemplates actual, physical delivery of the subject commodity.”²⁶⁶

Applying the factors from *Nagel*, the court held that the HTA contracts were enforceable forward contracts.²⁶⁷ The contracts contained “specific terms for delivery” and were therefore not fungible; the contracts were between a farmer and grain elevator, “industry participants”; and because Hamilton was actually charged a “rolling fee” for every extension of time, the contracts could not be deferred indefinitely.²⁶⁸

D. Indemnity

In *Indianapolis City Market Corp. v. MAV, Inc.*,²⁶⁹ the court of appeals held that the City Market had breached its contract with a vendor, was not entitled to indemnification, and was liable for the vendor’s lost profits.²⁷⁰ MAV ran a Greek restaurant stand inside the historic City Market in downtown Indianapolis.²⁷¹ Pursuant to terms in MAV’s lease, the City Market relocated MAV to the east wing of the City Market while the historic Market House portion of the City Market was undergoing renovations.²⁷² On August 24, 2007, City Market sent a letter-agreement to MAV confirming City Market’s obligation under the lease to pay for MAV’s buildout in the renovated Market House.²⁷³ City Market made an initial payment of \$5000 to MAV’s selected contractor; however, MAV later chose to find another contractor.²⁷⁴ MAV had its attorney hold the \$5000 in trust until it selected another contractor.²⁷⁵ City Market demanded that the \$5000 be returned immediately, and when MAV refused, City Market “terminated” the

264. *Id.* (citing 7 U.S.C. § 6(a) (2006)).

265. *Id.* (citing *Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 441 (7th Cir. 2000) (collecting cases)).

266. *Id.* (citing 7 RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 17:10, 17:11 (4th ed. 1997)).

267. *Id.* at 83.

268. *Id.* The court found that delivery could not be deferred indefinitely in spite of some ambiguity in regards to delivery date and rolling fees. *Id.* The court reversed and remanded. *Id.*

269. 915 N.E.2d 1013 (Ind. Ct. App. 2009).

270. *Id.* at 1023-24, 1026.

271. *Id.* at 1016.

272. *Id.*

273. *Id.* at 1017.

274. *Id.*

275. *Id.*

August 24 letter-agreement on October 24, 2007.²⁷⁶ Prior to termination, City Market had actually approved MAV's new contractor.²⁷⁷ MAV sued City Market, seeking a declaration that City Market breached the lease and damages.²⁷⁸ The trial court entered a declaratory judgment for MAV on February 19, 2008, and shortly thereafter, the parties agreed to complete the buildout in the Market House.²⁷⁹ "MAV opened for business in the renovated Market House" on April 7, 2008.²⁸⁰ After a bench trial in 2009, the trial court awarded MAV damages for lost profits for the period of November 2007 to April 2008.²⁸¹

Initially, the court of appeals affirmed the trial court's judgment that City Market had breached the letter-agreement.²⁸² City Market contended that MAV had misrepresented that it had already selected a contractor at the time of the letter-agreement.²⁸³ The court found no requirement in the "four corners" of the agreement for MAV to have already selected a contractor; further, because City Market was the drafter, "if the selection of a certain contractor and a signed contract were vital conditions of the letter-agreement, the terms of that documents should have reflected the same."²⁸⁴

The court of appeals soundly rejected City Market's contention that an indemnification clause in the lease exculpated City Market from liability for its own breach of lease.²⁸⁵ "In general, an indemnity clause 'covers the risk of harm sustained by *third persons* that might be caused by either the indemnitor or the indemnitee. It shifts the financial burden for the ultimate payment of damages from the indemnitee to the indemnitor."²⁸⁶ Furthermore, "[i]ndemnification clauses are not void as against public policy, though they will be strictly construed, and the intent to indemnify the indemnitee for its own negligence must be stated in clear and unequivocal terms."²⁸⁷ The lease at issue included broad indemnification language:

Tenant shall indemnify and save harmless Landlord, and Landlord shall indemnify and save harmless Tenant, from and against any and all liability, liens, claims, demands, damages, expenses, fees, costs, fines, penalties, suits, proceedings, actions, and causes of action of any and

276. *Id.* at 1018.

277. *Id.*

278. *Id.*

279. *Id.* at 1018-19.

280. *Id.* at 1019.

281. *Id.* at 1019-21.

282. *Id.* at 1022-23.

283. *Id.* at 1023.

284. *Id.*

285. *Id.* at 1023-24.

286. *Id.* at 1023 (quoting *Morris v. McDonald's Corp.*, 650 N.E.2d 1219, 1222 (Ind. Ct. App. 1995)).

287. *Id.* at 1023-24 (citing *Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist.*, 796 N.E.2d 1216, 1222 (Ind. Ct. App. 2003)).

every kind and nature arising or growing out of or in any way connected with Tenant's use, occupancy, management, or control of the Premises or Tenants' operations, conduct or activities in the building.²⁸⁸

City Market contended that this language protected City Market from damages for its own breach of lease; the court rejected this argument as "specious."²⁸⁹ The lease did not state that City Market would be indemnified for its own negligence or breach.²⁹⁰ The indemnification clause was apparently "designed to cover the risk of harm sustained by third persons" and was therefore inapplicable to the first-party claim between City Market and MAV.²⁹¹ Additionally, City Market's construction was simply untenable—*any* breach of lease would be covered, eliminating even the City Market's ability to recover damages for nonpayment of rent.²⁹²

Lastly, the court affirmed the award of MAV's lost profits, which it held were properly foreseeable consequential damages.²⁹³ The court cited *Johnson v. Scandia Associates*, where the Indiana Supreme Court reaffirmed the rule from *Hadley v. Baxendale*, that breach of contract damages are allowed "when the non-breaching party's loss flows naturally and probably from the breach and was contemplated by the parties when the contract was made."²⁹⁴ "Consequential damages may include lost profits, providing the evidence is sufficient to allow the trier of fact to estimate the amount with a reasonable degree of certainty and exactness."²⁹⁵ The court held that the award of lost profits MAV suffered from the delay in opening in the renovated Market House was within the scope of the evidence and affirmed.²⁹⁶

E. Economic Loss Doctrine

In *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*,²⁹⁷ the Indiana Supreme Court dismissed negligence claims against engineers involved in a large construction project because the claims sought damages for "economic loss," which belongs in the domain of contract law.²⁹⁸ The case arose out of the problem- and delay-plagued renovation and expansion project of the

288. *Id.* at 1024 (citation omitted).

289. *Id.* ,

290. *Id.*

291. *Id.*

292. *Id.* at 1024 n.5.

293. *Id.* at 1024-26.

294. *Id.* at 1024 (citing *Johnson v. Scandia Assocs.*, 717 N.E.2d 24, 31 (Ind. 1999)); *see also* *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Exch.).

295. *Id.* (citing *Clark's Pork Farms v. Sand Livestock Sys., Inc.*, 563 N.E.2d 1292, 1298 (Ind. Ct. App. 1990)).

296. *Id.* at 1026.

297. 929 N.E.2d 722 (Ind. 2010).

298. *Id.* at 732.

library's main downtown Indianapolis facility.²⁹⁹ Specifically, several construction and design defects arose with the underground parking garage, which threatened the entire project because the parking garage was to act as the foundation for the rest of the building.³⁰⁰ The library incurred significant costs curing the defects and through associated delays.³⁰¹ The library sued the architect, engineers, and general contractor in negligence and, where a contractual relationship existed, breach of contract.³⁰² The library settled with the architect and general contractor—the only parties in a direct contractual relationship with the library—leaving the library's negligence claims against the engineers.³⁰³ The trial court granted the engineers partial summary judgment on the grounds that the negligence claims were barred by the “economic loss rule.”³⁰⁴

The supreme court succinctly stated Indiana law on the economic loss doctrine, citing *Gunkel v. Renovations, Inc.*, an important Indiana Supreme Court case on economic loss.³⁰⁵ Under a negligence theory, “where the injury to the plaintiff is from a defective product or service (as the Library alleges here), the defendant is liable under a tort theory if the defect causes personal injury or damage to property *other than the product or service itself*.”³⁰⁶ “However, Indiana cases go on to hold that the defendant is not liable under a tort theory for any purely economic loss caused by its negligence (including, in the case of a defective product or service, *damage to the product or service itself*).”³⁰⁷

The supreme court embarked on a lengthy examination of the history and theoretical justifications for the economic loss rule.³⁰⁸ In the opinion, the supreme court cited extensively to a draft Restatement of Economic Torts.³⁰⁹ The court tracked the Indiana precedent on the economic loss doctrine, starting in the 1980s up to *Gunkel*, the most recent supreme court case on the subject.³¹⁰ The court cited two justifications for the economic loss rule: contract law, not tort, is properly suited to resolving liability for economic losses,³¹¹ and the economic loss

299. *See id.* at 725.

300. *Id.*

301. *Id.* at 725-26. The court of appeals opinion contains a more detailed discussion of the facts surrounding the library construction project. *See Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 900 N.E.2d 801, 804-08 (Ind. Ct. App. 2009), *vacated*, 929 N.E.2d 722 (Ind. 2010).

302. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 726.

303. *Id.*

304. *Id.*

305. *Id.* at 726-27 (citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 153 (Ind. 2005)).

306. *Id.* at 726 (emphasis added) (citation omitted).

307. *Id.* at 726-27 (emphasis added) (citation omitted).

308. *Id.* at 727-30.

309. *Id.* at 727-28 (citing RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS (Council Draft No. 2, 2007)).

310. *Id.*

311. *Id.* at 729-30 (citing *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965)).

rule prevents unbounded liability, especially in negligent misstatement cases.³¹² The first justification was clearly applicable to this case, where “the [l]ibrary looked to a series of contracts to establish the relative expectations of the parties.”³¹³

The court noted that the economic loss doctrine was subject to two limitations: “there (1) must be purely economic loss for it to apply and (2) are some exceptions to its application even where there is purely economic loss.”³¹⁴ The library argued that both of these limitations allowed its claims to go on.

The court held that the library sought damages for purely economic loss.³¹⁵ “[P]ure economic loss’ means pecuniary harm not resulting from an injury to the plaintiff’s person or property.”³¹⁶ This covers “‘damage to the product or service itself’” and damages “‘from the failure of the product or service to perform as expected.’”³¹⁷ However, as a “corollary,” damages are recoverable in tort “‘if the defect causes personal injury or damage to *other* property.’”³¹⁸ The court determined that “the Library purchased a complete refurbishing of its library facility” as an integrated whole; therefore, any damages caused by the engineers’ negligence was to the product itself and not to “other property.”³¹⁹ It did not matter that the damages were “physical” requiring reconstruction and repair; the damages were economic losses because they were based on the value of the product and services purchased by the library.³²⁰ Likewise, the “imminent risk of danger” and personal harm associated with the structural defects did not avoid the economic loss rule, even though the absence of personal injury in this case may have been somewhat fortuitous.³²¹

Next, the court concluded that no policy-based exception to the economic loss rule was applicable.³²² First, the library argued that the economic loss rule should not apply to “engineers and design professionals.”³²³ The court recognized that certain “appropriate exceptions” to the general economic loss rule exist—for example, claims for legal malpractice, breach of fiduciary duty, breach of duty to

312. *Id.* at 730 (citing *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931)). Note that in spite of the *Ultramares* justification, a significant exception to the economic loss doctrine applies to negligent misstatement cases.

313. *Id.* at 730.

314. *Id.*

315. *Id.* at 731-34.

316. *Id.* at 731.

317. *Id.* at 731 (quoting *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 153 (Ind. 2005)).

318. *Id.* (quoting *Gunkel*, 822 N.E.2d at 153).

319. *Id.* at 731-32 (citing RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS § 8 cmt. c(2) (Council Draft No. 2, 2007)).

320. *See id.* at 732 & n.9 (citing cases from other jurisdictions).

321. *Id.* at 733 (citing *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 490-91 (Ind. 2001)). It follows that in the event the library building collapsed, tort damages would be proper only if someone was hurt or another building was damaged. *See id.*

322. *See id.* at 734-42.

323. *Id.* at 734.

settle by an insurer, and negligent misstatement.³²⁴ However, the court did not provide any guidance on *why* such exceptions exist.³²⁵ The court refused to create an exception for design professionals, finding that the policy justifications for the economic loss rule “amply justif[ied] application of these precedents to engineers and design professionals.”³²⁶ Essentially, there was no good reason to distinguish between contractors and professionals for damages from the same construction defects.³²⁷

The court further held that the economic loss rule was particularly appropriate in a large construction project where the participants have the opportunity to allocate risks through a “network or chain of contracts.”³²⁸ Construction projects involve an intricate network of participants, all with roles varying from project to project.³²⁹ The participants should be encouraged to allocate risks using the tools available, such as indemnification, performance bonds, or insurance.³³⁰ “The concepts of shifting and sharing the risk of loss are equally applicable to the construction industry where the provision of professional design services is implicated.”³³¹ Even though participants may not have direct contractual relationships with every entity involved in the project, parties can allocate risks when they “enter[] into a contract with a party involved in the *network of contracts*.”³³²

The library also argued that the economic loss rule did not prevent claims against design professionals based on negligent misrepresentation.³³³ The court recognized that an exception to the economic loss rule existed for certain negligent misrepresentations outside privity of contract, but the exception was inapplicable where “the [l]ibrary is connected with the [d]efendants through a network or chain of contracts.”³³⁴

Last, the court rejected the library’s argument that the economic loss doctrine did not apply where the defendant supplied solely services and not a tangible

324. *Id.* at 736.

325. *See id.*

326. *Id.* at 735.

327. *See id.* at 735 (citing *Flagstaff Affordable Hous. Ltd. P’ship v. Design Alliance, Inc.*, 223 P.3d 664, 673 (Ariz. 2010); *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 89 (Nev. 2009)).

328. *Id.* at 736-40.

329. *See id.* at 737-38.

330. *See id.* at 738.

331. *Id.*

332. *Id.* at 740 (emphasis added) (quoting *BRW, Inc. v. Dufficy & Sons, Inc.* 99 P.3d 66, 72 (Colo. 2004)); *see also* *Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd.*, 929 P.2d 1228, 1235 (Wyo. 1996); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992-93 (Wash. 1994); RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS § 8(3)(c)(i) (Council Draft No. 2, 2007).

333. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 740-41.

334. *Id.* at 741. *See* the discussion of *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010), *infra* nn.337-49.

product.³³⁵ The court left open the possibility that an exception might exist “in appropriate circumstances,” but it held that in general, the economic loss rule applies to both products and services.³³⁶

In *U.S. Bank, N.A. v. Integrity Land Title Corp.*,³³⁷ decided the same day as *Indianapolis-Marion County Public Library*, the Indiana Supreme Court allowed a tort claim for negligent misrepresentation to go forward pursuant to an exception to the economic loss rule.³³⁸ The facts were relatively simple. As part of a real estate transaction where U.S. Bank was the lender, Integrity performed a title search and issued a title commitment that failed to disclose a foreclosure judgment on the property.³³⁹ U.S. Bank sued for breach of contract and “negligent real estate closing.”³⁴⁰ The trial court granted summary judgment to Integrity on both claims.³⁴¹

The supreme court made clear that Integrity had argued at all times that it was not in contractual privity with U.S. Bank.³⁴² The court noted, “This is a critical point. Were there to be a contract between Integrity and U.S. Bank, the parties in all likelihood would be relegated to their contractual remedies.”³⁴³ Without any contract, economic loss may be recovered in tort under certain exceptions, including claims for “negligent misstatement.”³⁴⁴

The case then resolved on an issue of first impression whether Indiana would recognize a tort action for negligent misrepresentation against a title insurer or commitment issuer.³⁴⁵ The court noted that other states have split on this issue.³⁴⁶ Indiana courts had previously adopted the tort of negligent misrepresentation in other contexts, specifically referencing section 552(1) of the Restatement

335. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 741-42.

336. *Id.* at 742. In doing so, the court rejected the reasoning behind *Insurance Co. of North America v. Cease Electric Inc.*, 688 N.W.2d 462, 464 (Wis. 2004). The supreme court affirmed summary judgment for the engineers. *Indianapolis-Marion Cnty. Pub. Library*, 926 N.E.2d at 742.

337. 929 N.E.2d 742 (Ind. 2010).

338. *Id.* at 749.

339. *Id.* at 744. Technically, the lender in the real estate transaction was Texcorp, which subsequently assigned the note, mortgage, and mortgage insurance policy to U.S. Bank. *Id.* at 744 & n.1.

340. *Id.* at 744.

341. *Id.* at 744-45.

342. *Id.* at 745. Note that the stated lack of privity appears to conflict with the supreme court’s statement that “Texcorp [U.S. Bank’s predecessor in interest] contracted with [Integrity] . . . to prepare a title commitment . . .” *Id.* at 744 (emphasis added).

343. *Id.* at 745 (citing *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 729 (Ind. 2010)). Because there was no contractual privity, the court summarily affirmed the court of appeals’s opinion on the issue. *Id.*

344. *Id.* at 745-46 (quoting *Indianapolis-Marion Cnty. Pub. Library*, 929 N.E.2d at 736) (citing RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS § 12 (Council Draft No. 2, 2007)).

345. *Id.* at 746.

346. *Id.* at 746-47.

(Second) of Torts.³⁴⁷ The court additionally cited several “factors” regarding duty in tort for negligent misrepresentation suggested by the unaccepted draft Restatement of Economic Torts.³⁴⁸ Applying all of these considerations, the court determined that a tort duty existed—title companies know mortgage lenders rely on preliminary title commitments, and in this case the title company acted in an advisory role, with superior knowledge, for a fee.³⁴⁹

In *KB Home Indiana Inc. v. Rockville TBD Corp.*,³⁵⁰ the court of appeals held that the economic loss rule did not bar a negligence action for damages to real property resulting from discharge of pollution.³⁵¹ For years, the manufacturing facility operated by Rockville leached toxic solvents, including trichloroethylene (TCE), into the surrounding environment.³⁵² The neighboring landowners, the Kopetskys, subdivided their land and sold the lots to KB for the purpose of developing a residential subdivision.³⁵³ KB eventually discovered groundwater contamination in the purchased lots and halted construction on the subdivision.³⁵⁴ Among other parties, KB sued Rockville in negligence, trespass, and continuing nuisance.³⁵⁵ The trial court granted summary judgment for Rockville, finding that KB’s claims were barred by the economic loss doctrine.³⁵⁶

Under the economic loss doctrine, “contract is the sole remedy for the failure of a product or service to perform as expected.”³⁵⁷ Further, “if the plaintiff is not seeking damages involving the benefit of the bargain or other matters governed by contract and/or related principles, the economic loss doctrine does not bar a negligence action.”³⁵⁸

The court of appeals reversed the trial court, finding that the economic loss doctrine did not bar a negligence action.³⁵⁹ KB had no contract with Rockville, a polluter located on adjoining property.³⁶⁰ KB may have had contract claims for breach of warranty against the vendor, Kopetsky, but this “[did] not absolve Rockville of responsibility for *its* negligent conduct that may have caused the

347. *Id.* at 747 (citing *Greg Allen Constr. Co. v. Estelle*, 798 N.E.2d 171, 174 (Ind. 2003)).

348. *Id.* at 748-49 (quoting RESTATEMENT (THIRD) OF ECONOMIC TORTS & RELATED WRONGS § 9 cmt. f (Council Draft No. 2, 2007)).

349. *Id.* at 749-50 (accepting the reasoning of *Bank of Cal., N.A. v. First Am. Title Ins. Co.*, 826 P.2d 1126, 1129 (Alaska 1992)). The supreme court reversed the trial court’s grant of summary judgment to Integrity on the tort claim. *Id.* at 750.

350. 928 N.E.2d 297 (Ind. Ct. App. 2010).

351. *Id.* at 299.

352. *Id.* at 300.

353. *Id.* at 300-01.

354. *Id.* at 301.

355. *Id.* at 301-02.

356. *Id.* at 303.

357. *Id.* at 304 (citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 152 (Ind. 2005)).

358. *Id.* at 305 (citing *Choung v. Iemma*, 708 N.E.2d 7, 13 (Ind. Ct. App. 1999)).

359. *Id.*

360. *Id.*

contamination.”³⁶¹

It is noteworthy that the opinion in *KB Home* was issued without the benefit of the Indiana Supreme Court’s opinion in *Indianapolis-Marion County Public Library*.³⁶² The opinion in *KB Home* appears to be consistent with the supreme court’s holding in that case because a land purchaser will ordinarily be in a position to allocate risk with the vendor, but not any adjoining property owners.³⁶³

361. *Id.*

362. *Id.* at 304-05 n.3 (noting that the supreme court had granted transfer but no decision had been issued).

363. *See id.* In resolving KB’s other claims, the court of appeals determined that an action for nuisance was inappropriate because the contamination had ceased long ago (there was no nuisance to abate). *Id.* at 307-08. The court determined that an action for trespass was inappropriate because the act of trespass, the contamination, had ceased before plaintiff KB came to possess the land. *Id.* at 308. The court distinguished *Cooper Industries, LLC v. City of South Bend*, 899 N.E.2d 1274, 1284 (Ind. 2009), as deciding when an environmental legal action accrued, and not “whether South Bend had a legally sufficient trespass claim.” *Id.* The court similarly distinguished *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. 2008), as involving a claim under the Underground Storage Tank Act and not in trespass. *Id.* KB’s claims for environmental damage were allowed, but only under a negligence theory. *Id.* at 309.